

## IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No.D-846 of 2014

Present:

Mr. Justice Aqeel Ahmed Abbasi &  
Mr. Justice Muhammad Faisal Kamal Alam

Dated of hearing : 26.04.2016  
Date of decision : 26.04.2016  
Plaintiffs : 1. Abdul Huq son of Mangho Khan and  
2. Zakir Hussain Khaskeli son of Ali Raz  
through Mr. David Lawrence, Advocate.  
Respondents : M/s Shahryar Imdad Awan, Assistant Advocate  
General Sindh and Shafique Ahmed Leghari,  
State Counsel, representing Official  
Respondents.  
Respondent No.11 : Mr. Aftab Ahmed Shar, Advocate, representing  
Taluka Bar Mirwah.

### **ORDER**

**Muhammad Faisal Kamal Alam, J:** - Through instant petition, the Petitioners are primarily seeking restraining orders against the Respondents that they should not try to merge their piece of land falling in survey No.370 with a portion of land claiming to be owned by the Petitioners as part of survey No.371, Deh Thari, Taluka Mirwah, District Khairpur. Following relief has been sought in the instant petition:

- “a. To declare the act of the respondents No.1 to 7 and 10 thereby raising illegal and unlawful boundary wall around the revenue survey No.371 of Deh Thari Taluka Mirwah District Khairpur, owned and possessed by the petitioners and other Khatedars, and attempting to merge the private property into judicial complex Thari Mirwah is and will be illegal, unlawful, without any lawful authority and without any mandate of law.*
- b. To direct the respondents to act in accordance with law and not to violate the legal and constitutional rights of the petitioners with regard to the aforesaid property.*

- c. To restrain the respondents from raising any sort of construction work, illegally unlawfully and without any lawful authority over and upon the property of the petitioners by granting appropriate injunction under the facts and circumstances of the case.*
- d. To grant any other just and equitable relief, which has not been specifically prayed for, under the circumstances of the present matter and for the just decision of the present petition and in the interest of justice.*
- e. To award cost of the petition.”*

2. Material facts for deciding the instant constitutional petition are that the Petitioners (Abdul Huq son of Mangho Khan Jogi and Zakir Hussain Khaskeli son of Ali Raz) are claiming to be joint owners of 13 ghuntas in survey No.371, deh Thari Taluka Mirwah, District Khairpur (hereinafter referred to as the “**Subject Land**”). The main grievance of Petitioners is that the construction of boundary wall at the adjacent land of Judicial Complex, Khairpur, is done in such a way that it is interfering in the lawful possession of Petitioners. It is further averred that Respondent No.10-a private contractor hired by official respondents, is making an illegal attempt to merge (amalgamate) the Subject Land with that of above adjacent land of Judicial Complex; survey No.370. It is also stated that earlier two suits; bearing Suit No.92 of 1999 and Suit No.14 of 2008 (New No.192 of 2009) filed on behalf of the Bar Association were dismissed and since the orders have attained finality, thus the matter has been resolved in favour of the Petitioners. Consequently, present petition may be allowed in terms of the prayer clause mentioned hereinabove.

3. The Respondents have filed their respective comprehensive parawise comments to the petition and have categorically disputed the claim of ownership of the Petitioners. The parawise comments filed by Respondent

No.2-Deputy Commissioner Khairpur is of much significance, wherein he has specifically dealt with the report dated 28.02.2008 filed by the Executive District Officer (Revenue), Khairpur and relied upon by the Petitioners.

4. Before filing this petition, another constitutional petition was filed being C.P.No.D-216 of 2010 in this Court by other purported Khatedars / Claimants of other portion of land in aforementioned survey No.371, including the present Petitioner No.1 (Abdul Huq son of Mangho Khan). A division bench of this Court on 30.11.2010 had disposed of the earlier petition by observing that in case the Petitioner is in possession of the property in question, he will not be dispossessed from the said property without due course of law.

5. In the intervening period, Mr. Aftab Ahmed Shar, President Taluka Bar Mirwah, has filed an application under Order I Rule 10 of Civil Procedure Code for becoming a party in the matter as one of the Respondents, which was allowed on 17.02.2016. The stance of Bar Association through its President Mr. Aftab Ahmed Shar is that the Petitioners are in collusion with the Revenue officials and under the garb of present proceedings they have attempted to usurp the portion of an area belonging to Judicial Complex, Thari Mirwah.

6. With the assistance of learned counsel for the parties, we have gone through the record of the case and also examined the earlier orders passed in above suits, that is, Suit No.92 of 1999 and Suit No.14 of 2008 (New No.192 of 2009) instituted by Advocates as Members of Bar Association, Thari Mirwah. Record shows that these suits were in fact dismissed vide orders dated 19.03.2003 and 16.03.2011, respectively, for non-prosecution, and the same were not decided on merits, therefore, the Petitioners cannot

claim any right or interest in respect of the Subject Land on the basis of above referred orders of dismissal of suits for non-prosecution as there has been no determination of title of subject land in favour of Petitioners.

7. It has been vehemently argued by the learned State Counsel representing Respondent No.2 that a reference is pending before the Commissioner, Sukkur Division for cancellation of entries in respect of the Subject Land. Respondent No.2 (Deputy Commissioner, Khairpur) has further pointed out illegalities in the purported entitlement of the Petitioners and according to Respondent No.2, that without issuance of T.O. Form, (Transfer Order) the Petitioners cannot claim any ownership of the Subject Land and they have invoked the constitutional jurisdiction of this Court with unclean hands and consequently the petition is liable to be dismissed.

8. Taking into account the respective pleadings of the parties and the material available on record, it is apparent that the claim of the Petitioners has been seriously disputed by Respondents as well as by the Revenue authorities, whereas, disputed claim of title otherwise, cannot be decided without recording of evidence, which exercise obviously cannot be undertaken by this Court under writ jurisdiction. Moreover, in view of certain defects and absence of T.O. Form in respect of Subject Land, the very grant / allotment has become doubtful and the Revenue authorities have also filed Suo-Moto Reference before the concerned authority for cancellation of such entries in the revenue record. It may be observed that if the entries in respect of Subject Land are cancelled by the Commissioner as mentioned in the parawise comments of Respondent No.2, then such order would be assailable under the relevant revenue laws, viz. the West Pakistan Land Revenue Act, 1967, whereas, it is a trite principle that writ jurisdiction cannot be invoked in such matters where adequate and efficacious remedy has been provided under law. Reference in this regard

can be made to the judgment of the Honourable Supreme Court of Pakistan reported in **P L D 1991 SC page-476** (*Federation of Pakistan and others Vs. Major (Retd.) Muhammad Sabir Khan*), wherein, the Honourable Supreme Court has held that writ jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan cannot be invoked where issue of ownership and possession is to be determined. Relevant portion of the aforereferred judgment is reproduced hereunder:

*“ Thus after hearing both the learned counsel the final position that emerges is that the question of title is involved. Not only this the question of possession also cannot be resolved except through proper trial. With due respect to the High Court this case did not qualify for entertainment in the Writ jurisdiction and the Writ petitioner in his own interest should have been advised to approach the other proper forum. With these remarks this appeal is allowed, the impugned judgment is set aside and parties are left to seek and prove remedy in accordance with the law in the proper forum. No order as to costs.”*

9. Adverting to the observation made in the earlier C.P.No.D-216 of 2010 about adhering to due process of law; it is clarified that the term ‘due process of law’ is of wide import and its applicability varies from case to case in accordance with the set of facts and circumstances. Moreso, due process of law is also directly related to the right, interest and entitlement of a person as recognized by law. In the present case, the Petitioners could not make out a *prima facie* case of their legal entitlement or possession over Subject Land, whereas, the entries in the revenue record are under scrutiny before the relevant revenue authority in the shape of Suo-Moto Reference as referred to hereinabove. Moreover, documents filed by the Respondents relating to Judicial Complex, Survey No.370, Thari Mirwah, Khairpur, suggest that as per layout plan attached, the Subject Land (0-13 ghuntas) is part of Judicial Complex, whereas, such fact has not been denied or disputed by the revenue authorities. In view of hereinabove facts and circumstances of the case, we do not find any substance in the instant

petition which was accordingly dismissed vide our short order dated 26.04.2016, and these are the reasons of such short order.

Before parting with the above reasons of the order, we may observe that the concerned revenue authorities may decide the fate of pending reference and the title of Subject Land in accordance with law, preferably, within a period of one month from the date of receipt of this order.

JUDGE

JUDGE

Riaz / P.S\*