

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.S.A. No.03 of 2016
Muhammad Ibrar Khan and another
Versus.
The Deputy Commissioner and another

Date of Hearing: 06.10.2016
Appellants by: Mr. Muhammad Ishtiaq Ahmad Raja, Advocate
Respondent No.2 by: Barrister Ammar Hussain Khushnood, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular second appeal, the appellants, Muhammad Ibrar Khan and Khalid Mehmood Bhatti, impugn the judgment and decree dated 21.12.2015, passed by the Court of the learned Additional District Judge, Islamabad, whereby the appellants' appeal against the order dated 23.10.2014, passed by the court of the learned Civil Judge, Islamabad, was dismissed. Vide the said order dated 23.10.2014, the learned Civil Court allowed respondent No.2's application under Order VII, Rule 11 C.P.C, and rejected the plaint.

2. The appellants, who are the residents of village Shah Allah Ditta, on 01.02.2014, instituted a suit for declaration and permanent injunction against the Deputy Commissioner, Islamabad, and the Capital Development Authority ("C.D.A."). The record shows that an undated application on behalf of the residents of Mouza Shah Allah Ditta, Tehsil and District Islamabad, was submitted to the Deputy Commissioner, Islamabad, seeking permission to make the *kaccha* road leading to the said Mouza a metaled road on self-help basis. This road goes through land acquired by CDA (Khasra Nos. 663,665,688 and 689) to the applicants' property in Khasra Nos. 550, 563, 585 and 616. This application is said to have been signed by twenty-three residents of Mouza Shah Allah Ditta, including the two appellants. On 27.12.2010, the Executive Engineer, Local Government and Rural Development Department, ICT, Islamabad, conveyed 'no objection' regarding the construction

of the road on self-help basis by the local community subject to the clearance by the local owners of the land. The appellants claimed to have constructed an eighty feet wide road, more than one kilometer long on self-help basis.

3. The appellants apprehended that the respondents were going to close the road leading to their village. The appellants were also aggrieved by the use of the road by the C.D.A. to approach the dumping station in Sector D-12. Fearing the closure of the said road by the respondents, the appellants instituted the suit praying for the following reliefs:-

- "1. A decree for declaration to the effect that the plaintiffs have a fundamental right to use the road described and shown in 'Red Ink' in the annexed plan which is built on the Self Help Basis by the plaintiffs and other inhabitants.*
- 2. as consequential relief a decree for permanent injunction, restraining the defendants from closing the road and putting hurdles in its maintenance be passed favour of the plaintiffs and as against the defendants.*
- 3. Any other relief which according to the facts and circumstances available the Honourable Court deems fit."*

4. Respondent No.2 (CDA) instead of filing a written statement, filed an application under Order VII, Rule 11 C.P.C, praying for the rejection of the plaint on the ground *inter-alia* that the C.D.A. had through two awards dated 16.03.1969 and 16.06.1985 acquired the land through which the road in question passed. The appellants contested this application. Vide order dated 23.10.2014, the learned Civil Court rejected the plaint. The operative part of the said order dated 23.10.2014, is reproduced herein below:-

"5. The perusal of averments of plaint shows that the plaintiff has filed suit for declaration and permanent injunction regarding the suit property described in Para No.2 and 3 of the plaint on the basis of permission given by the defendant No.1 on the application of the plaintiffs along with other people of vicinity and claimed to be constructed 80 feet wide road more than one kilometer. And filed the instant suit against defendant No.2 with contention/grounds that they are intend to close the existing road without any lawful justification. However, the complete description of subject suit property including its meets and bounds actual place to and from has not averred. Further only two plaintiffs preferred to file the instant suit on the basis of permission of defendant No.1 without any title over the suit property and claimed to be local residential which falls within the ambit of the public interest litigation claiming the suit property as public thoroughfare. Furthermore, the alleged

intention of the defendant No.2 of blocking the subject road has not averred in the plaint including time, date and place. It is, therefore, the suit is hit by the provision of Section 92 of C.P.C. as the suit being filed without permission of the Advocate General. So also U/o VII, Rule 11(d) C.P.C. lack of cause of action to the plaintiffs without title."

5. The said order dated 23.10.2014 was impugned by the appellants before the learned Additional District Judge, Islamabad. The learned Appellate Court, vide judgment dated 21.12.2015, dismissed the appeal. The said concurrent decisions of the learned lower courts have been impugned by the appellants in this regular second appeal.

6. The learned counsel for the appellants submitted that the learned lower courts erred by not appreciating that the suit instituted by the appellants was not under Section 92 C.P.C; that although the appellants had filed an application under Order 1, Rule 8 C.P.C. before the learned Civil Court, permission to sue on behalf of the residents of Mouza Shah Allah Ditta had not been granted by the learned Civil Court; that during the pendency of the appeal, an application under Order 1, Rule 10 C.P.C. was filed for the impleadment of several residents of Mouza Shah Allah Ditta, but regardless of this the appellants' appeal was dismissed; that the appellants, prior to the institution of the suit, could not obtain permission from the Advocate General, in terms of Section 91 of C.P.C, because at the time of the institution of the suit, Advocate General (Islamabad) had not been appointed, and his powers were being exercised by the Chief Commissioner, Islamabad; that permission under Section 91 C.P.C was not obtained from the Chief Commissioner, Islamabad, as the Deputy Commissioner, Islamabad was defendant No.2 in the suit; and that the Advocate General subsequently appointed was of the view that since this suit had been instituted without his permission, such permission could not be given after the institution of the suit. Learned counsel further submitted that the appellants could continue with the suit in their individual capacities, because they also happened to be residents of Mouaza Shah Allah Ditta, and the blockage of access road to

their houses in the said Mouza would violate their individual easement rights.

7. Learned counsel for the appellant contended that learned lower courts did not appreciate that the appellants were residents of Mauza Shah Allah Ditta and had an independent right to institute a suit against the respondents to protect their easements rights. He further submitted that the appellants wanted to prosecute the suit in their individual capacities and not as representative of the residents of Mauza Shah Allah Ditta. Therefore, he submitted that in such circumstances there was no need for a prior permission of the Advocate General of Islamabad or any other office exercising the powers of the Advocate General to the institution of the suit. Learned counsel for the appellants further submitted that the appellants are not claiming permanent easement rights; that the land on which the metalled road was made by the residents of Mauza Shah Allah Ditta is indisputably owned by the C.D.A; and that the appellants seek to use the road only until the C.D.A. develops the land or puts it to any other use. Learned counsel for the appellants prayed for the appeal to be allowed and the concurrent orders of the learned courts below to be set-aside.

8. On the other hand, learned counsel for respondent No.2 submitted that there are several access roads to Mouza Shah Allah Ditta, which could be used by the appellants and other residents of the said Mouza; that the mere fact that the *kaccha* road was metalled by the residents of Mouza Shah Allah Ditta, on self-help basis, did not make them owners of the land through which the said road passes; that the land through which the said road passes is the undisputed property of the CDA; that the requirements of a representative suit had not been satisfied by the appellants; that the appellants could have obtained the permission contemplated in Section 91 C.P.C. prior to the institution of the suit from the Chief Commissioner, Islamabad, who was not a party to the suit; and that the appellants also had no case on merits. Learned counsel for counsel for respondent No.2 prayed for the appeal to be dismissed.

9. I have heard the arguments of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant appeal are set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

10. Section 91 C.P.C. reads as follows:-

“91. Public nuisance.--(1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate General may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.”

11. The right of the public to pass over a public highway is a public right. Under the civil law, there are two remedies against a person who causes any public nuisance. He may be sued under Section 91(1) C. P. C. or he may be sued by a private, individual under Section 91(2). Section 91(2) makes it clear that nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. It is obvious that if a particular right of suit arises in favor of a particular person, even if there is public nuisance, even then such right of suit is not affected by provisions of Section 91 C.P.C. So if the plaintiffs are shown to suffer direct or special damage beyond that suffered by the general public, there is no reason why they should not be entitled to maintain their suits without the consent of the Advocate General. Since the appellants want to prosecute the suit in their individual and independent capacities and not as representatives of the residents of Mauza Shah Allah Ditta, I am of the view that the suit can proceed without the appellants having obtained the permission of the Advocate General.

12. A reference to the following case law would be appropriate:-

(i) In the case of Islamuddin and others Vs. Ghulam Muhammad (PLD 2004 SC 633), it has been held as follows:-

"... there is no bar upon an individual to institute a suit for a right existing in his favour in respect of the cases pertaining to public nuisance without obtaining consent of the Advocate-General, therefore, non-following the procedure under Order I, Rule 8, C.P.C. would not be fatal in given circumstances of the case.

Besides it, in view of the findings of the High Court namely "in case of public nuisance and private nuisance, injury to the property and to a person would confer jurisdiction upon the Court except that in the case of public nuisance, consent of Advocate-General as required under section 91, C.P.C. would be necessary under the law, while in case of private nuisance no such consent would be required but the relief for filing a suit for -injunction and damages would be available in both kinds of nuisance" the objection being raised on behalf of appellants has no substance."

(ii) In the case of Shahzad Vs. IVth Additional District Judge, Karachi (PLD 2016 Karachi 26), it has been held as follows:-

"8. Section 91 of the C.P.C. provides that a suit for declaration or injunction in respect of public nuisance can be filed by two or more persons with the permission of the Advocate-General. However, there is an exception to this principle as embodied in subsection (2), which inter alia provides that the provisions of subsection (1) of Section 91, C.P.C., would not limit or otherwise affect any right of suit, which may exist independently. In the instant case the respondents/plaintiffs have claimed that the conversion of a residential unit into commercial unit (car showroom) has disturbed the peace and their privacy and security and they would face the constant disturbance and agony along with their families due to the said illegal conversion. Therefore, in our view, they have independent right to sue on the basis of these averments and no permission of the Advocate-General is required for filing a suit in respect of such rights, as subsection (2) provides an exception to subsection (1) of Section 91, C.P.C."

(iii) In the case of Muhammad Issa Abbasi Vs. Abdul Qadir (PLD 2013 Karachi 60), it has been held as follows:-

"... subsection (2) of section 91, C.P.C. also provides the safety valve to the respondent No. 1 which says that nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provision. In addition if the lis is of multiple causes as for instance public and private, the plaint cannot be rejected on account of permission having not been obtained and thus in my view section 91, C.P.C. has no application in the case in hand and also section 42 of Specific Relief Act does not bar filing of suit by respondent No. 1 in pursuance of easmentary rights arising out of the Plot No. 74 as the same were infringed by illegal occupation and encroachment of the adjacent land by the applicant."

(iv) In the case of Anjuman-i-Mutasreen Khshatkaran Vs. Province of Punjab (2012 CLC 1145), it has been held as follows:-

“12. Section 91, C.P.C. provides that a suit for declaration or injunction in respect of public nuisance can be filed by two or more persons with the permission of the Advocate-General. However, there is an exception to this principle as embodied in subsection (2), which inter alias provides, that the provisions of subsection (1) of section 91, C.P.C. would not limit or otherwise affect any right of suit, which may exist independently. The plaintiffs had contended that they suffered losses due to construction of embankments to save the lands of the then Federal Minister so they had independent right to sue on the basis of these averments and no permission of the Advocate-General was required for filing this suit. The findings of the learned trial court on Issue No.2 are, therefore, not sustainable and are reversed.”

(v) In the case of Akhtar Muhammad Vs. Abdul Hameed (2011 CLC 1379), the Hon'ble Balochistan High Court, has held as follows:-

“In present case, the point for determination at this stage is that whether the suit was not maintainable within the meaning of section 91, C.P.C., as admittedly the requisite sanction has not been obtained from the Advocate-General and the mandatory requirements of filing a suit in representative capacity are not fulfilled. It is to be noted, that though the petitioners have tiled a suit for right of way, but they are not claiming any right of public at large, rather they are claiming a right to their personal/private extent. According to their own showings the way which they are claiming is not a recognized lane or a public road, rather a piece of land, owned by the opposite party/respondents remained in their use since 1982. Thus in the circumstances, as the act alleged only offend the sentiments of a particular person and cause annoyance to a particular person, at the first instance, does, not constitute an act of public nuisance, therefore, the case of the petitioner will not be governed by the provisions of section 91, C.P.C.

In addition the plain reading of the section reveals, that the provisions of section 91, C.P.C. do not restrict an individual person for filing a suit for establishment of his right, which has been infringed, as subsection (2) of the section provided an exception to subsection (1) of the section. In view of subsection (2) there will be no bar to a private person for filing a suit for a public nuisance with the exception, that some special damage has been suffered by him.”

13. It is hardly necessary to point out that where the case does not relate to a public nuisance, then Section 91 C.P.C. is not called into play and no intervention of the Advocate General can possibly arise.

14. From the review of the aforementioned case law, the principle deducible is that where a case does not relate to a public nuisance, then Section 91 (1) C.P.C. is not called into play

and no intervention of the Advocate General can possibly arise.

15. In the case at hand, it is to be determined whether the learned courts below were correct in non-suiting the appellants simply because they had not obtained permission from the Advocate General, Islamabad, before instituting the suit against the alleged nuisance being caused by C.D.A. by dumping garbage on land acquired by C.D.A., and thereby causing inconvenience to the residents (including the appellants) of Mauza Shah Allah Ditta, who use the road constructed on the land belonging to CDA. Admittedly, such permission was not obtained by the appellants before instituting the suit. Given the submission of the learned counsel for the appellants that the appellant intend to prosecute the suit in their individual/independent capacities and not for and on behalf the residents of Mauza Shah Allah Ditta, I am inclined to hold that prior permission of the Advocate General, Islamabad, was not required before the institution of the suit.

16. I appreciate the fair stance taken by the learned counsel for the appellants that regardless of the amount expended by the residents of Shah Allah Ditta in making the road on 'self-help basis', the appellants were not seeking permanent easement rights over the road, but only to use the road until C.D.A. develops the land. It is not disputed that the land through which the road passes is owned by C.D.A., and the appellants cannot obstruct C.D.A. in the suit use of the road. Since the land through which the road passes is owned by C.D.A. they are at liberty to use to approach their dumping station through the road in question. C.D.A. is also at liberty to close the road in order to carry out developmental activity.

17. In view of the above, the appeal is allowed and the impugned judgment dated 21.12.2015 passed by the Court of the learned Additional District Judge, Islamabad, as well as the order dated, 23.10.2014 passed by the learned Civil Court, are set aside. The matter is remanded to the learned Civil Court before which the suit instituted by the appellants shall proceed, subject to law, in the appellants' individual capacities, and not as

representatives of Mauza Shah Allah Ditta. However, it will be for the learned Civil Court to determine whether the case is in fact a case of private nuisance or involves the determination of the appellants' independent right to use the road so as to take the case within the parameters of Section 91 (2) C.P.C. An additional reason for allowing the appeal that both the learned Courts below were under a misconception that the suit instituted by the appellants was under Section 92 C.P.C., when this was not the case. The Appellants had attempted to institute the suit under Section 91 C.P.C., but were not able obtain prior permission from the Advocate General, Islamabad, or the Chief Commissioner, Islamabad. There is no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 25/10 2016

(JUDGE)

Qamar Khan*

Approved for reporting.