

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Ch. Muhammad Ibrahim Zia, C.J.

Raja Saeed Akram Khan, J.

Civil Appeal No. 151 of 2014

(Filed on 30.05.2014)

1. Khawaja Muhammad Akhlaq,
2. Khawaja Muhammad Altaf, sons,
3. Mst. Anwar Jan, caste Khawaja Dar r/o Choore,  
Tehsil Dheerkot, District Bagh.

..... APPELLANTS

VERSUS

1. Mst. Naseeba Jan w/o Muhammad Ishaq,
2. Khawaja Muhammad Ishaq,
3. Mst. Razia Begum,
4. Mst. Tasleem Akhtar daughters of Khawaja  
Sher Ahmed Khan, Caste Khawaja r/o Choore,  
Tehsil Dheerkot, District Bagh.
5. Tehsildar Dheerkot, District Bagh.
6. Baib Tehsildar Dheerkot, District Bagh.
7. Patwari Constituency Choore, Tehsil Dheerkot,  
District Bagh.

.... RESPONDENTS

(On appeal from the judgment of the High Court  
dated 31.03.2014 in Civil Appeal No. 153 of 2010)

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FOR THE APPELLANTS: Miss Kokab Al Sabah  
Roohi, Advocate.

FOR THE RESPONDENTS: Mr. M. Yaqoob Khan  
Mughal, Advocate.

Date of hearing: 22.03.2017.

**JUDGMENT:**

**Ch. Muhammad Ibrahim Zia, C.J.**— The titled appeal has been filed against the judgment of the High Court dated 31.03.2014, whereby the appeal filed by the appellants, herein, has been dismissed.

2. The facts forming the background of this appeal are that respondent No.1, herein, brought a suit for declaration pertaining to the land situate at village Choore, Tehsil Dheerkot, in the Court of Civil Judge Dheerkot on 22.02.2008. It was alleged that the plaintiff is wife of defendant No.1, therein. The marriage was solemnized on 16.05.1966. The father of the defendants gifted her 1/4<sup>th</sup> share of his property in lieu of dower as mentioned in Nikah Nama. An agreement to this effect was also executed by the father of defendants in her favour on 16.05.1966. It was further stated that the father

of the defendants has died now and the defendants want to deprive her of the suit property. After necessary proceedings, the learned trial Court dismissed the suit vide judgment and decree dated 24.02.2010, for want of cause of action and being time barred. The appeal filed before the Additional District Judge, Dhirkot, stood accepted and a decree to the extent of 1/4<sup>th</sup> share in the light of the agreement dated 16.05.1966 read with Nikah Nama, was granted in favour of the plaintiff vide judgment and decree dated 30.06.2010. The second appeal filed before the High Court has been dismissed through the impugned judgment, however, the judgment and decree of first appellate Court has been amended to the extent that survey No.1268 measuring 7 *marla* will be read, written and treated as survey No.1268 measuring seven (7) *kanal*. Hence, this appeal.

3. Both the parties have filed written arguments. First of all it is felt advised to attend the preliminary objection raised by the respondents regarding competency of appeal, which goes to the

roots of the case. The respondents have raised the objection that the learned High Court through the impugned judgment has neither varied nor modified or altered the judgment and decree of the first appellate Court, thus, direct appeal is not competent. It is also argued that even otherwise, according to the nature of the suit the value of the suit is less than Rs.50,000/- therefore, direct appeal is not competent, whereas, the appellants have filed the direct appeal. According to the principle of law laid down by this Court in a number of cases, on this sole ground this appeal is not maintainable.

4. The appellants in their written arguments have met this objection as follows:-

"9. That the section 42-A (i) deed under rules PLA is competent before this Hon'ble Court, but at the same time under section 42-A of Interim Constitution Act, 1974 this Court has a power to do complete justice between the parties invoke the jurisdiction. The humble appellants prayed for invoking the jurisdiction above mentioned law to meet this eventuality. May not be penalized from the fruit of justice by this Hon'ble Court on the basis of technicalities. Facts of the case are before this Hon'ble Court. In the memo of

appeal thus, the case may be decided on merits.”

5. For resolution of this vital proposition, we have minutely examined the record. The perusal of the plaint reveals that the declaratory suit has been filed for cancellation of mutation No.552 on the ground that the suit property is in the ownership of the plaintiff-respondent as her dower. In the plaint the property has not been valued rather for the purpose of pecuniary jurisdiction, the value of the suit is mentioned as less than Rs.50,000/-. Leaving aside this aspect, through the impugned judgment the judgment of the first appellate Court has been upheld, neither it has been modified nor varied. The appeal has been dismissed while upholding the judgment of the Court immediately below. The hereinabove reproduced written arguments of the appellants are indicative of the fact that the appellants while conceding on the point that the appeal was not competent rather petition for leave to appeal has to be filed, prayed for exercising inherent powers and deciding the appeal on merits. The impugned judgment of the High Court has been passed on 31.03.2014. Under Rules for filing petition for leave to appeal before this Court, the limitation prescribed is 60

days. The appellants have not filed any application for conversion of appeal into petition for leave to appeal within the limitation. It is clear that the appellants have incompetently filed direct appeal, whereas, according to the nature of the impugned judgment the petition for leave to appeal has to be filed. In this regard, this Court has already enunciated the principle of law in various judgments and one of those is the case reported as *WAPDA & others vs. Taj Begum & others* [2014 SCR 588], wherein, it has been held as follows:-

“9. Now we will advert to the jurisdiction vested in this Court. Section 42 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 confers jurisdiction upon the Supreme Court of Azad Jammu & Kashmir. Subsection (2) of Section 42 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, postulates that the Supreme Court shall have such jurisdiction as is or may be conferred on it by this Act or by or under any law subject to the provisions of this Act. Subsection (2) is reproduced as under:-

‘42. Supreme Court of Azad Jammu and Kashmir.- (1) .....

(2) Subject to the provisions of this Act, the Supreme Court of Azad Jammu and Kashmir shall have such jurisdiction as is or may be conferred on it by this Act or by or under any law.

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

- (8) .....
- (9) .....
- (10) .....
- (11) .....
- (12) .....
- (13) .....
- (14) .....
- (15) .....

What appears from the plain reading of subsection (2) of Section 42 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 is that the Supreme Court has jurisdiction conferred upon it by or under any other law. Under Section 42(10) of the AJ&K Interim Constitution Act, 1974, subject to the succeeding provisions of this Section, the Supreme Court of Azad Jammu & Kashmir shall have jurisdiction to hear and determine appeals from the judgment, decree, final orders or sentence recorded by the High Court of Azad Jammu & Kashmir and subsection (11) of Section 42 of the Act provides the cases where direct appeal lies to the Supreme Court and sub-section (12) of section 42 provides that the appeal shall lie to the Supreme Court in the cases to which subsection (11) doesn't apply if the Court grants leave to appeal. Sub-Sections (11) and (12) of Section 42 of the Azad Jammu & Kashmir Interim Constitution Act, 1974 are reproduced hereunder:-

'(11) An appeal shall lie to the Supreme Court of Azad Jammu and Kashmir from any judgment, decree, final order or sentence of the High Court of Azad Jammu and Kashmir.-

- (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced to death or to imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or
- (b) if the High Court has withdrawn for trial before itself any case from

any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or

- (c) if the High Court has imposed any punishment on any person for contempt of the High Court ; or
- (d) if the amount or value of the subject-matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of the Council and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or
- (e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below;
- (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act.

(12) An appeal to the Supreme Court of Azad Jammu and Kashmir from a judgment, decree, order or sentence of the High Court in a case to which subsection (11) doesn't apply shall lie only if the Supreme Court of Azad Jammu and Kashmir grants leave to appeal.'

The proposition in hand relates to Section 42(11)(d) and (e) of the Act, which provides that the appeal shall lie to the Supreme Court of Azad Jammu & Kashmir from any judgment, decree or final order of the High



Court of Azad Jammu & Kashmir if the amount or value of the subject matter of the dispute in the Court of first instance was and also in dispute in appeal is not less than fifty thousand rupees or such other sum, as may be specified in that behalf by the Act of the Council and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below. The proposition came under consideration of this Court in a case reported as *Muhammad Sharif & 7 others vs. Azad Government & others* [1997 SCR 351], wherein it was observed that under Section 42(11)(d) direct appeal is competent only if value of the subject matter in the Court of first instance was and in appeal is not less than fifty thousand rupees and the High Court has altered the judgment. The proposition again came under consideration of this Court in the case reported as *Chief Administrator Auqaf vs. Sain Ghulam Ahmed Nisar & 38 others* [PL] 2012 SC (AJ&K) 1], wherein it has been held as under:-

'15. It, therefore, follows that under clause (d) and (e) of sub-section (11) of Section 42 of the Interim Constitution Act, 1974 a direct appeal lies to the Supreme Court if the amount or value of the subject matter in the first Court as well as in appeal before the Supreme Court is not less than fifty thousand rupees or any increased sum specified by the Act and the judgment, decree or final order placed before the Court is varied or set aside by the High Court.

OR

If the judgment, decree or final order by the High Court involves directly or indirectly claim or question respecting property of fifty thousand rupees, amount or value and the High Court has varied or set aside the judgment, decree or final order of the Court immediately below.'

The provision i.e. Section 42(11)(d) of the Azad Jammu & Kashmir Interim Constitution Act, 1974 is unambiguous. When the value of the subject matter in the Court of first instance and in the appeal is not less than fifty thousand rupees and the High Court has altered or varied the judgment or decree of the Court immediately below, then a direct appeal lies in this Court.”

It is now almost settled that if an appeal or petition for leave to appeal has been filed incompetently and parties fail to approach the Court during prescribed limitation for conversion of the same into appeal or petition for leave to appeal, as the case may be, thereafter the appeal or petition for leave to appeal which has been incompetently filed, cannot be maintained and liable to be dismissed. On this proposition there are number of cases the latest one of which is the case reported as *Chief Administrator Auqaf vs. Sain Ghulam Ahmed & others* [2013 SCR 715], wherein it has been held that:

“We have heard the learned counsel for the parties and perused the record. The record reveals that the direct appeal against the judgment of the High Court dated 28<sup>th</sup> March, 2008 was filed on 23<sup>rd</sup> May, 2008 within the prescribed period of limitation. During the course of arguments on 24<sup>th</sup> March, 2011, a preliminary objection was raised from the

opposite side and we formulated a point to the effect whether the direct appeal under section 42(11)(d)(e) of the AJ&K Interim Constitution Act, 1974 is competent or not when the value of the subject matter in the lower Court and the appellate Court is not below Rs.50,000/- and the High Court has not altered, varied or set aside the judgment of the Court immediate below. A full bench of this Court reached the following conclusion:--

'We, therefore, hold that the intention of the legislature is clear on the point that if the High Court does not vary, alter or set aside the judgment of the Courts below, a direct appeal to the Supreme Court is not competent, although the amount or value of the subject-matter is more than fifty thousand rupees.'

The judgment on the aforesaid point was delivered on 29<sup>th</sup> April, 2011 in presence of learned counsel for the appellant. The appellant has moved an application for converting the appeal into P.L.A. on 29<sup>th</sup> August, 2011 after a period of four months, while limitation for filing P.L.A. in this Court is sixty days from the order/judgment of the High Court. If for the sake of arguments we consider the argument that the appellant was misled by the above referred judgment of this Court, then too it was enjoined upon him to file application for treating the appeal as P.L.A. soon after the announcement of judgment on 29<sup>th</sup> April, 2011 or within the period of sixty days. The learned counsel for the appellant could not furnish any explanation of filing application after four months of the announcement of the judgment. The appellant is negligent, therefore, not entitled for condonation of delay. Even otherwise the appellant has not moved any application for condonation of delay. If we treat the period of limitation from the date of announcement of judgment by this Court, even then the application has been filed more than two months beyond the

period of limitation. The application is therefore dismissed.”

In the light of hereinabove position the objection raised by the respondents prevails. As according to the nature of the impugned judgment the appeal filed by the appellants is not competent, therefore, there is no need to discuss the merits of the case.

This appeal stands dismissed being incompetently filed. No order as to costs.

Muzaffarabad,  
\_.04.2017

CHIEF JUSTICE

JUDGE  
(J-I)

Date of announcement: 03.05.2017