

## **HIGH COURT OF AZAD JAMMU & KASHMIR**

Writ petition No.794/2018.  
Date of institution 16.04.2018.  
Date of decision 15.11.2023.

1. Sadiqa Zafar d/o Abdul Majeed r/o Plate Tehsil & District Muzaffarabad;
2. Shahid Majeed s/o Abdul Majeed r/o Plate Tehsil & District Muzaffarabad;
3. Shahnaz Nayyer w/o Nayyer Iqbal r/o Plate Tehsil & District Muzaffarabad.

Petitioners

VERSUS

1. District Judge Muzaffarabad;
2. Nisar Ahmed s/o Khan Bhadar Khan;
3. Mst. Gulzar d/o Khan Bhadar Khan r/o Chatter Domail Tehsil & District Muzaffarabad;
4. Dara-ul-Uloom Ghosia through Incharge Nadeed Ahmed s/o Nazir Hussain Shah r/o Sethi Bagh Tehsil & District Muzaffarabad.

Respondents

### **WRIT PETITION**

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

#### **PRESENT:**

Bashir Ahmed Mughal, Advocate for the Petitioners.  
Mohammad Yaqoob Khan Mughal, Advocate for Respondents No.2, 3.

#### **JUDGMENT:**

Through this petition filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, the petitioners, have challenged the validity and legality of the impugned judgments passed by the learned District Judge

Muzaffarabad and learned Civil Judge Court No.4 Muzaffarabad dated 09.06.2017 and 11.06.2016 respectively.

2. Basically, the plaintiffs/petitioners, herein, filed a declaratory suit against the defendants/respondents in the Court of Civil Judge Muzaffarabad which through order dated 26.12.2011 was dismissed for want of prosecution and for non-compliance of the Court order and against the said order, plaintiffs filed a review petition under Section 114 Order 47 CPC and the said review application was dismissed by the Court on 11.06.2016 and against the said decision, plaintiff/petitioners, filed a revision petition before the learned District Judge Muzaffarabad on 02.07.2016, which also met the same fate vide decision dated 09.06.2017, hence, this writ petition for setting aside the orders/decisions of the Courts below.

3. Mr. Bashir Ahmed Mughal, learned counsel for petitioners vehemently argued that the learned trial Court while passing the basic order imposed two penalties upon the plaintiffs/petitioners at the same time which is against the law and norms of justice. The suit might be dismissed in default or otherwise in non-compliance of the order of the Court but instead of adopting such course of law, the

learned trial Court illegally and arbitrarily dismissed the suit for default in appearance and non-obeying the Court order, he added. The learned counsel further contended that if the plaintiffs had failed to comply with the Court order then under Order XVII Rule 3, the proper course for the Court to proceed to decide the suit forthwith. He further contended that it is settled law that if justice so requires interlocutory orders may be required at any time and review application if barred by time can be treated as one under Section 151 CPC. Finally, the learned counsel prayed that while setting aside the orders of both the Courts below, the suit filed by the petitioners may kindly be restored.

4. Mohammad Yaqoob Khan Mughal, learned counsel for respondents No.2 & 3 while controverting the arguments of the learned counsel for petitioners submitted that trial Court ordered the petitioners to produce evidence but despite availing several opportunities, they have failed to produce the same and subject to payment of cost last, opportunity was also granted to the petitioners for the purpose but the petitioners neither appeared before the Court nor paid the cost, thus, the trial Court was left with no option to dismiss the suit in accordance with law vide order dated 26.12.2011. Against the said order, review

petition was filed after a lapse of two years and 10 months, so, the review petition was not competent as the same was hopelessly time barred, he argued. The learned counsel further contended that as the review petition was filed after prescribed period of limitation, therefore, the instant writ petition is also not maintainable for the reason that a writ petition can only be issued against an authority who has violated the law or travelled beyond its jurisdiction, so, the petitioners have failed to point out any violation of law and defect of jurisdiction, therefore, while upholding the impugned orders, the writ petition may be dismissed.

5. I have heard the learned counsel for the parties and have gone through the order dated 26.12.2011. A perusal of order shows that the trial Court dismissed the suit for non-compliance of the order as well as for want of prosecution. As adumbrated, the basic decision/order passed by the trial Court under Order XVII Rule 3 is ex-facie on two counts i.e. dismissal of suit for want of prosecution and secondly, on the basis of non-compliance of the previous order of the Court. It is useful to reproduce the order of the trial Court dated 26.12.2011;

’’کونسل مدعا علیہ حاضر۔ مدعیان یا کونسل مدعیان حاضر نہ ہیں۔ نہ ہی ہر جانہ ادا ہوا ہے۔ مسل بعد از انتظار بوقت 2:30 بجے دن پیش ہو۔ کونسل مدعا علیہ حاضر۔ وقت عدالت ختم ہو چکا ہے۔ مدعیان یا کونسل مدعیان غیر حاضر نہ ہی ہر جانہ ادا ہوا ہے۔ دعویٰ ہذا بصیغہ عدم تعمیل حکم و بصیغہ عدم پیروی خارج کیا جاتا ہے۔ مسل بعد از تکمیل ضابطہ داخل دفتر ہو۔ حکم سنایا گیا۔‘‘

Plain language of the Order XVII Rule 3 of CPC is reproduced as under:-

**3. Court may proceed notwithstanding either party fails to produce evidence, etc.** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

6. The provisions of Order 7 Rule 13 are very drastic and penal and should be used only in exceptional cases in a transparent manner and only on grave disobedience on the part of defaulting party <sup>1</sup>. Dismissal under Order XVII Rule 3 CPC is not tenable and warranted. It is desirable that litigants should get decisions on merit in their cases, if the plaintiff fails to comply with the order of the Court repeatedly, then an action can be taken against him under relevant provision of law. **The petitioners, herein, have been burdened with two penal orders simultaneously, firstly for non-compliance of the order of the Court and secondly dismissal for want of prosecution. Dismissal of suit for want of prosecution is governed under different provisions of law i.e. Order 9 Rule 8 CPC, while**

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<sup>1</sup>. 2003 YLR 1579.

**Order 17 Rule 3 CPC deals with almost different eventuality requiring adjudication of the lis, where orders of the Court have not been complied with, thus, dismissal for want of prosecution is not warranted under Order XVII Rule 3 CPC, such like order is nullity in the eye of law and liable to be reversed.**

(underlining is mine)

7. Requirement of law is that discretionary powers should be exercised on the basis of recognized principle of administration of justice where record showed that on the eventful day plaintiffs were not present before the Court and in a situation like that, the proper course of action provided by the CPC was the dismissal of the suit for non-prosecution under Order IX, Rule 9 CPC. In absence of plaintiff, application of penal provision of Order XVII Rule 3 CPC seems not to be proper and justified under the law. The impugned order seems to be passed against the law and norms of justice, imposing of two penalties at the same time is not justified and warranted by law in any manner, the suit might be dismissed in default or otherwise for non-compliance of the Court order, as at the relevant date, the plaintiffs were absent, so, the suit should have been

dismissed in default in appearance, which in my opinion was a proper course.

For the foregoing reasons, the writ petition is accepted and both the judgments passed by the learned District Judge and learned Civil Judge Court No.4 Muzaffarabad dated 09.06.2017 and 11.06.2016 are set-aside. Basic order passed under Order XVII 17 Rule 3 CPC be treated and deemed to be passed under Order 9 Rule 8 CPC, review application shall be treated as application under Order 8 Rule 9 CPC for restoration of the lis. Case is remanded to the Court of 1<sup>st</sup> instance to decide the lis in accordance with law as indicated above expeditiously within a period of two months. Parties are directed to appear before the Court on 23.11.2023. No order as to costs. File shall be kept in archive.

Writ petition accepted.

Muzaffarabad.

15.11.2023 (Saleem)

JUDGE

**Approved for Reporting**

**JUDGE**