

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ petition No.2759/2022.

Date of inst.15.07.2022.

Date of decision 09.09.2022.

1. Muhammad Anwar S/o Kala Khan.
2. Arshad Hussain S/o Gohar-ur-Rehman caste Qureshi R/o village Gojra Quershi Mohalla Lohar Gali Tehsil & District Muzaffarabad.

Petitioners

VERSUS

1. Additional District Magistrate Muzaffarabad.
2. Ali Akbar S/o Azeemullah R/o village Gojra Qureshi Mohalla Lohargali Tehsil & District Muzaffarabad.
3. Tehsildar Revenue Muzaffarabad (Magistrate First Class) Muzaffarabad.

Respondents

4. Assistant Director LG&RDD District Muzaffarabad.

Pro-forforma Respondent

WRIT PETITION

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

PRESENT:

Kh. Shoukat Hussain Ganai, Advocate for the petitioners.

Kh. Junaid Pandit, Advocate for the respondent No.2.

Nemo for other respondents.

ORDER:

The titled writ petition has been addressed under Article 44 of the Azad Jammu and Kashmir Interim Constitution, 1974, whereby vires of the impugned order passed by the Additional District Magistrate Muzaffarabad, on 01.07.2022, has been challenged for having been issued without lawful authority.

In view of proposed conclusion reached at by the Court, facts of the case need not to be reiterated here for the sake of brevity and convenience.

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

I have heard the learned counsel for the parties, perused the contents of writ petition and have minutely examined the impugned order as well.

Be that as it may, appeal, review and revision are statutory remedies. As the petitioner could not avail the remedy of revision under section 439 Cr.P.C., 1898, against the order impugned herein but instead of adopting the proper recourse in this regard the petitioner opted to file the instant constitutional writ petition. However, it is mentioned that writ is an equitable relief which can only be exercised in extra ordinary circumstances, that too, particularly when other adequate remedy is not provided by law and the petitioner satisfies the conscious of Court quo his specific grievance as well as by indicating any violation of law. My this view finds support from 1985 P.Cr.LJ 2409, wherein at pages 2410 and 2411 of the report it has held as under:-

“...There is no dispute about the proposition of law that provisional jurisdiction of the High Court is concurrent with that of Sessions Judge as contemplated under section

439-A, Cr.P.C. It is also settled law that if jurisdiction is concurrent then the normally aggrieved party is advised to resort to the remedy available in the lower Court. In the instant case revision application was filed in the Sessions Court and that has been dismissed and second revision application cannot be filed in the High Court. Section 561-A Cr.P.C, contemplates inherent jurisdiction of the High Court, which provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is submitted on behalf of the respondents that this inherent jurisdiction of the High Court under section 561-A Cr.P.C, cannot be invoked as an additional or alternative jurisdiction after exhausting provisional jurisdiction.

Another point worth consideration is that section 561-A Cr.P.C, would apply to proceedings which are pending and in the instant case as is obvious from the final order which is impugned that proceedings have come to an end and there are no pending proceedings that is why remedy of revision was resorted by the petitioner in the Court of Sessions Judge. On that ground also section 561-A, Cr.P.C. will not be attracted.”

In case titled Hameed Kausar Vs. The State PLD 1979 Lah. 727. At page 729 of the report, it was held as follows:-

“This application is liable to dismissal on more than one grounds, i.e. by providing section 439-A of the Code of Criminal Procedure clause (2), the intention of the law maker is to make the provisional jurisdiction exercisable by either of the two Courts, and in such a situation the revision in this Court does not lie, once the Additional Sessions Judge has exercised the provisional jurisdiction.”

Moreover, controversial disputed questions of facts requiring detailed probe and evidence are not normally resolved in an extra ordinary writ jurisdiction. Equitable relief cannot be bestowed in favour of a person against whom

any sort of allegation of public nuisance or for that matter violation of law particularly by putting hindrance in the peaceful living and normal life of the public at large snatching their right to use path/walking tracks on the basis of prescription are leveled.

Servitus Viae:-

The *servitude* of road way, this doctrine takes breath from law of prescription. Section 133 Cr.P.C., empowers the magistrate to order the removal of an obstruction from any way or from any public place.

The proceedings under section 133 are preventive/curative in nature not amounting to prosecution. Such like proceedings are only proof of urgency or imminent danger to the public interest.

It is crystal clear that the matter pertains to public nuisance. As C.P.C. is applicable mutatis mutandis to the writ proceedings, hence, requirement of section 91 of the C.P.C. regarding prior consent/permission of the Advocate General has not been adhered to/satisfied as well as the people of vicinity and beneficiaries of the road are necessary party in the lis and in their absence no effective order can be passed.

Thus the constitution petition in hand is incompetent for the ut-supra multiple reasons.

In view of above multiple reasons the petition in hand is not maintainable, hence, the same is liable to be dealt with

under the doctrine of limine control. The ut supra constitutional petition is dismissed in limine. Miscellaneous application met the same fate.

-Sd-

Muzaffarabad
09.09.2022 (MM)

VACATION JUDGE

Note:-

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

-Sd-

VACATION JUDGE