

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No.838/2019.
Date of institution 21.05.2019.
Date of decision 03.06.2022.

Inhabitants of Village Leepa through Bashir Alam Awan s/o Mangta Caste Awan r/o Leepa District Jhelum Valley, Azad Kashmir.

Petitioner

VERSUS

1. District Judge Jhelum Valley/Hattian Bala;
2. Manzoor-ul-Haq Qureshi;
3. Rafique-ul-Haq Qureshi;
4. Qamar-ul-Haq Qureshi;
5. Maqbool-ul-Haq Qureshi;
6. Khurshid-ul-Haq Qureshi;
7. Zaffar-ul-Haq Qureshi;
8. Dawood-ul-Haq Qureshi (sons);
9. Mst. Resham Jan;
10. Mst. Chalundra Begum;
11. Mst. Alam Jan widow;
12. Mst. Zahida Bibi;
13. Mst. Abida Bibi;
14. Mst. Tahira Bibi daughters of Abdul Qadoos r/o Leepa District Jhelum Valley;
15. Assistant Commissioner Leepa Valley;
16. Tehsildar Revenue Leepa;
17. Patwari Halqa Leepa;
18. Public at Large.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Kh. Shoukat Hussain Ganahi, Advocate for the Petitioner.
Sh. Attiq-ur-Rehman, Advocate for the Respondents Nos. 2 to 14.

JUDGMENT:

The supra titled writ petition has been addressed under Article 44 of Azad Jammu & Kashmir

Interim Constitution 1974, whereby, the petitioner prayed for setting aside the impugned judgment of the learned Civil Judge Leepa as well as learned District Judge Jhelum Valley dated 22.11.2018 and 25.04.2019 respectively. Further direction has been sought for cancellation of the decree dated 18.07.1979 issued by learned Sub Judge 1st Class Hattian/Leepa and the respondents may also be restrained from leasing, making sale or gift deed as well as from making any sort of construction.

2. Precise facts forming the background of the captioned writ petition are that the petitioner filed an application u/s 12(2) CPC before the learned Civil Judge Leepa for cancellation of the decree dated 18.07.1979 by alleging that the land comprising survey No.235 old measuring 1 kanal 6 marla situated at Village Leepa was initially in the ownership of Mangta s/o Mehna and out of said land he transferred 18 marlas land to Ata Mohammad s/o Hashim Ali who made "Waqaf" of the property for graveyard (Qaberistan). It was further alleged that predecessor in interest of respondents Nos. 1 to 13 built a community hall on the suit property and started to use the same for private business and in January 2017, due to fire in the Leepa Bazar, the community hall stood destroyed and the Govt. announced for help and the lists of owners of the

houses and shops were prepared and it transpired that the predecessor of respondents Nos. 1 to 13 got a decree dated 18.07.1979 by practicing fraud. The respondents filed objections upon the said application and the learned Civil Judge after hearing the parties dismissed the application without recording evidence through judgment dated 22.11.2018 and the petitioner against the aforesaid judgment filed a revision petition before the learned District Judge Jhelum Valley which also met the same fate vide judgment dated 25.04.2019, hence, the captioned writ petition for setting aside the judgments of both the Courts below alongwith decree dated 18.07.1979.

3. Both the parties in compliance of the Court order submitted their written arguments and in the written arguments filed on behalf of the petitioner it has been alleged that the impugned judgments of both the Courts below are against the law and facts and the decree dated 18.07.1979 has been obtained by the predecessor of respondents 1 to 13 by practicing fraud as the suit property is public graveyard and the entry in the revenue record on the basis of fraudulent decree is not justifiable but both the Courts below without considering these aspects passed the impugned judgments. It has been averred that while accepting the supra petition, the judgments of both the

Courts below alongwith decree dated 18.07.1979 may please be set-aside.

4. In the written arguments filed on behalf of the respondents, it has been stated that the application u/s 12(2) CPC, filed by the petitioner, herein, before the trial Court was hopelessly time barred as the same has been filed after passing 38 years and the application has been filed in representative capacity without obtaining the sanction of the Advocate General. It has further been alleged that the impugned decree dated 18.07.1979 has been passed on the basis of compromise and the Mangta s/o Mehna admitted the adverse possession of the predecessor of the respondents and the petitioner was in knowledge of the decree since 1979, hence, the judgments of both the Courts below have been passed in legal fashion and no illegality or perversity has been committed by the trial as well as 1st Appellate Court.

5. I have gone through the record as well as written arguments filed on behalf of the parties.

6. The application u/s 12(2) CPC was filed by the petitioner, herein, before the learned Civil Judge Leepa for setting aside the impugned judgment and decree dated 18.07.1979 on the ground that the same has been obtained fraudulently. First of all, dealing with the question of

applicability of Section 91 of CPC, which postulates as under:-

“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.”

In 2007 SCMR 1157, the Hon’ble Apex Court of Pakistan has also held as under:-

“The perusal of the above mentioned provisions of law indicates that appellants were required firstly to obtain sanction of the Advocate General before filing the suit which apparently they did not do so. Appellants filed the suit in their personal capacity although the relief sought was in respect of the entire community and thus, it was necessary that the suit should have been filed in representative capacity.”

The term “Public Nuisance” is defined in Section 268 of the Azad Penal Code (APC) which read as under:-

“Section 268. Public Nuisance:--- A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to

persons who may have occasion to use any public right.”

7. A common nuisance is not excused on the ground that it causes some convenience or advantage. In Islamabad Capital Territory under the Code of Civil Procedure (Amendment) Act, XLVIII of 2016, for the words “having obtained the consent in writing of the Advocate General” used in sub Section (1) of Section 91 of the Code of Civil Procedure, 1908, the words “with the leave of the Court” have been substituted. Whereas, in juxtaposition, such like amendment does not exist in the Codal Scheme of CPC in Azad Jammu & Kashmir and keeping in view the legal maxim **“A verbis Legis Non Est Recedendum”** from the words of the law there is to be no departure strictly, therefore, I have to follow the law of the land in letter and spirit.

8. At the outset it is in the fitness of things to mention that all the amendments in the Code of Civil Procedure 1908 made in Pakistan from time to time have already stood adopted in Azad Jammu & Kashmir vide the Code of Civil Procedure (adaptation of amendments) Act 2003. So far as the plain phraseology of Section 91 CPC, is concerned, it clearly postulates that prior permission of Advocate General is necessary where lis is pertaining to

nuisances, but this condition is not barrier in view of Section 91 (2) CPC. and would not limit or otherwise affect any right of suit which might exists independently. Ready reference in this regard is [PLD 2016 Sindh 26]. So far as the amendment in Section 91 (1) CPC, vide Amendment Act (XIV of 2018) is concerned, through which now the only leave of Court is condition precedent, is yet not appearing in Codal scheme of CPC.

9. Leaving aside this aspect of the matter, appeal in hand is not maintainable on the other multiple grounds, ignoring findings regarding application of Section 91 CPC, rest of findings given by the Courts below have concurrently been recorded, which are well reasoned. It is astonishing state of affairs that the present petitioner in the writ petition has not raised any ground of attack which can match with the scheme of Article 44 of the Azad Jammu & Kashmir Interim Constitution 1974, thus, no case has been made out for interference.

10. The petitioner also claimed that the impugned decree has been obtained fraudulently by concealing the facts from the Court, therefore, the same may be set-aside. The record also reflects that the impugned decree dated 18.07.1979, is a compromise decree and the parties were well in the knowledge about the aforesaid decree and

the petitioner's father after issuance of the said decree remained alive for long time but he never challenged the same in his life time. However, after elapsing 38 years the petitioner has filed the application u/s 12(2) CPC, which is hopelessly time barred. Furthermore, the impugned decree which has been challenged by the petitioner is a compromise decree and as per reported judgment of Hon'ble Apex Court of Pakistan cited as [1989 SCMR 416] "order of Court passed in terms of compromise or a consent decree passed by the trial Court on the basis of Special Oath exactly in accordance with terms of settlement revealing no mistake is not challengeable.

Although the matter in hand is not pertaining to the public nuisance but in my considered view, the petitioner has failed to prove any fraud or forgery in the decree dated 18.07.1979, which as per stance of the petitioner has been obtained by practicing fraud. So, the writ petition filed by the petitioner being not maintainable is hereby dismissed.

Muzaffarabad.
03.06.2022 (Saleem)

-Sd-
JUDGE

Note:- Judgement is written and duly signed. The office is directed to announce the judgment in presence of the parties or their counsel accordingly

-Sd-
JUDGE