

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.

Raja Saeed Akram Khan, J.

Civil Appeal No.12 of 2017

(PLA filed on 02.09.2016)

1. Muhammad Ajmal,
2. Sheikh Khurshid Anwar,
3. Shafique Anwar,
4. Toufeez Anwar,
5. Attiq-ur-Rehman,
6. Hafiz Amjad Islam,
7. Tayyab Irfan,
8. Sheikh Khalid Jamil,
9. Mohsin Zia, sons,
10. Mst. Riffat Begum,
11. Mst. Ulfat Begum,
12. Mst. Azmat Bibi, and
13. Mst. Raffia Sheikh, daughters of Nehmat-Ullah s/o Ameerullah, residents of village Pruk, Tehsil Pattika (Naseerabad), District Muzaffarabad.

.....APPELLANTS

VERSUS

1. Azeem Akhtar, son,
2. Mst. Saleema Begum, widow,
3. Muhammad Saeed,
4. Muhammad Rafique,
5. Muhammad Bashir, sons,
6. Mst. Robina,
7. Mst. Waseem-un-Nisa, daughters,
8. Mst. Karim-un-Nisa, widow of Azeem-Ullah,
9. Muhammad Naeem,
10. Nazar Hussain,
11. Tassadaq Hussain,
12. Dilpazir Hussain,
13. Muhammad Hussain, sons of Mst. Safia Begum (deceased daughter of Azeem-Ullah),

14. Muhammad Asif,
15. Muhammad Arif, sons,
16. Mst. Riffat Qadeer, daughter of Mst. Raqiyya Begum (deceased daughter of Azeem-Ullah).
17. Abdul Qadeer husband of Mst. Raqiyya Begum d/o Azeem-Ullah.
18. Abdul Qayyum, son,
19. Mst. Hamida Begum, daughter of Mehar-un-Nisa (deceased daughter of Ameer-Ullah),
20. Tahir Waseem, son,
21. Mst. Musarrat Bibi, daughter,
22. Iftikhar Ahmed, husband of Mst. Jameela Begum d/o Najam-un-Nisa (deceased daughter of Ameer-Ullah). Serial No.1,2,3,5,8 to 13 4, 6,7, 14 to 17 residents of village Pruk, serial No.18, 19 residents of village Danool Kundi Peran, Tehsil Pattika (Naseerabad) District Muzaffarabad, serial No.20 to 22 residents of village Kahori at present near office of Director Agriculture, Gojra, Muzaffarabad.

.....RESPONDENTS

23. Mst. Saeeda Begum, daughter of Abdullah r/o village Kundal, Tehsil Patika (Naseerabad) District Muzaffarabad.
24. Mst. Naseema Begum daughter of Abdullah r/o Ward No.11, Mohallah Sethi Bagh, Muzaffarabad.
25. Ansar Atta, son,
26. Mst. Kiran Saeed,
27. Mst. Nighat Azeem, daughters,
28. Muhammad Saeed, husband of deceased Mst. Razia Begum, residents of village Pruk, Tehsil Patika (Naseerabad), District Muzaffarabad.
29. Sheikh Ibrar Ahmed, husband,
30. Azhar Ibrar, son,
31. Mst. Tahira Bibi, daughter of Mst. Jameela Begum (deceased daughter of Abad-Ullah), residents of village Pruk, Tehsil Patikka (Naseerabad), District Muzaffarabad.

..... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 04.07.2016 in Civil Appeal No.42/2012)

FOR THE APPELLANTS: Mr. Abdul Rashid Abbasi, Advocate.

FOR THE RESPONDENTS: Syed Mehar Ali Shah Bukhari and Miss Bilqees Rasheed Minhas, Advocates.

Date of hearing: 07.12.2017.

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.– The captioned appeal by leave of the Court has been filed against the judgment of the High Court dated 04.07.2016, whereby the appeal filed by the appellants, herein, has been dismissed.

2. According to the summary of the facts the plaintiff-respondents No.1 and 2, herein, brought a suit for declaration and joint possession against the defendants in the Court of Civil Judge, Muzaffarabad on 01.09.1999. The learned trial Court, after necessary proceedings, vide judgment dated 25.04.2005 granted the decree of joint possession. Feeling aggrieved, respondents No.1 and 2 filed an appeal before the Additional District

Judge, Muzaffarabad on 22.07.2005. The record of the trial Court as well as the Additional District Judge, being destroyed in the earthquake of 2005, was reconstructed. The learned Additional District Judge, Muzaffarabad vide judgment dated 13.12.2011 remanded the case to the trial Court for decision afresh. The appellants, herein, filed an appeal before the High Court which has been dismissed through the impugned judgment on the ground that the appeal has not been properly constituted and the copy of judgment of trial Court has not been appended, hence this appeal by leave of the Court.

3. Mr. Abdul Rashid Abbasi, Advocate, the learned counsel for the appellants after narration of necessary facts submitted that through the impugned judgment the learned High Court while applying the provisions of Order XLI, Rule 1, CPC dismissed the appeal filed by the appellants solely on the ground that it has not been properly constituted and the copy of judgment of trial Court has not been appended with the memo of appeal.

In the light of the case history, he submitted that as the appeal was filed against the remand order and procedure for such appeal is prescribed under Order XLIII, CPC. The learned Additional District Judge neither framed the decree nor the appeal before the High Court was filed against the decree. Order XLIII, CPC clearly speaks that the rules of Order XLI are applicable, so far as may be, to the appeals from the orders. The learned High Court has overlooked the statutory provisions specifically dealing with the proposition. He further argued that as the appeal was admitted for regular hearing and notices were issued, thus, even otherwise according to the enunciated principle of law if at all filing of copy of judgment was required it has to be deemed dispensed with. He placed reliance on the cases reported as *Muhammad Shafi vs. Mst. Jamil Bibi and others* [1980 CLC 1130] and *Muhammad Amin Shah vs. Mehtab Din and another* [PLD 1996 SC(AJ&K) 11] and submitted that while accepting this appeal the impugned judgment may kindly be set-aside.

4. Conversely, Syed Mehar Ali Shah Bukhari and Miss Bilqees Rasheed Minhas, Advocates, the learned counsel for the respondents forcefully defended the impugned judgment and submitted that according to the statutory provisions furnishing of the certified copy of the judgment of the trial Court is mandatory requirement. In this case as the appellants have failed to furnish the same, hence, the High Court has rightly dismissed the appeal. All the legal and factual propositions have been considered. No valid ground exists for interference. According to enunciated principle of law, without furnishing the certified copy of judgment of trial Court the appeal cannot be maintained. They referred to the cases reported as *Miss Lubna Arshad and another vs. Nomination Board and others* [PLD 1981 (AJ&K) 14], *Abdul Rehman vs. Muhammad Sharif & others* [PLD 1979 SC(AJ&K) 117] and *Muhammad Shafi vs. Mst. Jamil Bibi and others* [1980 CLC 1130]

5. We have considered the arguments of the learned counsel for the parties and examined the record made available. According to the facts, the suit filed by respondents No.1 and 2, herein, was

decreed by the trial Court vide judgment dated 24.05.2005. Against this judgment an appeal was filed on 22.07.2005 before the Additional District Judge, Muzaffarabad who summoned the record of the trial Court. The perusal of record reveals that the record of trial Court as well as the first appellate Court stood destroyed in the earthquake of 2005. This fact needs no further inquiry as the learned High Court has already specifically observed in the interim order dated 06.07.2012 that the record of the trial Court being destroyed is not available. In this state of affairs, dismissal of the appeal by the High Court on this sole ground does not appear to be justified. No law or rule cast a duty upon the person to do which is not possible. It is obviously clear that obtaining the certified copy of the trial Court's judgment was not possible in view of facts and circumstances of the case, thus, the parties cannot be penalized. In this special situation, the requirement of furnishing the certified copy of judgment of trial Court shall be deemed dispensed with.

6. The record further shows that the appeal was filed before the High Court on 15.02.2012. The office of the High Court while reporting that the appeal is properly constituted placed the same before the learned Chief Justice who entertained the appeal for hearing and issued notices to the respondents. The appeal remained pending before the High Court for almost four years and then finally it has been dismissed through the impugned judgment on the ground that it is not properly constituted and copy of trial Court judgment has not been appended.

7. Even otherwise, according to the statutory provisions of law the appeal was filed against the remand order and procedure for such appeal is prescribed under the provisions of Rule 2 of Order XLIII, CPC, which speaks that the rules of Order XLI shall apply, so far as may be, to appeals from orders. Thus, it is clear that according to the statutory provisions the rules of Order XLI are not applicable in toto rather they shall apply so far as may be. Same like, the provisions of section 108,

CPC also clearly speak that the provisions relating to appeals from original decrees, so far as may be, shall apply to appeals from the appellate decrees and from orders made under this Code. In this state of affairs, the impugned judgment of the High Court is not maintainable.

8. So far as the case law cited on both sides is concerned, it is very amazing that neither the parties or their counsel nor the Courts below have thoroughly perused the record and noticed the destruction of record of trial Court as well as first appellate Court. Therefore, the discussion of referred judgments is hardly required, in view of distinguishable aspect of the case, as observed and concluded in the preceding paragraph No.5.

For the above stated reasons, while accepting this appeal and recalling the impugned judgment of the High Court the case is remanded back to the High Court for deciding the same on merit according to law after hearing the counsel for the parties.

CHIEF JUSTICE

JUDGE

Muzaffarabad,
08.12.2017