JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

C.R No. 344-M/2021
With CMs No. 1022-M & 1127-M of 2021

Shahzada Colonel Sharif-ud-Din &others...(Petitioners).
v/s
The Settlement Officer Districts Upper and Lower Chitral & others.....(Respondents)

Present: *M/S Qazi Jawad Ehsan Ullah (via video link), Barrister Asad Ul Mulk and Mohib Ullah Tarichvi, Advocates.*

M/S Sher Muhammad Khan, Zafar Hayat and Rahim Ullah Chitrali, Advocates.

Date of hearing: 28.06.2021

JUDGMENT

WIQAR AHMAD, J.- This order is directed to dispose of the petition filed by petitioners under section 115 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ***"Code"***).

2. Plaintiffs (petitioners herein) had brought a suit for declaration, permanent injunction coupled with a prayer for recovery of possession against defendants (respondents herein), in respect of the property in dispute (fully described in headnote of the plaint). It was contended in the plaint that plaintiffs had been ancestral owners of the property in dispute being legal heirs of their predecessor-in-interest namely Shahzada Shuja-ud-Din, who was son of late Burhan-ud-Din. Along with the

plaint, they had also filed an application for the grant of temporary injunction. On being noticed, defendants/ respondents appeared before learned civil Court and contested the suit by filing their separate written statements. The learned civil Court vide order dated 13.02.2021 allowed the application filed by petitioners restraining the respondents from all sorts of interference in the property in dispute for a period of six months. Feeling aggrieved there-from, respondents have filed an appeal before the learned District judge Chitral, who vide the impugned order dated 29.04.2021 accepted the appeal by setting aside order of the learned civil Court and defendants/respondents were allowed to raise construction on the property in dispute at their own risk and cost. Feeling aggrieved there-from, petitioners have filed the instant petition with the following prayer;

"It is therefore most humbly prayed that upon acceptance of the instant Civil Revision, the impugned judgment and order dated 29th April 2021 of the learned District Judge Lower Chitral may graciously be set-aside and the injunctive order dated 13th February 2021 issued by the learned Senior Civil Judge Lower Chitral be graciously restored.

Further or alternatively this august Court may grant such relief, on such terms and conditions in purview of all enabling provisions of law, as it deems just and officious to meet the ends of justice."

3. Learned counsel for the petitioners submitted during the course of his arguments that the learned District Judge had not been having jurisdiction in

the matter but despite that appeal of the respondents was allowed through the impugned judgment. Regarding lack of jurisdiction, the learned counsel added that pecuniary limit of jurisdiction notified as per the last notification, issued under section 18 of the West Pakistan Civil Court Ordinance 1962 (hereinafter referred to as the "***Ordinance***") was to the extent of ten million and that same would remain applicable to the extent of appeal against orders. The learned counsel added that the changes brought by the Khyber Pakhtunkhwa Code of Civil Procedure (Amendments) Act, 2020 (hereinafter referred to as the ***"Amending Act"***) in section 106 of the Code shall not be applicable as non-obstante clause has not been added to the newly substituted section and that despite the fact that appeals against final judgment and decree would be laying before the District judge, appeals against interim order shall lie before this Court. Regarding merits of the petition the learned counsel submitted that the proposed construction would change nature of the suit property and to avoid such change of nature the learned appellate Court should not have allowed the respondents to raise construction even at their own risk and cost. He placed reliance upon the judgments reported as ***1980 SCMR 89, 1988 SCMR 1691, 1989 SCMR 130, PLD 1990 SC 792, 2005 SCMR1388, PLD 2006 SC 328, 2011 SCMR 743, PLD***

2016 SC 121, PLD 1980 Lahore 382, PLD 1991 AJK 50 and 2009 CLC 92.

4. Learned counsel for respondents submitted in rebuttal that petitioners/plaintiffs have got no cause of action as they have been claiming their legacy from a predeceased son of Burhan-ud-Din, on the basis of gift deeds which deeds did not make mention of the property in dispute specifically. He added that respondents have got a strong case than the petitioners, as claim of the respondents in the property in dispute has been based upon registered sale deeds coupled with continuous peaceful possession since the date of their purchase. He also added that when the learned appellate Court has allowed the respondents to raise construction at their own risk and cost then no inconvenience was likely to be caused to the petitioners. He drew attention of this Court towards the photographs annexed with C.M. No. 1127 of 2021 and contended that construction had already been raised to a larger extent and further construction would make no difference vis-à-vis change of nature of the property and that in case the petitioners/plaintiffs succeed in the suit, the respondents would not claim any compensation for the construction so made, and that they had also submitted an affidavit in this respect before the Courts below.

5. I have heard arguments of learned counsel for the parties and perused the record.

6. Arguments of learned for the petitioners that order of the learned District Judge Lower Chitral was without jurisdiction, is difficult to be agreed with. Section 11 of the Amending Act has the effect of substitution of section 96 in the Code while section 13 of the Amending Act has the effect of substituting section 106 of the Code. Both the sections of law are reproduced hereunder for ready reference;

11. Substitution of section 96 of the Act No. V of 1908.--- In the said Act, for section 96, the following shall be substituted, namely:

"96. <u>Appeal from final judgment or decree.</u>---Save where otherwise expressly provided in the body of this Code and notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the District Court from the final judgment and decree passed by the Civil Court, while an appeal shall lie to the High Court from the final judgment and decree of the District Court while exercising original jurisdiction on any question of law or fact erroneously determined by the original court and the Appellate Court shall decide the appeal within six months, after completion of service of summons."

13. Amendment of section 106 of the Act No. V of 1908.--- In the said Act, for section 106, the following shall be substituted, namely;

"106. <u>What Courts to hear appeals</u>.---Appeals against order, passed under this Code, shall lie to the Court, directly from its subordinate court exercising original jurisdiction adjudicating the suit, in the prescribed manner.".

The need for substituting section 96–which deals with appeal from final judgment and decree as well as section 106 which deal with appeals against

orders–had arisen due to the change of forum of institution of suit brought by section 3 of the Amending Act, which is also reproduced hereunder for ready reference;

3. Substitution of section 6 of the Act No. V of 1908.---In the said Act, for section 6, the following shall be substituted, namely: "

6. Pecuniary jurisdiction.---Save in so far as is otherwise expressly provided, all civil suits shall be filed in the following manner, namely:

(a) where the amount or value of the subject matter of the suit is below rupees fifty million, the suit shall be filed in the Court of Civil Judge, as may be prescribed by the High Court; and

(b) where the amount or value of the subject matter of the suit is rupees fifty million or above, the suit shall be filed in the Court of District Judge, as may be prescribed by the High Court.

The net effect of all these amendments with respect to pecuniary jurisdiction for institution of suit and appeals has been to the following effect;

(a) A suit with a value of the subject matter below Rs. 50 million was provided to be instituted in a civil Court, while a suit with the subject matter of Rs. 50 million or above was provided to be instituted before the Court of District Judge of the concerned District.

(b) All appeals against final judgment and decree passed by civil Court was provided to be laying before District Court, and appeals against judgment and decree passed by District Court in exercise of original jurisdiction would lie before the High Court.

Similarly, by substitution of section 106 the legislature intended to provide a forum of appeal before the next higher Court against orders of immediate subordinate Courts in the hierarchy. Arguments of

learned counsel for the petitioners was that since a non-obstante clause had not been introduced in section 106, therefore it could not be given an overriding effect over provisions of the Ordinance. While arguing in this manner, the learned counsel could not realize that a subsequent Act carries the effect of implied repeal, if its provisions are found to be in conflict with earlier law on same subject. The subsequent statute, expressing the intention of the legislature in express words should be given precedence over operation of a previous statute. True that implied repeal cannot be lightly inferred but where provisions of the two Acts cannot stand together then the doctrine of implied repeal can safely be employed. Mr.S.M. Zafar in his book "***Understanding Statute"*** has opined in this respect;

> ***" The basic principle of implied repeal is that the latter enactment is so inconsistent with and repugnant to other, that the two of them are incapable of standing together, the latter is presumed to have repealed the former. If it is reasonably possible to construe the provisions as to give effect to both, that must be done, and their reconciliation must in particular be attempted if the latter statute provides for its construction as one with the earlier, thereby indicating that Parliament regarded them as compatible, or if the repeals expressly effected by the latter statute are so detailed that failure to include the earlier provisions among them must be regarded as such an indication. On the application of the principle that the 'express mention of one thing excludes others'.***

Similarly in the case of ***"Mumtaz Ali Khan Rajban & another v/s Federation of Pakistan & others"***

reported as ***PLD 2001 SC 169***, Hon'ble Supreme Court of Pakistan had also observed in this respect;

As regards the plea of alleged repeal of the Act, 1975 by necessary implications, it is significant to note that the general rule is that no repeal can be implied, unless there is an express repeal of an earlier Act by the later Act, or unless it is established that the two Acts cannot stand together. However, a repeal by implication is possible, as laid down in N.S. Bindra's Interpretation of Statutes, Eighth Edition, page 829/830 in the following circumstances:--

"***(1) If its provisions are plainly repugnant to a subsequent statute.***

(2) If the two standing together would lead to wholly absurd consequences.

(3) If the entire subject-matter of the first is taken away by the second."

Hon'ble Supreme Court of Azad Jammu & Kashmir in the case of ***"Muhammad Asif Khan and others v/s Azad Government of the State Jammu and Kashmir through Chief Secretary & others"*** reported as ***2014 PLC (C.S) 534***, after quoting various authorities on the interpretation of statutes; had also held and declared;

27. The following recitals from Halsbury's Laws of England, Vol.44, are also instructive:

`A statute or a part of a statute may be repealed by a subsequent statute, or an intention that the earlier statute should be repealed may be inferred from the nature of the provision made by the later statute.'

`The rule is that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that law that the two are incapable of standing together.'

We may also notice that in Osborn's Concise Law Dictionary the word "repeal" has been assigned the following meaning:---

`The abrogation of a statute or part of a statute by a subsequent statute. It may be either i.e. specially enacted, or it may be implied, i.e. the necessary result of the subsequent enactment.'

28. We thus form the opinion that, unless the intention gathered from the subsequent enactment is otherwise, if a law or provision of law is superseded or revoked, through a legislative measure it is to be taken as a repeal."

Intention of legislature in giving the mechanisms for appeals against judgment and decree as well as appeals against other orders have been quite clear and that was to provide that the next higher forum in the hierarchy of civil Courts should have the jurisdiction to hear appeals from the immediate Court below. A non-obstante clause has expressly been introduced in section 6 as well as section 96 of the Code but even if such words were not found in newly inserted section 106, the intention becomes manifestly clear when we read section 106 along with newly inserted section 96 as well as section 6 of the Code. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of ***"Rana Aamer Raza v/s Doctor Minhaj Ahmad Khan"*** reported as ***2012 SCMR 6*** had also considered other statutes found *pari materia* with the Punjab Employees Efficiency, Discipline and Accountability Act, 2006, for the purpose of ascertaining true intention of the legislature. Relevant findings of the Court are reproduced hereunder for ready reference;

Here we are seized of giving effect to a Statute which incorporates a Constitutional provision by reference. In construing such a piece of legislation, the Court has to examine and keep in mind three things: (i) the Statement of Reasons and Objects given therein; (ii) the statement of objects given in other laws in pari materia to the one under consideration; and (iii) the mandate of the Constitutional provision which stands adopted by way of reference.

14. A bare perusal of the statement of objects of the similar amending provisions in various Universities of Punjab, a detail of which has been given in the table above, reflects that the legislative intent was that "the principles of good government as enunciated in the Constitution should be made applicable".

While interpreting newly inserted section 106 of the Code we cannot steal eyes from newly inserted section 96 as well as section 6 of the Code. Adopting such an approach would produce absurd consequences. One of the absurd consequences would be that the newly inserted section 96 has provided that the District Court would hear appeals from original judgment and decree in case of a suit carrying jurisdictional value of any amount less than 50 million. If the last notification of pecuniary limit of jurisdiction made under section 18 of the Ordinance is given precedence over the newly inserted section 106 then the net effect would be that though appeals against final judgment and decree shall lie before the District Court in a suit having valuation of more than 10 million and below 50 million, but it would not be able to hear appeals against interlocutory orders in same suit and the appeals

against interlocutory orders would be deemed to be laying before the High Court. This would naturally be absurd consequence of such an interpretation. It is also a cardinal principle of interpretation that when an interpretation produces such absurd consequences then it should not be placed upon provisions of a statute. Maxwell on ***"the Interpretation of Statutes"*** (Twelfth Edition by P.St. J. Langan) contains the following passage, regarding consequences flowing from an interpretation, which may be reproduced hereunder with benefit;

"In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the one. "All intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available." Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction."

Hon'ble Supreme Court of Pakistan while giving its judgment in the case of ***" Khaliq Qureshi and 5 others v/s United Bank Limited"*** reported as ***"2001 SCMR 103"*** on the basis of existing case law has also held in this respect;

"It is pertinent to mention here that "the initial presumption is that an absurdity is not intended by the law-maker. (PLD 1964 Dacca 756, PLD 1962 Lah. 878). In case of doubt as to the intention of Legislature,

an interpretation which leads to manifest absurdity should, if possible, be avoided. (PLD 1964 Lah. 101 + PLD 1966 Azad J&K 38). If proposition accepted, leads to absurd result, there is always a presumption against such absurdity". (PLD 1959 Quetta. 1),"

7. The interpretation as desired by learned counsel for petitioners would also render newly inserted section 106 in the Code as redundant. Redundancy cannot be attributed to legislature because appeals against orders would then be regulated by the notification issued under section 18 of the Ordinance and then this newly inserted provision would naturally become superfluous. Redundancy cannot be attributed to legislature. In this respect reliance may be placed on the judgments of Hon'ble Supreme of Pakistan given in the case of ***"Messrs Master Foam Pvt. Ltd and others v/s Govt: of Pakistan through Secretary & others"*** reported as ***2005 PTD 1537***, the case of ***"Dr. Raja Ameer Zaman v/s Omar Ayub Khan and others"*** reported as ***2015 SCMR 1303*** and the case of ***"Pakistan Telecommunication Employees Trust v/s Federation of Pakistan and others"*** reported as ***PLD 2017 Supreme Court 718.***

8. Last but not the least, the determination of forum of appeal, according to the notification issued under section 18 of the Ordinance, would amount to regulating the forum through subordinate legislation. A piece of subordinate legislation cannot be given

precedence over primary legislation. When the newly inserted section 106 of the Code was found in conflict with a piece of subordinate legislation issued by government of Khyber Pakhtunkhwa under section 18 of the Ordinance, the former must be given precedence over the latter. Hon'ble Supreme Court of Pakistan in the case of ***"Additional Collector Sales Tax Lahore & another v/s Rupafab Limited and others"*** reported as ***2001 PTD 2383*** has held that rules, which were merely subordinate legislation, could not be allowed to override or prevail upon provisions of a parent statute and whenever there had been an inconsistency between the rules and statues, the latter must prevail. Similar findings have also been recorded by Hon'ble Apex Court in its judgment given in the case of ***"Word Call Telecom Ltd through Chief Executive Officer and others v/s Pakistan Telecommunication Authority (PTA) through Chairman and others"*** reported as ***2016 SCMR 475***. It is therefore quite clear that section 106 of the Code being a piece of primary legislation and subsequent in time would have precedence over the notification issued under section 18 of the Ordinance and shall accordingly govern the field. Reliance of learned counsel for petitioners on the judgment of Hon'ble Supreme Court of Pakistan given in the case of ***"Khalil-ur-Rehman v/s Town Committee Rabwah through Chairman"*** reported as

PLD 1990 Supreme Court 792, for fortifying his arguments that the Ordinance being special law should prevail on the subject, is also misplaced for the reason that when the latter legislation has specifically provided a forum of appeal against orders, then a piece of subordinate legislation issued under section 18 of the Ordinance cannot be allowed to prevail over the primary legislation. Moreso when the latter legislation has also been specific regarding the subject as there has been no ambiguity in the text or intention of the legislation, in substituting section 106 of the Code. Facts of the present case are therefore distinguishable and ratio of the judgment of ***Khalil-ur-Rehman*** *Supra* cannot be applied to the case in hand. It has also been clarified by this Court in its earlier judgment given in the case of ***"Amir Zada & others v/s Mian Zamin Khan"*** (***"RFA No. 391-M of 2020"***) that the District Court would have jurisdiction to hear appeals in a suit carrying subject value of any amount less than fifty million, due to the change brought in the law relating to forum of appeals by provisions of the Amending Act.

9. Coming to merits of the case, it is manifest that the learned appellate Court below has allowed the respondents to raise construction in the property in dispute at their own risk and cost. Perusal of the plaint

reveals that petitioners had admittedly been out of possession and a prayer for recovery of possession has also been made in the plaint. In Para 17 of the plaint the petitioners/plaintiffs have stated that they had been dispossessed on 27th October 2020, but in this respect no proof in the shape of any complaint under Illegal Dispossession Act or other complaint to the local police have been annexed. On the other hand, claim of the respondents has been based upon registered sale deeds. Settlement operations in District Chitral has almost been completed but the revenue record has not yet been finally notified. The petitioners/plaintiffs, after finding adverse entry in the proposed revenue record in respect of the property in dispute, have also moved application before the settlement officer, detail of which has been mentioned in Paras 24,25,26 and 27 of the plaint, but their application could not get favour with the settlement officer. Deep merits of the case cannot be discussed at this moment, lest it may prejudice case of either party at the final outcome, but it is clear that petitioners have been out of possession and their title regarding the property in dispute, is yet to be established in the suit. The learned appellate Court has allowed the respondents to raise construction at their own risk and cost. It has been noted in the impugned order that construction had already been started on the property in dispute. The

photographs annexed with C.M No. 1127 of 2021 also shows that construction on the property in dispute has been raised to some extent. Raising of further construction is not likely to cause any inconvenience to the petitioners. On the other hand, stopping of the ongoing construction may cause greater inconvenience to the respondents. In the case of ***"Malik Manzoor Hussain v/s Muhammad Bashir& others"*** reported as ***1980 SCMR 366*** Hon'ble Supreme Court had held that stopping of ongoing construction would cause greater inconvenience to the party making construction on the spot and had held that the balance of convenience was lying in favour of such party. When the leaned appellate Court, through the impugned order, allowed raising of construction on risk and cost of the respondents then the petitioners are not likely to suffer any loss either. In case they succeed in establishing their title in the suit, respondents would not be able to claim any compensation for the construction or improvements made on the spot. They have already submitted an affidavit to said effect before the Courts below and their counsel reiterated same stance during the course of his arguments that respondents would not claim any compensation for any improvements made on the property in dispute, in case the plaintiffs/petitioners succeeded in proving their title regarding the property in

dispute, at the conclusion of suit. There has not been any likelihood of an irreparable loss to the petitioners. In the case of ***"Fazal Begum and others v/s Sh. Ijaz Ahmad and others"*** reported as ***1985 SCMR 1928*** Hon'ble Supreme Court of Pakistan had maintained order of the High Court, whereby respondents had been allowed to raise construction at their own risk and cost. This Court has also allowed raising of construction on own risk and cost in the judgments rendered in the case of ***"Wajid alias Khan Sheerin & 5 others v/s Muhammad Niaz Khan & others"*** reported as ***2011 MLD 1548*** and the case of ***"Zahir Shah v/s Shahzeb"*** reported as ***2015 YLR 1505***. So far as the judgments relied upon by learned counsel for respondents are concerned, same have mostly been rendered in the cases where status of the parties had been running as co-sharers in the revenue record or admitted as such in the pleadings. The case in hand have different set of facts and in the peculiar circumstances of the case this Court do not find allowing the respondents to raise construction on their own risk and cost, as unjustified or causing any prejudice to the rights of the petitioners/plaintiffs. Said judgments are therefore distinguishable. In the given situation, when the learned appellate Court has allowed the respondents to raise construction on the property in dispute at their own risk and cost, this Court do not find any ground for

interference in such order and reversing order of the learned appellate Court.

10. In light of what has been discussed above, the instant revision petition was found divested of any force and same is accordingly dismissed.

Announced
Dt: 28.06.2021

JUDGE

Office 30/06/2021