

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.

Raja Saeed Akram Khan, J.

Civil Appeal No. 215 of 2018

(PLA Filed on 07.06.2018)

1. Azad Govt. of the state of Jammu & Kashmir through its Secretary Power Development Organization having his office at New Secretariat Muzaffarabad.
2. Managing Director, Power Development Organization having his office at New Secretariat Muzaffarabad.
3. Director Civil, Hydro Elector Board (PDO) Upper Chatter Muzaffarabad.
4. Director Mechanical, Hydro Electric Board (PDO) Upper Chatter Muzaffarabad.
5. Deputy Director Civil, Hydro Electric Board (PDO) upper Chatter Muzaffarabad.
6. Deputy Director Mechanical, Hydro Electric Board (PDO) Upper Chatter Muzaffarabad.
7. Project Officer, Hydro Electric Board (PDO) Upper Chatter Muzaffarabad.
8. State Officer, Power Development Organization having his office at Upper Chatter Muzaffarabad.

9. SDO, Power House Chinari District Hattian.
10. SDO, Civil, Power House Chinari, District Hattian.
11. Overseer, Mechanical, Hydro Power Project Chinari, District Hattian Bala.
12. Overseer Civil, Hydro Power Station Chinari, District Hattian Bala.

.....APPELLANTS

VERSUS

1. Muhammad Amin S/o Ahmed Ali, Caste Kiani, resident of village Gharthama, Tehsil & District Hattian Bala (AK).

.....RESPONDENTS

[On appeal from the judgment of the High Court dated 09.04.2018 in revision petition No. 220 of 2016]

FOR THE APPELLANTS: Syed Asim Masood Gillani, Advocate.

FOR THE RESPONDENT: Mr. Shahzad Shafi Awan, Advocate.

Date of hearing: 05.12.2018

ORDER:

Ch. Muhammad Ibrahim Zia, C.J.–

The captioned appeal by leave of the Court has arisen out of the judgment of the High Court dated 09.04.2018, whereby the revision petition filed by the appellants, herein, has been dismissed.

2. The brief facts of the case are that the plaintiff-respondent, herein, filed a suit for declaration-cum-permanent injunction regarding land comprising *khewat* No.163, survey No.830/572 (old), 2396 (new), measuring 16 *marla* and survey No.2468, measuring 7 *marla* and *khewat* No.12/6, survey No.268 (old), 2453 (new), measuring 2 *kanal*, 3 *marla*, total measuring 3 *kanal*, 6 *marla*, situated in village Gharthama, Tehsil and District Hattian Bala. It was averred in the plaint that the plaintiff is

owner in possession of the suit land, whereas, the defendants are interfering in the same without any justification. The plaintiff-respondent, herein, demanded Rs.60,000/- as damages sustained by them due to erection of boundary wall and by diverting the flow of water towards their land. The suit was contested by the other side by filing written statement. They refuted the claim of the plaintiff. It was stated that the defendants have neither interfered in the suit land nor diverted the flow of water towards the same, however, the tress which were damaged have been acquired and the plaintiff has received the compensation of the same. The learned trial Court framed issues in the light of the respective pleadings of the parties and asked them to lead evidence pro and contra. At the conclusion

of the proceedings, the learned trial Court decreed the suit in the terms that the defendants are restrained from diverting the flow of water towards the land of the plaintiff and restrained from causing damage to the land, crops, trees and residential house. They were also restrained from interfering in the suit land without acquiring the same, vide judgment and decree dated 29.03.2014. Feeling dissatisfied from the judgment and decree dated 29.03.2014, the plaintiff filed appeal before the District Judge Hattian Bala for the partial relief. The defendants appeared before the District Judge and appointed standing counsel but subsequently they absented themselves, therefore, they were proceeded ex-parte vide order dated 09.06.2015. The learned District Judge while accepting the appeal

maintained the judgment and decree passed by the trial Court, however, partly agreed the judgment and decree of the trial Court appealed against and directed the defendants to pay the damages to the plaintiff to the tune of Rs.60,000/-. The defendants were also directed to acquire the suit land comprising survey No.3453, measuring 3 *kanal*, 2 *marla*, within three months. The defendants filed an application for cancellation of the ex-parte decree on 14.01.2016 which was dismissed vide order dated 27.04.2016. Against the aforesaid order dated 27.04.2016, a revision petition was preferred before the Azad Jammu & Kashmir High Court. The learned High Court after necessary proceedings through the impugned judgment dated 09.04.2018 has dismissed the revision petition.

3. Syed Asim Masood Gillani, Advocate the learned counsel for the appellants after narration of necessary facts submitted that the suit as well as all the subsequent proceedings are against the law and facts because the necessary party i.e. Power Development Organization has not been arrayed as party. The decree passed by the learned High Court is also against the facts. The acreage of the property bearing survey No. 1453 is incorrectly mentioned in the judgment of the learned District Judge. This aspect has not been properly attended by the Court below. The plaintiff-respondent has failed to produce any evidence, thus, the judgments are passed in vacuum without any legal justification, therefore, while accepting this appeal, recalling the impugned judgment and decree, the

judgment and decree passed by the Courts below may kindly be set aside.

4. Mr. Shahzad Shafi Awan, Advocate, the learned counsel for the respondent seriously opposed the appeal on the ground that the arguments advanced are misconceived. The learned counsel has argued the merits of the case, whereas, the instant appeal has arisen out of the revision petition filed in the High Court against the rejection of the application for setting aside the ex-parte decree, thus, the only proposition according to the facts of this case to be resolved in this appeal is whether an ex-parte decree can be set aside in the stated circumstances. He further argued that according to record, the appellants fully participated in the proceedings but thereafter, they deliberately defaulted, thus,

the first appellate Court was justified to decide the ex-parte appeal and the appellants failed to bring on record any sufficient reason for their absence. The ex-parte decree was passed on 16.07.2015, whereas, application for setting aside this judgment and decree was filed on 14.01.2016 which on the face of it was time barred. Even no sufficient reason for such delay has been brought on record. The learned District Judge-first appellate Court dismissed the application vide order dated 17.04.2016. The order is speaking one. The learned High Court has rightly declined to interfere with such order in revisional jurisdiction, thus, the learned counsel for the appellants in this regard, has not advanced any arguments nor any

justification has been given, therefore, appeal is not maintainable.

5. We have heard the arguments of the learned counsel for the parties and examined the record made available. According to the admitted facts and Court's record, the trial Court-Senior Civil Judge decided the suit No. 66 through judgment and decree dated 31.03.2014. Against this judgment and decree, an appeal was filed before the District Judge on 24.04.2014. The appellants, herein, were duly summoned. On 16.09.2014, one *Khurshid Anwawr*, Deputy Director, Hydro Electric Board appeared before the Court and sought time for engaging service of counsel. Consequently, on next date of hearing i.e. on 15.10.2014, the standing counsel representing the appellants, herein,

appeared in the Court and also represented the appellants on subsequent dates of hearing on 27.10.2014 and 24.11.2014, however, ultimately, on 10.03.2015, one Raja Fiaz, on behalf of the defendants appeared and requested the Court for engagement of another counsel, thus, the appeal was further adjourned. Another adjournment was also granted on another date on the request of the representative of the appellants, herein, on 13.04.2015 but despite this, they opted for non-appearance and consequently, the appeal was decided ex-parte by the learned District Judge vide judgment and decree dated 16.07.2015. The appellants, herein, filed an application for setting aside the ex-parte decree on 14.01.2016 and the learned District Judge dismissed the same on 27.04.2016. This

order has been upheld by the learned High Court through impugned judgment.

6. The argument of the learned counsel for the appellants relating to merits of the case appears to be misconceived as according to the above stated case history, in this appeal, the material proposition requires resolution is whether the appellants have any legal justification or sufficient cause for rehearing of the appeal on their application. According to the provisions of Order XLI, Rule 21 of Code of Civil Procedure, 1809 it is the duty of the applicant to satisfy the Court that the notice was not duly served or applicant was prevented by sufficient cause from appearance when the appeal was called for hearing. Such application has to be made within period of 90 days as prescribed under

Article 169 of Limitation Act, 1908. According to the settled principle, Court's proceedings have got presumption of correctness, thus, in this case it is proved that the appellants have put their appearance in the appeal before the first appellate Court if not earlier, at least on 15.10.2014. Thereafter, they were represented by their standing counsel but subsequently, they defaulted in appearance and after almost two years' period, the appeal was decided and ex-parte decree was granted on 16.07.2015. Thus, it was enjoined upon the appellants to file the application within prescribed limitation but they failed even to file the application within limitation which was filed almost after six months time, that to without any sufficient reason for condonation of such delay. In

these circumstances, their application for rehearing of the appeal on the face of it was not maintainable.

7. Leaving aside this aspect, even they failed to satisfy the Court or bring on record any sufficient reason for their non-appearance in the first appellate Court on calling of the appeal for hearing. Almost after two years period after their appearance in the appellate Court, the ex-parte decree was passed. Therefore, the order passed by the first appellate Court is quite in accordance with law, hence, the learned High Court rightly declined to interfere in the revisional jurisdiction and the impugned judgment of the learned High Court is in accordance with law calling for no interference.

8. So far as the argument regarding mis-discription of the property or acreage of the property in the decree is concerned, it may be clerical mistake and any of the party may approach to the concerned Court for the correction of such clerical mistake under inherent powers of the Courts as postulated under provisions of sections 151 or 152 of Code of Civil Procedure 1809.

With these observations this appeal stands dismissed with no order as to costs.

CHIEF JUSTICE

JUDGE

Muzaffarabad,
05.12.2018