

HIGH COURT OF AZAD JAMMU AND KASHMIR

Appeal No.83/2022.

Date of inst.18.05.2022.

Date of decision 24.06.2022.

Inhabitants of villages Malhar, Keri Charoon, Bhango through

1. Muhammad Ishaq S/o Bagga Khan caste Sudhan R/o Keri Charoon Tehsil Hajira.
2. Karim Hussain Tahir S/o Muhammad Ismail caste Gujjar R/o Molhar Tehsil Hajira.
3. Wasim Ahmed S/o Sain Khan R/o Bango Tehsil Hajira Distric Poonch, Azad Jammu & Kashmir.

Appellants

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through Chief Secretary, having his office at New Secretariat Muzaffarabad.
2. Deputy Director Local Government and Rural Development Azad Jammu & Kashmir, having his office at Upper Chatter Muzaffarabad, Azad Jammu & Kashmir.
3. Assistant Director Local Govt. & Rural Development Poonch Rawalakot, Azad Jammu & Kashmir.
4. SDO Local Govenrment and Rural Development Rawalakot.
5. Overseer Local Government and Rural Development Rawalakot, Azad Jammu & Kashmir.
6. SDO Local Government and Rural Development Hajira, District Poonch, Azad Jammu & Kashmir.
7. Overseer Local Government and Rural Development Hajira District Poonch, Azad Jammu & Kashmir.
8. Fazal Karim S/o Abdul Hussain caste Khawaja R/o Molhar Tehsil Hajira District Poonch, Azad Jammu & Kashmir.
9. Muhammad Zaffar S/o Fazal Karim caste Khawaja R/o Molhar Tehsil Hajira District Poonch, Azad Jammu & Kashmir.

Respondents

CIVIL APPEAL

Before:- **Justice Syed Shahid Bahar, J.**

PRESENT:

Raja Muhammad Hafiz Tahir, Advocate for the appellants.

M/s Haider Rasheed Mughal AAG, Shahzad Shafi Awan and Sabhir Javed, Advocates for the respondents.

JUDGMENT:-

Captioned appeal has been filed against the impugned judgment and decree passed by the learned Additional District

Judge Hajira on 12.05.2022, whereby judgment and decree passed by Civil Judge Hajira dated 29.04.2022, has been maintained.

FACTS IN BRIEVITY:-

Plaintiffs-appellants filed a suit in the Court of Civil Judge Hajira on 18.04.2022, stating therein that they are permanent residents of villages Malhar, Keri Charoon, Bhango and claimed for mandatory injunctions etc. against the defendants-respondents, herein, regarding construction of bridge. The trial Court ordered the plaintiffs-respondents to deposit proclamation fee within seven days for summoing of respondents-defendants vide order dated 18.04.2022 and the case was fixed for further proceedings by 30.04.2022. Meanwhile, an application for curtailment has been filed by ther other side and the case was taken up by the trial Court on 29.04.2022. On the aforesaid date while filing objections on interim injunction on behalf of defendants-respondents No.8 and 09 and after hearing the learned counsel for the parties the suit was dismissed by the trial Court under Order IX rule 2 and Order XVII rule 3 C.P.C., for non-compliance of Court order vide impugned judgment and decree 29.04.2022, which was assailed before 1st appellate Court, which after hearing, met the same fate vide impugned judgment and decree dated 12.05.2022, hence, the captioned appeal.

Learned counsel for the parties argued the case as per their respective pleadings.

I have heard the learned counsel for the parties and gone through the record of the case.

ENSUING PROCEEDINGS:-

Admittedly the present appellants filed a suit before the trial Court on 18.04.2022, for mandatory injunctions against the respondents, herein, regarding construction of the disputed bridge. A perusal of file further reveals that the trial Court ordered the appellants, herein, to deposit proclamation fee within seven days so that the respondents could be summoned vide order dated 18.04.2022 and the case was fixed by 30.04.2022. However, on application the case was curtailed and the case was taken up by the trial Court on 29.04.2022. The defendants-respondents No.8 and 09 objected the interim injunction by filing objections and the trial Court after hearing the learned counsel for the parties dismissed the suit under Order IX rule 2 and Order XVII rule 3 C.P.C., for non-compliance of Court order by giving verdict that plaintiffs-appellants despite elapsing the fixed period did not comply with the Court order and failed to deposit proclamation fee vide impugned judgment and decree 29.04.2022, which was assailed before 1st appellate Court and the said Court after hearing has rightly concurred with the findings of the trial Court vide impugned judgment and decree dated 12.05.2022.

A perusal of file further shows that the funds are likely to be elapsed on 30.06.2022 and the appellants-defendants by knowing the fact tried to procrastinate the matter just to deceive the respondents-defendants and prima-facie vigilantly did not comply with the Court order, hence, no illegality whatsoever, has been committed by the trial Court while passing the impugned judgments and decrees.

Moreover, there were as many as three defendants, who represented their respective villages, however, they kept mum about compliance of Court order and did not bother to pay the requisite proclamation fee for the purpose. It is settled principle of law that law always helps the vigilant not the indolent.

The learned counsel for the appellants-defendants failed to point out any illegality and irregularity which might have been committed by the Courts below, while passing the impugned judgments and decrees.

As per Section 100 of Civil Procedure Code, 1908, this Court can interfere in second appeal if the decision is being contrary to law or usage having the force of law; the decision having failed to determine some material issue of law or usage having the force of law; a substantial error or defect in the procedure provided by Civil Procedure Code, 1908, or by any other law for the time being in force, which may possibly have procured error or defect in the decision of the case upon the merits, which are missing in the instant case.

Findings of two Courts below in the similar line merits no interference at all. No leniency could be shown in favour of plaintiffs who failed to comply with the specific order of the Court and even did not bother to seek enlargement of time under Section 148 of the Code of Civil Procedure, 1908, quo compliance of the orders of the Courts infra up to this Court.

Trial Court by specific order directed the plaintiffs to deposit cost of publication quo summoning public at large, no enlargement of time has been sought.

The plaintiffs themselves remained indolent to press the matter diligently, law helps vigilant and not indolent.

Order XI rule 2&4 are clear enough in this regard.

Proper recourse provided by law as to submit application under Section 148 C.P.C. quo enlargement of time and condonation of delay accrued in this regard.

The plaintiffs have not shown sufficient cause for their non-paying the publication charges within the time fixed. Thus the Court has no option but to dismiss the suit.

While dealing with the case of similar facts the Karachi High Court in case titled Munawar Isani and 04 others Vs. Barkat Isani and 09 others, [2003 CLC 288]. At pages 293 and 294 of the report laid down as under:-

“The appeal was allowed and the impugned judgment was set aside and directions were issued to the trial Court to decide the matter pertaining to the title within six months. Since the plaintiffs were directed to pay the cost of Rs.10,000/- for publication in newspaper for substitute service upon defendants Nos.5 to 9 as they were residing in America, but they did not do so. As per order dated 14.12.2001 the plaintiffs were directed to deposit cost of rupees ten thousand for publication in newspaper for service upon defendants Nos.5 to 9 because they were residing in America, but from the perusal of the plaint, the plaintiffs have shown the residence of defendants Nos.5 to 9, of village Bado, Taluka Garhi Yasin and in fact at the time of filing of the suit, the defendants were residing in America. The plaintiffs instead paying the cost moved an application

under Order 47, rule 1, C.P.C. to review the order, dated 14.12.2001. After hearing learned counsel, the review application was dismissed on 13.03.2022 and again the plaintiffs were directed to pay the said cost within seven days, but they did not pay the cost and on the contrary learned counsel moved an application under section 148, C.P.C. to condone the delay in depositing the cost, but the same was dismissed on 20.03.2022. In view of the conduct of the plaintiffs it is manifest that they remained indolent to pursue the matter delinquently. It is relevant to mention here that there were directions of this Court while deciding the 1st Civil Appeal No.1 of 1997 to decide the matter within six months and then direction was given on 17.04.2001 and the period of such direction had already been expired and the matter was being delayed on one ground and the other by the plaintiffs.

As the plaintiffs have not shown sufficient cause for his non-paying the postal charges for publication charges was required within the time fixed before issuance of the summons the Court has no option but to dismiss the suit. The petitioner can institute afresh case if they feel so effected for adjudication of their legal right. The trial Court extended sufficient time for compliance, but instead of making the compliance miscellaneous applications were filed by the plaintiffs for getting the order set aside or condonation of delay for depositing the cost of rupees ten thousand. Learned counsel while filing the application under Order 9, rule 4 read with section 151, C.P.C. has stated that the respondents Nos.5 to 9 who were represented by attorney the defendant No.4 was required to serve Court motion notice afresh after the death of their attorney as the defendants Nos.5 to 9 were residing in U.S.A. and they could not serve in ordinary manner. It is further admitted by the learned counsel in the application that the plaintiff No.1, who is also appearing on behalf of the plaintiff Nos.2 to 6 are residing at Karachi neither the Advocate for plaintiffs would contact with the plaintiff No.1 nor he would contact with the respondents and as such the publication charges could not be deposited within time. It is further admitted in the application that on 20.03.2022 Advocate for the plaintiff had gone to Kandhkot to conduct his cases and he authorized his junior alongwith application under section 148, C.P.C. for seeking condonation of delay and extension of time to deposit the publication charges, but the same was not allowed and the suit was dismissed against the defendants Nos.5 to 9 for non-payment of publication charges. It is rule of law that every case should be decided on merits and not on technical grounds. Since

the compliance of the order was not made by the plaintiffs to proceed the case on merits. There was no option left to the trial Court to dismiss the suit under Order IX rule 2, C.P.C.”

In view of forgoing reasons finding no substance in the instant appeal the same is hereby dismissed. The costs shall follow the eventualities.

Muzaffarabad,
24.06.2022 (MM)

-Sd-
JUDGE

Note:-

Judgment is written and duly signed. Office is directed to apprise learned counsel for the parties accordingly.

-Sd-
JUDGE