

HIGH COURT OF AZAD JAMMU AND KASHMIR

Civil Appeal No.84/2014:
Date of institution 24.12.2014;
Date of hearing. 23.01.2023;
Date of decision. 23.01.2023.

Walayat Ali S/o Danu Khan, caste Bhatti R/o Gala Samyar
Tehsil & District Kotli.

.....Appellant

VERSUS

1. Safeer Hussain Shah;
2. Amjad Hussain Shah, sons;
3. Naseem Akhtar;;
4. Saleem Akhtar;
5. Shamim Akhtar D/o Talib Hussain Shah (Late), caste
Syed R/o Mohra Shahpur Panjaira Tehsil & District
fKotli.

.....Respondents

CIVIL APPEAL

Before:- Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Mr. Khalid Mehmood Khokhar, Advocate for the appellant.
Sardar Mansha Jamal, Advocate for the respondents.

JUDGMENT:

The captioned appeal has been filed against the judgment and order passed by the learned District Judge Kotli on 04.12.2014, whereby, appeal filed by respondents herein, against judgment and decree dated 07.01.2014 has been accepted.

Brief facts of the case are that Talib Hussain Shah, now survived by respondents herein, filed an application for cancellation of ex-parte judgment and decree dated

15.01.2008 against appellant herein, in the court of Senior Civil Judge Kotli on 31.03.2016 wherein it was averred that the applicant is 105 years old and is blind for the last ten years. It was further stated that non-applicant filed suit for possession against applicant and himself engaged counsel on behalf of applicant and the fact of the matter is that he never went to Court and nor engaged counsel and now the fact of ex-parte decree came to his knowledge, hence, the same is liable to be set-aside. Respondent filed objections on the application. The learned trial Court in the light of pleadings of the parties framed issues, provided them opportunity to lead evidence and at the conclusion of the proceedings dismissed the application for want of proof and for non-compliance of the Court order vide order dated 07.01.2014. The applicant/respondent felt aggrieved from the order dated 07.01.2014 preferred an appeal before the District Judge Kotli. The learned District Judge Kotli after hearing pro and contra accepted the appeal vide its impugned order dated 04.12.2014 while setting aside order dated 07.01.2014 remanded the case to the trial Court for fresh decision after recording evidence of the applicant on its merits, hence, the captioned appeal.

The learned counsel for the appellant argued the case at length and also presented his arguments in written forum, which are made part of the file hence, need not to be reiterated for the sake of brevity. The gist of his arguments is that the trial Court after provided reasonable opportunity to the applicant/respondents for producing evidence but they failed to produce additional evidence except two witnesses and to comply with the order of the Court, thus, learned District Judge was not justified to allow the applicant to produce evidence before trial Court to fill up lacunas of his case, hence, the impugned order is liable to be dismissed.

The learned counsel for the respondents supported the impugned judgment on all counts and submitted that for the ends of Justice it was necessary to extend a chance to applicant to produce his evidence, hence, the order recorded by the District Judge entails to be maintained.

I have heard the learned counsel for the parties and gone through the record of the case with due care and caution.

A perusal of the order dated 07.01.2014 recorded by the trial Court reveals that the learned Judge failed to appreciate the statements of Subtain Hussain shah and

Munawar Hussain Shah produced by applicant and simply stated that evidence produced by the applicant is insufficient, hence, the learned District Judge was justified to hold that the trial Court has failed to appreciate the evidence led by the applicant in a legal fashion and passed the impugned order in a hasty manner. As some serious allegations have been leveled in the application which can only be resolved after recording evidence, therefore, in my considered view the order recorded by the District Judge to allow the applicant by giving a chance to produce his entire evidence is justified irrespective of the fact that applicant was allowed sufficient opportunities to lead evidence. Law demands that cases should be decided on its merits and reasonable opportunity should be provided to the parties to prove their pleadings.

Moreover, the appeal filed by appellant is not competent because under law an appeal can be filed against an order or decree if the same is specifically provided in the statute. As no right of appeal is provided in the statute against an order recorded by the court while deciding an application under section 12(2) CPC, thus, the order recorded by the Court under section 12(2) CPC can be assailed through revision petition and an order recorded by the Court in revisional jurisdiction can be assailed only through writ

petition. Though appeal before the District Judge against the order recorded by the trial Court in the application under section 12(2) CPC was not competent however, it is now a well settled precept that if first appellate Court had entertained and decided the matter as an appeal then same could be treated as decision of revision which was competent. Reliance may be placed on 2014 MLD 109. Thus, the appeal filed by appellant is also liable to be dismissed on the ground of its maintainability.

The upshot of the above discussion is, the appeal filed by appellant is hereby dismissed on merit as well as being incompetent.

Circuit Kotli;
23.01.2023.

JUSTICE

Approved for reporting.

JUSTICE