

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.135/2020.

Date of institution 29.09.2020.

Date of decision 30.09.2024.

1. Ejaz Ali Raja;
2. Mst. Rabia Azad;
3. Mst. Isma Azad;
4. Khadeeja Khan daughters;
5. Mst. Tehsim Bibi widow of Mohammad Azad Khan;
6. Mauzam Zaffar;
7. Asad-ur-Rehman sons;
8. Mst. Yusra Zaffar;
9. Uzma Zaffar;
10. Sidra Zaffar daughters;
11. Mst. Shameem Akhtar widow of Zaffar Khan;
12. Shaukat Khan son;
13. Mst. Saleema Begum;
14. Hameeda Begum;
15. Saeeda Bibi daughters of Abdul Rehman Khan s/o Feroz Din Khan from the womb of Mst. Iqbal Begum;
16. Bibi Begum d/o Atta Mohammad Khan r/o No.1, 6, 8, 10 to 12 Majhoi Tehsil & District Muzaffarabad No.7 Chellah, Tehsil & District Muzaffarabad No.9 Palhoter Tehsil & District Muzaffarabad and No.13 Parsacha Tehsil Pattika Naseerabad District Muzaffarabad, No.14 Ambore Tehsil & District Muzaffarabad.

Appellants

VERSUS

1. Raja Yasir Hussain s/o Tariq Hussain;
2. Farooq Niazi;
3. Naeem Khan;
4. Farhat Khan sons;
5. Fateha Shahzadi;
6. Nasreen Shahzadi daughters of Mohammad Hussain Khan (respondents No.3, 4 and 6 through power of attorney respondent No.5);
7. Mst. Suleman Bibi;

8. Perveen Bibi daughters of Mohammad Ismail Khan s/o Atta Mohammad;
9. Shahzad Aslam;
10. Fawad Aslam sons;
11. Mst. Naila Aslam;
12. Shazia Aslam daughters of Mohammad Aslam Khan;
13. Mst. Saeeda widow;
14. Hassan Khan;
15. Mansoor Khan sons;
16. Mst. Seemab Ilyas wife of Mohammad Ilyas Khan;
17. Shafqat Tanvir Khan;
18. Amjad Ali Khan;
19. Anjum Bilal sons;
20. Robina Kokab daughter of Mohammad Ismail Khan s/o Atta Mohammad Khan;
21. Mohammad Farid Khan s/o Ali Akbar Khan;
22. Raza Ali Khan;
23. Shujah Ali Khan sons;
24. Mst. Sadia Farid Khan d/o Mohammad Farid Khan;
25. No.23 to 25 from the womb of Mst. Nasima Bibi d/o Mohammad Ismail Khan s/o Atta Mohammad Khan r/o No.1,2,7,10,11,14 to 19,22,23,24 Ambore Tehsil & District Muzaffarabad, No.8 Bhimber City Tehsil & District Bhimber, No.9 Tehsil Dhirkot District Bagh No.12 Haripur Tehsil Haripur District Abbotabad No.13 Dhani Syedan Tehsil & District Muzaffarabad, No.20 Kahori presently Bala Peer Tehsil & District Muzaffarabad, No.21 Khanqa Kotera Tehsil Charhoi District Kotli;
26. Department of Revenue through Senior Member Board of revenue Azad Jammu & Kashmir, having his office at new Secretariat Muzaffarabad;
27. Extra Assistant Commissioner (Collector) District Muzaffarabad;
28. Sub Registrar Muzaffarabad;
29. Municipal Corporation Muzaffarabad through Chairman Muzaffarabad;
30. Tehsildar Settlement Assistant Collector 1st Class Muzaffarabad;
31. Deputy Commissioner (Collector) District Muzaffarabad;
32. Tehsildar Assistant Collector 1st Class Muzaffarabad;
33. Collector Land Acquisition District Muzaffarabad;
34. Patwari Halqa Ambore;

35. Department of Defense Ambore Camp, Muzaffarabad, Azad Jammu & Kashmir Pakistan/Azad Kashmir through Military Assistant Officer in the office of Shaukat Line Muzaffarabad.

Respondents

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Kh. Amir Ahmed, Advocate for the Appellants.

Raja Khalid Hussain Rathore, Advocate for Respondents No.3 to 5.

Raja Ishtiaq Ahmed, Advocate for Respondent No.9.

Mohammad Sagheer Javed, Advocate for Respondents No.18 to 21.

JUDGMENT:

Through this appeal filed under Section 100 of the Code of Civil Procedure, 1908, (CPC), the appellants have challenged the judgments/decisions of the learned District Judge Muzaffarabad besides learned Civil Judge Court No.IV Muzaffarabad dated 16.09.2020 and 22.11.2019 respectively, whereby, the suit as well as appeal of the appellants, herein, were dismissed.

2. FACTUAL MATRIX:-

Plaintiffs/appellants, herein, filed a suit seeking declaration cum perpetual injunction inter-alia correction of revenue record against defendants/respondents before trial Court (Civil Judge Court No.IV Muzaffarabad). The trial Court after institution of the suit ordered the plaintiffs to

deposit the proclamation fee in order to summon the respondents but despite the Court orders, the plaintiffs did not do the needful resultant of which the learned trial Court on 22.11.2019 [**dismissed**] the suit for non-compliance of the Court order. Feeling aggrieved from the said order, plaintiffs preferred an appeal before the learned District Judge Muzaffarabad, which also met the same fate vide the impugned decision dated 16.09.2020, hence, this appeal for setting aside the judgments/decisions of both the Courts below.

3. APPELLANTS' ARGUMENTS:-

The learned counsel for appellants while reiterating the grounds taken in the memo of appeal contended that lastly when the Court ordered for depositing the proclamation fee within three days, the plaintiffs deposited the amount Rs.6,700/- within three days to the concerned Reader of the Court but the learned Civil Judge illegally dismissed the suit for non-compliance of the Court order by not mentioning the presence of the counsel for plaintiffs. He further argued that the first appellate Court did not apply its judicial mind while deciding the lis and arbitrarily passed the impugned judgment, hence, the judgments being contrary to law are liable to be set-at-naught.

4. RESPONDENTS' RETORT:-

Conversely, the learned counsel for respondents defended the impugned decisions on all counts and submitted that no illegality or perversity has been committed by the learned Courts below while rendering the decisions impugned herein. He further argued that despite availing more than twice opportunities, the plaintiffs did not deposit the proclamation fee, therefore, the learned trial Court has rightly dismissed the suit for non-compliance of the Court order and the learned District Judge while upholding the decision of the trial Court committed no illegality. The learned counsel further contended that against the order of the trial Court, the remedy available to the plaintiffs was to file a revision petition, however, instead of filing revision petition, the plaintiffs/appellants preferred an appeal which is not maintainable as per law. Finally, they prayed for dismissal of the instant appeal.

5. COURT'S QUERY:-

During the course of arguments when the learned counsel for the appellants was confronted upon the maintainability of the appeal, he failed to satisfy the Court on this point; even could not refer any case law in this regard, however, he half-heartedly made a request qua conversion of appeal into revision. Trite that if an appeal is filed which was not otherwise competent and the period of limitation is available and if the Court comes to the conclusion that the order has been

passed in violation of the law, the appellate Court may exercise revisional jurisdiction by converting the appeal into revision ¹.

Be that as it may, facts of the case don't warrant conversion of appeal, as the request is time barred; 2nd appeal was filed on 29.02.2022, request qua conversion was made after lapse of two years, by lapse of time certain rights created in favour of opposite party cannot be frustrated, thus, verbal request qua conversion is discarded.

6. I have taken stock of the arguments advanced from both sides of the aisle besides record of the instant case has scrupulously been brooded over.

7. After institution of any kind of suit, appeal, revision or application etc. it is enjoined upon the Court to adopt and follow the proper procedure given by the law like issuance of notices to the other side to defend and prosecute the case and in case of non-availability of the defendants within the country or for that matter if the defendants are residing outside the jurisdictional territory of the Court or in abroad, they are usually informed and summoned through advertisement given in the national or international newspaper, so in order to complete the summoning process, the plaintiffs/appellants, herein, were directed by the trial Court to deposit proclamation fee for summoning the defendants. As per plain reading of the order

¹. Mian Asghar Ali V. Government of Punjab (2017 SCMR 118),

dated 22.11.2019 passed by the trial Court, the plaintiffs were firstly ordered to deposit the proclamation fee on 05.10.2019 and the next date was fixed for 21.10.2019 and on the due date, the plaintiffs were further directed to deposit the proclamation fee for summoning the defendants, however, the same could not be deposited and a request was made on behalf of the plaintiffs that a short time may be granted to them for the purpose, which was accepted with the direction to the plaintiffs to deposit the same within three days but despite elapsing the given period the needful could not be done, hence, the Court dismissed the suit for non-compliance of the Court order.

8. As far as stance of the plaintiffs/appellants that they deposited the proclamation fee to the reader of the Court by hand is concerned, [it was the duty of the plaintiffs/appellants to deposit the fee before the Court by filing an application regarding submission of the fee and after making the payment, ensure to receive the receipt or proof of payment, as this will be essential for Court record to complete the process but instead of adopting due course of law, the plaintiffs stated to give the amount by hand to the Reader without furnishing any application which is not permissible under law]. Therefore, the learned trial Court has rightly dismissed the suit for non-compliance of the Court order and no illegality or perversity has been committed by the learned District Judge while deciding the

lis, hence, the same needs no interference by this Court.

(emphasis added)

[Order IX Rule 2 CPC] deals with the situation where on the fixed day for the purpose of depositing Court fee or postal charges; if needful is not done, consequently the Court may dismiss the suit. It is useful to reproduce Order IX Rule 2 CPC as infra:-

“2. Dismissal of suit where summons not served in consequence of plaintiff’s failure to pay costs. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed.

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.”

9. **Seemingly the order passed by the trial Court dated 22.11.2019 comes within the ambit of Order IX Rule 2 CPC which is not a decree, neither comes under the list of appealable orders nor can be termed as a decree, thus, it is abundantly clear enough that order passed by the trial Court was not an appealable order ² and 1st appeal before the 1st appellate fora was not competent; that too,**

². Order XLIII read with Section 104, CPC.

whereas any order passed under Order XVII Rule 3 CPC describes different eventualities, but when it relates to a matter where suit was dismissed for non-payment of process fee such order is not a decree, thus, not appealable.

(emphasis supplied)

It is also useful to reproduce [**Order XVII Rule 3 CPC**] as infra;

“3. Court may proceed notwithstanding either party fails to produce evidence, etc. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.”

10. It is now clear enough that if we take the order of trial Court from both angles, appeal before the 1st appellate for as well as before this Court is not competent. Even otherwise, contours of second appeal under Section 100 CPC are circumscribed as it can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law³, whereas in the case at hand, the order passed by the trial Court is perfectly sync with order IX Rule 2, CPC, therefore, on this score too, second appeal could not succeed. It is reflecting from record that trial Court directed plaintiffs more than two times to deposit the requisite

³. Bahar Shah Vs. Manzoor Ahmed (2022 SCMR 284).

publication charges but instead of making compliance the plaintiffs kept on making requests for extension of time, which shows that (plaintiff party) appellants by remaining indolent had failed to comply with the orders of the Courts ⁴. In my estimation order could have been made under Order IX Rule 2 CPC and Section 151 without referring Order XVII Rule 3 CPC ⁵.

Appeal is creature of the Statute, if this remedy is not provided by the Statute itself, mere filing of appeal ipso facto does not extend or bestow jurisdiction to upper fora to adjudicate the same. Such like lis in its inception is liable to be buried without touching the merits of the case. Judicial power qua adjudication of a lis can only be exercised subject to jurisdiction.

(Underlining is mine)

Due to supra multiple reasons, the appeal at hand is not maintainable and fails which is hereby **[dismissed]**. Parties shall bear their own costs. file be kept in archive.

Muzaffarabad.

30.09.2024 (Saleem)

JUDGE

Note:- Judgment is written and duly signed. The office is directed to intimate the parties or their counsel accordingly.

JUDGE

(APPROVED FOR REPORTING)

JUDGE

⁴. Munawar Isani Vs. Barkat Isani (2003 CLC 288).

⁵. Inayat Ullah Vs. Khan Begum (PLD 1958 (W.P) Lahore 686)