

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Present:

Mr. Justice Syed Hassan Azhar Rizvi.

Mr. Justice Salahuddin Panhwar.

C.P.No.D- 1830 of 2013

Date of hearing: 14.01.2015.

Date of judgment: 28.01.2015

Petitioners: Through Mr. Ghulam Shabbir Babar, Advocate.

Respondent No.5: Through M/s Salman Hamid and Muhammad Aslam Rana, Advocates.

Respondent No.6: Through Mr. Suresh Kumar, Advocate.

Official respondents: Through Mr. Allah Bachayo Soomro, Additional A.G.

SALAHUDDIN PANHWAR, J: Through instant petition, petitioners

have prayed as under:-

- (a) To declare that the respondent No.01 to 04 have illegally and unlawfully issued the VII form to the respondent No.06 without surveying from Settlement & Survey Department, Government of Sindh.
- (b) To declare that respondent No.05 has mala-fidely sold out the property bearing un-Surveyed No.203, 415, 391, 127/1, 132 total 50-20 Acres situated at Deh Kalo Khohar, Taluka Thano Bola Khan, District Jamshoro, Sindh to the respondent No.06.
- (c) To declare that the respondent No.06 has illegally and unlawfully occupied the suit property and also illegally constructed boundary wall on the suit property.
- (d) To declare that the respondents No.01 to 04 have excessive used their powers to issue the new VII form in the name of the respondent No.06.



- (e) To restore the physical possession of the suit property from the respondent No.06 through the respondent No.07 to 08.
- (f) To appoint the receiver on the suit property till final disposal of the application under section 164, Sindh Revenue Act, 1967 filed by the respondent No.05.
- (g) To direct the Anti-Corruption Establishment to conduct inquiry on the illegal and unlawful act of the respondent No.02 to 04 and also registered case against the respondent No.02 to 08.
- (h) To take legal action against the responsible persons who have illegally and unlawfully committed act of transferring the land in favour of the respondent No.06.
- (i) To restrain the respondent No.05 to 06 and their associates, agents and well wishers not to create third party interest and also restrain them not to construct further on the suit property.
- (j) To direct to the Member (CS & EP), Board of Revenue, Sindh at Hyderabad to decide the application within one month.
- (k) To provide protection of the life, liberty, freedom, and property to petitioners and his family members, well wishers and their liberty shall not disturb them in any manner in their fundamental, constitutional and human rights to live peaceful life, because the lives, honor, and security of the petitioner and his family members are in the imminent danger supporters of (proposed accused) and their accomplices.
- (l) Any other relief this Hon'ble Court deems fit may be granted.
- (m) The cost of petition."

2. Precisely, relevant facts are that the petitioners filed a complaint u/s 3 of Illegal Dispossession Act against the respondent No.5 which was dismissed by the Additional Sessions Judge, Jamshoro by order dated. 08th October 2008; the petitioners assailed such order before this Court by filing Criminal Revision Application, thereby impugned order was set aside by order dated. 02.11.2009. The relevant portion is reproduced hereunder:-

"From the record perused by me coupled with the report of Mukhtiarkar, it has been clear that the applicants own area of 101-17 acres on which the respondents have raised the boundary wall and location of the land claimed by the respondents is not established as there is no Sourathal. The respondents land is



unsurveyed and their title is also not perfect and record does not reflect the original source. The respondents have shown possession after the official assignee has handed over possession. The location however is not clear. I am clear in my mind that land of the applicants based on the aforesaid material has definite boundaries and the respondents have encroached upon the land of the applicants. The trial Court was in error in dismissing the application of the applicants.

I accordingly set aside the impugned order and direct the Mukhtiarkar to hand over possession of the land in question to the applicants.

These are the reasons of my short order passed on 2.11.2009 whereby the Cr. Rev. Application was allowed and Mukhtiarkar was directed to put the applicant in possession of the property which was owned and possessed by them as per the record."

3. It is further revealed that such order was challenged by respondents in Honourable Apex Court and that petition was disposed of by consent, being relevant Para No.2 is reproduced herewith:-

"With the consent of the learned counsel for the parties, this petition is disposed of in the terms that the impugned judgment as well as the judgment of the Additional Sessions Judge dated 8th October 2008 are set aside and the criminal complaint filed by the respondents before the Additional Sessions Judge stands dismissed as withdrawn and the dispute shall be decided in the proceedings now pending before the E.D.O. (R), Jamshoro which shall be concluded within a period of two months positively."

(underlining has been supplied for emphasis)

4. Learned counsel for the petitioners inter alia contends that after the remand of matter, EDO (Revenue) passed order whereby claim of respondents was denied and being aggrieved, respondents challenged the same before Board of Revenue where such issue is pending for adjudication; further he contends that during pendency respondents No.1 to 4 illegally issued Form VII as well sale certificate so as to defeat the petitioners, thereby private respondents sold out the property mentioned in prayer clause 'b' to the respondent No.6 through registered sale deed hence the official

respondents acted in *mala-fide* manner hence they are liable to be prosecuted under Anti-Corruption Laws.

5. Learned counsel for respondents No.5 and 6 at the outset contends that they have no objection with regard to prayer clause 'j' regarding direction to the Member Board of Revenue for decision of appeal; whereas instant petition is not maintainable under the law on the plea that sale transaction, in question, being through registered deed cannot be cancelled by this Court in writ jurisdiction and such issue can be agitated before the Civil Court.

6. After careful consideration to the contentions raised by learned counsel for respective parties and meticulous examination of available record, suffice to say that Honourable Apex Court found the matter to be adjudicated by the Revenue hierarchy as the matter was pertaining the determination of boundaries. Candidly, the matter is pending before the Member Board of Revenue and since legality of the order passed by E.D.O (Revenue) is not in question in this petition, whereas with regard to relief of issuance of sale certificate and sale transaction in consequence thereof, it is worth to add here that under the doctrine of *lis pendence*, normally nature of property shall not be changed during pendency of litigation for simple reason that subsequent purchaser shall always sail or sink with seller. Doctrine of *lis pendence* is for no other object but to save the competence and legality of already pending lis or title requiring judicial determination therein else a claim of transaction during pending litigation shall result in frustrating the pending litigation. Besides, in case one who succeeds to transfer a property during pending litigation but fails to establish his legal character before the Court (s) of law then such failure (result) shall have the affect of declaring the intervening transaction as null and void. The doctrine of *lis pendens* in pith and substance is not only

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based on equity but also at good conscience and justice and is backed on the foundation of Section 52 of the Transfer of Property Act, 1882. We are guided by the case of 'Mst. Tabassum Shaheen V. Mst. Uzma Rahat & Ors (2012 SCMR 983) wherein Honourable Supreme Court held that:

5. The afore-referred provision enshrines the age old and well established principle of equity that *ut lite pendente nihil innovetur* (pending litigation nothing new should be introduced) and stipulates that *pendente lite* parties to litigation wherein right to immovable property is in question, no party can alienate or otherwise deal with such property to the detriment of his opponent. Any transfer so made would be hit by this Section. The doctrine by now is recognized both in law and equity and underpins the rationale that no action or suit would succeed if alienations made during pendency of proceedings in the said suit or action were allowed to prevail. The effect of such alienation would be that the plaintiff would be defeated by defendants alienating the suit property before the judgment or decree and the former would be obliged to initiate *de novo proceedings* and that too with lurking fear that he could again be defeated by the same trick.

Thus, in view of this legal position, the sale transaction, questioned through petition, shall receive its due fate at the end of the litigation pending before proper forum.

7. With regard to sale transaction through registered sale deed, it is settled proposition of law that any instrument can be cancelled u/s 39 of specific Relief Act by the Civil Court and this Court has no jurisdiction to cancel such instrument. It is worth to make it clear here that a plea of fraudulent document shall not be allowed to defeat a normal procedure, so provided by the law, for judicial determination of title of such document / status. To invoke constitutional jurisdiction the party must establish a clear legal right which should be beyond any doubt and controversy but in instant matter controversy is, *prima facie*, involved. Further, the term 'fraud or fraudulent' shall always require an inquiry which is also not permissible in

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writ jurisdiction. We are fortified in such view with the case law, reported as 2011 SCMR 279 wherein it was held that:

6. It is worth mentioning that it is mandatory and obligatory for a party invoking the Constitutional jurisdiction to establish a clear legal right which should be beyond any doubt and controversy. In the light of alleged forgery and fraud as pointed out by learned Additional Advocate General, we are of the considered view that legal right and entitlement of the petitioners are controversial. It hardly needs any elaboration that disputed question of fact cannot be decided in constitutional jurisdiction.

8. It is also not a disputed position that the Apex Court, while setting aside firstly initiated criminal proceedings through course of Illegal Dispossession Act, specifically ordered that 'dispute shall be decided in the proceedings now pending before the E.D.O. (R), Jamshoro' such revenue proceedings has, now, reached upto higher authority of revenue hierarchy, therefore, it would not be proper to step over the competence of such forum through writ jurisdiction. The plea of subsequent change in the title through registered sale deed, prima facie, falls within meaning of *lis pendence* hence should not be taken as a sword to defeat the competence of the forum (Revenue hierarchy), particularly when such forum was found competent by Apex Court.

While considering all these facts, admittedly apex Court referred the matter to Revenue hierarchy for decision in accordance with law but during that adjudication there is subsequent change in the title through registered sale deed but since it is, prima facie, falls within meaning of *lis pendence* hence should not be taken to defeat the competence of the forum (Revenue

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hierarchy) as was found competent by Honourable Apex Court to adjudicate the matter in dispute.

9. Moreover, through instant petition (s) number of relief (s) have been sought which includes '*status of sale*', '*restoration of possession*', '*appointment of receiver*' and other relief (s) which all appear to be requiring determination of factual controversies, which being not permissible in writ jurisdiction, cannot be entertained. As regard the relief of direction for *Anti corruption authority* it would suffice to say that such agency, in its competence, is competent to examine the question of cognizance or otherwise and no one, under the law, is restrained from approaching such agencies.


10. As regard the relief sought as prayer clause (j), we find it justifiable as the law also demands *early disposal* and even such relief was consented by the respondents, hence the Member (CS & EP), Board of Revenue, Sindh at Hyderabad is directed to conclude the matter within a period of one month. Needless to add here that though Member Board of Revenue is the last forum of revenue hierarchy yet the decision thereof is a cause of grievance to a party, then same could be brought before Civil Court whereby all relief (s) including cancellation of document, in question, can well be sought.


11. As regard, the relief, sought as prayer clause (k), enough to say that since law itself guarantees to such rights hence the petitioner (s) shall, if approached to law enforcing agencies with a complaint, be dealt in accordance with law. However, this guarantee shall not be exploited to cause harassment or influence by any law enforcing agency.

12. In view of above discussion, the petition, in hand, is hereby disposed of in terms stated above. However, the observation, made in the petition, shall



not prejudice the rights of any parties to petition, to resort legal remedies, provided by the law. However, to keep the rights protected, the respondent No.6 is directed not to create third party interest till the decision of matter, pending before the Member (CS & EP), Board of Revenue, Sindh at Hyderabad and to continue with any other legal order by Civil Court of law or other authority, if party so chooses even after such decision from Member (CS & EP) Board of Revenue.



JUDGE
28.1.2015


JUDGE

Tufail

Announced by


Judge 28.1.2015


28.1.15
(SHAHNAWAZ TARIQ)