

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.202/2018.
Date of institution 12.09.2018.
Date of decision 19.09.2023.

1. Dilshad Shah S/o Mir Haider Shah.
2. Ashiq Hussain Shah S/o Sarwar Shah, R/o Bagh Syedan, Said Pur, Tehsil Naseerabad Patika District Muzaffarabad.

....Appellants

VERSUS

1. AJ&K Govt. through Secretary Revenue/ Chief Secretary, Muzaffarabad AJ&K.
2. Senior Member Board of Revenue, Muzaffarabad.
3. Tehsil Revenue (Maal) district Muzaffarabad.
4. Forest Department through Secretary Forest, Azad Govt. State of Jammu and Kashmir, Muzaffarabad.

....Real-Respondents

5. Sajjad Hussain Shah.
6. Kafayat Hussain Shah sons of Sarwar Shah.
7. Nasreen.
8. Nusrat Bibi.
9. Samina Bibi.
10. Shaheena, and
11. Ismat daughters of Sarwar Shah.
12. Kulsoom Bibi widow of Shafat Hussain.
13. Naqash Kazmi
14. Jazab Kazmi
15. Muqadas Kazmi; and
16. Fiza Kazmi daughters of Shafat Hussain Kazmi,
17. Mehdi Hassan son of Shafat Hussain (Sr.No.18 and 19 minors through their real mother) R/o Bagh Syedan Tehsil Naseerabad Patika District Muzaffarabad.
18. Fazeelat Bibi widow of Gull Hassan Shah.
19. Syed Shafqat Hussain Shah.
20. Ghulam Abbass Kazmi.
21. Azam Hussain sons of Gull Hassan Shah.
22. Robina Kazmi,
23. Yasmeen Kazmi, daughters of Gull Hassan Shah.
24. Safia Bibi (widow of Rehmat Shah)
25. Asima Bibi D/o Rehmat Shah.
26. Kaneeza Fatima widow of Raheem Shah.
27. Sajid Shah.
28. Zahid Hussain Shah.
29. Naheeda Kazmi,

30. Asiya Kazmi daughters/sons of Syed Raheem Shah R/o Bagh Syedan Tehsil Naseerabad Patika District Muzaffarabad.
31. Azhar Hussain Shah.
32. Ashiq Hussain Shah sons of Bibi Hazrat Noor R/o Pichpaie Tehsil and District Muzaffarabad.

....*Proforma-Respondents*

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Mr. Hazoor Imam Kazmi, Advocate for the appellants.

Ch. Akif-ud-Din, Advocate/ Legal Advisor for Forest Department.

Judgment:-

The appeal in hand is a second appeal filed under Section 100 read with Order XLII of the Code of Civil Procedure, 1908 (C.P.C); assailing the judgment and decree passed by the First Appellate Court i.e. learned Additional District Judge, Muzaffarabad dated 02.07.2018 which turned down the judgment and decree ordained by Trial Court i.e. learned Civil Judge Muzaffarabad dated 16.09.2004.

A. FACTUAL MATRIX:-

2. Mir Haider Shah and other (predecessor of appellants, herein) filed a suit for declaration against revenue department before the Court of Civil Judge Muzaffarabad, alleging therein that they are owners in possession of land comprising khewat No.16/20, survey Nos. 69, 58, 38, 37, 36, 35, 34, 33, 24 (old) measuring 278 kanals 13 marlas, in addition land survey Nos. 130, 125, 117, 114/2, 114/1, 112, 111, 110, 107, 105,

91, 90, 41, 28 total measuring 278 kanals, 01 marla situated at village Hotreri, Saidpur, District Muzaffarabad.

3. On filing of the suit, the defendants produced cognovit and the trial Court/Civil Judge passed a decree for declaration in favour of Mir Haider Shah and others vide judgment/decreed dated 16.09.2004. Feeling aggrieved from the said judgment and decree, respondent/Azad Govt. etc, filed an appeal before the learned Additional District Judge, Muzaffarabad on 06.09.2005. During pendency of an appeal, on 08.10.2005, due to devastating earthquake of 2005, Courts were obliterated and record of the case was also wiped out in the said earthquake. The respondent/Azad Govt. moved an application for reconstruction of record before the learned Additional District Judge, Muzaffarabad but the said application was rejected by the Court through the order dated 11.03.2008. Feeling dissatisfied with the said order, the respondents filed a revision petition before this Court in first round. This Court after hearing arguments of the parties vide its order dated 09.04.2018 directed the court below i.e. learned Additional District Judge, Muzaffarabad to reconstruct the record and decide the appeal filed by the respondents herein within a period of 03 months after receipt of the said order. The learned Addition District Judge, finally after hearing arguments of the learned counsel for the parties accepted the appeal of the respondents and suit No.446/2004 filed by the predecessor of appellants was

dismissed vide impugned judgment and decree dated 02.07.2018, hence, instant appeal.

B. APPELLANTS ARGUMENTS:-

4. Mr. Hazoor Imam Kazmi, the erudite advocate representing appellants submitted written arguments wherein he reiterated the facts and grounds narrated in the appeal and contended that the Court below has not considered this vital aspect of the case that the application filed for reconstruction of the record by the respondents was without government's sanction, , while objections upon the said application were not sought from the appellants, hence, the acceptance of the appeal of the respondents by setting aside the judgment and decree of Civil Judge is at odds with the norms of law and justice. The learned counsel vehemently contended that before settlement, the land survey No. 35 and 24 (old) were entered in the name of ancestor/forefather of appellants, hence, the claim of respondents that the said land was a crown land/ forest land is without substance. He zealously contended that the previous record produced by the plaintiff is the proof of ownership of the impugned land but the learned court below has not considered this aspect of the case and arrived at wrong conclusion. The learned counsel staunchly contended that this court in previous round of litigation directed the court below to reconstruct the record but the court below has failed to do so and passed the impugned judgment and decree against the law and facts, which

is liable to be set-aside. The learned counsel pointed out that the application for reconstruction of record was filed without approval of government, hence, the judgment and decree of the court below is not maintainable. The learned counsel submitted that the Civil Judge had rightly passed the judgment and decree on filing of cognovits in favour of plaintiffs, hence, after giving cognovit, the respondents were not competent to file appeal, hence, rule of estoppel was applicable against them and appeal was liable to be dismissed on this sole point. The learned counsel finally prayed that by accepting the instant appeal, impugned judgment and decree dated 02.07.2018 may be set aside and judgment and decree of Civil Judge Muzaffarabad dated 16.09.2004 may be restored.

C. **RESPONDENTS' COUNTER-ARGUMENTS:-**

5. In reply, Ch. Akif-ud-Din, the learned Legal Advisor representing Forest Department submitted written arguments, wherein he contended that the land in dispute was crown land which is in possession of Forest Department. He submitted that the plaintiffs filed suit for declaration before trial Court, wherein only Revenue Department was made party, whereas, Government as well as Forest Department were necessary parties but they were not arrayed as party in line of defendants, thus, the judgment and decree of Civil Judge dated 16.09.2004 falls in the definition of "ineffective decree" and same has rightly been set aside by the Additional District Judge, Muzaffarabad vide

impugned judgment and decree. The learned legal Advisor defended the impugned judgment and decree on all four corners and prayed for dismissal of the appeal with costs.

6. *I have taken stock of the written arguments as well as record of the case with due care.*

D. MOOT POINTS:-

7. While embarking upon the factual matrix of the lis besides pro and contra stance, I have observed that some important points of law arising out from the lis call for adjudication.

i. The respondent herein was not arrayed party in the lis before the trial Court and consent decree was passed at its back i.e. in absentia of necessary party vis a vis it took a stance of misrepresentation and fraud as well, whether appeal was competent against the consent decree or proper recourse was to attack the decree by resorting to section 12(2) CPC?

ii. The appellant brought a simple suit for declaration before the trial Court, particularly when factum of possession speaks against the plaintiff, thus, whether the suit for declaration was competent in view of **Section 42** of the Specific Relief Act (I of 1877) without praying for consequential relief in shape of asking for recovery of possession?

E. DETERMINATION BY THE COURT:-

8. Chequered history of law reveals that sub section (2) of Section 12 of the Code of Civil Procedure has been brought by Ordinance X of 1980 w.e.f 26.03.1980, while the same has been inserted in Code i.e CPC in the year 2003 in Azad Kashmir. Prior to the aforesaid amendment, a separate suit was maintainable for having such decree declared a nullity on these grounds (enshrined in the 12 (2) CPC). Plea of fraud, misrepresentation or want of jurisdiction. Seemingly Section 12(2) CPC overlapped the remedy before the General Courts of Jurisdiction as visualized in the Section 9 CPC.

9. As per canon of construction of Statutes, latter law holds the field.

10. It is well established principle of interpretation that the law creates new and extra ordinary remedies unknown to common law are to be strictly construed. Special remedy provided by Section 12(2) of the Code will be available only in respect of cases where the ground of attack is based on fraud, misrepresentation or want of jurisdiction.¹

11. It is trite that a person who is adversely affected by a judgment and decree of a Court has simultaneously got a right to file an appeal against the same in view of Section 96 of the Code or to challenge the same by assailing the remedy provided under

¹. Messrs Arokey Ltd. V. Munir Ahmad Mughal [PLD 1982 SC 204] and Hindu Panchayat of Sukkur v. Matloob Ahmed [1991 MLD 480].

sub-section 2 of the Section 12 CPC, but condition precedent is that he must have to establish his grievance whereby he stood adversely affected by the same.

12. It is open to aggrieved person to choose either of the two remedies.²

13. Notwithstanding Section 12(2) is not a substitute of appeal and can only be invoked if it is shown that judgment/decree has been obtained behind the back of the party by playing fraud upon the Court. Wisdom behind legislating the provision of Section 12(2) is to avoid multitude of proceedings.³

14. Appeal from original decree is provided under Section 96 CPC, it is useful to reproduce Section 96 herein below:-

“Sec. 96. Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeal from the decision of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with consent of parties.”

15. Subsection 3 of Section 96 of CPC is clear enough that no appeal is competent against the consent decree. The

². Ardesbir Cowasjee v. K.B.C.A [PLD 2003 Karachi 314]; Khawaja Muhammad Yousaf v. Federal Government through Secretary Ministry of Kashmir Affairs [1999 SCMR 1516] and Ch. Jalal Din v. Mst. Asghari Begum [1984 SCMR 586].

³. Messrs Ilyas Marine and Associates v. Amin Lasania [2004 MLD 1008].

respondent Azad Govt. was not party in the lis, thus opted to come forward in the attire of a necessary party and made challenge to the compromise decree on different counts as stranger. First appeal was competently filed.

16. A person who is not party to the lis can prefer appeal against the decree if he is adversely affected by same.⁴

17. At the outset the respondent Azad Govt. by filing 1st appeal before the 1st appellate Court has taken a specific stance that suit land is under ownership and possession of official quarters i.e. Azad Govt. and Forest Department. Ground No.1 of the memo of appeal is worth mentioning:-

”(1) یہ کہ اراضی زیر اپیل ملکیتی آزاد حکومت و مقبوضہ جنگلات ہے جس میں ہزاروں کی تعداد میں از قسم دیودار و کائل موجود ہیں۔ لیکن مالک اراضی آزاد حکومت و قابض محکمہ جنگلات کو دعویٰ میں فریق ہی نہ رکھا گیا ہے جو ضروری فریق ہیں۔“

18. While on other side the suit filed by the appellant party herein was only for declaration, no consequential relief has been sought in view of the Section 42 of the **Specific Relief Act, 1877**. It is useful to reproduce Section 42 as infra:-

“Sec.42. Discretion of Court as to declaration of status or right. Any person entitled to any legal character or to right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Bar to such declaration. Provided that no Court shall make any such declaration where the plaintiff,

⁴. Abdul Rehman v. Government of Balochistan [2005 YLR 277]; Deputy Commissioner v. Mir Abdul Nabi [1999 CLC 252] and University of Punjab v. Malik Jahangir Khan [PLJ 1994 Lahore-1].

being able to seek further relief that mere declaration of title omits to do so.”

19. Baring proviso postulates that no Court shall make any such declaration where the plaintiff being able to seek further relief, meaning thereby consequential relief.

20. Wisdom of law behind the above baring provision is to extend executable relief rather than mere academic declaration which could serve no purpose at all.

21. In juxtaposition Order 11 Rule 2 CPC postulates that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of the action, relinquishment of parts of claim bars further suit.

22. While dealing with the proposition the Hon’ble Supreme Court of Pakistan in the case titled “**Hashim Khan vs. NBP**” [PLD 2001 SC 325] held as infra:-

“We now refer to the provisions of Order 11 Rule 2 CPC, the reading of the said provisions is very clear terms discloses that omission or failure to include any of the reliefs operates as relinquishment of such claim. It is essential that party instituting proceedings should include all reliefs flowing out of the main grievance of cause of action.”

23. Trite law that decree for declaration pertaining to crown land is not permissible. Factum of wrong entries in the revenue record comes within the jurisdictional ambit of revenue

authorities. The appellant can agitate the matter before the revenue authorities subject to relevant laws in order to get rectification of adverse entries (if any).

24. First appellate Court is a court of fact as well as of law⁵, whole case of the parties stands reopened⁶; moreover the appeal is continuation of original proceedings of civil Court, appellate Court has same powers which are enjoyed by Court of original jurisdiction.⁷

25. **Thus, it is clear enough that in first appeal the appellate Court is vested with jurisdiction to reappraise the evidence, re-open the entire lis by embarking upon factual as well as legal aspects of the case arising out from the lis. Supposedly the original suit in its inception is brought back for adjudication before the 1st appellate Court, thus zone of jurisdictional powers of the appellate Court are wide enough.**

(Underlining is ours)

26. It is trite that in case of judgment of 1st appellate Court and trial Court are in variance preference would be given to the verdict of Appellate Court.⁸

27. The appellate Court is vested with power while deciding the appeal to reject the plaint under Order VII Rule 11 CPC as well.⁹

⁵. Federation of Pakistan v. Riaz Latif [PLD 1990 SC 90].

⁶. Muhammad Saleem v. Lahore Development Authority [1993 MLD 2312].

⁷. Dr. Kamran Masood v. Ch. Saadat Khalid [2003 YLR 449].

⁸. Niamat Ali v. Ghulam Jilani [PLD 2019 Lah 717] and Muhammad Hafeez v. District Judge Karachi East [2008 SCMR 398].

Nub of above discussion is that the instant appeal fails, which is hereby dismissed. File shall be kept in archive. Parties shall bear their own costs.

Muzaffarabad,
19.09.2023.^(AR)

JUDGE

Approved for reporting

JUDGE

⁹. Ghulam Sarwar v. Mst. Sultan Bibi [1989 MLD 4873] and Niamat Ali v. Sardaran Bibi [2003 YLR 51].