

**SUPREME COURT OF AZAD JAMMU & KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Ch. Muhammad Ibrahim Zia, C.J.  
Raja Saeed Akram Khan, J.  
Ghulam Mustafa Mughal, J.

Civil Appeal No.199 of 2016  
(PLA filed on 24.3.2016)

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary, Muzaffarabad.
2. Inspector General of Police, Muzaffarabad.
3. Collector Land Acquisition, District Kotli.

.... APPELLANTS

*v e r s u s*

1. Abdul Hameed,
2. Javed Iqbal,
3. Maroof (sons),
4. Saleem Akhtar (daughter) of late Noora s/o Kala,
5. Shah Begum (widow),
6. Mushtaq Ahmed,
7. Abdul Qayyum,
8. Mahmood Ahmed (sons),
9. Kabir Begum,
10. Munir Begum,
11. Tasweer Begum,
12. Tanveer Begum (daughters) of late Muhammad Ashraf s/o Khan r/o Mandi Tehsil & District Kotli.
13. Additional District Judge Kotli.

..... RESPONDENTS

14. Superintending Engineer PWD, Azad Jammu & Kashmir, Muzaffarabad.
15. Secretary Works, Azad Government, Muzaffarabad.
16. Inspector General Prison's Muzaffarabad.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court,  
dated 23.1.2016 in Civil Appeal No.115 of 2013]

FOR THE APPELLANTS: Mr. Akhlaque Hussain Kiani,  
Additional Advocate-General.

FOR THE RESPONDENTS: Ex-parte.

*Date of hearing:* 11.4.2017

**JUDGMENT:**

**Ghulam Mustafa Mughal, J.**—This appeal is directed with leave of the Court against the judgment passed by the High Court in Civil Appeal No.115/2013, on 23.1.2016, whereby appeal filed by the appellants, herein, has been dismissed.

2. The necessary facts to be noticed for the purpose of the decision of the captioned appeal are that the land comprising survey No.1223-min, measuring 20 kanal, 11 marla and survey No.1224, measuring 29 kanal, 12 marla, total measuring 50 kanal, 3 marla, situate in village Mandi, Tehsil & District Kotli, stood acquired for the construction of district Jail Kotli through award on 25.11.1987. The Collector Land Acquisition determined the compensation of the acquired land to the tune of Rs.3,96,040/-. As per award, the predecessor-in-interest of the private respondents was declared

entitled to the compensation amounting to Rs.4,06,055/-. The compensation amount was not paid to the land-owners, on which they filed a complaint before the Ombudsman of Azad Jammu & Kashmir, which, after necessary proceedings, was accepted and the appellants, herein, were directed to pay the compensation to the land-owners along with 15% annual rent vide order dated 10.7.1994. It reveals that the compensation was not paid to the predecessor-in-interest of the private respondents, as it was directed by the Ombudsman. After a considerable time, the appellants, herein, paid a sum of Rs.2,32,615/- to the predecessor-in-interest of private respondents on 9.7.2002. As the whole amount determined by the Collector Land Acquisition and ordered to be paid by the Ombudsman was not paid within the prescribed period, hence the private respondents, herein, filed a suit for recovery of outstanding amount along with 15% profit for the period mentioned in the impugned order. The suit was contested by the respondents by filing written statement on 2.9.2003. The appellants, herein, were proceeded ex-parte vide order dated 20.4.2005. After recording the ex-parte evidence and hearing the plaintiffs, vide judgment and decree dated 31.5.2005, the suit was decreed. The defendants, herein, moved an application for setting aside the ex-parte judgment and decree

but the same was dismissed for want of prosecution vide order dated 12.5.2012. The predecessor-in-interest of the respondents, herein, filed an application for execution of the decree dated 31.5.2005 before the Additional District Judge Kotli on 14.11.2012. A notice was issued to the respondents for filing objections and after hearing the parties, the learned Additional District Judge vide order dated 21.3.2013, directed the respondents to pay the decretal amount along with 15% profit within a period of two months. The judgment and order dated 21.3.2013 was challenged before the High Court through an appeal on 18.6.2013. After hearing the parties, the learned High Court has dismissed the appeal.

3. Mr. Akhlaque Hussain Kiani, Additional Advocate-General, appearing on behalf of the appellants, vehemently contended that under the provisions of Land Acquisition Act, 1894, only 6% of the interest can be awarded by the Reference Judge or a Court and the award of 15% profit by the District Judge was nullity in the eye of law. The learned Additional Advocate-General argued that the judgment of the District Judge as well as the executing Court is contrary to the law, therefore, the same is liable to be ignored and the judgment passed by the District Judge as well as the executing Court may be recalled under the inherent powers available to

this Court under section 42-A of the Azad Jammu & Kashmir Interim Constitution Act, 1974, read with Order XLIII, Rule 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978. The learned Additional Advocate-General was confronted as to how a judgment and decree, which has attained finality, can be set aside or can be recalled while exercising inherent powers, he submitted that if a judgment is contrary to the law or has been handed down by ignoring some mandatory provisions of law, then the powers available to this Court under section 42-A of the Azad Jammu & Kashmir Interim Constitution Act, 1974, read with Order XLIII, Rule 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978, can be exercised sparingly. In support of his submissions, the learned Additional Advocate-General has placed reliance on the following cases:-

- i) *AJ&K University v/s Mir Alam & 43 others* [2002 SCR 292],
- ii) *Raja Muhammad Akram Khan v/s Azad Govt. & others* [2005 SCR 425] &
- iii) *Municipal Committee, Chakwal v/s Ch. Fateh Khan & others* [2006 SCMR 688].

4. We have heard the learned counsel for the appellants and perused the record.

5. It may be stated that the land of the respondents, herein, was acquired through award announced on 25.11.1987.

The compensation of the same was not paid to them, as was determined by the Collector Land Acquisition. They filed a complaint before the Ombudsman of Azad Jammu & Kashmir, who, after necessary investigation, vide order dated 10.7.1994, directed the Government to pay the compensation along with 15% annual rent to the private respondents. The order of the Ombudsman was not implemented. Subsequently the private respondents, herein, filed a suit for compensation along with 15% profit before the District Judge. The suit was contested by the respondents but they absented themselves from the Court, hence, were proceeded ex-parte and after recording the ex-parte evidence, the learned Additional District Judge Sehensa, vide judgment and decree dated 31.5.2005, decreed the suit. The private respondents, herein, moved an application for execution of the judgment and decree on 14.11.2012. Meanwhile the appellants, herein, moved an application for setting aside the ex-parte judgment and decree, which was dismissed for want of prosecution through order dated 12.5.2012. The execution application was restored on 15.11.2012 and through the judgment passed by the Additional District Judge, it has been ordered to execute the decree within stipulated period. It may be observed that the judgment and decree dated 31.5.2005 has attained finality for

having not been challenged at any higher forum, however, it appears that the award of 15% profit is contrary to the law. Under the Land Acquisition Act, only 6% interest can be awarded by the Court under Section 28 of the Land Acquisition Act, which reads as under:-

**“28. Collector may be directed to pay interest on excess compensation.—**If the sum which, in the opinion of the court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into court.”

Thus, keeping in view the above-reproduced provision of law, the interest at the rate of six per centum only could be granted by the Collector from the date on which he took possession of the suit land to the date of payment of sum so enhanced.

6. The contention of the learned Additional Advocate-General that under the inherent powers, a judgment which is nullity in the eye of law or has been passed in violation of some mandatory provisions of law, can be recalled, has a substance. It is well-settled proposition of law that a judgment, decree or order of the court, which is a nullity

in the eye of law, can be ignored whenever and wherever it is pressed into service. It has rightly been argued on behalf of the appellants that this Court has got inherent powers under section 42-A of the Azad Jammu & Kashmir Interim Constitution Act, 1974, read with Order XLIII, Rule 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978, and a direction under the abovementioned provisions of the Constitution and the rules can be given in a proper case. This Court under the above-referred provisions of the constitution and the rules, can recall an order or rehear a case or can treat a judgment as nullity. This view has been approved by this Court in the case reported as *AJ&K University v/s Mir Alam & 43 others* [2002 SCR 292], wherein it was observed that inherent powers can be invoked only when no other remedy is available to the litigants and such a situation arises that a Court of law cannot resort to any other provision of law except under the inherent powers. Identical view was taken in the case reported as *Inspector General Prisons & 3 others v/s Ghulam Muhammad Lolabi & 2 others* [2000 SCR 424]. The relevant observation has been recorded at page 31 of the report, as under:-

“...It is enigmatic that no appeal was filed by the Custodian, despite the fact that the judgment of the High Court runs counter to



paragraph 3 of the Evacuee Property Allottees (Compensation) Order, 1967, according to which  $\frac{2}{3}$ <sup>rd</sup> compensation is to be paid to the allottee while  $\frac{1}{3}$ <sup>rd</sup> would go to the Custodian. However, the judgments of the Reference Judge and the High Court being in patent violation of the aforesaid order, we amend the same in exercise of powers vested in this Court under section 42-A of the Azad Jammu & Kashmir Interim Constitution Act, 1974 read with rule 4 of Order XLIII of the Azad Jammu & Kashmir Supreme Court Rules, 1978 and direct that Ghulam Muhammad Lolabi, appellant, shall be entitled to receive  $\frac{2}{3}$ <sup>rd</sup> of the compensations amount while  $\frac{1}{3}$ <sup>rd</sup> shall go to the Custodian, who would also be entitled to get 15% solatium and 6% interest on his proportionate share.”

We have considered the case in hand on the touchstone of the above judgments and the case-law and we are of the view that though the appellants have not filed any appeal against the judgment and decree passed by the learned Additional District Judge Kotli on 21.3.2013 and even the application for restoration was also dismissed in default. It appears that they have not diligently prosecuted their case and in such like cases the inherent powers cannot be exercised in favour of a party, who slept over his right and has not prosecuted its case with due diligence and care but the fact remains that the judgment of the Additional District Judge as well as the order under challenge has been passed in utter disregard of the law, therefore, we are constrained to issue a

direction under section 42-A of the Azad Jammu & Kashmir Interim Constitution Act, 1974 read with Order XLIII, Rule 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978 in the terms that award of 15% profit in a suit for compensation is illegal and against the law, because at the time of filing suit and decree, under the provisions of Section 28 of the Land Acquisition Act, the interest at the rate of 6% per annum could be allowed. Although subsequently through Act No.V of 2007, dated 9.5.2007, the interest at the prevalent bank rate can be allowed. However, in this case the suit was filed and decreed before enforcement of Section 28-B through Act V of 2007, hence decree can only be granted at the rate of 6% per annum in view of the clear statutory provision mentioned herein above. The judgment and decree passed by the District Judge on 31.5.2005 as well as the order passed in the executing proceedings on 21.3.2013 stands modified in the terms indicated above.

**JUDGE**

**CHIEF JUSTICE**

**JUDGE**

Mirpur

Date of announcement: 02.05.2017