SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.

Raja Saeed Akram Khan, J.

Civil Appeal No. 199 of 2014

(PLA filed on 10.7.2015)

WAPDA through Chief Engineer, Mangla, Tehsil and District Mirpur/Director Legal WAPDA House, Lahore.

.... APPELLANT

VERSUS

1. Muhammad Arfan (son),
2. Mahwish (Daughter) of Mst. Fazal Begum.
3. Mst. Allah Rakhee, daughter of Alif Din, caste Jutt, r/o Saib Chak Tehsil and District, Mirpur.

..... RESPONDENTS

4. Revenue Department through Collector Mirpur.
5. Settlement Department through Collector District, Mirpur.
6. Ali Shah s/o Naek Muhammad, caste Jutt, r/o House No. 74, Sector B\4, Tehsil and District, Mirpur.
7. Azad Govt. through Chief Secretary, Muzaffarabad.
8. Owner of *Deh*.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 19.5.2015 in Civil Appeal No. 78 of 2013)

FOR THE APPELLANT: Sh. Masood Iqbal, Advocate.

FOR THE RESPONDENTS: Mr. Kamran Tariq, Advocate.

Date of hearing: 22.12.2016.

JUDGMENT:

Mohammad Azam Khan, C.J— The mother of respondents No. 1, 2 and respondent No. 3 field a declaratory suit in the Court of Senior Civil Judge, Mirpur on 1st August, 2011, in respect of land measuring 1 kanal 8 marla comprising survey No. 45, situate in village Saib, Tehsil Mirpur to the effect that they are owners and in possession of the land and are residing at the construction of a plot. The defendants have no concern with the land. In the new settlement pertaining to the year 1991-92, the land has been shown as acquired in the revenue record. The perpetual injunction was also sought that the defendants shall refrain from demolishing the house constructed over the said land. The

trial Court through judgment dated 23rd May, 2012 rejected the plaint under Order VII, rule 11, C.P.C. An appeal was preferred before the District Judge, Mirpur, which was entrusted to the Additional District Judge, Mirpur. The Additional District Judge, Mirpur through judgment dated 23rd October, 2013 dismissed the appeal. Dissatisfied, the respondents filed an appeal in the Azad Jammu & Kashmir High Court. A learned Judge in the High Court, through the impugned judgment dated 19th May, 2015 has accepted the appeal, set aside the judgment of the trial Court as well as the Additional District Judge and remanded the case to the trial Court for disposal on merits, hence, this appeal by leave of the Court.

2. Sh. Masood Iqbal, Advocate, the learned counsel for the appellant argued that the judgment of the High Court is against law and the record. Previously, one Muhammad Rafique filed a suit on 21st November, 2009 in respect of the same land against WAPDA and

others, which was dismissed. He filed an appeal in the Court of District Judge. The District Judge ordered for remand of the case. WAPDA filed an appeal in the High Court. The appeal was accepted. Thereafter, Muhammad Rafique filed an appeal in this Court, which was dismissed. The learned counsel submitted that after dismissal of the appeal and the suit of Muhammad Rafique, her mother has filed the instant suit. As such it is hit by resjudicata. The learned counsel stated that the land is an acquired land, which is in the ownership of WAPDA. From the plain reading of the plaint, it can easily be determined that the plaint was rightly rejected it is proved that the plaint was correctly rejected by the trial Court and the District Judge and the judgment of the High Court is not maintainable. The learned counsel further argued that the suit land is *Shamilat Deh* land. It is the same land in respect of which Muhammad Rafique had filed a suit, therefore, on the principal of res-judicata, the subsequent

suit filed by Fazal Begum, his mother-in-law, and Allah Rakhi, his mother is not maintainable. He relied upon the cases reported as *Barkat Ali & Another vs. Sultan Mehmood and 18 others* (2009 SCR 158) and Raja *Asmatullah Khan vs. Qudratullah and another* (2014 SCR 1537).

In the case reported as *Barkat Ali & Another vs. Sultan Mehmood and 18 others* (2009 SCR 158), this Court observed that from the pleading of the parties as well as the judgment recorded by the lower Courts it appears that the suit land is admittedly *shamlat Deh*, about which the civil Courts have limited jurisdiction and admittedly cannot grant permanent injunction against all the share-holders who possess the land in the estate as well.

In the case reported as *Asmatullah Khan vs. Qudratullah and another* (2014 SCR 1537), this Court observed that the decree of ownership regarding the *Shamilat Deh* land on the basis of the agreement of a private person on cognovits cannot be granted.

3. While controverting the arguments, Mr. Kamran Tariq, Advocate, the learned counsel for the respondents argued that the suit land as well as parties are different as compared to one in respect of which Muhammad Rafique had filed a suit. Therefore, there is no question of res-judicata. He submitted that the plaintiffs have raised important questions which can only be resolved after recording evidence. He defended the judgment of the High Court.

4. We have heard the learned counsel for the parties and perused the record. The mother of respondents No. 1, 2 and 3 filed a declaratory suit in respect of the land measuring 1 kanal 8 marla comprising survey No. 45, alleging therein that they are in possession of the land as owner. They also challenged the entries of new settlement record pertaining to the year 1991-92. They claimed that land is undivided *shamilat Deh* land of the village and after constructing the house over the said land, they are residing therein. In the new settlement pertaining to the

year 1991-92, the land has incorrectly been entered in the ownership of the Azad Government and possession of WAPDA being an acquired land. The perpetual injunction was also sought. The trial Court rejected the plaint. Under the provisions of Order VII rule 11,C.P.C., a plaint shall be rejected in the cases where; (a) it does not disclose a cause of action; (b) where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so; and (d) where the suit appears from the statement in the plaint to be barred by any law. It is the duty of the Court to examine the plaint whether it can be returned under rule 10 of Order VII, C.P.C., or it can be rejected under rule 11 of Order VII,

C.P.C. or it is maintainable. If from the contents of the plaint, the suit appears to be barred by any law or it is not in accordance with clauses (a), (b) and (c) of rule 11 of Order VII, C.P.C. then the plaint has to be rejected.

5. From the contents of the plaint it appears that the plaintiff-respondents have alleged that the land is *shamilat deh* land of village Saib and is an undivided land. They are in possession of survey No. 45, measuring 1 kanal 8 marla and are residing in the house constructed over it. They also challenged the entries of new settlement pertaining to the year 1991-92. Whether the land is an acquired land and in the ownership of the Azad Government and in possession of WAPDA; whether the respondents are owners in the village and are sharers in the said *shamilat deh* land, which is an undivided and still in ownership of proprietary body of the village; are such questions which require

determination by the Court after recording of evidence. While applying rule 11 of Order VII, C.P.C. for rejecting a plaint, only contents of the plaint have to be considered. It was observed in the case reported as *Muhammad Younis Arvi vs. Muhammad Aslam and 16 others* (2012 SCR 135) as under:

> "9. In our considered opinion the controversial point raised by the parties can only be resolved after framing of issues. Under the provisions of Civil Procedure Code, even the trial Court is equipped with the powers that after framing issues, the suit can be disposed of partly or in toto by deciding the purely legal issues, it can be done so but without framing issues or providing opportunity of hearing and leading evidence to the parties in the peculiar facts and circumstances of the case the rejection of the plaint is not justified. Thus the impugned judgment of the High

> Court doesn't suffer from any legal infirmity, hence the same is upheld. Consequently this appeal fails without any order as to costs."

6. We have also considered the arguments of the counsel for the appellant that previously, a suit was filed by Muhammad Rafique in respect of the same land, therefore, fresh suit by his mother is hit by principal of res-judicata. A perusal of the record reveals that Muhammad Rafique filed a suit in respect of land comprising survey No. 52 measuring 8 kanal 9 marla and not in respect of survey No. 45 measuring 1 kanal 8 marla. The plaintiffs were not party in the said suit. Rule of res-jidicata is attractive if the suit between the same parties and same subject matter has been decided by a Court of competent jurisdiction in the previous proceedings. The suit land and the parties are different, the rule of res-judicata is not attracted.

From what has been discussed above, finding no force in this appeal it is hereby dismissed with no order as to costs.

CHIEF JUSTICE JUDGE

Mirpur.
.12.2016.