

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT

Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

Civil Appeal No. 151 of 2013
(PLA filed on 01.10.2013)

1. Zafar Iqbal Khan,
2. Mazhar Iqbal Khan,
3. Azhar Iqbal Khan,
4. Khizar Iqbal Khan,
5. Khuram Iqbal Khan, sons of Mohammad Sarwar,
castes Ghakhra, Resident of Kathyala Amar,
Tehsil Samahni, District Bhimber.

.... APPELLANTS

VERSUS

1. Ashiq Hussain,
2. Muhammad Khan, sons,
3. Parveen Akhtar,
4. Musarat Begum,
5. Irshad Begum, daughters,
6. Naseem Begum wife of Fazal Hussain, Residents
of Kothyala, Tehsil Samahani, District Bhimber.

7. Mohammad Siddique,
8. Mohammad Latif, sons,
9. Naseem Begum d/o Fazal Begum, castes Ghakhra, Resident of Kathyala Amar, Tehsil Samahni, District Bhimber.
10. Mst. Sandal Begum wife of Muhammad Saleem.
11. Muhammad Azam (died) represented by respondents No. 12 and 13.
12. Muhammad Banaris,
13. Muhammad Arif s/o Muhammad Hussain.
14. Abdal Begum, widow,
15. Muhammad Bashir s/o Ghulam Hussain,
16. Shah Begum, wife of Muhammad Khalil,
17. Zarina Begum,
18. Saleem Begum,
19. Sakeena Begum,
20. Kausar Robina d/o Fateh Muhammad,
21. Sughra Begum wife of Muhammad Jamil,
22. Muhammad Rafique s/o Atta Muhammad,
23. Faiz Ahmed s/o Khan Bahadar Khan,
24. Muhammad Latif s/o Paindoo,
25. Sabir Hussain s/o Dil Muhammad,
26. Muhammad Nazir s/o Abdul Karim,
27. Muhammad Riaz s/o Rehm Dad Khan,

28. Mahroof s/o Aziz Ahmed Khan,
 29. Javed Ahmed s/o Sohbat Ali,
 30. Muhammad Naseem s/o Mahmood Khan (died)
represented by:
 - (a) Sughran Bibi, widow,
 - (b) Danish, son,
 - (c) Shabnam,
 - (d) Saima,
 - (e) Bibian, daughters of Muhammad Naseem.
- Residents of village Kathyala, Tehsil Samahni,
District Bhimber.
31. Revenue Assistant, Bhimber.

..... RESPONDENTS

32. Member Board of Revenue of AJK.
33. Commissioner Revenue, Mirpur.
34. Collector, Mirpur.
35. Azad Government through its Chief Secretary,
Muzaffarabad.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court
dated 11.09.2013 in Writ Petition No. 54/2004)

FOR THE APPELLANTS: Raja Saadat Ali Kiani,
Advocate.

FOR THE RESPONDENTS: Haji Imran, Advocate.

Date of hearing: 23.05.2016

JUDGMENT:

Ch. Muhammad Ibrahim Zia, J.— This appeal by leave of the Court has been addressed against the judgment of the High Court dated 11.09.2013, whereby the writ petition filed by respondents No. 1 to 9, herein, has been accepted.

2. The summary of the facts is that respondents No. 1 to 9 filed a writ petition before the High Court claiming therein that the legal heirs of one Boota (i.e., Fazal Hussain, Ghulam Hussain, Fazal Begum and Mst. Qasim Bi) are co-sharers in Khewat No. 32 measuring 33 kanal 12 marla. Ghulam Hussain exchanged land bearing survey No. 361 measuring 4 *kanal* 2 *marla* and survey No. 362 with Muhammad Hussain and Faiz Ahmed Khan by executing an exchange deed on 25.06.1979. On the basis of aforesaid exchange deed Muhammad Sawar

executed a gift deed in favour of Zaffar Iqbal and others, appellants herein, on 25.03.1986. The respondents No. 1 to 9 challenged the validity of the said exchange deed as well as gift deed before the sub Judge Mirpur by filing two suits which were dismissed on 30.03.1994. The appeals filed against the judgment were also dismissed on 25.04.1995. Second appeal filed before the High Court and lastly petition for leave to appeal filed before the High Court was also dismissed.

3. Afterwards, respondents, herein, filed an application before the Revenue Assistant for partition. The application was allowed on 31.05.2001. Appellants, herein, filed an appeal before the Collector which was accepted on 09.10.2001 and the case was remanded to the Revenue Assistant for proceedings keeping in view the judgments of the Civil Courts. The order of the Collector dated 09.10.2001 was challenged through revision petition before the Commissioner Mirpur which was dismissed on 28.01.2003. The second revision petition filed before the Board of Revenue was also dismissed. The

respondents (petitioners before the High Court) further claimed that the share of Ghualm Hussain in Khasra No. 261 & 262 was only up to 1 kanal 9 marla but he executed exchange deed beyond the frictional share, therefore, the exchange deed followed by gift deed was subject to partition, which was rightly ordered by the Revenue Assistant. The writ petition was contested by other side. The learned High Court after necessary proceedings accepted the writ petition and set-aside the orders dated 09.10.2001, 28.01.2003 and 21.01.2004 while restoring the order passed by Revenue Assistant on 31.05.2001, hence this appeal by leave of the Court.

4. Raja Saadat Ali Kiani, Advocate, the learned counsel for the appellants after narration of necessary facts raised preliminary objection that the writ petition before the High Court was not competent due to failure of impleading Board of Revenue which was necessary party. He submitted that this point goes to the root of the case. Although, the same has not been expressly raised in the pleadings but according to principle of law enunciated by this Court in a number

of judgments even this Court can take judicial notice of it. On this sole ground, the judgment is not maintainable.

5. Conversely, Haji Imran, Advocate, the learned counsel for the respondents while meeting the preliminary objection submitted that the decision of Member Board of Revenue was challenged in the writ petition and he was impleaded as party, hence, non-impleading the Board of Revenue as party is not fatal. He further submitted that as this point has not been raised before the High Court, therefore, the same cannot be raised at this stage.

6. In the light of peculiar facts of this case, we would like to firstly resolve the preliminary objection raised by the learned counsel for the appellant. In this context, admittedly the Board of Revenue has not been arrayed as party in the memo of writ petition. The judgment of the Member of Board of Revenue has been challenged in the writ petition and the learned High Court in the concluding paragraph of the impugned judgment among others, set-aside the "order of Board of Revenue dated 21.01.2004". On

this legal proposition, law is almost settled and this Court in a number of cases has held that according to the statutory provisions of Azad Jammu and Kashmir Board of Revenue Act, 1993 and rules made thereunder the decision of Member Board of Revenue is treated as decision of Board of Revenue. When the decision of Member Board of Revenue is challenged the Board of Revenue is necessary party. In this regard reliance can be placed on the judgment reported as *Zahid Mehmood Shah and others vs. Azad Govt. & others* [2011 SCR 159], wherein it has been observed that:

“5.It is evident from the record that Member Board of Revenue dismissed the revision petition on 25th April, 2001. The order was challenged by way of writ petition in the High Court and only Member Board of Revenue was arrayed as party. The Board of Revenue was not arrayed as party in the case. For resolving the proposition whether the Board of Revenue is necessary party or not, we have to resort to section 6(3) of the Azad Jammu and Kashmir Board Act, 1993. It provides that any order made or decree passed by a Member Board of Revenue

would be deemed to be the order or decree of Board of Revenue, therefore, the Board of Revenue is a necessary party....”

This principle has also been enunciated in the latest judgment reported as *Mst. Maqsood Begum & others vs. Naseem Akhtar & others* [2016 SCR 33]. Thus, in view of principle of law enunciated by this Court, in absence of Board of Revenue the writ petition was not maintainable.

7. So far as the argument of learned counsel for the respondents that this point has not been raised in the written statement, is concerned, it has no substance as there is no bar on the Court to take notice of such like point which goes to the root of the case. Even such pure point of law which does not require any detailed investigation, can be raised at any stage. In this regard reliance may be placed on the case reported as *Raja Muhammad Ashraf Khan Kiyani vs. Azad Govt. & others* [1997 SCR 389], wherein it has been held that:

“11. We have heard very lengthy arguments on behalf of learned counsel for the parties

and perused the record made available with care. The last point which was raised by Sardar Rafique Mahmood Khan, the learned counsel for the respondents Nos. 3 to 5 with the permission of the Court in our opinion goes to the root of the case. It is indeed a law point and it has been the consistent practice of this Court to allow a law point to be raised at any time if the same does not need a detailed investigation. However the general rule is that the point should be raised in the appeal or the concise statement. It is true that the point has not been raised in the memo of petition for leave to appeal nor in the concise statement but in many reported cases the absence of a necessary party was noted by the Court itself and without the point being raised the writ petition or appeal was ordered to be dismissed on that ground. We will be referring to some cases on this point subsequently."

8. In view of above stated facts and principle of law enunciated by this Court, the preliminary objection raised regarding non-maintainability of writ petition prevails and without discussion on other merits of the case, it is held that without arraying

Board of Revenue, the writ petition filed by the respondents before the High Court was not competent.

Consequently, while accepting this appeal, the impugned judgment of the High Court is set-aside and the writ petition filed by the respondents being non-maintainable stands dismissed with no order as to costs.

Mirpur,
25.05.2016

JUDGE
(J-I)

JUDGE
(J-II)