

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

**Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.**

1. Civil Appeal No.237 of 2017
(Filed on 09.11.2017)

Muhammad Naeem s/o Muhammad Zaman, caste Gujar,
r/o Phagwar Mohra, Tehsil and District Kotli.

....APPELLANT

VERSUS

1. Ghulam Sarwar s/o Ghulam Mohi-ud-Din, caste Gujar, r/o Pang Shareef, Mohra Chalyar, Tehsil and District Kotli.
2. Azad Government through its Chief Secretary, AJK, Muzaffarabad.
3. Secretary Electricity, Azad Jammu & Kashmir, Muzaffarabad.
4. Chief Engineer, Electricity, Mirpur Division, Mirpur, Azad Kashmir.
5. Executive Engineer Electricity, District Kotli, Azad Kashmir.

.....RESPONDENTS

[On appeal from the Judgment and decree of the High Court dated 18.09.2017 in Civil Appeals No.35, 38 and 39 of 2014]

FOR THE APPELLANT: Sh. Masood Iqbal,
Advocate.

FOR THE RESPONDENTS: Mr. Mehmood Akhter
Qureshi, Advocate.

2. Civil Appeal No.238 of 2017
(Filed on 14.11.2017)

Ghulam Sarwar s/o Ghulam Mohi-ud-Din, caste Gujjar,
r/o Panag Sharif, Mohra Chalyar, Tehsil and District
Kotli.

...APPELLANT

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir through its Chief Secretary, Azad Jammu & Kashmir, having his office at New Secretariat Complex, Chatter, Muzaffarabad.
2. Secretary Electricity Department, Azad Govt. of the State of Jammu & Kashmir, having his office at New Secretariat Complex, Muzaffarabad.
3. Chief Engineer, Electricity Department, Mirpur Division, Mirpur, Azad Kashmir.
4. Executive Engineer Electricity, Electricity Department, Kotli.
5. Muhammad Naeem s/o Muhammad Zaman, caste Gujjar, r/o Phagwar Mohra, Tehsil and District Kotli. (owner Royal Star Hotel, Butt Adda, near Civil Supply, Kotli).

.....RESPONDENTS

[On appeal from the Judgment and decree of the High Court dated 18.09.2017 in Civil Appeals No.35, 38 and 39 of 2014]

FOR THE APPELLANT: Mr. Mehmood Akhter
Qureshi, Advocate.

FOR THE RESPONDENTS: Sh. Masood Iqbal, Advocate.

Date of hearing: 22.01.2020

JUDGMENT:

Ghulam Mustafa Mughal, J.— The titled appeals have been filed against the judgment and decree dated 18.09.2017, passed by the Azad Jammu & Kashmir High Court in civil appeals No.35, 38 and 39 of 2014. As both the appeals arise out of one and the same judgment and raise common questions of facts and law, hence, were heard together and are being decided as such.

2. The precise facts forming the background of the captioned appeals are that Ghulam Sarwar, plaintiff/appellant, herein, in appeal No.238/2017, filed a suit under Order XXXIII, CPC, for recovery of damages amounting to Rs.150,000,000/- (fifteen crore), against Muhammad Naeem & others defendants/appellants, herein, in cross appeal No.237/2017, in the Court of District Judge Kotli on 16.02.2012, stating therein, that he was working in Royal Star Hotel situated near Civil Supply, Kotli. It

was further averred that an electricity transmission line of 11 K.V. was passing by the Hotel which was at the distance of only 5 to 6 inches from the hotel building. It was alleged that on 05.09.2012, Muhammad Naeem, defendant, who is the owner of Royal Star Hotel, ordered him to call down a customer sleeping in a room of the hotel at 3rd floor. It was further alleged that when the plaintiff went up and knocked the door of the room of the customer several times but he did not respond. It was further alleged that upon this, the plaintiff went towards the outer-side window to check him but unfortunately got a severe electric shock from the aforesaid electricity transmission line passing by the hotel and got badly injured. It was stated that the plaintiff was taken to the hospital but in consequence of the said unfortunate accident some of his body parts have been amputated and he has become handicapped. It was claimed that the accident happened due to negligence and

carelessness of the electricity department and the owner of the hotel, therefore, decree of recovery of damages caused to him amounting to Rs.150,000,000/- (fifteen crore) may be granted in his favour. The suit was contested by the private as well as official-defendants by filing separate written statements. In the written statement filed by the official-defendants, it was stated that the supply line passing by the hotel was installed in 1980 and the hotel building was constructed after that, hence, no fault has been committed by the electricity department. Muhammad Naeem, defendant, in his written statement, pleaded that to his extent, the suit is liable to be dismissed as the sad incident happened due to the negligence of the Electricity Department. It was averred that even otherwise the suit filed by the plaintiff is not maintainable on the ground that he has not placed on the record any proof which is prerequisite for filing suit under Order XXXIII, CPC.

The learned trial Court framed issues in light of the pleadings of the parties and asked them to lead evidence in support of their respective stand. At the conclusion of the proceedings, vide judgment and decree dated 14.04.2014, the suit filed by the Ghulam Sarwar, plaintiff, was decreed in the terms that he is entitled to Rs.40,00,000/- as recovery of damages out of which Rs.32,00,000/- are to be paid by the defendants No.1 to 4, whereas, rest of the amount is to be paid by the defendant, Muhammad Naeem, the owner of the hotel. The plaintiff felt aggrieved from the judgment and decree passed by the learned trial Court dated 14.04.2014 and filed appeal before the Azad Jammu & Kashmir High Court on 22.05.2014 for enhancement in the damages awarded by the trial Court. Azad Govt. & others as well as Muhammad Naeem also filed separate appeals before the High Court on 12.07.2014, for setting aside the judgment and decree passed by the learned District Judge dated

14.04.2014. The learned High Court consolidated all the appeals and after hearing the parties through the impugned judgment and decree dated 18.09.2017, modified the judgment and decree passed by the learned trial Court dated 14.04.2014, in the terms that the defendant, Muhammad Naeem, is responsible for general damages caused to the plaintiff amounting to Rs.20,00,000/- and the plaintiff is entitled to the decree of the said amount. The appeal filed by Azad Govt. & another was accepted and judgment and decree of the trial Court to their extent was set aside, whereas, the appeal filed by Muhammad Naeem stood dismissed. Now, Muhammad Naeem and Ghulam Sarwar has challenged the legality and correctness of the impugned judgment through the instant appeals. Muhammad Naeem has challenged the impugned judgment on the ground that he is not responsible for the injury sustained to Ghulam Sarwar, plaintiff, and legally he cannot be asked to pay the damages,

whereas, in the counter appeal filed by Ghulam Sarwar, it is pleaded that proper damages may be awarded.

3. Sh. Masood Iqbal, the learned Advocate appearing for Muhammad Naeem, defendant/appellant, herein, argued with vehemence that the judgments of the Courts below are illegal, perverse and capricious for having been handed down against the record and statutory law. The learned Advocate further argued that a specific procedure is provided in Order XXXIII, rules 1 to 9, CPC, for giving permission to an applicant to sue as *forma pauperis* but the learned District Judge Kotli while entertaining the application has not followed the mandatory procedure visualized in the aforesaid statutory provision of law, hence, whole proceeding conducted in the suit which culminated into decree for recovery of damages are nullity in the eye of law and void *ab initio*. The learned Advocate further argued that in

appeal the learned High Court has also not attended the controversy as well as stated legal position in its true perspective and accepted the counter appeal filed by the Azad Govt. & others erroneously. The learned Advocate further argued that appeal filed by Muhammad Naeem was illegally dismissed by the learned High Court because he cannot be held liable to pay damages as he was not the owner of the hotel rather the same was being run by him on rent. The learned Advocate submitted that the story narrated by Ghulam Sarwar, was not believable, however, if the same is assumed as correct for the sake of arguments, even then, he was guilty of contributory negligence but this aspect of the matter has not been considered by both the Courts below. The learned Advocate further submitted that the learned High Court has heard the appeal as first appellate Court and it was imperative for it to decide the case while discussing the evidence in support of each and every issue

separately but the manner in which the appeal has been decided is illegal and is against the provisions contained in Order XLI, rule 31, CPC, therefore, the impugned judgment cannot be termed as a judicial order. The learned Advocate further submitted that even no specific or general damages were claimed by the plaintiff. He added that neither any proper description of damages was made in the plaint nor any documentary evidence or the medical certificate etc. were adduced in support of the claim, in absence whereof, it cannot be said that the case is proved for any type of damages. The learned Advocate further submitted that even otherwise, Muhammad Naeem, appellant, herein, cannot be held liable to pay the damages. He further submitted that the counter appeal is also liable to be dismissed for the same reason.

4. Conversely, Mr. Mehmood Akhter Qureshi, the learned Advocate appearing for Ghulam Sarwar, plaintiff/appellant, herein, in cross appeal argued that

the plaintiff has got injured due to the act of Muhammad Naeem and he has become incapable of living an ordinary life, therefore, the damages awarded by the learned District Judge and the High Court were not proper rather it was enjoined upon the Courts below to award the claimed amount keeping in view the serious injured condition of the plaintiff. The learned Advocate further argued that the learned High Court has discussed the evidence and gave sound reasons in support of the impugned judgment, therefore, it cannot be said that the impugned judgment is based on no evidence or it is arbitrary and capricious. The learned Advocate submitted that the learned High Court has erroneously accepted the appeal of the officials of the Government who were responsible for taking care while passing the electricity transmission line. Their negligence, according to the learned Advocate, is so evident,

hence, it cannot be said that they are not responsible for the injury caused to Ghulam Sarwar/plaintiff.

6. We have heard the learned counsel for the parties and have gone through the record of the case. After considering the entire record as well as file of the trial Court, we are of the view that the objection raised by Sh. Masood Iqbal, the learned Advocate for Muhammad Naeem, has substance in it. Ghulam Sarwar, filed a suit under Order XXXIII, CPC. A specific procedure is provided in the aforesaid statutory provision of law for disposal of the application of a *forma pauperis*. The procedure provided in Order XXXIII, CPC, is mandatory in nature. From the record it appears that the learned District Judge has not bothered to go through the aforesaid statutory provision of law while allowing the plaintiff to sue as *forma pauperis*. This aspect of the matter has not been considered by the learned High Court. Moreover, a perusal of the plaint reveals that

the plaintiff has made general statement regarding his disability without any proof. No statement of expenditure has been produced, thus, it was imperative for the learned High Court being the Court of first appeal to resolve each and every issue by perusing the evidence and by forming its independent conclusion. Even otherwise, the Court was bound to form points for determination of the appeal and resolve the same while discussing the evidence of the parties. In our estimation, the learned High Court has violated the provisions of Order XLI, Rule 31, CPC. Some important questions regarding proper calculation and award of damages and the responsibility of the respondents have escaped the notice of the learned High Court which require resolution.

Thus, we are constrained to accept the appeal and set aside the impugned judgment and decree of the learned High Court dated 18.09.2017. All the three appeals would be deemed pending and

the learned High Court shall decide the them afresh
after providing an opportunity of hearing to the
parties.

Mirpur.
22.01.2020

JUDGE
JII

JUDGE
JI