

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No.66 of 2019
(PLA filed on 16.11.2018)

Muhammad Shabbir s/o Muhammad Shafi, caste
Malik, r/o Goi, Tehsil and District Kotli.

.... APPELLANT

VERSUS

1. Additional District Judge Kotli.
2. Civil Judge Court No.1, Kotli.
3. Abdul Rashid,
4. Muhammad Munir s/o Muhammad Bakhsh,
5. Shahid Rashid s/o Abdul Rashid, caste Malik,
r/o Charnari, Goi, Tehsil and District Kotli.
6. Collector, District Kotli.
7. Assistant Commissioner, Kotli.
8. Extra Assistant Commissioner, Kotli.
9. Tehsildar, Kotli.
10. Niab Tehsildar, Kotli.
11. Gardawar, Circle Goi.
12. X.E.N., Highways, Kotli.
13. S.D.O., Highways, Sub-Division, Kotli.
14. Highway Inspector, In-charge Dandli, Goi,
Tehsil and District Kotli.

15. Overseas, Circle Goi, District Kotli.

.....RESPONDENTS

16. Advocate-General (AJK).

..... PROFORMA-RESPONDENT

(On appeal from the judgment of the High Court
dated 02.10.2018 in writ petition No.24/2018)

FOR THE APPELLANT: Ch. Muhammad
Ilyas, Advocate.

FOR THE RESPONDENTS: Mallick Muhammad
Zariat Khan,
Advocate.

Date of hearing: 20.01.2020

JUDGMENT:

Ghulam Mustafa Mughal, J.— The caption petition for leave to appeal has been directed against the judgment dated 02.10.2018 passed by the Azad Jammu & Kashmir High Court in writ petition No. 24 of 2018.

2. The precise facts forming the background of the captioned petition for leave to appeal are that the appellant, herein, filed a writ petition before the Azad Jammu & Kashmir High Court on 23.04.2018,

stating, therein, that he is owner of the land, comprising *khewat* No.121/117, *khata* No.1297/1247 min, *khasra* No.1492 and 1492 min, situated at village *Goi*, hence, has equal rights in *shamilat-deh* land. It was further stated that the appellant, herein, has constructed a shop over the suit land wherein he is running the business of vehicles since many years. It was averred that on 18.01.2018 respondent No.8 and 11 prepared spot inspection report on the application of respondent No.3, wherein, it was observed that the appellant, herein, has encroached upon the land in possession of respondent No.3, herein, and the orders for ejectment of the appellant, herein, were passed. It was stated that the appellant, herein, filed a suit for declaration and temporary injunction before the learned Civil Judge Court No.1, Kotli, on 14.02.2018, wherein, it was averred that the plot upon which the appellant, herein, is running his business comprising khasra No.1515 is *shamilat-deh*

land and is not part of *khasra* No.1467 and 1466 falling in the ownership of defendant/respondents, herein, but the learned Civil Judge Court No.1 Kotli vide judgment and decree dated 27.02.2018 dismissed the suit being barred by law. It was further stated that the judgment and decree of the learned Civil Judge Court No.1 Kotli was challenged by way of appeal before the learned Additional District Judge Kotli which also met the same fate and was dismissed vide judgment and decree dated 26.03.2018. It was prayed that the judgment and decree of the trial Court as well as the first appellate Court dated 27.02.2018 and 26.03.2018, respectively, as well as the orders/reports of the revenue authorities dated 03.02.2003, 07.12.2017, 25.11.2017 and 18.01.2018, may be set aside being illegal. It was further prayed that he may not be dispossessed until partition of *shamilat-deh* land takes place. The learned High Court after hearing the parties through

the impugned judgment dated 02.10.2018 has dismissed the writ petition.

3. Ch. Muhammad Ilyas, the learned Advocate appearing for the appellant argued that the appellant filed a suit before the learned Civil Judge Court No.1 Kotli, stating, therein, that he has constructed a shop at the land comprising *khasra* No.1515 which is *shamilat-deh* and defendants No.1 to 3 in connivance with the revenue staff on the basis of some spot inspection report interfere in the peaceful possession of the plaintiff while claiming the disputed area as part of *khasra* No.1466 and 1467. The learned Advocate further argued that it was further stated in the plaint that the defendants want to occupy the land forcibly which is in the possession of the plaintiff and also want to demolish his shop constructed over the said piece of land. The learned Advocate submitted that while deciding the application for interim relief filed along with the suit, the learned trial Court illegally rejected the

plaint under Order VII, rule 11, CPC. The learned Advocate further submitted that against the judgment and decree of the learned trial Court, an appeal was filed before the learned Additional District Judge Kotli which also met the same fate and was dismissed. The learned Advocate further submitted that the judgments/orders passed by the learned Civil Judge Court No.1 Kotli and the learned Additional District Judge Kotli were challenged before the Azad Jammu & Kashmir High Court by way of writ petition but the learned High Court without attending the controversy in its true perspective has dismissed the writ petition on the ground of availability of alternate remedy through the impugned judgment. The learned Advocate further submitted that the learned High Court on one hand has dismissed the writ petition for want of jurisdiction and has discussed the merits of the case on the other hand, which is illegal.

4. Conversely, Malik Muhammad Zaraiat Khan, the learned Advocate appearing for the other side argued that the order passed by the learned Additional District Judge Kotli could be challenged by way of appeal/revision petition before the learned High Court and in presence of this adequate efficacious remedy, the writ petition was not competent which has rightly been dismissed by the learned High Court. In this regard, the learned Advocate has placed reliance on the cases reported as *Saif Ali vs. Custodian of Evacuee Property and others* [1993 SCR 39] and *Zafar Umar Khan & another vs. Agricultural Development Bank and 5 others* [1996 SCR 321]. The learned Advocate submitted that the appellant, herein, in fact has occupied the *shamilat-deh* land and is not an owner in the village. He further submitted that the revenue staff wants to dispossess him from the common land, hence, he has filed the suit with unclean hands in order to protect his un-authorized possession.

5. We have heard the learned counsel for the parties and have gone through the record of the case. It may be stated that the against the judgment of the Additional District Judge Kotli, the appellant, herein, has an alternate remedy in shape of appeal/revision petition before the Azad Jammu & Kashmir High Court, hence, the writ petition was incompetent and has rightly been dismissed by the learned High Court through the impugned judgment. However, in the concluding part of the impugned judgment, the learned High Court has given some remarks about the merits of the case which in our view were not justified after dismissal of the writ petition on the ground of jurisdiction. In the present case, the appellant, herein, has based his claim on the point that he is in possession of the land comprising *khasra* No.1515 which is *shamilat-deh* but a perusal of the original file reveals that he has not appended any document along with the plaint on the basis of which it can be ascertained that he is

owner in the village and in that capacity can retain the possession of the *shamilat-deh* land. Moreover, the demarcation carried out by the official-respondents in presence of the respectable of the locality denotes that the appellant, herein, has trespassed upon the landed property of the private-respondents, herein, thus, is an intruder and is not entitled to any discretionary relief. The learned trial Court has dismissed the suit mainly on the ground that he cannot give any declaration in respect of the *shamilat-deh* land. The judgment of the trial Court has been maintained by the first appellate Court on appeal. As stated above, no proof of ownership in the village or possession of the plaintiff/appellant, herein, in number *khasra* 1515 was appended with the file of the trial Court, therefore, the Courts below should have rejected the plaint for want of cause of action. The dismissal/rejection of the suit under the provisions of The Grant of Khalsa Waste Land as Shamilat Deh Act, 1966, was not proper

because if a co-sharer proves that he is an owner in the village and in that capacity is in possession of piece of *shamilat-deh* land, then he can file a suit for perpetual injunction for protection of his possession until the regular partition takes place. Thus, while exercising inherent jurisdiction conferred on this Court under Order XLIII, rule 5 of the Azad Jammu & Kashmir Supreme Court Rules, 1978, the findings of the Courts below to the extent of dismissing the suit under The Grant of Khalsa Waste Land as Shamilat Deh Act, 1966, are hereby quashed. The suit would be deemed to have been rejected for want of cause of action under Order VII, rule 11, CPC. The judgment of the trial Court as well as the first appellate Court stands modified in the afore-stated manner.

In view of the above finding no force in this appeal, the same is, hereby, dismissed with no order as to costs.

Mirpur
20.01.2020

JUDGE

JII

JUDGE

JII