

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
R.A No. 94 of 1991

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of CMA-381/1991

Date of hearing: 30.11.2016

Date of judgment: 02.12.2016

Applicants: Through Mr. Sunder Das, Advocate

Official Respondents: Through Mr. Ashfaqe Nabi Kazi,
Assistant Advocate General, Sindh

JUDGMENT

MUHAMMAD FAISAL KAMAL ALAM-J:- This Civil Revision Application has called in question the Judgment and Decree dated 18.05.1991 and 21.05.1991, passed by the learned Appellate Court (District Judge, Nawabshah), dismissing the Civil Appeal No.55/1990 of the present applicants by maintaining the order dated 26.02.1990, passed by the learned Senior Civil Judge, Nawabshah, whereby the plaint in Suit No.01 of 1990 was rejected.

2. The relevant facts for deciding the present civil revision application are that the present applicants, who were the plaintiffs in the above suit, have agricultural land which were/are irrigated through Water Course No.7-R, Malwah Distributory.

3. The private respondents No.1 to 4 have requested the official respondents for shifting of their water course from 18-R and 18-L located at Ex-Lundki Distributory to the above mentioned water

course No.7-R, from which the present applicants were getting their water as per their due share. In the proceedings before the Irrigation Authorities performing functions under the Sindh Irrigation Act, 1879 (**Irrigation Law**), both the present applicants and respondents contested each other's claim.

4. In the proceedings before the Irrigation Authority, the Deputy Commissioner, who is a competent authority under the above statute, ruled in favour of present applicants and finally present private respondents filed a revision in terms of Section 91 of the said Irrigation Law before the Commissioner.

5. According to Mr. Sunder Das, the learned Counsel for applicants, the grievance of the present applicants is that the Commissioner did not afford proper opportunity of hearing to the present applicants, who were objectors before the Irrigation Authorities, and decided the revision against the present applicants, by ordering, *inter alia*, accepting the request of present respondents for change of peech from the above referred water course 18-R/18-L (Ex-Lundki Distributory) to water course 7-R (Ex-Malwah). The order, by which the present applicants became aggrieved of, was passed on 04.12.1989 and is available in R&P of the case file. Since no further remedy is provided against such an order, the present applicants filed the above mentioned First Class Suit by seeking following relief:-

“(a) Declaration that order dated 04.12.1989 passed by Commissioner Sukkur Division is illegal and malafide agaisnt the principles of natural justice, consequently the defendants No.1 to 3 are not entitled to the change

of peech from WCs 18-R/18-L Ex-Lundki Distributory to WC 7-R Ex-Malwah Distributory.

- (b) An injunction, restraining the defendants from effecting the change of peech on WC 7-R Ex-Malwah for the lands of defendants No.1 to 3 may be issued.***
- (c) Costs of the suit be borne by defendants.***
- (d) Any other relief.”***

6. The above suit was contested by the present private respondent and the record shows that they have also filed an application under Order VII Rule 11 of CPC, seeking rejection of the plaint on the basis of a bar contained in Section 91 of the said Irrigation Law. The objections were filed by the present applicants/plaintiffs and the matter was heard by the learned trial Court, which resulted in passing of the above mentioned impugned order (of 26.03.1990) and subsequent Decree dated 29.03.1990. It would be advantageous to reproduce here-in-under the above Section 91 of the Irrigation Law:-

“91. (l) Whenever it appears to any Canal-officer not inferior in rank to an Executive Engineer that it is expedient to change the source of water-supply of any land for the more efficient distribution of water, he shall serve a notice on the holder or holders of the land and, if he proposes to transfer the source of water-supply of the land to any existing water-course, on the owner or owners of such water-course also, calling upon them to state in writing their objections, if any, as to the source or alignment or construction of the proposed water-course.”

7. Mr. Ashfaqe Nabi Kazi, the learned Assistant Advocate General, Sindh has defended the orders by arguing that if the jurisdiction is rightly exercised by the government functionaries under a statute, then such orders are immune from being challenged in a proceeding of the nature. He has laid much emphasis on Sub-Section (iii) of Section 91 (of the Irrigation Law), whereunder the jurisdiction of Civil Court is specifically barred. The learned A.A.G further contends that perusal of the order dated 04.12.1989 (passed by the Commissioner) clearly shows that in its Paragraph No.4, the contentions of the present applicants have been recorded, which means that the present applicants did participate in the proceedings before the Commissioner. However, this has been categorically controverted by Mr. Sunder Das, the learned Counsel for applicants, by drawing the Court's attention on the first page of the above order, wherein attendance of every party has been recorded except the present applicants and he further submits that the presumption is in favour of the applicants as they were not notified about the proceedings before the Commissioner. He further contends that their objections, which were already available on record, must have been reproduced by the Commissioner in Paragraph No.4 of its above order dated 04.12.1989. It is further contended on behalf of the applicants that a proper course would have been that instead of rejecting their plaint, the present applicants should have been given an opportunity to lead the evidence and the learned Trial Court should have decided the above suit on merits. The learned Counsel has also cited a decision of the Hon'ble Apex Court, reported in *1994 SCMR Page-356*, to

augment his arguments that Civil Courts being Courts of ultimate jurisdiction can examine the acts of other forums, which enjoy exclusive jurisdiction in the matter.

8. Though no Advocate has represented the private respondents but their Counter Affidavit is available on record, wherein the private respondents have defended both the impugned decisions of the Courts below mainly on legal grounds. This Counter Affidavit is available at Page-79 of the case file, is silent about the main contentious issue raised by the present applicants about non-providing of hearing opportunity to them by the Commissioner, when he exercised his revisional jurisdiction and passed the order dated 04.12.1989. It has also been specifically mentioned in the contents of the present revision application that the Commissioner had a close relationship with the present respondent No.1.

9. Rival contentions of the learned Counsel representing the parties have been heard and with their able assistance the record of the case has been examined.

10. A minute examination of Section 91 (*reproduced ibid*) of the Irrigation Law makes it very clear that a change of water supply from a source or from existing water course can only be done after hearing the owners of such water course and their written objections. The object and spirit of this statutory provision is very obvious, that if a water supply from a certain water course or source is being altered or changed (change of peech), then those Khatedars and/or owners or agriculturalists getting their respective share from a designated water

course, who will be adversely affected, should be heard. This is one of the main apprehensions of the present applicants that their water supply/share which the applicants are getting from water course No.7-R, Ex-Malwah Distributory will considerably be reduced and ultimately their cultivation will be affected. These matters even otherwise cannot be decided by the official respondents/irrigation authorities in a slipshod manner but after taking into account all the attending factors. In this regard, the learned Counsel for the applicants has rightly cited a reported case of this Court; *2009 CLC 691 (Karachi)*, wherein, this Court, in exercise of its revisional jurisdiction, has set-aside the orders of Courts below, whereby plaint was rejected by invoking Section 91 of the said Irrigation Law.

11. In another reported judgment of the learned Divisional Bench of this Court; *2005 CLC 441 (Mehrab Khan v/s Province of Sindh)*, it is held, *inter alia*, that a genuine Khatedar/owner is entitled to his due share of water under a water course. In the above reported case also the petitioner of that case and Khatedars of a water course had a dispute *inter se* against transfer of a peech and in the early round of litigation, it is mentioned in the above referred case, that the learned District Judge remanded the case to the Collector to decide the dispute between the parties.

12. The barring provision in a statute is only applicable when the official acts are neither tainted with *mala fides* nor is unreasonable. The barring provision cannot be strictly interpreted, resulting in depriving a citizen/person of his substantial rights and that too when it

has been vehemently agitated that the order passed by the revisional authority suffers from material illegality and was against the principles of natural justice as no proper hearing opportunity was given to the present applicants. In this regard, guidance can be taken from a well-known judgment reported as *PLD 1997 Supreme Court Page-03 (Abbasia Cooperative Bank v/s Hakeem Hafiz Muhammad Ghaus and 05 Others)*, wherein the Hon'ble Apex Court has laid down the rule about the ousting provision in a statute in the following words:-

“The next question which arises for consideration in the cases is, whether the Civil Court was competent to examine the validity of the auction conducted by the authorities? The Civil Court under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication. It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order

or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court. In the case before us, the action of the Cooperative Authorities in auctioning the suit property for recovery of the loan against respondent No.1 was challenged in the suit as contrary to the provisions of the Ordinance and M.L.O 241.”

13. A close scrutiny of the above Irrigation Law leads to the conclusion that in terms of Section 21, 22 and 23, a substantial interest of a khatedar/agriculturalist/land owner has been created and such kind of a statutory right cannot be allowed to be brushed aside by invoking an ouster clause of the Irrigation Law. Both the Courts below, while deciding the case, have failed to exercise their respective jurisdiction properly and legally.

14. The record of the present case shows that restraining order was passed on 13.02.1997 and operation of the impugned decisions was suspended and it was observed that the above order dated 04.12.1989 (of Commissioner) was not implemented thus far.

15. The result of the above discussion is that both the impugned decisions of the Courts below are passed without application of judicial mind and suffers from material irregularity, which necessitates interference in this revisional jurisdiction. Consequently, both the decisions of the Courts below; judgment dated 18.05.1991 and decree dated 21.05.1991 as well as order of 26.02.1990 and decree dated 29.03.1990 are set-aside and the case is remanded to the learned Trial Court with the directions to decide the Suit No.01 of 1990, which now stands revived, in an expeditious manner and preferably within two months from today. The learned Judge will pass the judgment after giving an opportunity to the parties to lead the evidence, but disallowing any of the parties to seek adjournments with the object to delay the proceedings. Parties to bear their own costs.

JUDGE

Shahid

