

**THE HIGH COURT OF SINDH
CIRCUIT COURT AT HYDERABAD**

R.A No.123 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGE
1. For hearing of CMA No. 1108 of 2023 2. For hearing of Main Case	
Applicants	: Through Mr. Muhammad Ayoub Chandiho Advocate
Respondents	: Through Mr. Mumtaz Ali Soomro Advocate
Date of hearing	: 25 July 2023
Date of Decision	: 28 October 2023

**The HIGH COURT OF SINDH
CIRCUIT COURT AT HYDERABAD**

R.A No.196 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGE
1. For Order on Office Objection 2. For Hearing of CMA No. 1695 of 2023 3. For hearing of Main Case	
Applicants	: Through Mr. Muhammad Ayoub Chandiho Advocate
Respondents	: Through Mr. Mumtaz Ali Soomro Advocate
Date of hearing	: 25 July 2023
Date of Decision	: 28 October 2023

ORDER

MOHAMMAD ABDUR RAHMAN, J. - These are two applications that have each been maintained by the same Applicant under Section 115 of the Code of Civil Procedure, 1908 against Orders dated 5 April 2023 and 17 May 2023 each passed by 1st Additional District Judge Kotri on applications under Order I Rule 10 read with Section 151 of the Code of Civil Procedure, 1908 and Order XLI Rule 27 read with Section 151 of the

Code of Civil Procedure 1908 in Civil Appeal No.44 of 2022 respectively, each of which applications were dismissed and which denied the Applicants the right to add the Province of Sindh through the Secretary Revenue Sindh, and the Mukhtiarkar Land Revenue Thana Bula Khan, the Assistant Commission Than Bula Khan, the Director Settlement Survey Department Hyderabad and the Additional Deputy Commissioner Jamshoro as parties to the *lis* and to permit the Appellants to adduce additional evidence by examining the Land Record Officer of the Province of Sindh.

2. A IIIrd Class Suit bearing No. 02 of 2021 was filed by the Respondent No. 1 to 3 before 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan being a Suit for Permanent Injunction. The plea taken by the Respondents was that the Respondents No.1 and 2 were each the exclusive owners of 1 Acre 10 Ghuntas of agricultural land in Survey No.128 Deh Hathal Buth, Taluka Thano Bula Khan District Jamshoro, while the Respondent No.3 was the sole and exclusive owner of 1 Acre 10 Ghuntas of agricultural land in Survey No. 128 Deh Hathal Buth, Taluka Thano Bula Khan District Jamshoro. In their pleadings the Respondent had made various attempts being made to dispossess them from their immovable properties without due process. I have examined the Record and Proceedings of IIIrd Class Suit bearing No.02 of 2021 and surprisingly it contains no prayer clause.

3. On the basis of pleadings, the following issues were framed by the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan:

- “ ...
- i. *Whether the instant suit is not maintainable under the law?*
 - ii. *Whether the plaintiffs are entitled for permanent injunction over suit property situated in Survey No: 128 in Deh Hathal Buth, Taluka Thano Bula Khan against defendants?*
 - iii. *What should the judgment/decree be?”*

4. By a Judgment dated 30 July 2022 and Decree dated 5 August 2022 the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan was pleased to decree IIIrd Class Suit bearing No. 02 of 2021 holding that the Plaintiffs should not be dispossessed nor should their possession be illegally interfered with without due process of law.

5. Being aggrieved and dissatisfied with the Judgment dated 30 July 2022 passed by the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan in IIIrd Class Suit bearing No. 02 of 2021 the Appellants have maintained Civil Appeal No. 44 of 2022 before the 1st Additional and District Judge Kotri, which is pending adjudication. In that Civil Appeal the Applicant had filed the following two applications:

(i) an application under Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure 1908, seeking that the Land Record Officer of the Province of Sindh should be summoned to inquire as to whether the Respondents are in fact the owners of the immovable property as claimed by them or as to whether it is State Land; and

(ii) an application under Order I Rule 10 read with Section 151 of the Code of Civil Procedure 1908, seeking to implead the Province of Sindh through the Secretary Revenue Sindh, the Mukhtiarkar Land Revenue Thana Bula Khan, the Assistant Commissioner Than Bula Khan, the Director Settlement Survey Department Hyderabad and the Additional Deputy Commissioner Jamshoro as parties to the *lis*.

6. It would be seem that prior to the adjudication of each of these applications, on 1 October 2022 the following order had already been

passed by the 1st Additional District Judge Kotri in Civil Appeal No.44 of 2022:

“ ... appellants are called absent their counsel Mr: Sikandar Ali is present. Respondent No:1 Nazeer Ahmed is present. Respondent No:02 and 03 not yet served. Mr: Mumtaz Ali Soomro advocate is present and filed vakalatnama on behalf of private Respondents. Advocate for appellant also filed application for extension of status-quo. Order passed on it. Extended till next date of hearing. During course of hearing submissions raised by the learned counsel for respective parties learned counsel for the appellant has pointed out that the suit property is entirely is state land for which learned DDA was taken on board and let the letter be directly addressed to Director Settlement & Survey land Record Officer Shahbaz Building Hyderabad and Mukhtiarkar Revenue Taluka T.B Khan calling report to clarify whether the land in question bearing S. No.128 is Government/State land or private land. Office is directed to issue such letter without delay, meanwhile interim status quo is extended till next date of hearing and matter party heard. Hg.....07.10.2022 for Final arguments on appeal.”

Pursuant to such an order a report had been filed and which is on the Record of Civil Appeal No. 44 of 2022 as to the title of the Respondents to their immovable property. Thereafter on 5 April 2023 the application under Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure 1908 and on 17 May 2023 the application under Order I Rule 10 of the Code of Civil Procedure 1908, were each dismissed it being held that no ground had been made out by the Applicants to maintain either application.

7. Being aggrieved and dissatisfied by both these Orders the Applicants have maintained these revision applications under Section 115 of the Code of Civil Procedure 1908 seeking to revise the Orders dated 5 April 2023 and 17 May 2023 stating that material irregularities had been committed by the 1st Additional District Judge Kotri while passing these Orders inasmuch as the standard applied by the Court was incorrect. Counsel for the Applicants relied upon the reported decision of **Piyaro Khan vs. Member Board of Revenue Sindh**¹ in support of his contentions.

¹ 2012 SLJ 1031

8. Conversely, Counsel for the Respondents has stated that they had simply filed IIIrd Class Suit bearing No. 02 of 2021 for Permanent Injunction stating they may not be dispossessed without due process of law, as attempts were made to forcibly remove them from their immovable properties. It was further clarified that the Respondents having not made a prayer seeking a declaration that they were owners of the land, impleading the Government of Sindh to verify the title of the Respondents did not arise and as such the Officers of the Government of Sindh sought to be impleaded were neither necessary or proper parties to IIIrd Class Civil Suit No.02 of 2021 before 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan. He relied upon the decision of the Supreme Court of Pakistan reported as **Rana Abdul Aleem Khan vs. Idara National Industrial Co-operative Finance Corporation Defunct**² wherein a suit for pre-emption it was held that the scope of the power of an appellate court to adduce evidence was restricted to where the trial court was called upon to admit evidence which it refused to permit. He contended that as no evidence was sought to be adduced of the Land Record Officer before the trial court, the same could not be adduced in evidence in Appeal. He also relied on a decision of this Court reported as **Muhammad Achar vs. Shahmir**³ wherein it was held that an Appellant could not be allowed to fill lacunas in evidence by adducing evidence at the appellate state under Order XLI Rule 27 of the Code of Civil Procedure, 1908. He emphasised that in a decision of this Court reported as **Ilyas Ahmed vs. Muhammad Munir**⁴ it was held that where declaratory relief is sought the person must have a right in the property to which he is seeking the declaration, but as he has not sought any declaratory relief, his title is not being adjudicated in IIIrd Class Civil Suit No.02 of 2021 before 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan. He next relied on the decision reported as **Shahzad**

² 2016 SCMR 2067

³ 2015 YLR 2191

⁴ PLD 2012 Sindh 92

Ali vs. Raees Khadim Hussain⁵ wherein it was held that a necessary party was a person against who a relief was sought or on whom the passing of the judgement of a decision would have an impact.

9. I have heard both the counsel for Applicants and Respondents and also perused the record. The Applicants have maintained an Application under Section 115 of the Code of Civil Procedure, 1908 seeking to revise two orders dated 5 April 2023 and 17 May 2023 each passed by 1st Additional District Judge Kotri on applications under Order I Rule 10 read with Section 151 of the Code of Civil Procedure, 1908 and Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure 1908 in Civil Appeal No.44 of 2022.

10. I have perused the Judgement dated 30 July 2022 and Decree dated 5 August 2022 passed by the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan in IIIrd Class Suit No. 02 of 2021 and who premised the Judgement on a Form VII that had been produced by the Respondents to demonstrate his title to their immovable property and granted an injunction restraining the removal of the Respondents from their immovable property. It is noted that the Applicants at the time of the hearing of the IIIrd Class Suit No. 02 of 2021 had raised a plea that the immovable property was actually government land but as no evidence had been led to prove such a fact i.e. calling for the land record, the contention of the Applicant was rejected by the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan.

11. The Applicants preferred Civil Appeal No. 44 of 2022 against the Judgement dated 30 July 2022 and Decree dated 5 August 2022 passed by the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan in IIIrd Class Suit No. 02 of 2021. It is apparent that the Applicants having realised that they had erred in not calling the relevant officers of the

⁵ 2016 CLC Note 55

Government of Sindh to adduce evidence as to the title of the Respondents to the immovable property have attempted to fill this lacuna in the Appeal and have maintained these application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 and an Application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 to implead the Land Record Officer and to ask him to adduce evidence as to the title of the Respondents to the Said Property. The Supreme Court of Pakistan in the decision reported as **Muhammad Mumtaz Shah (Deceased) vs. Ghulam Hussain Shah (Deceased)**⁶ has held that:

“ ... *Order XLI, Rule 27 states that generally, no evidence is to be produced at the Appellate stage. But there are two exceptions to the general rule i.e., additional evidence may be produced at the appellate stage if: a) the Court from whence the appeal is preferred has refused to admit evidence which it ought to have admitted; or b) the Appellate Court requires any document in order for it to pronounce a judgment.*”

There having been no attempt on the part of the Appellants to summon the officials of the Government of Sindh during the trial of IIIrd Class Suit No. 02 of 2021, clearly no question of a refusal on the part of the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan to permit such evidence to be adduced can be averred as a basis to maintain the Application under Order XLI Rule 27 of the Code of Civil Procedure, 1908. The only question that therefore is required to be answered in respect of the adducing of additional evidence is as to whether such evidence is required to determine the *lis* before the Appellate Court. I am clear that IIIrd Class Suit No. 02 of 2021 that was filed by the Respondents before the 1st Civil Judge and Judicial Magistrate Sehwan at Thano Bula Khan did not attempt to determine the title of the Respondents to the immovable property and quite correctly no issue was framed by the Court as to the title of the Respondents to the immovable property. That being the case, the evidence of the officers of the Province of Sindh as to the title of the Respondents to the immovable property would not be an issue that would

⁶ 2023 SCMR 1155

need to be decided in IIIrd Class Suit No. 02 of 2021 and there would be no need to adduce such evidence thereon. As to whether such a permanent injunction can or cannot be granted without a determination of title is a matter yet to be adjudicated on by the Ist Additional District Judge Kotri in Civil Appeal No.44 of 2022 and on which I will not comment so to avoid prejudicing those proceedings.

12. Similarly, the Applicants have attempted to implead various officers of the Province of Sindh as parties to the *lis* so as to make an adjudication as to the title of the Respondents to the immovable property. Again, as no issue was framed as to the title of the Respondents to the immovable property I cannot see how the Province of Sindh can be either necessary or property parties to IIIrd Class Suit No. 02 of 2021.

13. While I am of the opinion that the Ist Additional District Judge Kotri in Civil Appeal No.44 of 2022 had correctly dismissed each of the Applications under Order XLI Rule 27 of the Code of Civil Procedure, 1908 and also the application under Order 1 Rule 10 of the Code of Civil Procedure, 1908, I am left to consider the order dated 1 October 2022 by which the Ist Additional District Judge Kotri in Civil Appeal No.44 of 2022 had in fact summoned the evidence that was being asked to have been brought on record by the Respondents and which was in fact brought on record and which order has not been challenged by the Respondents at any forum. The evidence and the report having been filed before the Court, it would seem that the evidence that was wanting to be adduced by the Applicant has in fact been brought on record by the Ist Additional District Judge Kotri in Civil Appeal No.44 of 2022 and which would have, independently of the findings given on each of the applications moved by the Applicants, rendered those two applications as infructuous. Clearly these Revision Applications are therefore not maintainable.

14. For the foregoing reasons, I am of the opinion that there being no illegality or infirmity in either the orders dated 5 April 2023 or the Order dated 17 May 2023 each passed by 1st Additional District Judge Kotri on applications under Order I Rule 10 read with Section 151 of the Code of Civil Procedure, 1908 and Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure 1908 in Civil Appeal No.44 of 2022, these Revision Applications are misconceived and are both dismissed along with all listed applications with no order as to costs. Office is directed to return the Record and Proceedings to each of the Courts.

JUDGE

Hyderabad 28 October 2023