

SUPREME COURT OF AZAD JAMMU & KASHMIR
[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.
Raja Saeed Akram Khan, J.

Civil Appeal No.175 of 2015
(PLA filed on 19.08.2015)

Mst. Nighat Sarwar d/o Ghulam Sarwar, r/o Choki Samahni,
District Bhimber.

.... APPELLANT

versus

1. Mst. Shabana Kausar d/o Ghulam Ahmed Raja, r/o
Bandala, Tehsil Samahni, District Bhimber.

..... RESPONDENT

2. Director Public Instructions Schools Secondary, Azad
Government of the State of Jammu & Kashmir,
Muzaffarabad.

3. Director Public Instructions Elementary, Azad Government
of the State of Jammu & Kashmir, Muzaffarabad.

4. Divisional Director Schools Mirpur Division, Mirpur,
(Female).

5. District Education Officer Secondary District Bhimber,
(Female).

6. District Education Officer Elementary District Bhimber
(Female).

7. Headmistress Government Girls High School Dal Bandala,
District Bhimber.

8. District Accounts officer District Bhimber.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court,
dated 26.6.2015 in writ petition No.335 of 2010]

FOR THE APPELLANT: Mr. Muhammad
Siddique Chaudhary,
advocate.

FOR OFFICIAL RESPONDENTS: Mr. Raza Ali Khan,
Advocate-General.

FOR RESPONDENT No.1: Raja Khalid Mehmood
Khan, advocate.

Date of hearing: 19.12.2016

JUDGMENT:

Mohammad Azam Khan, C.J.—Respondent No.1
filed a writ of prohibition in the High Court that the respondents
may be refrained from cancelling her appointment order dated
20th April 2005, through which she was appointed as the Primary
Teacheress (B-7), after qualifying the test and interview. She also
challenged the appointment order of the appellant, herein, issued
on 1st December 2007, on the ground of being against law, rules
and the policies of the Government. After necessary proceedings,
the writ petition was decided through the impugned judgment on
26th June 2015. The petitioner, therein, was declared as temporary
employee. It was also declared that no appointment order was
issued in favour of the appellant on 1st December 2007. The order
is a fabricated one and on the basis of the said order the judgment

of the High Court delivered in the case titled *Nighat Sarwar v/s Director Public Instructions Elementary & others* in writ petition No.560/2008, decided on 16th October 2009 has been recalled and it has been directed that the official respondents shall recover the emoluments of the post from the appellant, herein, and it has been ordered to register FIR against the appellant, herein, hence this appeal by leave of the Court.

2. Mr. Muhammad Siddique Chaudhary, advocate, counsel for the appellant, argued that the judgment of the High Court is against law and the record. The appellant was appointed as the O.T. Teacheress after the test and interview, on 1st December 2007. The official respondents were not implementing the order due to political reasons whereupon she filed writ petition No.560/2008 on 3rd September 2008, for a direction that her appointment order be acted upon. A learned single judge in the High Court through the judgment dated 16th April 2009, accepted the writ petition and issued direction to the respondents that they shall implement the appointment order. On the order of the Court, the appellant was adjusted in the Department. The learned counsel argued that the judgment delivered in writ petition No.560/2008 has attained finality. No appeal was filed from the said judgment, nor was it in dispute in the writ petition.

The High Court has no power to set aside the judgment without being challenged. The judgment can be set aside by the Supreme Court in appeal or by the High Court in the review petition under Rule 43 of the AJ&K High Court (Procedure) Rules, 1984. The learned counsel further argued that the respondent was not entitled for filing a writ petition. The learned counsel argued that the High Court cannot pass an order for recovering the emoluments paid to her. The learned counsel referred to and relied upon the cases reported as *Muhammad Younas Tahir v/s Shaukat Aziz, Advocate, Muzaffarabad & others* [2012 SCR 213], *Bashir Ahmed Mughal v/s Azad Government & others* [2014 SCR 1258] and *Dr. Ashiq Hussain Bhatti v/s Azad Govt. & 5 others* [2016 SCR 365]. The learned counsel further argued that the order of the High Court for registration of FIR against the appellant is bad in law. He requested for acceptance of appeal.

3. While controverting the arguments, Mr. Raza Ali Khan, the learned Advocate-General, submitted that no appointment order was issued in favour of the appellant. The High Court has made a detailed inquiry in the matter and after summoning the whole record, reached the conclusion that no appointment order in favour of the appellant was issued. She fabricated the same and while committing fraud upon the Court,

procured a judgment in writ petition No.560/2008. He further argued that the fraud vitiates the most solemn proceedings and the Court has got powers to recall its judgment, which has been obtained by practicing fraud with the Court. The learned Advocate-General submitted that during the hearing of the case, after summoning the record, the Court reached the conclusion that the judgment has been obtained in writ petition No.560/2008, by practicing fraud. Notice was issued to the appellant on 9th December 2012 that why the judgment delivered in the said case may not be recalled. The learned Advocate-General relied upon the cases reported as *The Chief Settlement Commissioner, Lahore v/s Raja Mohammad Fazil Khan & others* [PLD 1975 SC 331] and *Lawrancepur Woolen & Textile Mills Ltd. Dawoodabad, district Attock v/s Muhammad Farooq & 2 others* [1995 SCMR 782].

4. Raja Khalid Mehmood Khan, advocate, counsel for respondent No.1, argued that the appointment order of respondent No.1 was a valid order. She was appointed as the Primary Teacheress against the post of O.T. Teacher. Her appointment order was that of Primary Teacheress. She was an M.A. Her appointment was never challenged by the appellant. The learned counsel referred to and relied upon the case reported as *Ch.*

Muhammad Younas Arvi & 2 others v/s Sohail Bostan & 3 others
[2004 SCR 352].

5. We have heard the learned counsel for the parties and perused the record with utmost care.

6. Respondent No.1 in the writ petition filed on 5th April 2010 for protection of her appointment order issued on 20th April 2005, alleged that she was appointed as the Primary Teacheress after the test and interview in the Government Girls High School Bandala. Through order dated 25th April 2005, she was transferred to the Girls High School Darhal Gaggan and thereafter she was transferred to the Girls High School Dal Bandala. She alleged that the respondents want to cancel her appointment order due to the political reasons. She also alleged that respondent No.8, appellant herein, has prepared a fake and fabricated order on 1st December 2007 against the same post, which is being held by her. She requested for cancellation of appointment order of the respondent. In the written statement, respondent No.8, appellant herein, alleged that she was validly appointed on 1st December 2007 and the High Court has, in writ petition No.560/2008, accepted her order as valid one and issued direction to the official respondents for implementation of her appointment order. The High Court summoned the record, which

transpired that the Deputy Director Elementary and Secondary (Schools), Muzaffarabad, made an inquiry into the matter. The inquiry report was furnished on 25th August 2008 in respect of the appointments made in district Bhimber and that of respondent No.8, appellant herein. In the said report, it was laid down that the appointment order of respondent No.8, appellant, herein, dated 1st December 2007, has never been issued from the concerned office of the Education Department. The High Court reached the conclusion that respondent No.8, appellant herein, had forged and fabricated an appointment order on 1st December 2007 and on the basis of the said forged, fabricated and fraudulent order, has obtained the judgment from the High Court in writ petition No.560/2008 on 16th October 2009, whereupon the High Court issued notice to respondent No.8, appellant herein, that why the judgment may not be recalled. The writ petition was disposed off in the terms indicated above.

7. Rule 42 of the AJ&K High Court (Procedure) Rules, 1984, provides that the Civil Procedure Code shall be applicable in the writ petitions, as far as practicable. Under Order XX, Rule 43, CPC, when a judgment is signed by a Judge, it cannot be recalled or altered. Under Rule 43 of the AJ&K High Court (Procedure) Rules, 1984, a review petition is competent against

the judgment of the High Court. The question in this case is that when the High Court reached the conclusion that a judgment was procured by practicing fraud upon the Court, whether the Court has powers to recall the said judgment or not? Section 151, CPC, confers the inherent powers in the Court to pass an appropriate order to meet the ends of justice. Scope and extent of the inherent powers is very wide and when the ends of justice require the Court to act, it has vast powers to pass appropriate order. Every Court is vested with inherent powers to do real and substantial justice for administration of justice. These powers can be exercised to prevent the abuse of the process of the Court and when a Court comes to the conclusion that *prima facie* fraud has been committed with the Court by a party, then the Court is obliged to undo the fraud and remove injustice forthwith.

8. There can be two situations; one, where fraud is committed with a party and the other where fraud is committed upon the Court. If a judgment is procured while practicing fraud with a party, then such party has to challenge the same by way of a regular suit, but if fraud is committed with the Court, the Court has to act *suo motu* and undo the wrong.

9. The remedy by way of writ petition is an equitable remedy and a party, which comes to the Court, must come with

clean hands. The judgment obtained by a party by relying upon forged and fabricated document for procuring a favourable judgment, is a fraud upon the Court, such act is an ill-gotten gain and writ cannot be issued for retention of ill-gotten gains.

10. The question of exercising of the inherent powers, where the judgment has been procured by practicing fraud, came under consideration of the superior Courts of sub-continent in a number of cases. In the case reported as *Sadho Saran Rai v. Anant Rai* [AIR 1923 Patna 483], observed as under:-

“The question then arises whether the Court had power to set aside the compromise decree either in review or in the exercise of its inherent power. There is a long list of cases of the Calcutta High Court, of the Bombay High Court and of the Madras High Court in which it has been broadly laid down that a Court has inherent power to correct its own (sic) passing a particular order it was misled by one of the parties. It was urged before us on behalf of the defendants-appellants that the only remedy is by suit and that once the decree has been signed there is no jurisdiction in the Court to set it aside on the ground of fraud. A distinction has been drawn in the cases of the Indian Courts between a fraud practiced upon a party and a fraud practiced upon the Court. It has been laid down that where the question is whether there was a consent in fact, there is power in the Court to investigate the matter in a properly constituted application and to set aside the decree if it is satisfied that a party never in fact consented to it but that the Court was induced to pass the decree on the fraudulent representation made to it that the party had consented to it, but that where there is a

consent in fact, that is to say, where the parties have filed a compromise petition and they admit that they have filed it, but one of the parties alleges that his consent was procured by fraud, the Court cannot investigate the matter either in review or in the exercise of its inherent power, and that the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. In other words, the factum of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated.”

In the case reported as *Shiv Sagar Singh v. Sitaram*

Kumhar and Ors. [AIR 1952 Patna 48], it was observed as under:

“If fraud has been committed upon the party and as a result of that fraud the Court has been misled into passing certain orders which otherwise it would not have passed then it is a fraud upon the Court itself. In such a case, under its inherent powers, the Court is not only entitled to, but it must, set aside any order or orders which may have been passed by it upon a false representation. In that view of the matter, I must hold that the Court below had ample jurisdiction to set aside its order under Section 151 of the Code; and this position in law is settled beyond dispute as will appear from the cases of this Court in *Sadho Saran Rai v. Anant Raj*, 2 Pat. 731 and *Chatur Prasad v. Mt. Bishuni Kuer*, AIR 1943 Pat. 13.”

In the case reported as *Grindlay's Bank Limited v/s*

Murree Brewery Company Limited, and another [PLD 1954

Lahore 745], it was observed as under:-

“...The application came up for hearing before the Division Bench which had passed the order for the meeting on 15th February 1954 but

Rehman, J., on the ground that Saeed Sehgal was distantly related to him, expressed his disinclination to sit on that bench. Since the application was primarily one for review, it was heard by Kaikaus, J. alone. The learned Judge wrote a lengthy judgment stating the relevant facts in detail and held that the order for the calling of the meeting was obtained by the Bhandra family by fraud and was thus void and of no effect. It is against that order that L.P.A. No.24 of 1995 has been presented.”

(Underlining is ours)

It was further observed in the said judgment as

under:-

“The only question that has caused us some anxiety is whether the learned judge sitting singly had the jurisdiction to recall the order of 15th February. That order had been made by a Division Bench of which the learned Judge was only one member. He heard Saeed Sehgal’s application because it purported to be one for review, which he alone could hear. He has, however, held that the application for review was barred by time. Further, the fraud which the learned Judge has found established against Bhandra was not alleged in the application by Saeed Sehgal though it came to the notice of the learned judge in the inquiry started on that application. The question we have to answer, therefore, is whether, Saeed Sehgal’s application not having alleged the fraud which has been found by the learned judge, and an application for review having been dismissed, the learned Judge sitting singly had the jurisdiction under section 151 of the Code of Civil Procedure to vacate an order passed by a division bench of which he was only one of the members. In law a judgment or order, however high or independent the Tribunal delivering or

making it and however exclusive its jurisdiction, is a nullity if it be proved that it was obtained by fraud. This fraud may be proved not only in the proceedings in which it was committed but also in a suit to set aside that judgment or order, the only limitation on the Court's power to avoid such jurisdiction being that the fraud should have been set up under section 40, 41, 42 or 43 of the Evidence Act by the party relying on it. In appropriate cases it is the duty of the Court that has seisin of the case to recall *suo motu* an order procured by fraud. In the present case, even if Saeed Sehgal's application for review failed either because it was barred by time or because as an application under section 151 it did not allege the fraud found, the learned Judge had arrived at the result that the Court of which he was a member had been deceived and that neither he nor the other learned Judge who sat with him would have made the order that he actually did on 15th February 1954, if deception had not been practiced upon them. This fraud was discovered in the proceedings taken on the application of Saeed Sehgal and if it had come to the knowledge of both the judges, they would certainly have been competent to recall the order of 15th May. Cannot then one of them sitting singly pronounce the order to be a nullity? Since fraud vitiates all proceedings, and a lower Court in a suit properly constituted is certainly competent to set aside a judgment of a higher Tribunal if it be proved that such judgment was obtained by fraud, it must *fortiori* follow that a judge of this Court sitting singly has jurisdiction to pass such order provided the issue whether the judgment was obtained by fraud properly comes up before him....”

In the case reported as *Ganesh Chandra Basu v/s*

Bashu Lasker & others [PLD 1958 Dacca 295], it was observed

as under:-

“In the case of *Peary Choudhury v. Sanoo Dass*, their lordships, Chatterjea and Greaves, JJ., observed at page 422 of the report as follows:

“We are of opinion, however, that under the circumstances found by the learned District Judge the Court had an inherent jurisdiction to set aside the decree. Not only has the Court power, but it is its duty to set aside a decree obtained by fraud practiced upon the Court, when apprised of it. We agree with the following observations made in a case in the Bombay High Court, in which a decree by consent was set aside in a summary manner upon an application by the defendant:

‘What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil P.C., to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled.’

In that case also, the finding of the learned subordinate Judge was that there was no consent given by the opposite party to the decree as in the present case and the opposite party did not appear in the appeal at all. Their Lordships in that case further explained, at page 421 of the report, the earlier case on the

point, namely, the case of the *Gulab Koer* (1) as follows:--

“It is therefore not a case where a party gives his consent and afterwards seeks to impeach it on the ground that his consent was obtained by fraud. In *Gulab Koer’s* case, the learned Judge, in distinguishing the case of *Annada Debi v. Stevenson* (2) where the Judicial Committee of the Privy Council held that it was competent to the Court to set aside on review a decree against an infant who was not represented before the Court, and on whose behalf there was no assent to the compromise by any competent person, observed : ‘This case is manifestly distinguishable on the ground that it was in essence an application by a person to vacate a decree which was made in her absence and without her consent. She asked to be relieved from the effects of a decree to which in substance she was not a party—a condition of things entirely different from what we find in the class of cases where a person who is a party to a suit assents to a consent decree which he subsequently seeks to impeach on the ground that his assent was obtained by fraud.’”

In the case of *Akina Bibi and others v. Muhammad Ali Shah and others*. Henderson, J., also held:--

“Where it is alleged that fraud was practiced on the Court and fraud in the form that the party complaining was shown to be one of the plaintiffs in a previous suit and to have agreed to a consent decree, whereas he was completely ignorant of the suit, the Court has, according to the preponderance of authority in the Calcutta High Court, inherent power to proceed under section

151, Civil P.C.”

In that case Henderson, J., also referred to the case of *Peary Chowdhury v. Sanoo Das* and quoted the following observation from that case:--

“Not only has the Court power but it is its duty to set aside a decree obtained by fraud practiced upon the Court, when apprised of it.”

In the case reported as *Rashida Begum & another v/s Ghulam Farid Shah and another* [PLD 1973 Lahore 637], it was observed by the Lahore High Court as under:-

“To me it appears that the respondents have deliberately concealed the order of allotment passed in the consolidation proceedings so as to be able to resist delivery of possession of the property in execution. If they had brought this fact to the notice of the Court I entertain no doubt that the Court would not have passed a decree for possession of the property which was originally purchased by the respondents from Akbar Ali and would have asked the petitioner to take steps to amend the plaint so that a proper and legal decree could be passed. If decree or order has been secured by practicing fraud on the Court the Court has inherent power to set aside the order passed on such fraud.”

In the case reported as *The Chief Settlement Commissioner, Lahore v/s Raja Mohammad Fazil Khan & others* [PLD 1975 SC 331], it was observed as under:-

“It seems to us that while there are cases in which the power of Court or Tribunal of

special or limited jurisdiction to *suo motu* recall or review an order obtained from it by fraud has been doubted, yet the preponderance of judicial authority is in favour of conceding such a power to every authority, tribunal or Court on the general principle that fraud vitiates the most solemn proceedings, and no party should be allowed to take advantage of his fraud. There can be no rational basis for discriminating between the powers available in this behalf to a Court of general jurisdiction and a Court or tribunal of special or limited jurisdiction, for in either case the effect of fraud is the same, and the duty to undo the effect must lie on the authority on which fraud is practiced. We are, therefore, of the view that even a tribunal of limited or special jurisdiction has the power to *suo motu* re-call or review an order obtained from it by fraud.”

In the case reported as *Budhia Swain v. Gopinath*

Deb [AIR 1999 SC 2089] it was observed in para 6 of the judgment as under:-

“6. What is a power to recall? Inherent power to recall its own order vesting in Tribunals or Courts was noticed in *Indian Bank v. M/s. Satyam Fibers India Pvt. Ltd.* (1996) 5 SCC 550: (1996 AIR SCW 3228: AIR 1996 SC 2592). Vide para 23, this Court has held that the Courts have inherent powers to recall and set aside an order (i) obtained by fraud practiced upon the Court, (ii) when the Court itself commits a mistake which prejudices a party. In *A. R. Antulaya v. R.S. Nayak*, AIR 1988 SC 1531 (vide para 130), this Court has noticed motions to set aside judgments being permitted where (i) a judgment was rendered in ignorance of the fact that a necessary party has not been served at all and was shown as served or in ignorance of the fact that a necessary party has died and the estate was not

represented, (ii) a judgment was obtained by fraud, (iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision *ex debito justitiae* on proof of the fact that there was no service.”

Thus, it is concluded that when an order/judgment is procured by practicing fraud upon the Court, the Court under inherent powers vested in it, is empowered to recall the said judgment.

11. It was forcefully argued by the counsel for the appellant that the appellant was legally appointed as the Primary Teacheress; the emoluments received by her cannot be ordered to be recovered. His reliance is upon three judgments of this Court. In the case reported as *Muhammad Younas Tahir v/s Shaukat Aziz, Advocate, Muzaffarabad & others* [2012 SCR 213], the President appointed judges in the High Court on the advice of the Council. The appointment was challenged and the appointment notifications were set aside on the ground that the advice has been issued without consultation with the two Chief Justices. While applying the *de facto* doctrine, the acts done by the learned judges and emoluments received by them were protected.

In the case reported as *Bashir Ahmed Mughal v/s Azad Government & others* [2014 SCR 1258], the judges in the

Shariat Court were appointed by the President. The appointments were challenged and the appointment orders were set aside due to flaws in the Shariat Court Act. While relying upon the judgment delivered in Younas Tahir's case (*supra*), all the acts done by the judges of the Shariat Court were declared valid including the drawing of the financial benefits.

In the case reported as *Dr. Ashiq Hussain Bhatti v/s Azad Govt. & 5 others* [2016 SCR 365], a civil servant was proceeded under the AJ&K Removal from Service (Special Powers) Act, 2001, and it was ordered that expenditures of the Government incurred on his training be recovered from him, as he has filed a bond to this effect. The order was passed that the amount of bond be recovered under the provisions of the Land Revenue Act. This Court observed that under the AJ&K Removal from Service (Special Powers) Act, 2001, there is no procedure for ordering recovery of bond amount. The case is not helpful to the case of the appellant.

The High Court reached the conclusion that the appointment order of the appellant dated 1st December 2007 was not issued by the competent authority. It is a fabricated order and is based on fraud. The emoluments have been received by the appellant on the basis of forged and fabricated order, therefore,

the judgment of the High Court to this effect is unexceptionable.

12. It was forcefully argued by the counsel for the appellant that the order for registration of FIR against the appellant cannot be issued. The High Court has made an inquiry into the facts and it has come on the record that an inquiry was conducted by the departmental authorities. In the inquiry report the appellant stated that the appointment order was handed over to her by one Capt. (R) Muhammad Yaqoob. It is not yet proved that the appellant herself prepared/fabricated the appointment order. The matter needs further inquiry and the impugned order to this extent needs amendment. The department shall make an inquiry into the matter as to who prepared/fabricated the appointment order and thereafter the FIR shall be registered against such person, who is found involved in the preparation/fabrication of the appointment order.

The appeal is disposed of in the terms indicated above, with no order as to the costs.

CHIEF JUSTICE

JUDGE

Mirpur
09.01.2017