High court of azad jammu & Kashmir

[Circuit Mirpur]

Writ Petition No. 377/2016;

Date of Institution.16.12.2016;

Date of Decision. 23.06.2018.

Muhammad Aziz s/o Muhammad Ashraf, caste Jat, R/o Manail Barali Tehsil and District Kotli.

…… Petitioner

Versus

1. Divisional Forests Officer Demarcation Division Mirpur,
2. Divisional Officer Forests Division Mirpur,
3. Azad Govt. through its Chief Secretary Muzaffarabad,
4. Revenue Assistant Demarcation Kotli/ Mirpur Division,
5. Settlement Officer Revenue Kotli,
6. Collector District Kotli,
7. District Judge, Kotli,
8. Senior Civil Judge, Kotli.

…..Real Respondents

1. Maqsood Begum, widow,
2. Muhammad Shaheer,
3. Muhammad Zafeer,
4. Muhammad Ghazanfar,
5. Muhammad Zaheer,
6. Muhammad Ayoub,
7. Sikandar,
8. Muhammad Imran sons of Muhammad Shafi,
9. Muhammad Akbar,
10. Muhammad Sadiq sons of Muhammad Ashraf,
11. Nazia Begum,
12. Sakina Bibi, widows,
13. Mirzaman,
14. Abdul Ghafoor,
15. Muhammad Asghar,
16. Muhammad Israr,
17. Muhammad Maroof,
18. Abdul Ghafaar,
19. Muhammad Sarfraz,
20. Muhammad Shehzad, sons,
21. Naseem Akhtar,
22. Ghulam Fatima,
23. Shahida,
24. Zahida,
25. Saima, daughters of Mangoo, caste Jat, Manail Tehsil and District Mirpur.

……..Pro-forma Respondents

writ petition

Before: - Justice Chaudhary Muhammad Munir, J.

Present:

Ch. Tehseen Ahmed, Advocate for the petitioner.

O r d e r:

Through the captioned writ petition filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioner challenged the validity of orders passed by District Judge, Kotli dated 29.09.2016 and Senior Civil Judge, Kotli dated 28.10.2014.

2. Precise facts of the case are that the petitioner filed a declaratory suit against the respondents on 24.07.2000 in the Court of Senior Civil Judge, Kotli, wherein he claimed that petitioner and pro-forma respondents are co-owners of the land under Khewat No.199 Khata Nos.798, 719, 711 and Khewat No. 315 Khata No. 1312, 1401 survey Nos. 2943, 2942, 2944, 2947, 2958, 2959, 2961, 2962, 2963 measuring 92 Kanal and also claimed 25 karam margin of adjacent forest land situated in village Barali District Kotli. The defendants/ respondents filed written statement through standing counsel and issues were framed by the trial Court. It has been stated that the defendants/ respondents absented after framing of issues, therefore, they were proceeded ex-parte, vide order dated 26.05.2003. Learned trial court after ex-parte evidence and hearing ex-parte arguments, decreed the suit in favour of petitioner/ plaintiff. It has further been stated that respondents No.1 and 2 filed an application under section 12(2) CPC before the Court of Senior Civil Judge, on 15.08.2009. Learned trial Court vide impugned order dated 28.10.2014 accepted the application and set aside the ex-parte judgment and decree dated 18.04.2005. It has also been stated that the petitioner filed a revision petition against the aforesaid order before the Court of District Judge, which was rejected, hence, this writ petition.

3. The writ petition was admitted for regular hearing, vide order dated 25.10.2017 and the respondents were summoned for filing written statement. The respondents failed to appear before the court despite service of summons, therefore, they were proceeded ex-parte, vide order dated 26.03.2018.

4. Ch. Tehseen Ahmed, Advocate, learned counsel for the petitioner argued that learned District Judge and Senior Civil Judge did not take into consideration the important point that the respondents appeared before the court through Standing Counsel and thereafter absented, so element of misrepresentation and fraud could not be alleged. Learned counsel further argued that the application under section 12(2) CPC was clearly time barred because all the proceedings were in knowledge of the respondents. Learned counsel stressed that the respondents did not have authority to file the application or defend the case because no sanction was granted to file the application by the Law Department. Learned counsel prayed for setting aside the impugned orders dated 29.09.2016 and 28.10.2014 passed by District Judge, Kotli and Senior Civil Judge, Kotli, respectively. Learned counsel placed reliance on the following case law, in support of his version:-

1. 2016 SCR 586,
2. 2017 SCR 1290,
3. 2016 SCR 1004, and
4. 2016 SCR 918.

5. I have heard learned counsel for the petitioner and gone through record of the case with utmost care. A perusal of record shows that the petitioner filed a suit for declaration regarding suit-land, which was contested by the defendants/ respondents through standing counsel and after framing of issues, the respondents absented, therefore, they were proceeded ex-parte, vide order dated 04.03.2005 annexure P-9 and after hearing the suit was decreed ex-parte on 18.04.2005, whereupon the respondents filed an application under section 12(2) CPC before the trial Court, which was accepted. The petitioner, herein, filed a revision before the District Judge, which was rejected.

6. It also reveals from record that the respondents/ defendants filed written statement annexure P-7 before the trial Court through Standing Counsel on 06.08.2001. On 04.03.2005, the defendants/respondents did not appear before the trial Court, therefore, they were proceeded ex-parte and the trail Court after hearing the parties decree the suit ex-parte, vide order dated 18.04.2005. The defendants No.1 and 2 challenged the ex-parte judgment and decree under section 12(2) CPC through Sardar Ghulam Mustafa Khan, Advocate. A perusal of record shows that Divisional Forests Officer Demarcation Division, Mirpur and Divisional Forest Officer, Kotli has given power-of-attorney to the aforesaid Advocate for filing application under section 12(2) CPC. It is admitted fact that the respondents are Government officials and public servants. Under Rule 29 of Law Department Manual, no litigation on behalf of the Government or of Public Servant can be filed or defended without sanction of the Minister In-charge or Law Secretary. For proper appreciation, Rule 29 of Law Department Manual, 1984 is reproduced as under:-

*“29. Sanction in suit etc., by or on behalf of the Government and Public Officers. No suit, appeal, review revision, petition etc., on behalf of the Government of Public Officer, as the case may be, shall be instituted without the sanction of the Minister In charge and in case of his absence the Secretary law.”*

Proper course for the defendants was to obtain sanction from the competent authority and then file application under section 12(2). In the instant case, the respondents given power-of-attorney to Sardar Ghulam Mustafa Khan, Advocate without any approval of the competent authority. This view finds support from 2016 SCR 918 and 2017 SCR 1290. In case titled Raja Muhammad Asghar & another Vs. State and 3 others [2017 SCR 1290] wherein it has been laid down that:

*“The objection raised by the respondents has substance, as according to the averments of the petitioners they are civil servants/public officers of Forests Department and presently are holding the posts of the Forest Guard and the Range Officer, respectively. Under the provisions of the Azad Jammu & Kashmir Law Department Manual, 1984, the petitioners being public officers/ civil servants of the Forests Department without previous sanction of the competent authority cannot file the appeal/PLA.”*

7. It stands proved from record that the respondents filed application under section 12(2) incompetently, which was not maintainable, in the aforementioned circumstances.

8. Another aspect of the matter is that the petitioner raised the point that the respondents have incompetently filed application under section 12(2) CPC for the first time in the instant writ petition, which is of pure legal nature. I agree with the contention of learned counsel for the petitioners that any pure legal question which goes to the root of the case can be raised at any stage with the permission of the Court. 2016 SCR 586 may be referred in this regard, wherein it has been held at page 593 of the report that *“any pure legal question which goes to the root of the case can be raised at any stage with the permission of the Court.”*

9. It is also noticed that the respondents appeared before the trial Court, filed written statement through Standing Counsel, and thereafter absented themselves on 26.05.2003, therefore, they were proceeded ex-parte and the plaintiff recorded his own statement along-with two witnesses. Thereafter, the defendants/ respondents filed an application for setting aside aforesaid ex-parte order, which was accepted and ex-parte order was set aside. The plaintiff recorded statement of Abdul Rasheed S/o Sheer Muhammad and thereafter on 04.03.2005, the defendants/ respondents again absented, therefore, they were again proceeded ex-parte. The defendants/ respondents participated in the proceedings and thereafter absented, therefore, proper course for them to file an application under Order 9 Rule 13 CPC for setting aside ex-parte judgment and decree order dated 18.04.2005, rather they filed application under section 12(2) CPC by putting allegation of fraud and misrepresentation against the plaintiff/ petitioner and on their own Standing Counsel. For proper appreciation, Order 9 Rule 13 CPC is reproduced as below:

*“13. Setting aside decree ex parte against defendants. (1) In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to cots, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;*

*Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.*

*Provided further that no decree passed ex parte shall be set aside merely on the ground of any irregularity in the service of summons, if the Court is satisfied, for reason to be recorded, that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.*

*(2) The provisions of section 5 of the Limitation Act, 1908 (IX OF 1908) shall apply to applications under sub-section (1)”*

10. In the instant case the respondents filed application under section 12(2) CPC, which was not competent because previously the defendants/respondents filed an application for setting aside ex-parte order dated 26.05.2003, wherein they did not take the plea of fraud. The application was accepted and ex-parte order was set aside but again they were proceeded ex-parte on 04.03.2005 and ex-parte judgment and decree were passed against them on 18.04.2005. If whole process in the suit from the start to end was attacked on the ground of fraud, and incident of absence of service of summons, application under section 12(2) CPC can be competently filed but where defendants in his earlier application under Order IX Rule 13 had not taken the plea of fraud or misrepresentation, they could not subsequently take such plea to invoke jurisdiction of the Court under section 12(2) CPC because limitation for the aforesaid two provisions is different. The application of the defendants under section 12(2) CPC before the trial Court was not competent on this score too.

For what has been discussed above, the writ petition is accepted and the impugned order passed by District Judge, Kotli dated 29.09.2016 and Senior Civil Judge, Kotli dated 28.10.2014 are hereby set aside, resultantly, ex-parte judgment and decree dated 18.04.2005 is hereby upheld.

Writ petition accepted.

Circuit Mirpur

23.06.2018 (M) **Judge**