

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No. 164/2012;
Date of institution 12.11.2012;
Date of decision 28.04.2023.

1. Yasmeen Akhtar widow of Riaz Ahmed;
2. Noor-ul-Saba;
3. Mohammad Ali;
4. Haider Ali;
5. Abdullah;
6. Imtiaz Ahmed;
7. Aftab Ahmed;
8. Sarfraz Ahmed sons;
9. Naseem Akhtar;
10. Pervaiz Akhtar daughters of Qaisar Bibi widow of Niaz Ahmed Caste Chib r/o Pang Peeran Tehsil & District Kotli.

Appellants

VERSUS

1. Raja Kamal Khan;
2. Zulfiqar Khan;
3. Iftikhar Ahmed son;
4. Taj Begum;
5. Sabeeya Begum d/o Walayat Khan deceased Caste Mangral r/o Sarsawa Tehsil & District Muzaffarabad Kotli;

Real Respondents

6. Satya Ram;
7. Maritthi Devi widow;
8. Officer Rehabilitation Department Kotli;
9. Tehsildar/ARC Kotli;
10. Collector District Kotli.

Proforma Respondents

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Rafiullah Sultani, advocate for the Appellant.

Malik Mohammad Zaraat Khan, Advocate for the Respondents.

JUDGMENT:

The captioned appeal has been directed against the judgment and decree passed by the learned Additional District Judge Kotli dated 13.08.2012, whereby the appeal filed by the real respondents, herein, was accepted and the judgment and decree passed by the learned Senior Civil Judge Kotli dated 29.12.2006 was set-aside.

2. The succinct facts for disposal of captioned appeal are that predecessor in interest of real respondents, herein, Walayat Khan, filed a suit for declaration against appellant, Niaz Ahmed and Proforma defendants, therein, in the Court of Senior Civil Judge Kotli in the manner that the plaintiff alongwith other co-sharers is the owner of the land comprising survey Nos.1306/1098, 1306/1098, 1306/1098, 1306/1098, total measuring 62 kanal 13 marla and the land comprising survey No.1307/1098 measuring 12 kanal was sold by the forefathers of plaintiff and its new survey number is 2268 measuring 6 kanal 3 marla was allotted to refugee which is in his possession. It has been alleged that as per pervious 'Jamabandi' pertaining to year 2001-02, the plaintiff's land was 35 kanal but due to wrong entry in the Settlement, the same

has been reduced and shown as 18 kanal 6 marla instead of 22 kanal 2 marla and from survey No.1306/1098, no land was sold by the plaintiff or his forefathers to any Hindu, so, after measurement of the land, the same should be 39 kanal 13 marla but in the revenue record, it has been shown as 47 kanal 12 marla which is against the law and facts as well as against the spot situation. It has further been alleged that neither the plaintiff nor his parents had sold the land from new survey No.2269 old survey No.1306/1098 and no any part of this land was the evacuee property of the Hindus, so, if defendant No.5 handed over its possession to defendant No.4 appellant, herein, then the plaintiff will cause a greater and irreparable loss and finally prayed that while making correction in the revenue record, a decree for perpetual injunction may please be issued in plaintiff's favour.

3. After filing the suit, the defendants except defendant No.4 were proceeded ex-parte and defendant No.4 filed written statement stating therein that the suit in its present situation is not maintainable, the suit has been filed after prescribed period of limitation and clearly hit by the principle of estoppel, so, the same is liable to be dismissed. It has further been alleged that the Court has no jurisdiction to entertain the suit and the necessary parties have not been

impleaded in the suit. The learned trial Court in light of pleadings of the parties framed 09 issues and the parties were directed to lead their evidence. After completion of the trial, the suit was dismissed for want of proof and want of jurisdiction as well as for lack of cause of action and being barred by limitation, vide the impugned judgment and decree dated 29.12.2006. Feeling aggrieved from the said judgment and decree, legal heirs of plaintiff, preferred an appeal before the learned Additional District Judge Kotli, which was accepted and the judgment and decree of the trial Court was set-aside through its judgment and decree dated 13.08.2012, hence, the supra appeal for setting aside the judgment and decree of learned Additional District Judge.

4. Mr. Rafiullah Sultani, learned counsel for appellants vehemently argued that while accepting the appeal the impugned judgment and decree passed by the learned Additional District Judge may be set aside. Learned counsel virtually reiterated the averments raised in the memo of appeal and submitted that the learned Court below while resolving issue No.1 pertaining to cause of action has not taken into consideration the contents of the suit whereas, in para No.4 of the contents of the plaint the respondents claimed that the piece of land of old survey No.1306/1098 becomes 39 kanals

15 marlas while the same has been shown as 47 kanals 12 marlas and when the respondents' land had already been measured in excess of share then how the plaintiff had cause of action? Learned counsel added that issue No.2 pertaining to the limitation has also not been properly adjudicated by the learned Court below. Learned counsel emphasized on the point that the learned Court has no jurisdiction to make any declaration regarding the land which belongs to 'Bait-ul-Mal' and it is the sole authority of the Custodian to declare the same evacuee or non-evacuee property. In support of his version, the learned counsel referred and relied upon [1992 CLC 382][2003 SCR 81][1994 SCR 187][2004 SCMR 340][PLJ 2002 SC 394][1997 MLD 1309][. Finally, prayed for setting aside the judgment and decree of the Court below while restoring the judgment and decree of the learned trial Court.

5. Conversely, Malik Mohammad Zaraat Khan, learned counsel for respondents submitted that predecessor in interest of respondents had not sold any land to any person and the same is in possession of the respondents since their forefathers and in this regard the respondents had proved their claim by producing oral as well as documentary evidence, so, the trial Court has not appreciated the evidence produced by the plaintiff/respondents in its true perspective and illegally

and against the law and facts dismissed the suit. He further argued that the dismissal of the suit on technicalities is not warranted by law, it is just to deprive the owners from their legal and vested rights. He added that the learned Additional District Judge has rightly set-aside the judgment and decree of the trial Court and passed the impugned judgment and decree purely in accordance with law. He referred to and relied upon the following authorities:-

[2013 MLD 1516][PLD 1994 Lahore 334][1993 SCR 78][2006 CLC 1204].

6. I have heard the learned counsel for the parties and perused the available record cautiously.

7. Comparative analysis of both the decisions in variance of each other revealed that civil litigation by filing regular civil suit filed by Walayat Khan is in response of the proceedings initiated against him for recovery of possession. In first round, the aforesaid suit was dismissed on 18.09.1996 but after reversal of the said decision by 1st Appellate Court vide decision dated 22.12.1996, the suit was again taken up by the trial Court qua adjudication of the lis on merits in light of the evidence adduced pro and contra. Following issues were framed by the trial Court by determining onus of proof accordingly:

- تنقیح نمبر ۱۔ کیا مدعی کو بنائے دعویٰ حاصل ہے؟ (بذمہ مدعی)
- تنقیح نمبر ۲۔ کیا دعویٰ مدعی اندر معیا د ہے؟ (بذمہ مدعی)
- تنقیح نمبر ۳۔ کیا دعویٰ اصول اسٹاپل کی زد میں ہونے کے باعث قابل اخراج ہے؟ (بذمہ مدعی علیہم)
- تنقیح نمبر ۴۔ کیا عدالت کو مقدمہ ہذا کی سماعت کا اختیار حاصل نہ ہے؟ (بذمہ مدعی علیہم)
- تنقیح نمبر ۵۔ کیا دیگر افراد ضروری فریق مقدمہ ہیں؟ (بذمہ مدعی علیہم)
- تنقیح نمبر ۶۔ کیا دعویٰ بشکل موجودہ ناقابل رفتار ہے؟ (مدعی علیہم)
- تنقیح نمبر ۷۔ کیا اراضی متدعو یہ مدعی کی ملکیتی اراضی ہے؟ (بذمہ مدعی)
- تنقیح نمبر ۸۔ بصورت اثبات تنقیح نمبر ۷ کیا دوران بندوبست 75-1974 اراضی متدعو یہ کو غلط طور پر خلاف واقعات بیت المال ظاہر کر کے درج ریکارڈ ظاہر کیا گیا ہے اور اس طرح یہ عمل قابل منسوخی ہے؟ (بذمہ مدعی)
- تنقیح نمبر ۹۔ کیا مدعی ڈگری حکم امتناعی دلا پانے کا حقدار ہے؟ (بذمہ مدعی)
- تنقیح نمبر ۱۰۔ داد رسی

First of all, the plaintiff side adduced evidence on their part by producing witnesses namely Abdul Khaliq s/o Zarat, Mohammad Jabbar, Adalat Khan, Faiz Alam and Mohammad Khan (attorney for the plaintiff) Vis a Vis the plaintiff brought on record the documentary evidence as well in shape of Ex. PC to Ex. PI i.e. revenue record i.e. record of right, periodical record of rights etc. while on the other hand only Riaz Ahmed attorney for respondent No.4 Niaz Ahmed got recorded his statement.

8. In order to make an apple to apple comparison of the issue wise findings of both the Courts below, I take up all the necessary issues to revisit both the findings. Issue No.1 was pertaining to cause of action and onus of the same was rested upon the shoulders of plaintiff (respondent herein). The

respondent/plaintiff in para No.4 of the plaint himself asserted as under:-

۴۔ یہ کہ نمبر خسرہ 1306/1098 جملہ تعدادی 62 کنال 13 مرلے کا جدید رقبہ تقریباً 39 کنال 15 مرلے بنتا ہے۔ ریکارڈ مال میں غلط ، خلاف قانون ، خلاف واقعات اور خلاف صورت موقع جدید نمبرات خسرہ 2262+2263+2266+2265+2269 جملہ تعدادی 47 کنال 12 مرلے مرتب کیا گیا ہے جو کہ سابق ریکارڈ مال کے نقیض ہے اس لیے بھی ریکارڈ جدید غلط ، خلاف واقعات ، خلاف صورت موقع اور حقوق مدعی پر غیر مؤثر و کالعدم ہے۔

The property bearing khasra Number 1306/1098 old measuring 62 kanal 13 marla was measured 39 kanal 15 marlas but in latest settlement proceedings, same was measured and made 43 kanal 12 marlas, thus, when the above property was already measured excessive how the plaintiff can claim cause of action, that too, particularly, after procurement of allotment in favour of the appellant and finally after issuance of Proprietary Rights Certificate. The proper recourse to the plaintiff/respondent herein, was to assail the proceedings before relevant fora provided by the scheme of special law. No cavil to the proposition that civil Court is a Court of ultimate jurisdiction and mother of all Courts, but simultaneously powers of Civil Court are subject to the certain limitations and protocols envisaged in the Laws. Section 9 of CPC is a gateway indicating corridors and cantors of adjudication of the civil dispute. It is pertinent to reproduce Section 9 of CPC as infra:-

Section 9. COURTS TO TRY ALL CIVIL SUITS UNLESS BARRED--The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

9. Thus, the term cause of action even otherwise, is to be construed before the relevant fora of adjudication not the fora of choice particularly which lacks jurisdiction. Thus, issue No.1 has not been resolved by the 1st Appellate Court in judicial fashion. Findings of the Court of 1 instance are upheld and endorsed. The 1st Appellate Court has miserably failed to resolve the issue No. 2 qua limitation in its legal parlance. Limitation in such like case become matter of jurisdiction and lis could not even be entertained in view of Section 3 of the Limitation Act, thus, the findings upon issue No.2 are also reversed and findings of the trial Court are upheld.

10. Under Section 22 of the Pakistan Administration of Evacuee Property) Act 1957, a mechanism has been provided to a person claiming any right pertaining to evacuee property in a way that he may prefer a claim to the Custodian. It is useful to reproduce Section 22 of the above act:-

22. Claims by interested persons. (1) Any person claiming any right or interest in any property

treated by the Custodian or Rehabilitation Authority as evacuee property may prefer a claim to the Custodian on the ground that—

- (a) the property is not evacuee property, or
- (b) his interest in the property has not been affected by the provisions of this act.

(2). An application under sub-section (1) shall be made within the prescribed period being a period of not less than thirty days from the prescribed date.

(3). On receiving an application under sub-section (2), the Custodian shall hold a summary inquiry in the prescribed manner, and after taking such evidence as may be produced shall pass an order, stating the reasons therefore, rejecting the application or allowing it wholly or in part on such terms and conditions as he thinks fit to impose."

Plaintiff yet has a chance to invoke the jurisdiction of Custodian under Section 22 as well as to assail the allotment and Proprietary Rights Certificate subject to law. Under Chapter VII of the Evacuee Property Act, 1957, bar of jurisdiction of civil and other Courts has been provided in Section 41, which speaks as under:-

41. Jurisdiction of Courts barred. (1) Save as expressly provided in this Act no civil or revenue Court or any other authority shall have jurisdiction—

- (a) to entertain or adjudicate upon any question arising in any suit, appeal, application or other proceedings as to whether any person is or is not evacuee or whether any property is or is not evacuee property or what right or

interest, if any, an evacuee has in any such property;

- (b) to question the legality of any this done under this Act by or at the instance of the Custodian; or
 - (c) in respect of any matter which the Custodian is empowered by or under this Act to determine.
- (2). Whenever any question such as is referred to in clause (a) of sub section (1) arises in any court, or before any other authority, the Court or authority shall state the question with relevant particulars and remit it to the Custodian for decision, and shall adjourn the proceedings in which the question arises until the decision of the Custodian is given, and the decision of the Custodian on the question stated shall be conclusive.
 - (3). No decision, decree or order of any Court or authority in respect of any evacuee or evacuee property passed between the first day of march, 1947, and the fifteenth day of October, 1949, shall be binding on the Custodian or affect any right or interest of an evacuee in any property affected by such decision, decree or order unless it is accepted or approved by the Custodian.
 - (4). [Save as provided by or under this Act, no Court] or other authority shall be competent to grant an injunction or other order in relation to any proceeding before the Custodian under this Act, or anything done or intended to be done by or at the instance of the Custodian under this Act.
 - (5). Nothing in the foregoing sub-section shall prevent the adjudication by a civil Court of a dispute between evacuees relating to a right in evacuee property upon a reference made to it by the Custodian or with the Custodian's previous approval.

Ignorance of law is no excuse, the plaintiff instead of adopting proper course of law and remedial measures quo selection of Forum, switched over and filed the civil suit with false hope to get redressal of his alleged grievance. It is trite law that special law overrides the General law and matter which comes within the ambit of special law cannot be dealt with and adjudicated by the civil Court having general jurisdiction avoiding bar contained in the special law, as well as by crossing the barriers of Section 9 of CPC.

11. No cavil to the proposition that civil Court is a Court of ultimate jurisdiction and mother of all Courts, but simultaneously jurisdiction of Section 9 of CPC is only applicable unless a special law is not available holding the field relating to particular dispute or cause of action which has been raised before the civil Court; ready reference in this regard is [2018 MLD 1969+1999SCMR 900+PLD 1973 SC 49]. Although existence of alternate remedy is not hurdle in a way to deprive a person to approach the civil Court, despite availability of alternate forum jurisdiction of the civil Court can be invoked by filing a civil suit, but if a specific bar is contained by virtue of special law, civil Court cannot entertain civil lis in view of such like bar. Civil Court in exercise of general jurisdiction under Section 9 CPC cannot bypass and overlook

the express or implied bar contained in any Statute regarding any specific matter, our this view receives support from 2017 CLC 45 and 2019 YLR 2737.

Albiet. Civil Court can see any illegality and mala-fide committed by any forum, tribunal or authority as Courts of law and equity, but in case of ouster clause specific or implied, civil Courts cannot take cognizance of the matter and ouster clause should be construed strictly. However, Statutory bar qua ousting jurisdiction of civil Courts must have been taken with naked eye and with due care and caution in a manner that if the Statute provides that an order made by an authority acting under it shall not be called in question in any Court, all that is necessary to oust the jurisdiction of the civil Courts is that;

- (i) The authority should have been constituted as required by the Statute;
- (ii) The person proceeded against should be subject to the jurisdiction of the authority;
- (iii) The ground on which action is taken should be within the grounds stated by the Statute;

- (iv) The other mode should be such as could have been under the Statute.¹

Even otherwise, the above conditions are satisfied in the instant matter, the plaintiff has failed to make challenge to the Proprietary Rights Certificate issued in favour of the appellants before any forum, the ouster is therefore, complete. Vis a vis, it is also trite law that suit relating to correction of entries made in revenue record is not within the jurisdictional ambit of civil Courts, ready reference in this regard is 2014 MLD 242.

Let us come to the findings given by the Court below on issue No.2 pertaining to limitation, which reads as under:-

”کیا دعویٰ مدعی زائد المعیاد ہے۔ بذمہ مدعی اتر دید مدعا علیہم“

Issue No.2 has its independent force which has not been taken and dealt with by the First Appellate Court, on one side the First Appellate Court discarded the stance of respondent's quo acquiring knowledge about allotment of the appellant and entries in the revenue record, while on the other side, permitted safe passage to the plaintiff by declaring that on account of continue possession on the suit land, question of limitation is not a barrier to challenge the wrong entries in the revenue record. In my estimation, even then a bar contained

¹ 72 Farid Ali Khan Vs. The Republic of Pakistan PLD 1960 SC 113.

in the special law read with Section 9 CPC in such like eventuality becomes absolute and could not be ignored as it frustrates the scheme and spirit of special law, as the plaintiff should not be allowed to abandon and switch over from the remedy provided under special law by ignoring the selection of forum.

It transpires from plain reading of the findings upon issue No.2 given by the 1st Appellate Court that same is self-contradictory and confusing enough, some important lines are liable to be reproduced:-

”ابتدائی عدالت نے بھی فیصلہ زیر اہیل میں تنقیح ہذا پر قرار داد میں یہ قرار دیا ہے کہ فریقین کے درمیان تحصیلدار سے لیکر کمشنر تک قبضہ کے سلسلہ میں مقدمہ بازی ہوتی رہی ہے لیکن ایسے کسی بھی فورم کی جانب سے ہونے والے کسی فیصلہ کی کوئی مصدقہ نقل مسل کیا تھ شامل نہ ہے البتہ مدعی ولایت خان کے بیان رو برو تحصیلدار قبضہ کی مصدقہ نقل Exh. DA ریکارڈ کا حصہ ہے۔“

Even otherwise, Exh. DA i.e. statement of plaintiff Walayat Khan was recorded on 20.11.2004 which is duly attested on the face of Exh. DA, it also revealed that matter qua acquiring possession was brought before the Court of Tehsildar on 17.09.1985 while in juxtaposition the suit was filed by the plaintiff party on 26.12.95 approximately after round about 10 years when the plaintiff was well aware and acquainted about the allotment and adverse entries in the revenue record

detrimental to his rights, he cannot be allowed to come forwarded by saying that he was not aware about the matter.

Be that as it may, Section 3 of the Limitation Act is clear enough in this regard. It is useful to reproduce the same as under:-

“3. Dismissal of suit, etc. instituted after period of limitation. Subject to the provision contained in Section 4 to 25 (inclusive), every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence.”

12. Section 3 of the Limitation Act 1908, is couched in a mandatory form which empowers the Court before whom a lis is brought to dismiss the same if it is found having not been brought before the Court within the time prescribed by the First Schedule of the Limitation Act, 1908. Section 3 provides that every suit instituted, appeal preferred application made after the period of limitation prescribed therefore shall be dismissed although limitation has not been setup as defence. It appears to proceed on the assumption that it is in the public interest that action must be brought within the statutory time limit.²

² 1002 MLD 2176+2014 CLC 426+2013 CLC 1737+2012 MLD 86+PLD 2011 K.425.

13. It is trite that Section 3 supra is mandatory in its nature, where no satisfactory explanation or defence in this regard has not been taken, in such like eventuality, it become a matter of jurisdiction of the Court, as Court cannot entertain any claim which is time barred, doors of justice are closed after prescribed period of limitation and no plea of hardship or ignorance can ipso facto enlarge the time qua entertainment and adjudication of the lis. Thus, finding of the 1st Appellate Court pertaining to issue No.2 are not in consonance with law and facts of the case and consequently liable to be reversed.

14. Issue No.3 whether the suit filed by the plaintiff is liable to be dismissed on the principle of estoppel? The burden of proof was upon the plaintiff's shoulders. In Exh. DA dated 14.11.90, the plaintiff in his statement himself admitted the transferring of possession to the defendant, so, due to admission of the plaintiff and in light of his previous statement, the learned trial Court has rightly dismissed the suit being hit by the principle of estoppel. Issue No.4 was pertaining to jurisdiction of the Court that whether the Court has powers to entertain such like suit i.e. correction of record, all the matters regarding correction of the record are purely within the jurisdiction of the revenue Courts and the civil Court has no

jurisdiction to entertain such like suits, therefore, the issue supra was rightly decided against the plaintiff. All the other issues have rightly been decided by the trial Court and no illegality or perversity has been committed by the learned Civil Judge Kotli while dismissing the suit filed by the plaintiff as the same has been passed purely in a legal fashion in accordance with law. However, the learned Additional District Judge has committed gross illegality while setting aside the judgment and decree of the learned trial Court.

The nub of above discussion is that the appeal is accepted and the judgment and decree of the learned Additional District Judge Kotli dated 13.08.2012 is hereby set aside while upholding the judgment and decree of the trial Court dated 29.12.2006. The parties are left to bear their own costs.

(Appeal accepted)

Muzaffarabad.
28.04.2023 (Saleem)

JUDGE

Note:- Judgment is written and duly signed. The office is directed to transmit this case in a sealed envelope to circuit bench Kotli and the Deputy Registrar of circuit bench Kotli is directed to intimate the parties or their counsel accordingly.

JUDGE

APPROVED FOR REPORTING