

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Review Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.

Civil Review No.38/2019

Civil Misc. No.180/2019

(Filed on 29.05.2019)

1. Muhammad Muzaffar,
2. Abdul Rasheed, sons of Haji Fazal-ur-Rehman,
3. Abid Hussain,
4. Babar Khan and
5. Asad Khan, sons,
6. Saheeda Bibi,
7. Shamim Bibi,
8. Farhat Bibi and
9. Ferdos Bibi, daughters of Abdul Karim, deceased,
10. Ejaz Latif,
11. Imtiaz Latif and
12. Shahid Latif, sons,
13. Nusrat,
14. Rifhat,
15. Saiqa and
16. Saima daughters of Abdul Latif,
17. Zareena Bibi, widow of Abdul Latif r/o near Prime Minister House Narul Jalal Abad, Tehsil & District Muzaffarabad.

.....PETITIONERS

VERSUS

1. Khushal Hussain, s/o Muhammad Arfan, caste Tanoli, R/o Narul Jalal Abad, Tehsil & District

Muzaffarabad, presently Lower Plate Tehsil and District Muzaffarabad.

2. Muhammad Yousaf Khan, S/o Abdullah Khan, R/o Muzaffarabad.
3. Muhammad Shafique,
4. Muhammad Afzal,
5. Muhammad Arshid,
6. Muhammad Amran,
7. Muhammad Umar, sons,
8. Sajida Bibi,
9. Shehnaz,
10. Tahira and
11. Abida daughters of Muhammad Rafique (deceased) residents of Narul, Tehsil and District Muzaffarabad.
12. Jahangir Dilawar,
13. Aamir Dilawar,
14. Babar Dilawar,
15. Arsalan Dilawar,
16. Farhan Dilawar,
17. Hammad Dilawar, sons,
18. Irum Naz,
19. Mehreen Naz, daughters of Dilawar Khan, R/o Lower Plate, Tehsil & District Muzaffarabad.
20. Muhammad Siddique S/o Muhammad Irfan, r/o Narul Muzaffarabad.
21. Akmal Khurshid,
22. Aamir Khurshid,
23. Adil Khurshid, sons,
24. Sumaira Khurshid,
25. Samra Khurshid, daughters,
26. Mst. Musarrat Shaheen, widow of Khurshid Anwar R/o Upper Chatter Tehsil and District Muzaffarabad.

27. Ghulam Hussain (deceased) represented by legal heirs:
 - (i) Muhammad Bashir,
 - (ii) Muhammad Munir,
 - (iii) Zaheer Ahmed,
 - (iv) Qadeer Ahmed, sons,
 - (v) Sureya Bibi, daughter
 - (vi) Razia Bibi, (widow).
28. Revenue Department through representative Revenue Muzaffarabad.
29. Revenue Department through Collector District Muzaffarabad.
30. Tehsildar Revenue Muzaffarabad.
31. Patwari Halqa City Tehsil & district Muzaffarabad.

..... RESPONDENTS

32. Naheeda Rashid,
33. Farkhanda Rashid,
34. Rakhshanda Rashid,
35. Bushra Rashid, daughters,
36. Rashid Rashid,
37. Haroon Rashid,
38. Qaiser Rashid,
39. Awais Rashid and
40. Yasir Rashid sons of Musarrat Bibi (deceased) R/o Gujjar Khan, Pakistan.
41. Mehmood Latif S/o Abdul Latif resident of Near Prime Minister House Narul Jalal Abad, Tehsil & District Muzaffarabad.
42. Zareen Khan,
43. Mehboob Khan,
44. Mujahid Khan, sons,

45. Gulzar Bibi,
46. Musarrat Bibi,
47. Gulnaz Bibi, daughters of Mst. Reshim (deceased) (No.42 resident of Gojra Muzaffarabad, Nos, 43, 44 and 47, residents of Chitta Batta, Tehsil and district Mansehra, No.45 resident of Manak Payyan, Tehsil and District Muzaffarabad, No.46 resident of Narul, Tehsil and District Muzaffarabad).
48. Mst. Taj Bibi,
49. Mst. Razia Bibi,
50. Mst. Besora Bibi,
51. Sakina Bibi d/o Fazal-ur-Rehman R/o Nos. 48, 49 mozia Narul, No.50 Bano Market Tehsil & District Muzaffarabad, No.51, resident of Sethi Bagh, Tehsil and District Muzaffarabad.
52. Muzaffar Hussain, son,
53. Gulnaz Bibi,
54. Rohail Bibi d/o Khani Zaman, R/o Narul, Tehsil and District Muzaffarabad.
55. Ashiq Hussain,
56. Mohammad Younis,
57. Mohammad Ashraf,
58. Munsaf Khan and
59. Qayyum Khan, sons,
60. Mst. Surriya Bibi,
61. Mst. Shaheen Bibi,
62. Mst. Sajida Bibi,
63. Mst. Almas Bibi, d/o Ghulab Khan, r/o Nos. 56, 57, 60 to 63 Abbotabad, No.58, 59 Lower Plate Tehsil & District Muzaffarabad.
64. Nadeem Khalil, sons,
65. Mst. Shakeela,
66. Mst. Sajeela,
67. Mst. Nabeela,

68. Mst. Noreen Khalil, daughters of Khalil-ur-Rehman,
69. Ali Khan, son,
70. Mst. Munnawar Bibi d/o Abdul Rahman, r/o Narul,
71. Khadim Hussain,
72. Pervaiz Hussain,
73. Abid Hussain, sons.
74. Mst. Naseema Bibi alias Cheema,
75. Mst. Surriya Bibi and
76. Mst. Abida D/o Gulzar Bibi r/o Gulbahar colony near Meeran Chunggi Peshawar,
77. Shahzaman s/o Rehmat-Ullah r/o Narul, Tehsil & District Muzaffarabad.

..... PROFORMA-RESPONDENTS

[In the matter of review from the order of this Court
dated 22.04.2019 in Civil PLA No.77/2019]

(Application for interim relief)

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

FOR RESPONDENTS No.1 & 2: Kh. Iftikhar Ahmed and
Raja Muhammad Altaf,
Advocates.

FOR RESPONDENTS No.3 to 31: Sardar Pervaiz Akhtar,
Advocate.

Date of hearing: 05.12.2019.

ORDER:

Raja Saeed Akram Khan, J.— Through the titled petition, the petitioners have sought the review of the order of this Court dated 22.04.2019, whereby the petition for leave to appeal bearing No.77/2019, filed by the petitioners, herein, was dismissed.

2. Necessary facts for disposal of this petition are that plaintiffs/respondents No.1 and 2, herein, along with Muhammad Rafique, Dilawar Khan, Muhammad Siddique sons of Muhammad Irfan (predecessor-in-interest of respondents No.3 to 27, herein,) filed a suit for declaration-cum-perpetual injunction along with prayer of possession, in the Court of Senior Civil Judge Muzaffarabad against the defendants/petitioners, herein, on 12.12.1994, alleging therein, that the land comprising survey Nos. 28, 29, 30, 31, 42, 44, 46 and 91, total measuring 78 *kanal*, 12 *marla*, situate in village Narul, Tehsil and District Muzaffarabad is recorded in the joint ownership of the parties in the revenue record. It was pleaded that one Abdul Rehman (the owner) and Mohammad Zaman (a sharer) have died and their legal heirs have been impleaded as party. They

alleged that the father of defendants No.1 to 9, namely Fazal-ur-Rehman is the possessor of land comprising survey Nos. 28, 29, 30, 31, and 91 through private partition. It was further alleged that besides Abdul Rehman and Mohammad Zaman Khan, (deceased), Khani Zaman has admitted the version of defendant No.1 during the previous litigation while surrendering their rights in his favour, however, the land comprising survey No.44, 46 is under the possession of the legal heirs of aforesaid deceased as per private partition. It was further averred that the plaintiffs are the exclusive owners of the land comprising survey No.42, through family partition, however, the father of defendants No.1 to 9 while encroaching upon had illegally possessed the land measuring 9 *kanal*, from the said survey number. It was further averred that the deceased father of the defendants also got executed the gift deeds dated 16.12.1984 and 21.08.1997, in favour of his sons, and also got attested a fake and fictitious mutation bearing No.5 regarding the land, comprising survey No.42, on 31.08.1999, which are liable to be cancelled being executed and attested without

lawful authority. The plaintiffs averred that they have asked several times to the legal heirs of Fazal-ur-Rehman to handover the possession of the land in excess to the share of their deceased father but they refused to do so, hence they have constrained to file the suit.

On filing of the suit, the defendants were summoned by the trial Court who filed the written statement, whereby the contents of the plaint were refuted in toto and request for dismissal of the suit was made. The trial Court in the light of the pleadings of the parties framed as many as 10 issues including the relief and after recording the evidence of the parties, decided the suit issue-wise while declaring the plaintiffs as legal heirs of Muhammad Irfan and holding them entitled to the land measuring 15 *kanal*, 14 *marla*, 03 *sarsai*, on the basis of 1/5th share in khewat No.42. The plaintiffs alongwith the vendees were partially declared in possession of the land under survey No.42. It was further directed that the proceedings regarding the possession of the rest of the land may be carried out in the Court of competent jurisdiction. It was further declared that if a co-sharer alienated the land in excess of his share

from this khewat number, then the plaintiffs alongwith the affectees/co-sharers can pursue for setting aside the same. The suit was decreed by the trial Court on 24.02.2010. Feeling dissatisfied from the judgment and decree of the trial Court the defendants/petitioners, herein, filed an appeal before the learned District Judge Muzaffarabad on 29.04.2010, who after hearing the parties dismissed the same vide judgment and decree dated 23.11.2010. Ultimately, the petitioners, herein, approached the learned High Court while filing second appeal, which was dismissed through judgment dated 29.11.2018. A petition for leave to appeal filed before this Court against the judgment of the High Court has also been dismissed through the order under review.

3. Mr. Abdul Rashid Abbasi, Advocate, the learned counsel for the petitioners submitted that important legal questions of public importance were involved in the petition for leave to appeal, which can only be resolved in a regular appeal, but the same remained escaped from the notice of the Court while handing down the impugned order, therefore, the same is liable to be reviewed. He

submitted that in the earlier round of litigation the suit for declaration and joint possession regarding the entire property measuring 78 *kanal*, 12 *marla*, brought by the respondents was dismissed by the Additional Sub-Judge Muzaffarabad, vide judgment dated 30.06.1975, against which an appeal was also dismissed by the District Judge on 15.01.1976. The said judgment of the learned District Judge remained unchallenged, as no appeal was filed by Muhammad Irfan, the predecessor of the respondents, hence the subsequent suit filed by the successors of Muhammad Irfan, regarding the same subject matter was completely hit by the principle of *res-judicata*. The point was forcefully agitated and argued before the Court at the time of hearing the PLA, but the same has not been considered by the Court, which amounts to an error apparent on the face of the record. He further added that it was also argued before the Court that the Courts below while granting the decree for joint possession travelled beyond its jurisdiction as the respondents never prayed for joint possession rather the suit was filed for specific possession regarding khasra No.42. This point has also

been lost consideration of the Court while handing down the impugned order. The learned counsel also argued that the Azad Government acquired the land measuring 41 *kanal*, 17 *marla*, out of the total land measuring 78 *kanal*, 12 *malra*, for the public purpose, through different awards, whereas the land measuring 12 *malra*, 6 *kanal*, has been alienated by different owners, but the respondents while filing the suit neither arrayed the Azad Government nor other vendees, in the line of the respondents. This point was forcefully agitated and argued before the Court, but the same has not been resolved. The other points regarding the appointment of local commission and decision of issue No.7, against respondents by the trial Court has also not been taken into account, while handing down the impugned order, which is an error apparent on the face of the record, hence the review of the impugned order is justified. In support of his claim, he referred to the case law reported as [2000 SCR 246], [2009 SCR 742], [2010 SCR 231], [2011 SCR 133], [2012 SCR 196], [2013 SCR 172], [2017 SCR 242], [2018 SCR 572].

4. On the other hand, Sardar Pervaiz Akhtar, Advocate, the learned counsel for caveator-respondents No.3 to 31, while controverting the arguments of the petitioners submitted that all the points raised by the learned counsel for the petitioners have already been dealt with and resolved by this Court after thorough deliberation. He submitted that the scope of review is very limited but the petitioners want to argue the review petition like an appeal, which is not permissible under law. On query by the Court regarding the question of non-arraying the Azad Government in the line of the respondents, the learned counsel submitted that the said point was never raised before the lower forum, rather for the first time was raised before this Court, therefore, there was no necessity to resolve the same. The petitioners have failed to point out any error apparent on the face of the record, therefore, this petition is liable to be dismissed.

5. Kh. Iftikhar Ahmed and Raja Muhammad Altaf, Advocates, counsel for respondent No.1 and 2, respectively, while supporting the arguments advanced by Sardar Pervaiz Akhtar, Advocate, submitted that all the

points raised by the petitioners have already been resolved by the Court and there is no error apparent on the face of the record, therefore, review of the impugned order is not justified.

6. I have considered the arguments of the learned counsel for the parties and perused the record with utmost care. The arguments advanced on behalf of the petitioners appear to be the result of misconception of law and the facts, as all the points raised by the petitioners were duly considered and resolved while handing down the impugned order. The point which was forcefully argued by the counsel for the petitioners regarding the applicability of principle of res-judicata was dealt with and resolved by this Court after through deliberation in para 7 of the impugned order. For convenience the same is reproduced as under:-

“7. The other contention of the learned counsel for the petitioners is that in view of the previous litigation, the suit of the plaintiffs was not maintainable on the sole ground of res-judicata. The point of res-judicata was raised at all the forums but the Courts below have not attended to and resolve the same in a legal manner. It may be observed here, that the trial

Court framed issue No.2 on the point and decided the same against the petitioners after discussing the whole facts/evidence in the light of the previous litigation. The trial Court concluded that in the previous round of litigation the dispute regarding the title was neither pleaded nor any findings were recorded and even the issue was also not framed, rather in the previous litigation the dispute was regarding the possessory rights, whereas in the case in hand, the dispute is regarding the title of the parties and cancellation of the gift-deeds. Both the appellate Courts after due deliberation on the point concurred with the findings recorded by the trial Court, thus, the argument of the counsel for the petitioners that the point of res-judicata has not been attended to and resolved, is against the record.”

7. Same like, the proposition regarding the specific possession and exclusive ownership of survey No.42 was also dealt with by this Court in the following manner:-

“In the present round of litigation, the plaintiffs Khushal Khan and others, built up their case before the trial Court that they are owners of the land to the extent of 1/5th share out of the total land measuring 78 kanal, 12 marla and through private partition the land comprising survey Nos. 28, 29, 30, 31, and 91 falls in the exclusive possession and ownership of Fazal-ur-Rehman (predecessor-in-interest of the petitioners herein) and survey Nos. 44 and 46 fall in the shares of Abdul Rehman, Mohammad Zaman and Khani Zaman,

whereas, survey No.42, exclusively falls within the ownership and possession of Muhammad Irfan, the predecessor of the plaintiffs, however, Fazal-ur-Rehman forcibly possessed the land measuring 9 *kanal* out survey No.42 and also alienated some portion of the land to some others through gift-deeds. The trial Court decreed the suit in favour of the plaintiffs/respondents, herein, in the following terms:-

"...بجوابت مندرجہ در تنقیحات بالاڈگری استقرار حق بحق مدعیان بخلاف مدعا علیہم بدیں صراحت صادر کی جاتی ہے کہ مدعیان کھیوٹ نمبر 42 نمبر خسره 42 موضع نڑول میں بطور وارثان محمد عرفان اراضی تعدادی 78 کنال 12 مرلے سے 1/5 حصہ بقدر 15 کنال 14 مرلے 3 سرسائی کے مالکان ہیں۔ مدعیان بشمول مشتریان تحت مدعیان نمبر خسره 42 پر جزوی طور پر قابض ہیں۔ بقیہ رقبہ کے دخل کے لیے عدالت مجاز میں بذریعہ تقسیم کارروائی کر سکتے ہیں۔ اگر کسی شریک حصہ دار نے کھیوٹ متذکرہ میں زائد از حصہ داری رقبہ منتقل کیا ہے تو مدعیان سمیت دیگر متاثرہ شریک حصہ داران اس کی منسوخی کے لیے مطابق قانون چارہ جوئی کر سکتے ہیں۔"

This judgment and decree of the trial Court has been upheld by both the Courts below. The contention of the learned counsel for the petitioners is that the plaintiffs failed to prove their basic claim that they are the exclusive owners of survey No.42 and the defendants/petitioners, have forcibly possessed the land measuring 9 *kanal* out of said survey number. Furthermore, the plaintiffs sought the relief only to the extent of survey No.42 but the trial Court decreed the suit while declaring the plaintiffs as owners of the land comprising *khewat* No.42 to the extent of land measuring 15 *kanal*, 14 *marla* and 3 *sarsai*, instead of dismissing the suit. In this context, I have perused the prayer clause of the plaint and the relief granted by the trial Court. The plaintiffs

sought the declaration for exclusive ownership of survey No.42 and further sought such alternate relief which the Court may deem appropriate. It is an admitted position that khewat No.42 consists of survey No.42 along with seven other survey numbers and the plaintiffs are owners of 1/5th share out of the total land measuring 78 kanal, 12 marla comprising khewat No.42. Thus, the trial Court has committed no illegality while declaring the plaintiffs as entitled to 1/5th share in Khewat No.42. As the plaintiffs failed to prove their exclusive ownership over survey No.42, therefore, the trial Court has clearly held that the plaintiffs along with the vendees are in partial possession of the land comprising survey No.42 and has not declared the plaintiffs as exclusive owner of survey No.42. However, as has been observed by the learned District Judge that the words “survey No.42” have been written inadvertently in the relief clause of the judgment and decree of the trial Court. In my considered view, the arguments of the counsel for the petitioners is misconceived as the trial Court has granted the decree to the extent which the plaintiffs have proved from the record/evidence. The Courts below have not closed the door finally to the extent of survey No.42 as the petitioners have got the opportunity to substantiate their claim before the revenue authorities during the partition proceedings.”

8. The other points raised by the learned counsel for the petitioners at the time of hearing the PLA were also considered and resolved in paragraphs No.8 and 9 of the impugned order. As regard the argument of the learned counsel for the petitioners that the Azad Government

acquired the land out of the total land measuring 78 kanal, therefore, the Azad Government was necessary to be arrayed as party in the line of respondents and despite agitating and arguing this point before the Court, the same has not been discussed and resolved, is concerned, the counsel for the respondents has rightly pointed out that this point was never raised before the lower forum, rather the same was for the first time raised before this Court. In this state of affairs, there was not necessity to resolve this point.

9. From the perusal of the whole record, it appears that all the points agitated in the review petition and argued before the Court are elaborately dealt with in the order under review. This is consistent practice of this Court that the points once decided cannot be reopened as the jurisdiction in review is not akin to appeal. Only an error apparent on the face of record can be reviewed. In the case in hand not only from the arguments of the learned counsel for the petitioners but also from the contents of the review petition, it appears that the petitioners want to argue the review petition like an appeal and also want to substitute

their point of view for the view formed by the Court after discussing all the aspects of the case, which is not permissible under law. The counsel for the petitioners has failed to point out any error apparent on the face of the record, which is prerequisite for admission of the review for regular hearing. The case law referred to by the learned counsel for the petitioners is also not applicable in the case in hand, having distinguishable facts.

The result of the above discussion is that finding no force this review petition along with the application for interim relief, stands dismissed with no order as to costs.

JUDGE

Muzaffarabad.
10.12.2019.