

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.849 of 2017

DATE	ORDER WITH SIGNATURE OF JUDGE
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Plaintiffs: Syed Hamid Mir and another through Mr. Khawaja Shamsul Ihsam, Advocate.

Defendants: Board of Revenue & others

**Defendants No.2 to 4 Through
Barrister Jamshed Malik.**

**Official Defendants Through
M/s. Suneel Kumar Talreja AAG alongwith
Nigar Afaq, State Counsel.**

**Board of Revenue Through
Mr. Shabbir Ahmed Shaikh, Advocate a/w
Asadullah Abbasi, A.C. Murad Memon &
Hussain Ali Hakro, Mukhtiarkar Murad
Memon.**

1. For hearing of CMA No. 5347/17 (U/O 39 Rule 1 & 2 CPC)
2. For hearing of CMA No. 5345/17 (U/O 39 Rule 1 & 2 CPC)

Date of Hearing: 21.02.2018

Date of Order: 21.02.2018

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration, Directions, Injunction, Possession and Damages and applications listed at Serial No.1 & 2 bearing CMA Nos.5347/2017 and 5345/2017 have been filed by the Plaintiffs seeking restraining orders from being dispossessed from part of the Suit Land and so also putting the Plaintiff back in possession of the said land.

2. The precise case of the Plaintiffs is to the effect that initially Plaintiff No.1 was sole and exclusive owner of 16 Acres of land in Na-Class No.249, Deh Kharkharo, Tapo Konkar, Gadap Town,

Karachi on the basis of record of rights maintained in Form-VII and 12 Acres of land in the same area adjacent to the 16 acres as above. It is the case of the Plaintiffs that Ijzatnama was executed on 04.07.1992, whereas, the 12 Acres of land was owned after purchasing of the same from one Ghulam Hussain. Thereafter, both these lands were sold to Plaintiff No.2 against consideration and the Plaintiff No.2 was handed over possession on 05.09.2016.

3. Learned Counsel for the Plaintiffs has contended that Defendants No.2 to 4 in connivance with the official Defendants have forcefully dispossessed the Plaintiff No.2 from 16 Acres land in question and have even blocked the access to his remaining 12 Acres of land, which is meant for poultry farming and is owned under a valid 30 years Lease. Learned Counsel has further submitted that the Defendants in connivance with each other have partly demolished the Plaintiff's Poultry Farm and have taken away 8000 Chicken birds, feeds etc. and all this happened under the supervision of police authorities as well as the concerned Deputy Commissioner and Assistant Commissioner. Learned Counsel next contended that the Plaintiff No.2 is owner on the basis of a valid agreement, whereas, the ownership of Plaintiff No.1 is not in dispute, and therefore, the Plaintiff is entitled for the relief(s) prayed for. Learned Counsel has referred to Orders dated 31.03.2017 and 20.04.2017 as well as Nazir's Reports dated 29.04.2017 & 08.05.2017 and submits that the contention of the Plaintiff No.2 has been justified on inspection, and therefore, firstly the Plaintiff No.2 is entitled for possession of the 16 Acres land in question and secondly for easy and free access to both parts of his land. In support he has relied upon the cases reported as **PLD 2013 SC 443 (Suo Motu Case No.16 of 2011 Alongwith CMAs), PLD**

2003 Karachi 237 (Sharif Haroon v. Province of Sindh through Secretary to the Government of Sindh, Land Utilization Department and another), 2009 YLR 955 (Sherri CBE (Citizens for a Better Environment) and another v. Government of Sindh through Secretary, Land Utilization Department Board of Revenue, Karachi and others & 2005 SCMR 1859 (Arshad Khan v. Mst. Resham Jan and others)

4. On the other hand, learned Counsel for Defendants No.2 to 4 has made an effort to explain the terms “Qabuli” & “Na-Qabuli Land” as well as “Na-class Land”. He submits that “Qabuli Land” is privately owned, whereas, “Na-Qabuli Land” is in fact a government land, which could be leased to any one, however, these terms reflect the factum of ownership in commercial language, whereas, “Na-class Land” has nothing to do with ownership but is only recognized as un-surveyed land. Per learned Counsel the Plaintiff No.2 claims ownership of a land, which is not surveyed and is not specifically specified, whereas, the Defendants No.2 to 4 have got nothing to do with the Plaintiffs’ land as they own within their rights a completely different property having Survey Nos.64 & 65. Learned Counsel has referred to the Sketch annexed with the Plaintiff at Pages 61, 85 and 109 and submits that though the Defendants land is mentioned in these Sketches but nowhere the land of the Plaintiffs has been distinctly stated and or identified, whereas, even otherwise the area of Survey No.249, wherein, they claim their land is a huge survey owned by various owners. Learned Counsel has further submitted that the ownership of Plaintiffs is itself in doubts inasmuch as a land for 30 years lease has been sold by Plaintiff No.1 to Plaintiff No.2, which is impermissible, whereas, the Plaintiff No.2 seeks a declaration on

the basis of Form-VII, which cannot be granted. Per learned Counsel the land of plaintiffs is unspecified; therefore, they are not entitled to seek any relief against his clients. He finally submitted that the case law relied upon by the Plaintiffs' Counsel in fact supports his case and he also places reliance on the same Judgments.

5. Learned AAG to the extent of arguments of Counsel for Defendants No.2 to 4 in respect of ownership and alleged sale has adopted the same; and further submits that since the land owned by the Plaintiff is un-surveyed, therefore, the relief being sought presently cannot be granted. He further submits that land on a 30 years lease for poultry farming cannot be sold; hence the allotment is liable to be cancelled in favour of the Government.

6. Counsel for Board of Revenue submits that the Plaintiffs have violated the lease condition after entering into a sale agreement of land allotted on 30 years lease for poultry farming & Wahi Chahi and the land is liable to be cancelled. Learned Counsel has read out the written statement as well as the counter affidavit filed on behalf of the concerned Mukhtiarkar.

7. While exercising his right of rebuttal, learned Counsel for the Plaintiffs contended that no specific denial has been made by the official defendants on the allegations so raised by the Plaintiffs, and therefore, they stand admitted. He further submitted that the Plaintiffs were allotted the land after due permission, whereas, renewal fee already stands paid up to the year 2022 and as per Nazir's Report, the Plaintiff has been found in possession on the portion of 12 Acres, whereas, the allegation of demolition and

blocking of access stands proved from the same, therefore, the Plaintiff is entitled for the relief(s) so claimed.

8. I have heard all learned Counsel as well as learned AAG and perused the record. It is the precise case of Plaintiff No.2 that he is the owner of the land i.e. 12 Acres and 16 Acres as stated above after having purchased the same from Plaintiff No.1 through an Agreement dated 05.09.2016. It is his further case that Plaintiff No.1 was owner of the land undisputedly on the basis of a 30 years lease for poultry farming purposes and he is using the land for the same purposes. It is his further case that Defendants No.2 to 4 (private defendants) in connivance with the officials have taken over the possession of the 16 acres land and have also denied access to him in respect of other portion of the land. On 31.03.2017 an order was passed by observing that till the next date, Defendants No.5 to 9 shall not deny proper access to the Plaintiffs to their Land. On the same date, Nazir was appointed as Commissioner to inspect the Suit Property. Pursuant to such order, Nazir has furnished his report dated 7.4.2017 which states in Para 2 that:

“.....At the pointation of plaintiff the land which he claimed ascertain [sic] portion in triangle shape with a improperly freshed [sic] wall was found raised at the height around 4 to 5 ft. making partition of the land in question. The main gate was found under the security of subject Anti Encroachment Officials....”

Thereafter on 20.04.2017, it was pointed out by the Additional Advocate General that land claimed by the Plaintiffs is in Na-class category, whereas, inspection has been made by the Nazir in absence of any concerned officials without first confirming the exact location and only on the pointation of the plaintiff, therefore, Nazir may be directed to re-inspect the property with the

assistance of the concerned officials. The Court observed as follows:-

“However, considering it necessary that inspection should be made to have a clear view with regard to correct location of the suit property, as the same is situated in “Na-class Land” and no computerized revenue record of the suit property has been placed on record, I within the purview of Order XXVI, Rule 9 C.P.C. deem it property to appoint Nazir of this Court as Commissioner to conduct local investigation, after issuing notices to parties, with the assistance of Superintendent Settlement/Survey Department, Karachi, Mukhtiarkar concerned and other concerned officials of Board of Revenue, including the assistance from law enforcement agencies, and submit his report with supporting record of Revenue Department with regard to location of the suit property, within 10 days hereof.”

9. Pursuant to such directions, Nazir carried out the inspection and furnished his Report dated 09.05.2017. In the report, the Nazir has stated that *Muhammad Ayub Tapedar stated that as per Surat-e-Hall for land Na-Class No.249 of Mukhtiarkar, East Karachi dated 18.11.1990 the land of plaintiffs falls far away from the present position.* The same position was stated by Mukhtiarkar Taluka Murad Memon, Malir Karachi. He has further stated that on 08.05.2017 a report from the office of City Surveyor, Survey Superintendent Office, Karachi Division was received, which states as under:-

“Land which was holding by Mr. Muhammad Jamil in Naiclass 249 of 16 Acre is far away from survey No.64 and 65. The land of Plaintiff is situated on the turn of KDA water line and KDA water line is far away from survey No.64 and 65 in Naiclass 249. The land of plaintiff.”

10. Though Nazir has placed reliance on the letters of Mukhtiarkar and City Surveyor as above, but on perusal of these letters it appears that proper translation has not been done by the office of the Nazir. The letter of City Surveyor dated 8.5.2017 is very clear and specific in its terms and states that *“On 29.4.2017 in Suit No.849 of 2017 Site was inspected along with Revenue Tapedar, Plaintiff No.2 and Nazir branch of Sindh High Court and on ground the land 16 Acres of Muhammad Jameel in Na-Class 249 is away from Survey Nos. 64 and 65 and is located on the turn of KDA Water*

Pipe Line which pipe line of KDA is away from Survey Nos. 64 and 65. Though Survey Nos. 64 and 65 are adjunct to Na-Class 249, but the Suit property according to Revenue Sketch falls away from these [survey] Nos.” Perusal of the aforesaid report as well as the Reports of Mukhtiarkar and the City Surveyor reflect that for the present purposes, it is not possible for this Court to give any conclusive finding as to the contention raised on behalf of Plaintiff No.2 as he has not been able to point out the exact location of his land on the basis of his ownership documents annexed with the plaint. It is categorically stated by the concerned officials that the land of the Plaintiffs falls far away from the present position i.e. the position being claimed by the Plaintiffs as all along the land has been pointed out by the Plaintiff No.2 to the Nazir of this Court. The officials have stated that the land of the plaintiffs is far away from Survey Nos.64 & 65 being claimed by the Defendants No.2 to 4 and in fact according to them, the land of the Plaintiff is situated on turn of KDA water line, whereas, said KDA Water Line is far away from Survey Nos.64 & 65 in Na-Class No.249. Time and again, I have confronted the Counsel for the Plaintiff to point out the exact location of the Plaintiffs’ land on the basis of their documents or any Sketch or map drawn by the officials concerned; however, none could be referred to. Sketch available at Page 61 does not specify or mentions the land of the Plaintiffs specifically, whereas, the Sketch at Page-85 is an unsigned Sketch but nonetheless the same also does not clearly identifies the Plaintiff’s land. Insofar as the Sketch at page-109 is concerned, again the same is not signed by any official but even the plaintiffs’ land is not shown as claimed; rather it appears to be at a distant place from Survey Nos.64 & 65 being claimed by Defendants No.2 to 4. It may be appreciated that this is only the injunction stage and the Plaintiff is duty bound to make out his prima-facie on the basis of his documents. Not only this, inspection has been carried out along with the

concerned officials and none has supported the Plaintiffs' case. It may also be pertinent to observe that much stress has been laid on the Nazir's report dated 7.4.2017 by the learned Counsel for the Plaintiffs that it has come on record that police officials as well as Deputy Commissioner have cordoned off the area and have virtually taken over his land. However, the Court cannot rely upon the Nazir's report exclusively (which in the present case otherwise does not fully support the plaintiff's claim). It is by now settled law, that the report of a Commissioner appointed by the Court is always persuasive in nature, and is only a tool for the Court to arrive at a just and fair decision but under no circumstances it is binding on the Court. It is not necessarily to be acted upon by the Court mandatorily. The Court has to and must examine the report as a Commissioner's report is not a substitute of evidence, and can only be an aid in evidence, whereas, this is not a case where the matter is being decided on the basis of any evidence which could corroborate with the pleadings and documents on record. We may, however, observe that inspection of location by a Court may be necessary and helpful in deciding a case, but surely it should not be substituted as an evidence, which otherwise is required to be produced by a party.¹ Thus, Order XXVI, Rule 12(2), C.P.C. makes it discretionary for the Court to accept or reject a Commissioner's report if it is to the dissatisfaction of the Court.²

Admittedly, the Plaintiff is not in possession of 16 Acres land in question, of which, he seeks possession at the injunctive stage. He further seeks a restraining order in respect of the same land. Through CMA No.5345/2017, the Plaintiff has prayed for a restraining order from being dispossessed from 16 Acres of land as above and at the same time through CMA No.5347/2017 the Plaintiff has prayed that he be put into

¹ Abdul Rashid v Mahmood Ali Khan (1994 SCMR 2163)

² Gulzar Hussain Awan v Akbar (1999 YLR 2250)

possession of the same land. In fact both these applications have contrary prayers and only one at the most could be granted. Admittedly, he is out of possession as per his own averments and in view of the facts and circumstances of this case, at this stage of the proceedings, he has failed to make out any case for putting him back into possession, which even otherwise is a final relief and cannot be granted at the injunctive stage. It is very strange, rather does not appeal to a prudent mind that while purchasing the land in question the Plaintiff No.2 could not obtain a proper and duly certified and or authenticated sketch of his land so as to enable him to correctly identify it as and when needed.

Insofar as the argument of both learned Counsel regarding claim of ownership of land on the basis of Form-VII and its validity is concerned, I may observe that perhaps for the present purposes this question is not relevant to be dealt with, lest it may prejudice the case of any of the parties. The question right now is only to the extent of exact location of the Plaintiffs land and for that no deeper appreciation is needed. The case law relied upon by the learned Counsel for the Plaintiffs is of no help at this stage of the proceedings when he has failed to make out a prima-facie case seeking the injunctive and other relief(s).

11. In view of hereinabove facts and circumstances of this case, on 21.02.2018 by means of a short order, Applications bearing CMA No.5345/2017 and CMA No.5347/2017 were dismissed and these are the reasons thereof.

Judge