

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**  
[Appellate Jurisdiction]

**PRESENT:**

*Ch. Muhammad Ibrahim Zia, C.J.*  
*Raja Saeed Akram Khan, J.*

Civil appeal No.251 of 2018  
(PLA filed on 25.05.2018)

1. Tanveer Khan,
2. Naveed Khan, sons,
3. Mst. Nayyar Sultana daughter of Muhammad Hussain Khan, through power of Attorney petitioner No.1, r/o Palhotar Langarpura, Tehsil and District Muzaffarabad.

.....APPELLANTS

**VERSUS**

1. District Judge, Muzaffarabad.
2. Sulta Zubair Abdul Malik, r/o Lawasi, presently Shoukat Line Gojra, Muzaffarabad.
3. Manzar Ilyas Khan, sons,
4. Naila Ilyas Khan, daughter of Sultan Muhammad Ilyas Khan, r/o Lawasi.
5. Zarrar Waleem Khan, r/o Lawasi,

6. Afzar Kaml Khan, sons of Zafar Umer Khan, near Prime Minister House Jalalabad, Muzaffarabad.
7. Robina Farooque, r/o Near Radio Station, Muzaffarabad.
8. Yasmin Farooque, r/o Sangri Merrra, Near Allah Wali Masjid, Muzaffarabad.
9. Saima Fiyaz, daughters of Zaffar Umer Khan, Industrial Area Parthan Kotli.
10. Nadeem Ehsan, r/o Madina Market near Neelum Cinema, Muzaffarabad.
11. Ghazala Ambreen wife of Muhammad Farooq, r/o Ambore, Muzaffarabad.
12. Nuzhat daughter of Salima Bibi, r/o Neelum Cinema, Madina Market, Muzaffarabad.
13. Naseer-ud-Din Khan son of Basheer-ud-Deen Khan, r/o Bajama, Tehsil Urri through Muhammad Atif Akram Khan Attorney, r/o Lower Plate near Jinnah Pilot High School Muzaffarabad.
14. Mst. Amirana Begum (Parveen Akhtar) daughter of Basheer-ud-Deen Khan, r/o Zachal Dara, Tehsil Hindwarra, District Kapwarra, Occupied Kashmir.

15. Noreen Arif w/o Dr. Muhammad Arif Khan,  
r/o Shoukat Line, Muzaffarabad.
16. Azad Govt. of the State of Jammu and  
Kashmir through Chief Secretary having  
his office at New Secretariat,  
Muzaffarabad.
17. Revenue Department through Secretary  
Mall (Land Revenue), Azad Government of  
the State of Jammu and Kashmir,  
Muzaffarabad.
18. Commissioner Mall (Land Revenue),  
Muzaffarabad Division, Muzaffarabad.
19. Collector District Muzaffarabad.
20. Tehsildar District Muzaffarabad.
21. Department of Settlement through  
Director Settlement, Muzaffarabad.
22. Assistant Tehsildar Mall (Land Revenue),  
Ghari, District Muzaffarabad.
23. Collector Land (Rural), Langarpurra  
Satellite Town, Muzaffarabad.

....RESPONDENTS

24. Rizwan Khan,
25. Ikhlaq Khan,
26. Jamil Khan, sons,

27. Mst. Amina Raof, r/o Dopatta Dheri (Ghari Dopatta).
28. Asim,
29. Adeel, sons,
30. Amber w/o Raja Naseer, r/o Tendali.
31. Beenish r/o Thota Sarai.
32. Raja Shamim Ahmed Khan husband of the deceased petitioner, namely, Mst. Shaheena Raof, r/o Tandali.
33. Mst. Rukhsana Raof daughters of Abdul Raof Khan, r/o Tandali.
34. Mst. Qammar-un-Nisa w/o Irfan Khan, d/o Abdul Raof Khan, r/o Dopatta.

.....PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 15.05.2018 in writ petition No.2673 of 2016)

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FOR THE APPELLANTS: M/s Abdul Rashid Abbasi and Muhammad Yaqoob Khan Mughal, Advocates.

FOR THE RESPONDENTS: Raja Muhammad Hanif Khan and Ch. Muhammad Manzoor, Advocates.

Date of hearing: 08.11.2018.

**JUDGMENT:**

**Raja Saeed Akram Khan, J.-** The captioned appeal by leave of the Court has been filed against the judgment of the High Court dated 15.05.2018, whereby, the writ petition filed by the appellants, herein, has been dismissed.

2. The facts as emerged from this appeal are that a piece of land measuring 11 *kanal*, 13 *marla*, situate at village Langerpura, comprising survey Nos.137, 138, 139, 236, 140 and 596, was purchased by the appellants No.1 and 2, herein, from Ali Akbar and others, through sale-deed, executed on 08.06.1964. The appellants claimed that they had been in continuous possession of the suit land till the announcement of award No.17/2007, dated 10.04.2007. Moreover, at the time of issuance

of award, the appellants came to know that the private respondents, herein, with the connivance of the officials of the revenue department have managed to show them as affectees of the award and tried to get the compensation of the land owned by the appellants. On this, the appellants filed a reference application regarding the apportionment and enhancement and also filed a civil suit to get the revenue record corrected and sought declaration to the extent of their entitlement. On filing of the suit, the private respondents, herein, filed an application under Order VII, Rule 11, CPC, for rejection of the plaint. The Court concerned rejected the application and directed the defendants to file the written statement but despite providing a number of opportunities they failed to file the written statement and absented themselves to appear in the Court, whereupon, they were

proceeded ex-parte and after recording the evidence, the trial Court decreed the suit vide judgment and decree dated 28.02.2013. The private-respondents, herein, filed an application under section 12(2), CPC, for cancellation of ex-parte decree which was dismissed by the trial Court vide order dated 29.04.2015. The private-respondents, herein, filed a revision petition in the Court of District Judge. The learned District Judge while accepting the revision petition set aside the ex-parte decree. The appellants, herein, feeling aggrieved from the judgment of the District Judge filed a writ petition before the High Court which has been dismissed through impugned judgment dated 15.05.2016, which is the subject matter of this appeal.

3. M/s Abdul Rashid Abbasi and Muhammad Yaqoob Khan Mughal, Advocates, the learned counsel for the appellants argued

that the impugned judgment is based on misinterpretation of statutory provision of law which is liable to be vacated. They contended that the learned High Court while passing the impugned judgment failed to take into consideration that the District Judge while exercising the revisional jurisdiction disturbed the well reasoned judgment passed by the trial Court. They added that the learned District Judge while passing the judgment travelled beyond the jurisdiction as he had to examine; whether the order impugned before it can be challenged under section 115, CPC or not, but instead of that, the learned District Judge discussed the merits of the original suit. He added that both the Courts below failed to adhere to the parameters of section 12(2) CPC, determined by law. In continuation of the arguments, the learned counsel submitted that application under section 12(2), CPC, can be



filed on three grounds mentioned in it, whereas, in the case in hand, none of the ground was available, therefore, the ex-parte decree could not be set aside. They added that both the Courts below also failed to take into consideration the important aspect of the case that the private respondents after due service of notice appeared before the Court and filed the power of attorney and thereafter 44 opportunities were given to them for filing written statement but they failed to appear before the Court and in such situation no other option was left with the trial Court except to pass an ex-parte decree. They further added that the application under section 12(2), CPC, can be filed on the ground of jurisdiction, fraud and misrepresentation. In the instant case, on filing of suit by the appellants, herein, the defendant-respondents filed application under Order VII, Rule 11, CPC and in support of it

raised the point of jurisdiction which was dismissed and the order of the trial Court was not challenged, therefore, later on, they were stopped to raise the objection regarding the jurisdiction of the trial Court in the application filed under section 12(2), CPC. Likewise, on the remaining two grounds, i.e. fraud and misrepresentation, the respondents failed to bring on record any concrete evidence. The learned counsel while referring to the application filed under section 12(2), CPC, submitted that in the application the whole responsibility has been fixed on the shoulder of the counsel, but the concerned counsel has not been arrayed as party. They contended that it is settled principle of law that the knowledge of the counsel shall be presumed to be the knowledge of the party, therefore, the respondents cannot claim cancellation of ex-parte decree on the ground that they could not

gain knowledge in time. The learned counsel lastly submitted that for setting aside the ex-parte decree, the proper course was to file an application under Order IX, Rule 13, CPC and application under section 12(2), CPC, in view of the circumstances of the case, was not competent. They referred to and relied upon the case law reported as *Maqsood Kousar v. Revenue Department & 91 others* [2015 SCR 929], *Kh. Muhammad Akbar and 5 others v. Kh. Fateh Muhammad and 16 others* [2000 SCR 211] and *Monazah Parveen v. Bashir Ahmad and 6 others* [2003 SCMR 1300].

4. Conversely, Raja Muhammad Hanif Khan and Ch. Muhammad Manzoor, Advocates, while appearing on behalf of the private-respondents strongly controverted the arguments advanced by the learned counsel for the appellants. They submitted that the impugned judgment is perfect and legal which

is not open for interference by this Court. They added that the concurrent findings recorded by both the Courts below are based on proper appreciation of relevant law on the subject and the evidence brought on the record. The appellants by practicing fraud succeeded to get the ex-parte decree while depriving the respondents of their legal shares. The learned counsel also discussed the merits of the suit in which ex-parte decree was passed and submitted that the learned High Court in view of the controversy involved in the matter, has rightly dismissed the writ petition and has not committed any illegality. They referred to and relied upon the case law reported as *Mst. Nasira Khatoon and another v. Mst. Aisha Bai and 12 others* [2003 SCMR 1050], [2007 SCR 381], *Muhammad Akram Shaikh v. Messrs Pak Libya Holding Company (Pvt.) Ltd. through Authorized Officer and 14 others* [PLD 2010

Karachi 400] and *Sikandar Ali v. Haji Abdul Karim and others* [2000 CLC 530].

5. We have heard the arguments and gone through the record made available along with the impugned judgment. In the case in hand, an ex-parte decree was passed against the respondents by the Senior Civil Judge, Muzaffarabad on 28.02.2013. The respondents on 02.07.2013, moved an application under section 12(2), CPC, for setting aside the ex-parte decree and mainly taken the following grounds; (i) the civil Court had no jurisdiction to pass the decree as the matter was subjudice in the Court of Reference Judge and under the provisions of Land Acquisition Act, the learned Reference Judge is competent to decide all the controversial issues between the co-sharers regarding the acquired land; (ii) the suit filed by the appellants, herein, was time barred; and (iii) the counsel for the

respondents has not brought into the notice of the respondents the true picture of the case due to which the ex-parte proceedings were initiated against the respondents. As the case in hand stands on application filed by the respondents under section 12(2), CPC, therefore, we do not intend to go beyond the parameters of section 12(2), CPC. Before proceeding further, it will be useful to reproduce here the relevant statutory provision, i.e. section 12(2), CPC, which reads as under:-

“12(1) .....

(2) Where a person challenges the validity of a judgment decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.”

After going through the statutory provision (supra), it appears that the remedy provided under section 12(2) CPC, will be available only in respect of cases where the ground of attack is based on fraud, misrepresentation or want of jurisdiction. From the scrutiny of the record, it transpires that earlier the respondents, herein, moved an application under Order VII, Rule 11, CPC, for rejection of the plaint and raised an objection regarding the jurisdiction of the Civil Court. The trial Court had not accepted the claim of the respondents and rejected the said application. It is an admitted fact that the order passed by the trial Court was not challenged by the respondents, meaning thereby that the same had attained finality. In such state of affairs, we agree with the stance taken by the learned counsel for the appellants that the point of jurisdiction is no more available to the respondents.

6. We have also given our serious thought to the other points raised in the application filed under section 12(2), CPC. After going through the contents of application it appears that the respondents put whole responsibility on the shoulders of their counsel but surprisingly the concerned counsel has not been arrayed as party in the line of the respondents and the respondents have also not brought on record anything in support of this contention. Even otherwise, the learned counsel for the appellants has rightly argued that the respondents duly engaged the counsel and under law, the act done by the counsel shall be presumed to be the act done by the party. In absence of any evidence in respect of the plea of fraud the trial Court was justified to reject the application. Similarly, it is not case of the respondents that ex-parte decree has been obtained by making misrepresentation.



After careful scrutiny of record, it appears that on filing of the suit by the appellants after due service of notice some of the respondents appeared in the Court but despite getting considerable opportunities failed to file the written statement and later on absented themselves from the Court, whereupon, the trial Court passed the ex-parte order. As the application filed by the respondents for setting aside the ex-parte decree does not fulfill the requirement of law as has been discussed hereinabove, therefore, we are of the view that the trial Court very wisely rejected the same, whereas, the learned District Judge, while exercising the revisional jurisdiction set aside the order passed by the trial Court without adhering to the parameters laid down in section 12(2), CPC, which are limited in nature and same illegality has been committed

by the High Court while passing the impugned judgment.

7. The case law referred to by the counsel for the respondents in view of the circumstances of the instant case are not applicable as in the case law reported as *Mst. Nasira Khatoon and another v. Mst. Aisha Bai and 12 others* [2003 SCMR 1050], Sindh High Court dismissed the application filed under section 12(2), CPC, and the apex Court of Pakistan upheld the judgment of the High Court while observing that in view of the circumstances of the case the provisions of section 12(2), CPC, would not be attracted in the present case. In the case reported as *Sikandar Ali v. Haji Abdul Karim and others* [2005 CLC 1032], the point of jurisdiction has been highlighted but in the instant case such ground is not available to the respondents as has been discussed in the preceding

paragraphs. Similarly, in the case reported as *Ghulam Nabi v. Azad Kashmir Logging & Saw Mills Corporation & another* [2007 SCR 381], this Court has held that law has to be applied as it is and an ex-parte order does not mean that the Court should flout the law, whereas, in the instant case the ex-parte judgment was recorded by the trial Court on the strength of evidence brought on the record and no violation of law was committed. In the other case law referred to by the counsel for the respondents reported as *Muhammad Akram Shaikh v. Messrs Pak Libya Holding Company (Pvt.) Ltd. through Authorized Officer and 14 others* [PLD 2010 Karachi 400], the element of fraud and misrepresentation have been discussed and it has also been observed that if the judgment is obtained against a person without his knowledge the same is sufficient ground for vacating the judgment. In the case

in hand, the proceedings were in the knowledge of the respondents. They also engaged the counsel and it is settled law that knowledge of the counsel shall be presumed to be the knowledge of the party.

The crux of the above discussion is that this appeal is accepted and while setting aside the judgments passed by the District Judge and the learned High Court, the judgment/order passed by the trial Court dated 29.04.2015, is hereby restored. No order as to costs.

**JUDGE**

Muzaffarabad,  
\_.11.2018

**CHIEF JUSTICE**