

## HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ Petition No.105/2024.

Date of institution 08.01.2024.

Date of decision 29.04.2025.

Pervaiz Baig S/o Muhammad Baig caste Baig R/o Lala Tehsil  
Athmuqam, District Neelum, Azad Jammu & Kashmir.

*...Petitioner*

### Versus

1. District Judge Neelum.
2. Senior Civil Judge Athmuqam District Neelum.
3. Badar Rasool.
4. Ishtiaq Rasool sons.
5. Sumaira Rasool, daughter.
6. Nayar Sultana W/o Mian Ghulam Rasood, caste Mughal R/o  
Kundal Shahi Tehsil Athmuqam, District Neelum.

*..Real-respondents*

1. Asif.
2. Wajid S/o Pervaiz R/o Lala.
3. Ikhtlaq Rasool S/o Mian Ghulam Rasool.
4. Fiaz S/o Haroon.
5. Tabinda.
6. Barida.
7. Saiqa.
8. Laiba.
9. Iqra.
10. Ayat D/o Abdul Hadi.
11. Ishfaq Hussain S/o Jamdar Malik R/o Kundal Shahi, Tehsil  
Athmuqam, District Neelum.
12. Sub Registrar Athmuqam.
13. Tehsildar Athmuqam.
14. Patwari Halqa Athmuqam.

*.....Proforma-Respondents*

### WRIT PETITION

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

In the presence of:

Amir Aziz Mughal, Advocate for the petitioner.

M/s Syed Abdul Samad and Amal Atta Mughal, Advocates for private  
respondents.

**Judgment:**

Through the instant petition, filed under Article 44 of Azad Jammu and Kashmir Interim Constitution, the petitioner is imploring infra relief:-

“It is therefore very humbly prayed that this petition may kindly be accepted and an appropriate writ in favour of petitioner may kindly be issued whereby the orders recorded by respondent No.1 dated 01.11.2023 and respondent No.2 dated 04.08.2023 may kindly be declared against law, facts, record, without jurisdiction and of no legal effect.”

**Facts in brevity**

2. Precise facts of the case as per petitioner are that respondents No.3 to 6 filed a suit for declaration as well as perpetual injunction and cancellation of sale deed dated 22.08.2000 alongwith prayer to cancellation of gift deed dated 10.07.2007 and mutations No.83, 174, against the petitioner and proforma respondents, on 19.12.2022, in the Court of Senior Civil Judge, Authmuqam. During proceedings, on 06.04.2023 plaintiffs/respondents No.3 to 6 filed an application under Order I, Rule 10, C.P.C alleging therein that defendant No.2 had died before the institution of suit and now they want to add legal representative of deceased/defendant No.2 as defendants. Upon the said application, defendants/petitioner filed their objection and after hearing both parties, the learned trial Court/respondent No.2, accepted the application vide order dated 04.08.2023. Feeling aggrieved from the said order, the petitioner filed revision petition before District Judge, Neelum (respondent No.1). The learned District Judge, after hearing parties, maintained

the order of the trial Court vide impugned order dated 01.11.2023, hence, instant writ petition for reversal of the aforesaid orders.

**Ensuing proceedings**

3. Written statement filed on behalf of respondents No.3 to 6 wherein the claim of the petitioner has been rebutted and contended that by accepting the written statement on behalf of the respondents, the writ petition filed by the petitioner may be dismissed with heavy cost.

4. Having meticulously considered the extensive arguments presented by all parties and thoroughly examined the case record, I have reached a consider position.

5. Through this petition, the petitioner has challenged the impugned orders dated 01.11.2023 and 04.08.2023 passed by the learned courts below and prayed that the aforesaid orders may be declared against the law, facts, record and without jurisdiction.

6. Perusal of record shows that Badar Rasool and others i.e. respondents No.3 to 6 instituted a suit for declaration cum perpetual injunction, and cancellation of sale deed dated 22.08.2000 and mutation No.83, gift deed attested on 10.07.2007 and mutation No.174 alongwith all the entries made in the revenue record, before the Senior Civil Judge, Authmuqam. During proceedings in the case, the respondents No.3 to 6 (plaintiffs) filed an application on 06.04.2023 under Order I, Rule 10, C.P.C for arraying party (i) Naila Bibi (widow) and (ii) Aqib Baig son of Sajid Baig. The petitioner herein

filed objection before the learned trial Court upon the said application. The learned trial Court after hearing arguments upon the aforesaid application, **accepted** the application vide its order dated 04.08.2023. Feeling dissatisfied, petitioner filed revision petition before District Judge, Neelum, which met the same fate.

### **Court's Finding**

7. Substance of the stance of the petitioner is that as the suit was brought against the dead person thus, same requires to be dismissed (to the extent of dead person) and legal heirs of the said deceased could not be allowed to become party in the line of respondent.

8. As the right to sue was alive and some other defendants were also arrayed in the line of respondent, thus, it can safely be held that as right to sue was surviving against the deceased and on account of lack of knowledge he was arrayed in the line of respondents instead of his legal heirs, therefore the petitioner cannot be non-suited merely for his inadvertence or lack of knowledge.

9. Survival of right to sue under civil law denotes that all rights of action existing in favour of or against do survive, but only personal action regarding with individuality of the deceased does not survive, any action of the person who passed away, if having remote nexus with the rights of anyone and by any way, in shape of pecuniary benefit or property rights, consequently of the same, his

liability by fiction of law automatically shifts upon the shoulders of his legal heirs.

10. Trite that neither any suit is filed against a dead person nor any decree can be passed against dead person, suit brought against a dead person is liable to be buried in its inception while decree is nullity in the eye of law.

11. Albeit if cause of action is alive against the legal representatives of such person can be added as a party in the civil lis and the matter is to be governed under Order I, Rule 10, C.P.C.

12. Addition of legal representatives of deceased is not contrary to law. I have gleaned wisdom from the reported judgment of the Supreme Court of AJ&K titled "Tazeem Bibi vs. Muhammad Khalid [2005 SCR 347]-@ p.349.

13. Case was one of partial abatement, in case of abatement in toto, impleadment of legal representatives of deceased under O-I, R.10, C.P.C could be questioned in a sense that suit in its inception could not progress against the dead person.

14. A suit against a dead person is a nullity in the eye of law upon the strength of provisions of Section 27 read with Order I Rules, 3, 9 & 10 of the Code because it can be filed against living person <sup>1</sup> or can be filed against natural & legal person.

15. Where there is only one defendant in the suit (who already died prior to institution of civil suit) shall be regarded invalid,

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<sup>1</sup>. PLD 2009 SC 183 + 2009 MLD 461.

however, in case of more than one defendants in the suit, the suit cannot be taken as nullity in its totality mere on account of reason the one of the defendant was dead at the time of presentation of a suit.

16. There is no question of abatement in view of the plain language of the Order XXII, Rule 1, C.P.C as the proceedings may be revived by the substitution of parties up to which time the party remained in the state of suspense or unaware unless the right is pertaining to personal activities connected with the individuality of the deceased, as such activities are hit by the doctrine of “*Actio personalis Moritur cum persona*”.

*The supra doctrine denotes that right of action dies with person deceased.<sup>2</sup>*

17. Although suit against a dead person is nullity in the eye of law but it is only when the suit was brought only against one person (dead) and substitution of the parties by way of impleading legal heirs of the deceased cannot provide oxygen tent to the suit and the suit shall be abated in toto as the plaintiff can bring a fresh suit against the legal representatives of the deceased subject to law of limitation, but the suit will remain in field and will not be hit by abatement if there are more than one defendants in the array of suit, if there is an application, substitution is permissible.<sup>3</sup>

(Underlining is mine)

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<sup>2</sup>. 1994 CLC 94 + PLD 2004 SC 185 + 2001 YLR 404 + 2009 CLC 413.

<sup>3</sup>. PLD 2003 Lah. 615 – O-1 R.3. 9 & 10 CPC.

18. Trite that mis-description of parties is curable even at the appellate stage, but if a name of a party is once deleted on request of claiming-party by saying that he has no nexus with claim as a necessary or proper party; subsequently, he can not be allowed to be impleaded as such.<sup>4</sup>

19. Defect in the suit is curable by way of allowing the application of legal heirs of the dead persons qua bringing them in the array of parties.<sup>5</sup>

20. Order 1, Rule 10, C.P.C is coached with the term 'bonafide mistake' of the plaintiff, in a way to provide room to put his claim against the legal representative of dead person.

21. If a party dies during the proceedings of a civil lis provisions of Order XXII R. 4 shall come into play, but where a party has already passed away prior to institution of the suit, the relevant provision dealing with the matter is Order 1 Rule 10 of CPC.

22. Abundantly clear that suit against more than one defendants will continue to survive in safe zone despite joint institution is against one of the dead person. Defect is curable if legal heirs of the deceased come forward by asking to allow them to join the proceedings as a party in the said lis or for that matter plaintiff prayed for addition.

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<sup>4</sup>. PLD 1975 Lah. 1016 + PLJ 1975 Lah. 334.

<sup>5</sup>. 2014 CLC 167; PLD 1971 SC 82.

23. I am fortified to follow the dicta of Apex Court laid down in the identical case titled Khan Mohammad Khan vs. Saif Ali [PLJ 2000 SC AJK 216]. In the above judgment the Apex Court relied upon Mokram Ali Molla vs. Abdul Hameed [AIR 1927 Cal. Page 880.]

24. A scrutiny of the application reveals that the plaintiffs/respondents moved application to enter the names of aforesaid defendants not the substitution of respondent No.2 which is mentioned in the suit. It is worth mentioning here that under Order 1, Rule 10, of C.P.C, the Courts can add or substitute the name of defendant in the suit at any stage during the proceedings which is necessary for adjudication of the case. So, in my considered view, the courts below have rightly accepted the application of the plaintiffs/respondents and have not committed any illegality, irregularity and perversity while passing the impugned orders. Thus, the orders impugned, herein, are **maintained**.

25. The petitioner has failed to point out any illegality or irregularity on the part of the respondents, thus, the petition at hands is not maintainable in the eye of law and same is liable to be dismissed.

Given the aforementioned findings, this petition lacks merit and is hereby **dismissed** with no order as to costs. So ordered.

*File shall be kept in archive.*

Muzaffarabad.  
29.04.2025.

**JUDGE**

**Approved for Reporting**

**JUDGE**