

## IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1367 of 2007

Muhammad Iqbal Dawood and another

Versus

Abdul Qayoom Hoth and another

Plaintiffs : Through Mr. M. Shafi Muhammadi,  
Advocate

Defendants : Nemo for Defendants.

Date of hearing : 06.04.2017

Date of Judgment : 11.05.2017

### **Precedents cited**

- (i). **1979 SCMR Page-15**  
*(M.G. Hassan and four others Versus Sheikh Riazul Haque and five others).*
- (ii). **1991 SCMR Page-2300**  
*(Mst. Nur Jehan Begum through Legal Representatives Versus Syed Mujtaba Ali Naqvi)*

Law under discussion: (1). Specific Relief Act, 1877 (SRP).  
(2). Code of Civil Procedure, 1908 (CPC).  
(3). Qanoon-e-Shahadat Order, 1984.

### **JUDGMENT**

**Muhammad Faisal Kamal Alam, J:** The Plaintiffs have brought this action against the Defendants and primarily against the Defendant No.1 (Abdul Qayoom Hoth), *inter alia*, for Recovery of Possession and Mesne Profits with the following prayer clauses\_

***“It is respectfully prayed on behalf of the Plaintiffs that this Hon’ble may be pleased to pass Judgment and Decree in favour of the Plaintiffs and against the Defendant No.1 as under: -***

- (a). *Possession of the land measuring 90 acres bearing No.NA-Class No.14, Deh & Tapo Kathore, Near Morio, Faqir Goth Taluka and District Malir, Karachi.*
- (b). *Direct Defendant No.1 to pay Rs.5,00,000/- to Plaintiffs as yearly income and onward at the same rate i.e. Rs.5,00,000/- per year.*
- (c). *Grant permanent injunction by restraining the Defendant No.1 his agents, sons, employees and person and person(s) working on his behalf from transferring possession or creating third party interest in the land bearing No. NA-Class No.14, Deh & Tapo Kathore, Near Morio, Faqir Goth Taluka and District Malir, Karachi in any manner whatsoever.*
- (d). *Cost of the suit.*
- (e). *Any other relief which deem fit and proper by this Hon'ble Court."*

2. The Plaintiffs are claiming their rights in a property measuring 90 Acres situated in NA-Class No.14, Deh and Tapo Kathore, near Morio, Faqir Goth, Taluka and District Malir, Karachi, which was allotted to Plaintiffs by Deputy Commissioner, and the Allotment Order was issued by Mukhtiarkar, Karachi East, working under the supervision and control of Defendant No.2 (Board of Revenue). Tenure of land was 30 years starting from the year 1991-1992 and the said land was given for agriculture purpose as evident from Exhibits P/3 and P/5 respectively at Pages-21 to 27 of the Evidence File.

3. Notices were issued and the matter was contested by Defendant No.1 (Abdul Qayoom Hoth) by filing Written Statement and a Counter-Claim of Rs.7,35,080/- (Rupees Seven Lacs Thirty Five Thousand and Eighty Only), whereas, Defendant No.2 (Board of Revenue) did not offer any contest, nor questioned the Plaintiff status vis-à-vis the suit land.

4. Issues were framed vide order dated 25.05.2009, which are reproduced herein below\_

*1. Whether the Defendant No.1 committed default in respect of payment of contract money to the Plaintiffs. If yes then what is its effect?*

*2. Whether any amount of the income of fruits and cultivated vegetable was ever paid by Defendant No.1 to the Plaintiffs? If not then what is its effect?*

*3. Whether any so-called "FAISLA" was ever done as alleged by Defendant No.1 and denied by the Plaintiffs? If yes then what is its legal value?*

*4. Whether any amount is due to be paid by the Plaintiffs to the Defendant as expenditure on the land in dispute in any form?*

*5. Whether the Defendant No.1 had been paying the electricity bills and incurred other miscellaneous expenses?*

*6. Whether the Plaintiffs are entitled to get possession of the land in dispute as well as the income earned by the Defendant?*

*7. What should be the decree?*

5. The Plaintiffs examined three witnesses; Plaintiff No.1 (PW-1), one Abdul Aleem Usmani (PW-2) and Muhammad Iqbal Qasim Jafrani (PW-3), whereas, Defendant No.1 also examined himself and one Saleh Muhammad Baloch (DW-2).

6. Mr. Shafi Muhammadi, learned counsel for Plaintiffs has argued the matter at length, whereas, despite ample opportunities, the counsel for Defendant No.1 remained absent. Learned counsel for Plaintiffs has also read the evidence of Defendant No.1 and with the able assistance of learned counsel for Plaintiffs, record of the case has been examined and my Issue wise determination is as follows:

ISSUES NO.1	As under.
ISSUES NO.2	As under.
ISSUES NO.3	As under.
ISSUES NO.4	As under.
ISSUES NO.5	As under.
ISSUES NO.6	As under
ISSUES NO.7	Suit of Plaintiffs is decreed in the terms mentioned herein below.

### **REASONS**

7. Since Counter-Claim of Defendant No.1 is also based on the purported Faisla (private settlement), therefore, Issue No.3 is to be decided first.

#### **ISSUE NO.3.**

8. The gist of the case of Plaintiffs is mentioned in Paragraphs-4 and 12 of the Plaint, which have been reiterated in Paragraphs-5, 6, 7, 11 and 14 of the Affidavit-in-Evidence of Plaintiff (PW-1), *inter alia*, that the above suit land was handed over to Defendant No.1 for the purpose of supervision and in order to effectively carry out the above object, the Defendant No.1 was also given accommodation facility at the suit land, having proper infrastructure, including tube well, besides standing crops and fruits trees.

9. The grievance of Plaintiffs is that the Defendant No.1 has stopped paying the amounts to Plaintiffs, which they were getting from the harvest and sale of different vegetable and fruit grain at the suit land, whereas, the stance of Defendant No.1 as mentioned in his Written Statement, is that the Defendant No.1 was awarded an annual contract at the rate of Rs.1,75,000/- (Rupees One Hundred Seventy Five Thousand Only) of Fruits Trees, which Defendant No.1 was paying. It was also pleaded by Defendant No.1 that before filing of instant suit, the matter

was settled through a private meeting/reconciliation meeting (Faisla) that was awarded by former Member Provincial Assembly Sajid Jokhio in favour of Defendant No.1 and according to which the Plaintiffs were liable to pay approximately Rs.1.5 Million (Rupees Fifteen Lacs Only) in addition to salary of entire year of 2005 and 2006 and other expenses which the Defendant No.1 has incurred. This fact has been mentioned in the Counter-Claim of Defendant No.1. In his evidence about above referred private settlement (Faisla), the reply of Plaintiff in cross examination is not contradictory to the stance that he has taken in his Affidavit-in-Evidence/Examination-in-Chief, that no such 'Faisla' was made and no decision with regard to claims of both parties were ever decided by said Mr. Sajid Jukhio. Besides this, the other witnesses Abdul Aleem Usmani and Muhammad Iqbal Qasim Jafrani have supported the version of Plaintiffs and has categorically mentioned in Paragraph-4 of his Affidavit-in-Evidence that no such private settlement proceedings ever took place nor he or Plaintiffs ever participated in any such private settlement. To a suggestion in his cross-examination, the said PW-2 (Abdul Aleem Usmani) has reiterated the contents of his Affidavit-in-Evidence, whereas, PW-3 (Muhammad Iqbal Qasim Jafrani) in his cross-examination has categorically stated that no private settlement was reached though the meeting was convened on 12.12.2004.

10. The Defendant No.1 has examined himself and has produced the Affidavit of said Muhammad Sajid Jokhio (Exhibit D/7), who has given the 'Faisla' (private settlement), but the said Muhammad Sajid Jokhio never entered the witness Box to reiterate the contents of his Affidavit on oath. In cross-examination, DW-1 (Abdul Qayoom Hoth) has further acknowledged that the above Affidavit (Exhibit D/7) was obtained by the said DW-1 from the above Muhammad Sajid Jokhio, which further devalues the evidential value of the said Affidavit (Exhibit D/7). The

other witness is DW-2 (Saleh Mohammad Baloch), who deposed on behalf of Defendant No.1, supported his pleadings.

11. In his cross-examination, the said DW-2 has stated that he does not remember what he has mentioned in his Affidavit-in-Evidence. He has further acknowledged that he is a childhood friend of Defendant No.1. Though he has further admitted in his cross-examination that he is an illiterate person, but at the same time to a suggestion, deposed that in the aforesaid Faisla, the Plaintiffs were liable to pay a sum of Rs.15,71,307/- (Rupees Fifteen Lacs Seventy One Thousand Three Hundred Seven Only) to Defendant No.1, besides his salary. The Faisla (private settlement), which is appended with Exhibit D/7 is examined. It is a matter of record that no amount is mentioned in the said Faisla (private settlement) as claimed by Defendant's side, which the Plaintiffs are liable to pay to Defendant No.1. Hence this document-Faisla (private settlement) in view of the above discussion is discarded. Issue No.3 with regard to Faisla (private settlement) is answered accordingly.

### **ISSUES NO.1 AND 2.**

12. Adverting to main issue of liability of the parties to each other, which is primarily covered by the Issues No.1 and 2.

13. The claim of Plaintiffs is two-fold; (i) that Defendant No.1 stopped paying the annual contract amount, and (ii) the Plaintiffs were deprived of use, enjoyment and income of the suit land as they were dispossessed therefrom by Defendant No.1 and his two sons. Since Tube wells, underground pipe lines and other facilities were installed by the Plaintiffs at their expense, so that the land can be properly utilized for agriculture purpose, besides fruits trees, grain and vegetable were also grown and cultivated and as per the Plaintiffs' claim he was paying the

dhal and other agriculture taxes and levies. He has placed on record various receipts as Exhibits P/6 to P/21, the receipt of payments of Revenue Taxes from the year 2006 backward to 2004. The Government receipts show that payments were made by Plaintiffs towards lease, taxes of land and local fee. In his cross-examination no question was put to PW-1 (Plaintiff No.1) about these receipts nor there was any suggestion on behalf of Defendant about the authenticity of these Exhibits / payment receipts, which means that in fact the Plaintiffs have paid different levies in respect of suit land to the Revenue Authority (Defendant No.2).

14. From the pleadings of the parties and evidence led it has become apparent that Defendant No.1 was inducted by Plaintiffs as Manager to look after the suit land and on the request of Defendant No.1, he was given yearly contract of Guava trees for a total consideration of Rs.1,10,000/- (Rupees One Lac Ten Thousand Only). It has been admitted by Plaintiff No.1 in his cross-examination that he received the amount only once from the Defendant No.1. In his Affidavit-in-Evidence, PW-1 has categorically mentioned (Paragraph-14) that at the relevant time, the suit land was generating an income of Rs.5,00,000/- (Rupees Five Hundred Thousand Only) annually from various cultivation; fruits trees and other vegetables and crops. It has been also categorically stated that Defendant No.1 and his two sons, namely, Idress and Rizwan have threatened the Plaintiffs from entering the land in question and in this way he was put out of possession. On these material aspects and assertions of the case, the PW-1 (Muhammad Iqbal Dawood), has not been cross-examined. This deposition is evaluated in the light of evidence of DW-1, who in his cross-examination has admitted that since 1998 he has not paid any amount to Plaintiffs. He has further admitted that he was servant of Plaintiffs. DW-1 acknowledged

that the entire suit land was given by Plaintiffs on 'Thekka'-annual contract of Rs.1,75,000/- (Rupees One Hundred Seventy Five Thousand Only), but he has paid the amount only once to the daughter of PW-1, while accepting in his cross-examination that at the time of handing over possession of the suit land there were fruit trees including Guava, Cheeko and Coconut. He has admitted that there were around 1200 (Twelve Hundred) Cheeko trees at the suit land. Relevant portion of the testimony of DW-1 (Abdul Qayoom Hoth) is reproduced herein below\_

*“It is correct to suggest that I was the servant of the plaintiff and the land used to be given to the other people before it was given to me. It is correct that I am the servant of the plaintiff and the plaintiff also gave the land to me on Thekka Basis at the rate of Rs.1,75,000/- for four years and I paid in cash to the plaintiff. I do not remember the year when the said Thekka was given to me. It is correct to suggest that the plaintiff had left for Canada after the said Contract/Thekka and thereafter I paid the Thekka to his (the plaintiff) daughter. I paid the Thekka to his daughter only for one year and paid the Thekka for two years to the plaintiff. For the first four years the rate of Thekka was Rs.1,75,000/- which I paid to the plaintiff and finally after expiry of four years the plaintiff said that I should pay him Rs.11000/- per year and all expenses would be borne by me and not by the plaintiff. I paid Rs.11000/- for three years till 1998. It is correct to suggest that I have not paid anything to the plaintiff from 1998 to till date. Vol. says that there was lack of water and thereafter I said to the plaintiff that I would not be able to carry on any more. It is correct that at the time of given the contract/Thekka, there were trees of Guava on about ten acres and the Cheeko on ten acres and coconut  $\frac{3}{4}$  acres of the side of Furrows lemon on one acre and on about  $\frac{4}{5}$  acres I used to cultivate vegetables although there are three*

*Wells with water but there is no electricity to get the water out of three tube-wells and there is stay on one tube-well. I had verbally requested to the plaintiff to get the land back and now-a-days I have cultivated Brengil and dulle on about two or three acres. It is correct that I have not paid any income since 1998 to the plaintiff. The electricity bills were issued by KESC. It is correct that Mr. Idrees and Mr. Rizwan are my sons and I used to pay the salaries to my sons. It is correct that I have given the detailed on Ex-D/6 regarding the income of different years but I have not given the same to the plaintiff. I have put my sons as my employees after 1998 and it is correct that I have not informed the plaintiff in writing that I put my sons as employees. It is correct that I have no receipt of payment to the labour for digging of the new tube-well and the figures as shown in Ex. D/5-1 regarding the payment of salary was paid to my sons. It is correct that I have not written any letter to the plaintiff regarding the expenses. It is correct that I have not informed the plaintiff regarding the bills of electricity. Vol. says that the plaintiff stopped to visit the land in question. It is correct that there were about 1200 Cheeko Trees. Although, there are Cheeko Trees at preset but the same are fertilized because we have no inputs on the same. After 1998 all these trees became in fertilized as there was no water. The tube-well dug by the defendant after spending the money of Rs.4 Lacs was providing water only 40 minutes for 2005 but now there is water and not paying the electricity bill after disconnection the electricity by KESC. It is incorrect to suggest that I earned a sum of Rs.5.00 Lacs per annum from the said land.”*

(Underlining is done for emphasis)

15. In view of above discussion, it is not difficult to hold that Plaintiffs have proved their case to the extent that Defendant No.1 has committed default in payment of annual contract money to the Plaintiffs

in respect of the income from fruits, which from the evidence can be deduced as Rs.1,75,000/- (Rupees One Hundred Seventy Five Thousand Only), which was paid once only, that too in the year 1998; thus Defendant No.1 is liable to pay the above amount to Plaintiffs from 1998 till date, which comes to Rs.33,25,000/- (Rupees Thirty Three Lacs Twenty Five Thousand Only). Hence, Issues No.1 and 2 are answered accordingly.

**ISSUES NO.4 AND 5.**

16. With regard to Issues No.4 and 5, DW-1 (Abdul Qayoom Hoth) has produced numerous receipts relating to purchase of different items, including Urea Bags, some electric items like cutouts, hardware items, etc. It is understandable that if a person is in occupation of an agriculture land having a proper infrastructure and giving profitable yield, then to maintain such infrastructure and the land itself expenses are incurred. The sum total of these receipts is approximately Rs.150,000/- (One Hundred Fifty Thousand Only) but, on examination of these receipts, their authenticity is questionable. Secondly, it has been admitted by the Defendant No.1 in his cross-examination that his claimed expense figure was never provided to Plaintiffs during all these years when the said Defendant No.1 was/is occupying the suit land. Obviously, had these receipts were provided to Plaintiff No.1 earlier, the latter would have counter checked those receipts with the concerned sources / suppliers. Thus, the claim of Defendant No.1 with regard to incurring expenses by producing the aforementioned receipts cannot be accepted as a genuine claim and is hereby rejected. Thirdly, the aforementioned purported claim is nothing as compared to the illegal act committed by Defendant No.1, rather usurping the suit land to the exclusion of its genuine lessees, that is, Plaintiffs. This observation is given in view of the fact that I have

examined the electricity bills in order to answer Issue No.5. It is surprising that Defendant No.1 has tried to even mislead this Court by making the evidence record voluminous by filing electricity bills of some other consumer, namely, Kareem Bux. The electricity bills issued by the then KESC, which have been exhibited as D/2 to D/10 are of the suit land and were issued in the name of Plaintiff No.1 (PW-1), whereas, the electricity bills, which have been placed on record as Exhibits D/2-11 to 29 are in the name of one Kareem Bux and even the account number of the two sets of bills, that is, the one issued in the name of PW-1 and the other in the name of said Kareem Bux are different and so is the consumer number.

17. This is an unfortunate trend, which has crept into litigation; persons/parties to a *lis* recklessly attempt to mislead the Court that too on the basis of Affidavit, but without realizing the consequences. With regard to Exhibits D/2 to D/10 (ibid), the payment slips issued by the then KESC Ltd., (now K. Electric) shows the name of Defendant No.1 as payer and since latter (Defendant No.1) was in exclusive possession of the suit land, he must be paying the bills in order to keep the infrastructure running. The total amount of these payment slips/bills comes to Rs.35,500/- (Rupees Thirty Five Thousand Five Hundred Only), which the Defendant No.1 can adjust / deduct while discharging his liability towards the Plaintiff No.1. Hence, my reply to the above two issues, viz. Issues No.4 and 5 is that Issue No.4 is answering in the term that Plaintiffs are not liable to pay any amount towards expenditure to the Defendant No.1 for the reasons mentioned above, but only are liable to reimburse / pay the amount that was paid by the Defendant No.1 towards electricity bills, which will be adjusted / deducted from the total amount to be determined in this proceeding and payable by Defendant

No.1 to Plaintiffs; this is the answer to Issue No.5. Consequently, the Counter Claim of Defendant No.1 is also dismissed.

### **ISSUE NO.6.**

18. Since it is an undisputed fact that before this proceeding, the Plaintiffs had also invoked the jurisdiction of learned IIIrd Additional District Judge Malir, Karachi, by filing the complaint under the Illegal Dispossession Act, 2005. The order has been exhibited as P/24, wherein, it has been observed that since the present Plaintiffs (Complainant in the above case) have themselves handed over the possession to the present Defendant No.1 and his sons, therefore, the case for Illegal Dispossession Act, 2005, was not made out.

19. Facts of this case are unique, but, painful. Admittedly, a caretaker / Defendant No.1 has successfully kept his employer-a genuine lease holder out of possession of the suit land and deprived the Plaintiffs from use and enjoyment of their land and particularly its income. It is not disputed that the suit land was granted by official Defendant No.2 on 30 years lease commencing from 1992-1993; Exhibits P/3 and P/4, which will expire in next few years and a considerable period / term of the lease has been consumed by Defendant No.1 and the litigation. This justifies that mesne profits should also be granted to Plaintiffs and in this regard I am guided by the Judgment of the Hon'ble Supreme Court reported in **1979 SCMR Page-15 (M.G. Hassan and four others Versus Sheikh Riazul Haque and five others)**, wherein, it has been held that mesne profits could be awarded by the Court even without a specific prayer. In his deposition, the PW-1 has mentioned in detailed an overall land scape of the suit land and the infrastructure it has, including tube wells, underground water supply pipes lines and other facilities, which a prudent agriculturist should have for making his agriculture land viable

and profit earning. If the evidence is apprised on these particular facts, then the conclusion is that Plaintiffs have proved their case; firstly, PW-1 was not cross-examined on this material aspect and secondly even DW-1 in his cross-examination has not disputed the factum of infrastructure and standing fruits trees and other yields, but has raised a claim of incurring expenditure, which aspect has already been dealt with in forgoing paragraphs. Plaintiffs' Statement on oath (Paragraph-14) that approximately the suit land was giving an annual income of Rs.5,00,000/- (Rupees Five Hundred Thousand Only) has not been questioned in the cross-examination. It is also a settled rule that if a witness is not cross examined on a material part of his evidence then the same is deemed to be accepted by the opponent. For a reference a well-known Judgment of Hon'ble Supreme Court reported in **1991 SCMR Page-2300 (Mst. Nur Jehan Begum through Legal Representatives Versus Syed Mujtaba Ali Naqvi)** is of relevance. Thus, I also grant mesne profits to Plaintiffs at the rate of Rs.5,00,000/- (Rupees Five Hundred Thousand Only) from the year 1998, that is, the year when the DW-1 has admitted that he has not paid any amount till date, which comes to Rs.9,000,000/- (Rupees Nine Million Only). Hence, Issue No.6 is answered accordingly.

#### **ISSUE NO.7.**

20. In his Affidavit-in-Evidence, the Defendant No.1 in clear terms has admitted that he was inducted as Manager by Plaintiffs to look after the suit land and he is ready to handover the possession of the same, but, after payment of his claim amount. Liabilities of the parties have already been determined in the forgoing Paragraphs; the suit of Plaintiffs is, therefore, decreed as follows against Defendant No.1 only:

- (i). that the Defendant No.1 will hand over the physical, peaceful and vacant possession of the suit land free from all encumbrances and claims to Plaintiffs and / or Plaintiff No.1.
- (ii) A sum of Rs.33,25,000/- (Rupees Thirty Three Lacs Twenty Five Thousand Only) payable towards annual contract (Thekka amount), but after deducting Rs.35,500/- (Rupees Thirty Five Thousand Five Hundred Only) towards aforesaid Electricity Bills, the total liability of Defendant No.1 under this head is Rs.32,89,500/- (Rupees Thirty Two Lacs Eighty Nine Thousand Five Hundred Only).
- (iii). Rs.9,000,000/- (Rupees Nine Million Only) (Five Hundred Thousand into Eighteen Years) towards mesne profits as determined in Paragraph-19.
- (iii). It is further clarified that Defendant No.1 is liable to pay to Plaintiffs a total amount of Rs.1,22,89,500/- (Rupees One Crore Twenty Two Lacs Eighty Nine Thousand Five Hundred Only); Rs.32,89,500/- (Rupees Thirty Two Lacs Eighty Nine Thousand Five Hundred Only) (towards annual contract) + Rs.9,000,000/- (Rupees Nine Million Only) towards mesne profits, together with Rs.5,00,000/- (Rupees Five Hundred Thousand Only) per annum as mesne profits from the date of this Judgment till realization of the amounts.

21. Parties are left to bear their own costs.

**Dated:** \_\_\_\_\_

**JUDGE**