

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
**(JUDICIAL DEPARTMENT)**

**CR No. 498-P/2016**

**Govt. of KPK through Secretary Communication & Works  
Department, Peshawar and others vs. Haji Safirullah and  
others.**

**J U D G M E N T .**

**Date of hearing: 13.7.2017.**

**Petitioner (s): by Mian Arshad Jan, AAG.**

**Respondent (s): by Mr. Muhammad Arif Khan, Advocate.**

**WAQAR AHMAD SETH, J:-** This Civil Revision is directed against the judgment/decree dated 27.4.2016 of learned Additional District Judge-X, Peshawar whereby appeal of the petitioners against the judgment/decree 30.10.2006 of learned Civil Judge-X, Peshawar was dismissed.

**2.** Brief facts of the case are that the respondents/plaintiffs had instituted a suit for declaration to the effect that they are owner in possession of property measuring 14 kanals situated at Mauza Malkandher, Tehsil & District Peshawar, however, the petitioners/defendants issued a notification under Section 4 of Land Acquisition Act, 1894 in respect of possession of disputed property for the purpose of construction of road, which is illegal, against law, facts and ineffective upon their rights; hence, the same is liable to be cancelled. They further prayed for permanent injunction restraining the petitioners/defendants from possession of the

suit property. They also prayed for suit for possession or in alternative payment of its market value.

3. On appearance, the suit was contested by the petitioners/defendants by filing written statement. Issues were framed and accordingly evidence of the parties was recorded. On conclusion of trial, the suit of the respondents/plaintiffs was decreed vide judgment/decreed dated 31.10.2006. Feeling aggrieved, the petitioners/defendants filed appeal before the learned Appellate Court but the same was dismissed vide judgment/decreed dated 11.9.2007. The petitioners, then, filed Civil Revision before this Court, which was allowed vide order dated 12.10.2009 and the case was remanded to the learned trial Court to decide it in light of certain observations mentioned therein. After remand, the learned trial Court appointed local commission and on receipt of its report, ten (10) issues including the relief were reframed and after hearing arguments of the parties, the following decree was passed vide judgment/decreed dated 24.3.2010.

***“Consequent upon my discussion on all the issues, a decree of declaration in respect of ownership of the suit property is hereby granted. Since, the suit property has been acquired by the defendants, therefore, the plaintiffs are entitled to compensation at the rate of Rs. 5,00,000/- per Marla of the suit property. The plaintiffs are also entitled to 15% compensatory acquisition charges along with 06% mark-up on the whole amount from the date of acquisition of the property till the realization of the amount. The rest of the claims i.e. possession and permanent injunction are dismissed as the suit property has already been acquired and main road i.e. Jamrud Road has been widened”.***

4. Aggrieved from the above judgment/decreed of the learned trial Court, the petitioners filed Appeal before this Court, which was dismissed vide judgment/order dated 3.4.2013. The said order was challenged by the petitioners before the Hon'ble Apex Court through Civil Appeal No. 1338/2014, which was allowed and judgment of this Court was set aside in the following manner vide order dated 21.1.2016:

***“In view of the above, this appeal is allowed and the impugned judgment is set aside. The appeal filed by the appellants before the learned High Court is directed to be returned to the appellants to be filed before the learned District Judge concerned. In case the said appeal is barred by time, the appellants may move an application seeking condonation of delay before the learned District Judge and if a sufficient cause in this regard is made out, the said Judge may consider the noted application. As the matter is pending since long, the appeal should be returned by the learned High Court to the office of the appellants within a period of one week and after its institution before the learned District Judge, it is directed that the learned District Judge shall decide the same within a period of three months thereof”.***

Hence, keeping in view the above said order of Hon'ble Apex Court, the appeal of the petitioners was returned to the learned Additional District Judge-X, Peshawar, who after hearing the learned counsel for the parties, dismissed the same vide judgment/decreed dated 27.4.2016; thus, the instant Civil Revision.

5. Arguments heard and record perused.

6. In addition to the facts narrated above learned counsel for the petitioner i.e AAG raised an objection regarding the maintainability of the suit of the respondents, as according to him under section 79 of the CPC and Article 174 of the Constitution, the Provincial Government is to be impleaded, failing which the suit of the respondents/plaintiffs would be not maintainable. Learned counsel for respondents / plaintiffs strongly objected to the said objection as the said objection was never raised by the petitioners / defendants in their written statement nor have agitated thereafter, especially when issues were framed or during the earlier round of litigation.

7. Section-79 of the Civil Procedure Code, 1908 reads as under:-

- In a suit by or against the (government the authority to be named as plaintiff or defendant, as the case may be, shall—**
- a) **In the case of a suit against the Federal Government;**
  - b) **In the case of a suit by or against a Provincial Government.**

Whereas Article-174 of the Constitution of Pakistan, 1973 reads as under:-

**“The Federation may sue or be sued by the name of Pakistan and a Province may sue or be sued by the name of the Province.**

8. Perusal of the plaint filed by present respondents / plaintiffs, in original was against Collector Land Acquisition Peshawar, ii) Collector Land Acquisition PDA, iii) XEH Highways Jamrud Road Peshawar, iv) SDO Highways Jamrud

Road; v) Chief Engineer C&W Department, Peshawar; vi) Secretary C&W Peshawar; vii) Director General PDA Peshawar; viii) Director PDA; ix) Deputy Director Building Control Agency Peshawar and lastly Assistant Director Building Control Agency Peshawar, subsequently amended plaintiff was filed and according to which defendant No.1 was Deputy Revenue Officer, Peshawar, ii) XEN Highways Jamrud Peshawar, iii) SDI Highways Jamrud Road Peshawar, iv) Chief Engineer Works & Services Department Peshawar, v) Secretary Works & Services Peshawar; vi) Director General CD & MD Peshawar; vii) Director CD&MD Peshawar and lastly Deputy Director Building Control agency, which clearly reflects that nowhere Government, Federal or Provincial was arrayed as defendant or was sued.

9. Record suggests that respondents / plaintiffs filed a suit seeking declaration to the effect that they are the owners of land measuring 14 kanals bearing Khasra numbers, mentioned in the heading of the plaint and that notification dated 11.9.1987 under section-4 of Land Acquisition Act, 1894, is illegal and ineffective upon their rights, in addition to other prayers in the suit. Section-4 reads as under:-

**Whenever it appears to the Provincial Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the official gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.**

(2).....

**10.** The underline is by me to show emphasis that the land has been acquired by the Provincial Government and even the notice impugned dated 11.9.1997 under Section-4 of the Act ibid mention the same. Under the scheme and theme of the Act ibid it's always the Government and for that matter Provincial Government, acquires a land for themselves / acquiring department or for Companies etc.

**11.** Record is suggestive that in written statement filed by the present petitioners / defendants in preliminary objection No.2 it was specifically agitated that the suit of the respondents / plaintiffs is not maintainable in its present form and as such issue No.3 on the pleadings of the parties was framed which is "Whether the suit is incompetent and being not in accordance with law is liable to dismiss summarily." In earlier round of litigation an appeal of the defendants was accepted vide order dated 12.10.2009 with the directions to the trial Court to decide the case afresh within a period of six months, positively and to report compliance to the Additional Registrar Judicial, of the Court concerned i.e Peshawar High Court, Peshawar. It was also directed that a local commission be appointed with certain direction, mentioned in the order dated 12.10.2009. Accordingly, the learned trial Court upon remand and direction of this Court appointed a local commission who submitted its report and thereafter issues were framed on 16.2.2010, but, probably or inadvertently no

issue regarding the in competency of the suit, was framed in particular, however, issue No.2 and 5 were framed which were; Issue No.2 “Whether this Court has got jurisdiction to enter the present suit? And issue No.5 “whether the suit is bad due to non joinder of necessary party”?

**12.** The learned trial Court while deciding issue No.2 has held that the suit of the respondents / plaintiffs for declaration, permanent injunction and possession alongwith award of compensation, has got jurisdictions entertain the same and issue No.5, has held that all the necessary party have been impleaded in the suit by the plaintiff, therefore, the issue was decided in negative, without dilating upon the competency of the suit in the absence of legal requirement of arraying Provincial Government in view of section 79 CPC and Article 174 of the Constitution of Islamic Republic of Pakistan, 1973.

**13.** Even otherwise it is the bounded duty of court of law to see the legal frame of the suit, initially. The appellate Court while deciding the case, after remand by this Court as well as the apex Court has not even touched the matter, which was the requirement. The bare reading of section 79 CPC would reflect that the word shall has been used for the purpose of suit by or against the Government and same is the position in Article-174 of the Constitution.

**14.** Question of law can be agitated at any time and reliance in this respect is placed on **2002 CLC-711, 2016 YLR-890, PLD-2007 Karachi-392 & 1999 YLR-1956,**

wherein it has been held that objection as to non maintainability of suit not raised in written statement and was raised in revision petition---Validity----Duty of court was to see and examine plaint, whether same has been properly filed in accordance with provisions of Civil Procedure Code and to see whether suit as framed could legally be proceeded. Objections regarding non filing of suit in terms of such statutory provisions being a legal objection going to the merits of case could be raised at any stage. Courts below by ignoring such statutory provisions have committed an illegality going to the root of suit. No relief could be granted in such suit for being not maintainable. Courts below by granting relief in such non maintainable suits had acted in excess of jurisdiction. In the instant case a proper objection was raised by the petitioners / defendants in the written statement and to this effect issue No.3 was framed on the pleadings of the parties but has remained unattended due to the negligence of the petitioners / defendants or by the Court, after the appointment of local commission etc, upon remand.

15. In the case of **Province of the Punjab through Member Board of Revenue Lahore and others versus Muhammad Hussain through legal heirs, reported in PLD-1993-147 (a) (b)**, while deciding the similar issue, it has held as under:-

- (a) ---S. 79---Constitution of Pakistan (1973), Art. 185(3)---Plaintiff claiming to be the owner of immovable property---Leave to appeal was granted in matter arising out of exparte judgment of the trial court to

examine whether important question with regard to the maintainability of the suit, its valuation, its being within time and on merits had received due attention of the Courts dealing with the case.

- (b) ---S. 79---Constitution of Pakistan (1973), Art., 174---Suit Central Government has to be filed in the name of Pakistan---suing Pakistan through the Departmental Head of the Federal Government or Provincial Government was not only a mistake but a diversion of the proceedings materially affecting service and representation of the concerned defendants.

Likewise, in the case of Haji Abdul Aziz versus

Government of Baluchistan Reported in 1999 SCMR-16

(a) & (b) it has been held as under:-

- (a) ---S. 42---Civil Procedure Code (V of 1908), S. 79---Constitution of Pakistan (1973), Arts 174 & 185 (3)---Suit against Government instituted through wrong person---Effect---High Court had dismissed revision against remand order passed by appellate Court on the ground that provisions of S. 79, CPC and Art. 174 of the constitution had not been complied with by plaintiff and this suit against government had been filed through wrong person---Leave to appeal was granted to consider plaintiffs (petitioners) contention that in spite of the fact that suit filed by plaintiff suffered form initial defect, same did not warrant any interference by High Court in exercise of its revisional jurisdiction; that appeal being time barred by 55 days and there being no request for condonation of delay, appeal was liable to be dismissed forthwith and that both courts below i.e appellate court and high Court had overlooked that important aspect of the case.
- (b) ---S. 42---Civil Procedure Code (V of 1908), S. 79---Constitution of Pakistan (1973). Art. 174---Suit against Provincial Government---Non compliance with provisions of S. 79 CPC and Art. 174 of the Constitution, whereby Province could be sued through concerned Secretary to

government---Unless suit was filed through proper person order directing ex parte proceedings against defendant would be liable to challenge—High Court while exercising revisional jurisdiction was empowered to take notice of defect which were apparent on the face of record---Failure of plaintiff to sue through proper forum was defect which went to the root of the matter and but for interference by High Court, serious prejudice would have been caused to defendant (Government)---order passed by High Court in dismissing revision for non impleading of Government through proper person was not open to exception--  
-Finding of High Court was maintained in circumstances.

16. In exactly similar circumstances to that of the present case, the apex Court of the country granted leave to appeal, to consider as to whether the suit was instituted properly, pursuant to the provision as enumerated in Article-174 of the Constitution of Islamic Republic of Pakistan, 1973 and section 79 of the CPC as admittedly, the provincial government was not impleaded as party through the Secretary concerned. Question which needed determination was to whether without impleading the provincial government the suit instituted could be considered as validity suit, in view of article 174 of the constitution and section 79 of the CPC. The Hon'ble apex Court of the country in the case reported in **2010 SCMR-115 titled Government of Balochistan, CWPP&H Department and others versus Nawabzada Mir Tariq Hussain Khan Magsi and others** while dilating upon the issue and discussing the judgment quoted above, has held as under:-

---S. 79---Constitution of Pakistan (173),  
 Art. 174---Suit against the Government---  
 No. suit can be filed against Provincial  
 Government without impleading the  
 Province as a party and the procedural  
 pre-condition is mandatory in nature and  
 no relief can be sought without its strict  
 compliance and suit would not be  
 maintainable---Provisions as  
 contemplated in S.79 CPC cannot be  
 made a ground for technical knockout  
 and wrong description of Secretary as  
 functionary of the Government is always  
 subject to correction---Due to non  
 compliance of mandatory provisions of S.  
 79 CPC and Art. 174 of the Constitution,  
 a suit against the functionary only is not  
 maintainable.

17. Due to non compliance of the mandatory provisions as enumerated in section-79 CPC, 1908 & Article 174 of the Constitution of Islamic Republic of Pakistan, a suit against the functionaries only is not maintainable, thus, in view of above, what has been discussed hereinabove, the civil revision is hereby allowed and concurrent findings of two courts below i.e are set aside and the suit filed by the respondents being non maintainable is stand dismissed.

**ANNOUNCED.**  
**Dated: 13.7.2017**

**JUDGE**

**\*Nawab Shah\***

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