

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.989/2007

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Plaintiff : Iftikharuddin& another,
through Mr. Mushtaq A. Memon, advocate.

Defendants : Province of Sindh and others,
through M/s.IqbalKhurram and Muhammad
Haroon, advocates for Board of Revenue,
Mr. Shafi Rajput, advocate for Intervener,
Mr. Jam Habibullah, State Counsel,
Mr. QadirBuxUmrani, Official Assignee.

Date of hearing: 26.03.2015.

Date of announcement: 21.04.2015.

ORDER

Through instant application (CMA No.5281/2009) defendant No.32 seeks recalling of *ex parte* order 23.09.2008 whereby he was debarred to file the written statement. The application is on the plea that summon(s) and notice(s) were not served upon him and since his valuable rights are involved in subject matter land therefore it would be in the interest of justice to provide opportunity of hearing; valuable right cannot be denied on technicalities rather requires adjudication on merits. The defendant is an illiterate person and daily '*Khabroon*' newspaper has no circulation in the area where he resides. Besides this, a common reader of Sindhi Newspaper reads Daily Kawish and not '**Khabroon**' and even Daily Khabroon is not falling within the ambit of national newspaper, having wide circulation.

2. Conversely learned counsel for plaintiff contends that defendant was served through publication hence his stand of non-service is without any justification. Per direction of this Court Official Assignee, repeatedly tried to take over the possession of suit land hence plea of non-service is without any substance, and not appealable to a prudent mind.

3. I have heard the respective sides and have also gone through the available record carefully.

4. Perusal of record reveals that on 09.08.2007 and 12.10.2007 summons and notices were issued, thereafter by diary sheet dated 23.09.2008 the notices were flashed in Daily Jang Urdu and Daily Khabroon Sindhi. On failure of the defendants to appear in response to such publication, they were held '**served**' and accordingly, on 12.03.2009 were debarred from filing of written statement.

5. The defendant has claimed specific plea of not being served with process of this Court and even had denied to have acquired notice or knowledge of the proceedings despite publication. The defendant has taken specific plea that '**daily Khabroon**' has no circulation in the area where he resides. This plea has not been denied specifically by the plaintiff. The course, provided by Order IX rule 6 (i) of the Code is penal in nature therefore, utmost care, resulting into satisfaction of the Court about service upon defendant, is always needed before resorting to such penal course. This is from the word '**proved**' used in this provision. However, the following provision i.e Order VI rule 7 of the Civil Procedure Code is permissive

in nature where discretion can be exercised on mere **'assigning of good cause'**. The term **'good cause'** though not defined by the Civil Procedure Code, but it shall include all those which appear to **'have prevented the defendant from appearing'**. The plea of non service, *in all senses*, can be taken to be a sufficient cause to permit an adjudication on merits which, *otherwise*, is requirement of the safe administration of justice. The perusal of record further reveals that plaintiff has claimed main relief against instant defendants hence involvement of their valuable rights cannot be denied. The service through Daily Khabroon can not be termed sufficient service particularly when there is specific denial to such service. Besides this, it is settled proposition of law that parties should be permitted to adjudicate their right by contesting the matter and that their valuable rights as provided under Article 10-A of the Constitution of Pakistan. Accordingly, considering all above circumstances couple with legal position, the instant application is allowed.

6. Report of Official Assignee with regard to taking over possession is fixed for orders, same is also insisted by the plaintiff's counsel; which also requires to be attended.

7. The examination of the record shows that through order dated 23.12.2008; Official Assignee was directed to take over possession of subject matter, in compliance whereof there were made number of efforts and correspondences, to execute such order. It is pertinent to refer order dated 23.12.2008 as under:-

“Learned counsel for the plaintiffs has made a very candid proposal that suit land which comprises of about 26 acres is being encroached

day by day and apprehends that time will come that there will be no vacant land available on which plaintiffs had made claim. He has stated that the possession of suit land may be taken over by the Court official as an interim measure.

Mr. QaziMajid Ali, learned AAG Sindh as well as Mr. Ahmed Pirzada, learned counsel for official defendants state that the suit land belongs to government and seriously dispute the title of plaintiff but guardedly agree to the suggestion of Mr. Mushtaq A. Memon that is, it may be done so without prejudice to the right of official defendants. Consequently, Official Assignee is appointed as receiver to take possession of suit land. The Receiver in case of any obstruction will take police assistance. The SHO, PS Malir Cantonment, Karachi, is directed to assist the Official Assignee in comply with the Court order. There Mukhtiarkar, Gadap Town, Deh Tor, is also directed to assist the Official Assignee in comply with the Court order. Plaintiff will..... In the above terms application stands disposed of.

Mr. Ahmed Pirzada requests that a fix date may be given as he states that suit itself is not maintainable.for the plaintiff. **By consent adjourned to 29.1.2009, when arguments on the maintainability of the suit will be heard.**

8. The record further shows that another order was passed on 26.02.2009 by this court. The operative part whereof is as follows:-

...It seems that through order dated 23.12.2008 the Official Assignee was appointed as Receiver to take possession of the suit land. Report of the Official Assignee of having complied with the order has not been filed as yet. Let such report be filed within a period of one week. It may further be noted that on 23.12.2008 Mr. QaziMajid Ali learned AAG as well as Mr. Ahmed Pirzada counsel for Board of Revenue have made a categorical statement that the suit land belongs to the government and has seriously disputed the title of the plaintiff to the same. The written statement..... . **The matter is already set down for hearing of arguments on its maintainability.** When such arguments heard, the question regarding the contents of written statement of defendant No.1 will also be examined.”

Besides, the record further shows that in continuity of issue of '*taking possession*' this court passed another order dated 20.05.2009 which reads as follows:-

“Reports of Official Assignee marked as Reference Nos.3 and 4 are on record. In the Reference No.3 dated 13.5.2009 it is shown that the police force was required to take possession of Survey No.45, that Survey No.44 has been taken into possession, only Rangers are occupying on the piece of that survey number which will be vacant after survey is carried out, according to Nazir report dated 28.5.2007 land of Survey No.45 was open to sky other than land measuring approximately 2000 sq. yds. Out of Survey No.45 were occupied by KatchaPacca construction and remained as mentioned above land is open to sky.

Subsequently on inspection the Official Assignee's report shows with regard to Survey No.44 which is reproduced as under:-

“During exercise of taking over possession it was found that there was an encroachment over the small piece of land where two incomplete rooms with boundary walls and some other boundary walls standing over the land were available. Further a small piece of land was in possession of Rangers, who did not allow the staff of Official Assignee to take possession of the same on the ground that the government has allotted them said piece of land. However they failed to produce any title document of the same at spot. The land was demarcated with the assistance of technical and total machine arranged by plaintiffs.

3. That in order to examine the title documents if any official assignee sent letter dated 20.4.2009 to D.G. Rangers to depute officer of his department to produce title documents in respect of claimed land. In response to said letter of Official Assignee Mr. Muhammad Nazir Khan, Senior Superintendent of Rangers (law Officer) attended before Official Assignee on 29.4.2009 with **original title documents and sketches and stated that two portion of (i)40 acres and (ii) 42.22 acres have been allotted to the Rangers by the government of Sindh from Naiclass No.24, Deh Tore, TapoKonker, Gadap Town, Karachi.** During the discussion it was decided that further joint survey be carried out in presence of parties viz. the plaintiffs and Rangers.”

Regarding Survey No.45 the operative part of Official Assignee reference No.3 is reproduced as under:-

“The Official Assignee respectfully submits the compliance report of orders dated 23.12.2008 and 26.3.2009 of the Hon’ble Court and prays that TPO Shah Faisal Town, Karachi may be directed to provide sufficient police including ladies police to take possession of Survey No.45, DEh Tore, TapoKonkar, Gadap Town, Karachi, which entirely is under encroachment and further **the plaintiff may be allowed to construct 3 rooms at the corners of suit land and fix barbed wires around the suit land for the purpose of protecting land from encroachment after notice to parties and their advocates.**”

It is ordered that Official Assignee be provided required assistance of police/Rangers to have removed the encroachment of land other than 2000 sq. yds of Survey No.45 as shown in Reference No.3 dated 13.5.2009 and to be taken into possession and report. Ordered accordingly.”

(Underlining is provided for emphasis)

While scanning the above record it is quite obvious that at the time of passing the order of appointment of official assignee this court also set-down for hearing on **‘maintainability of the suit’**. There can be no denial to the well established principle of law that appointment of receiver for taking the possession is the harshest discretion as to implement the order would *first* require one to be removed from possession hence this should *normally* be not resorted but where circumstances justify judicial conscious of the court with regard to **‘wastage of or damage to property’**. Before insisting such an order, the party is always required to establish prima facie case and circumstances showing existence of serious apprehension of wastage/ damage to subject matter. Needless to add that the object

behind appointment of receiver is to preserve the status quo during the pendency of litigation and to prevent the ends of justice from being defeated as stipulated under S. 94 C.P.C. In the instant matter the **‘maintainability of the suit’** has been in dispute from very beginning which was/is always required to be adjudged first. At this juncture, it would also be relevant to refer the relief(s), which the plaintiffs seek as:

- (A) Declare that the sanads/plots having No.B-1 to B-40 and B-253 to 256, B-350, B-384 to B-393, as well as annexures E to E/59 with the plaint are bogus and fake and therefore, all the actions of private defendants in pursuant thereto are illegal and void ab initio.
- (B) To call up all the documents/sanads in question in the instant proceedings – Annexure E to E/59 and adjudge them as cancelled.
- (C) Direct the defendant No.2 to implement the directions of defendant No.3 contained in the form of report dated 21.12.2005 by taking necessary action against the private defendants.
- (D) Permanently restrain the defendants and or any person or persons claiming through or under them from interfering **with the peaceful possession of plaintiffs**, causing harassment to plaintiffs and/or taking any coercive action against the suit property to the detriment of plaintiffs.
- (E) Permanently restrain all the defendants, their employees and/or any person or persons acting or claiming through or under them from giving effect to the fake sanads in question, by way of any sale transaction, mutation, **interfering in the possession of plaintiff with regard to the suit property** and/or taking any other action on the strength of these fake sanads in question, which will jeopardize the plaintiff’s rights and interest as owners in respect of suit property.
- (F) Grant damages/compensation...
- (G)

Accordingly, it is not disputed that the present plaintiffs has not sought the relief of **'possession'** in the suit rather the plaintiffs have claimed themselves to be in possession of the subject matter hence request of the plaintiffs for appointment of receiver for taking over possession of suit from defendants was never sustainable. The legal position be not reiterated that interim relief is always subordinate to main relief or least should be ancillary thereto, which manifestly is not the case in hand.

9. Be as it may, it is patent that till date the Official assignee has not taken the possession rather he through his report has brought the claims of stranger (Rangers) on record. The reports have also made it quite clear that the private persons, including defendants, are living in katcha-pucca constructed houses. I am clear in my view that **'preserving the status-quo or preventing the ends of justice'** shall never mean to demolish katcha-pucca houses or bringing the number of soul(s) under open sky in a case where the plaintiffs are yet to prove their title and even the title of the defendants has not been cancelled or declared as bogus, even if same are found so at the end of day (after due trial). In contra, claim of Board of Revenue is that property belongs to government and plaintiffs have no right over the subject property. However, since the order is still holding the field and this court cannot sit over the same but worth to add here that terms **'taking over possession of land'** or **'removing encroachment'** shall not allow the plaintiffs to insist removing the **'Rangers'** or occupants (holding Sanads), the status whereof is yet to be determined.

10. In these circumstances, it would not be just and proper to dispossess the occupants under the garb of incorrect interpretation of Order 40 of the CPC because if at the ends of the day the plaintiffs fail, there would be no way to compensate the occupants. Thus, by interim order Official Assignee cannot be allowed to dispossess the persons, may be under fictitious claims, before complete adjudication. Under these peculiar and developed circumstances, Official Assignee is hereby directed to take over the possession of open area and ensure that no one shall occupy that area, erect any sort of construction thereon. Further he shall ensure that whatever construction is available at the site should remain as it is and no further construction be allowed to anybody. The Official Assignee shall submit photographs of entire area with compliance report.

11. Office shall fix all pending applications for hearing. Respective parties shall argue the question of **'maintainability of the suit'** first without any further delay.

J U D G E

Imran/PA