

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

M.A No. 21 of 2021

DATE	ORDER WITH SIGNATURE OF JUDGE
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For orders on office objection
For hearing of main case

21.03.2022.

Mr. Mazhar Hussain Kalwar advocate for appellant.

Mr. Muhammad Sulleman Unar advocate for respondent No.9.

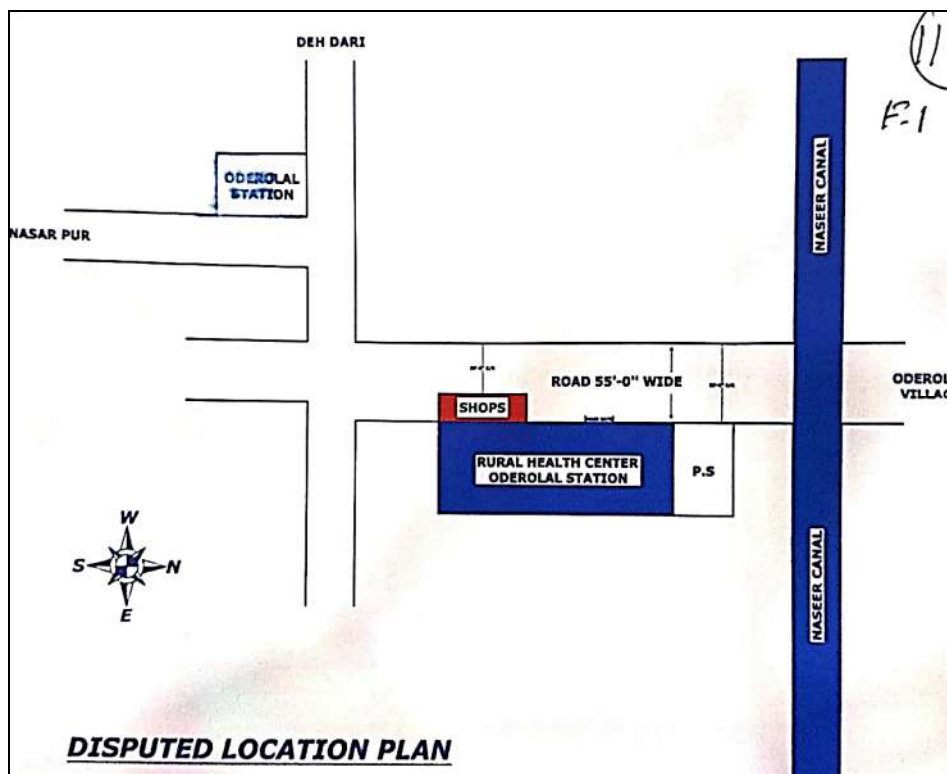
Mr. Wali Muhammad Jamari, Asstt. A.G a/w Dr.Qadir Bux Dahri, MS RHC, Oderolal Station, Dr. Zahid Deputy DHO Matiari and Bashir Ahmed Memon, AXEN, District Roads, Matiari.

Zulfiqar Ahmad Khan, J. Through this Miscellaneous Civil Appeal, the order dated 24.04.2021 passed by Presiding Officer, Anti-Encroachment Tribunal, Hyderabad has been impugned by the appellant, wherein an application made under Order 7 Rule 11, CPC by the respondents No.9 and 10 was allowed and plaint of the applicant was rejected by the said Tribunal.

2. Learned counsel for the appellant submits that appellant (plaintiff) filed a Suit bearing No. 3 of 2021 for the removal of encroachment and permanent injunction before the above mentioned Tribunal wherein it was alleged by the plaintiff that he was residing at District Matiari and that the illegal occupation of respondents / defendants No.9 and 10 upon the government land which caused agony, discomfort and trouble to general public of the locality and created uncertainty over the land in question and that the said act of respondents / defendants of illegal occupation of the government land was without legal justification hence unlawful, unjustified, misconceived and unwarranted and having no lawful use and authority and in violation of the law of the land. It was further stated that the private respondents while were under their legal rights to perform commercial activities over private lands, but the subject land was a government land (part of road) for which the answering respondents had no legal right to excavate the same and to built shops for their own commercial gains which was completely illegal and unwarranted under the law, therefore, he prayed to restrain the respondents No.9 and 10 and persons acting on their behalf, from construction of shops over the land in question.

3. Counsel for appellant draws Court's attention to various annexures stating that in fact a clear case of encroachment was made out where the said respondents had encroached parking area from the road in front of the Rural Health Centre, Oderolal Station. The Department itself at page-111 also affirmed the same situation which was also echoed by the Medical Superintendent, RHC, Oderolal Station. Counsel contended that appropriate procedure would have been to allow the Suit to proceed on merit rather than short circuiting the same through the illegal impugned order passed on the application under Order 7 Rule 11, CPC by the defendants.

4. To the contrary learned counsel for these respondents supported the application (and ordered passed thereon) and took the plea that the predecessor-in-interest of the respondents transferred 5-06 acres of land to Rural Health Centre, whereas the said respondents possessed 5.08 acres, hence 02 *Ghunttas* have now has been re-possessed by the private respondents, however, when challenged with annexure F-I at page-115 he could not satisfy how those 02 *Ghunttas* ended at the front of RHC and became part of 55 feet wide road running in front of the said RHC, the portion of which land was used for parking of Ambulances and other vehicles of doctors and patients coming for treatment at the RHC as per the plaint. The said annexure is reproduced as under that shows Shops (in red) being erected in front of the RHC and taking up part of 55 feet wide road:-



5. Heard the learned counsel and reviewed the material on record. It appears that the respondents are claiming that RHC is using 5-8 acres of land instead of 5-6 acres transferred to it, hence the additional 0-2 acres have been re-possessed by the respondents as they claim that the earlier transfer

of 5-6 acres of land to RHC was made from their ancestral lands. But even if this contention is admitted for a minute, how that parcel of land appeared on the front of RHC land and that too in the middle of a road is a serious question of fact (as well as law) that begged adjudication. With regards powers of Court under Order VII Rule 11, the Hon'ble Supreme Court in the case of ABDUL KARIM & others vs. FLORIDA BUILDERS (PVT) LIMITED (PLD 2012 SC 247) has formulated following guidelines for the interpretation of O.VII Rule 11.

Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the Court is obligated to accept each and every, averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the Court, which is inherent in every Court of justice and equity to decide whether or not a Suit is barred by any law for the time being in force completely intact. The only requirement is that the Court must examine the statements in the plaint prior to taking a decision.

Secondly, it is also equally clear, by necessary inference, that contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to examine whether the averments of the plaint are correct or incorrect. In other words the Court is not to decide whether the plaint is right or the written statement is right. That is an exercise which can only be carried out if a Suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaint appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the Court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements.

6. Also in the case of RABIA KHATOON vs. ABBASS ALI & another (2013 YLR 736) with regards applications made under Order VII, Rules 10 and 11, Court had given guidelines that such applications are to be decided on basis of tentative assessment of available material and while deciding application under O.VII, R.11 the Court to confine itself to the averments of the plaint and the same are to be taken as true. Court can take into

consideration, even defense or documents, brought on record by defense side, but such exception is subject to the limitation that said defense or document should be **irrefutable** rather **admitted**.

7. Also the Hon'ble Supreme Court has held in the case of FARMAN ULLAH vs. LATIF-UR-REHMAN (2015 SCMR 1708) that the cases be decided on merit if there is *lis* between the parties, which on the face of it appeared to be pending in the case at hand as the plaintiff stated that the land was public land and the private respondents were taking the plea that the land was in access to the land their predecessor-in-interest transferred to RHC, hence due process was to be followed to have the matter decided as per the scheme set up by the Sindh Public Property (Removal of Encroachment) Act, 2000 rather than ousting the plaintiff from the course of law.

8. In the given circumstance where it appears that factual and legal controversy exists between the parties, legal prudence required that power of Order VII Rule 11 could only have been exercised with great care. In the supra cases, the Hon'ble Supreme Court has directed that "where there is a controversy of fact or law between the parties in the main *lis*....the suit could not and should not be dismissed in these cases." It is also an established principle of law that "every *lis* should be decided on merits". Hence instant appeal is allowed by directing the Tribunal to decide the matter on merit by following the prescribed procedure, and to render a speaking judgment as per law, preferably within a period of three months from the receipt of this order.

J U D G E