JUDGMENT SHEET
PESHAWAR HIGH COURT, BANNU BENCH
(JUDICIAL DEPARTMENT)

Review Petition No. 514-B of 2017 in WP No.826-B of 2017

Maqbool Islam and 07 others
versus
Assistant Commissioner Banda Daud Shah, Karak & 2 others

JUDGMENT

Date of hearing: - **21.04.2021.**

For Petitioners: Mr. Khush Amir Khattak, Advocate.
For Respondents: Mr. Shahid Hameed Qureshi, AAG
Mr. Muhammad Khan, Legal Advisor &
Abdul Waheed TMO, BD Shah

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MUHAMMAD NAEEM ANWAR, J.- Through instant petition, filed under section 114 read with Order-XLVII Rule 1 of the Code of Civil Procedure, 1908, the petitioners have sought the review of judgment rendered in **Writ Petition No.826** dated **13.07.2017.**

02. Facts lying in background of the instant review petition are that petitioners being served with notice No.975/TMA BD Shah dated 22.05.2017, by TMA, BD. Shah, Karak had approached to the Tribunal, constituted under Khyber Pakhtunkhwa Public Property (Removal of Encroachment) Act, 1977, by filing of an application with the assertion that neither they have encroached upon the public property nor the description of any such property was given in notice, however, the property for which notice was issued is shamilat-e-deh of the revenue estate of "Shewa" of Tehsil BD Shah, District Karak, but it is not the public property, in which they have constructed

their houses since long and that there is a private path with width of 5/6 and 9/10 feet from different places which leads to the houses. Therefore, notice is ineffective upon their rights.

03. Respondents were put on notice by the learned Tribunal who have submitted their written reply along with record of the demarcation proceedings conducted by the official of revenue hierarchy, on the basis of which the impugned notice was issued to petitioners. It was also alleged by the respondents that residents of Banda Daud Shah have submitted application before Assistant Commissioner Tehsil Banda Daud Shah by mentioning therein that property bearing Khasra No.1659 is a thoroughfare, which has been encroached upon by the petitioners, this fact was confirmed through proper demarcation, thereafter, notice was issued for removal of encroachment. Learned tribunal after hearing the parties has dismissed the petition through its order dated 29.9.2017, the operative part of the order is reproduced as under: -

> "The upshot of the above discussion is that, this court has no hesitation to conclude that firstly, the petitioner has got no locus standi to file the present petition because the khasra number in question is joint ownership of the local residents. If at all it is considered that they are also the local residents and as such take holders in the shamilat even then they have no right to encroach upon a public thoroughfare, the area and directions of which is clearly mentioned in

the revenue record. the public thoroughfare in question is comprised of 7-Knaals and 14-Marlas, whereas on the spot its area was found less because of the encroachment."

04. The petitioners had assailed the order of learned tribunal through Writ Petition No.826-B/2017 which was dismissed by this court on 13.11.2017. Through instant application, petitioners contended that the order of this court rendered in writ petition No.826-B/017 is suffering from clerical and arithmetical mistakes which requires to be rectified and their grievance be redressed.

05. Learned counsel for petitioners contended that property bearing Khasra No.1659 measuring 7-kanals 14-marlas is shamilat-e-deh of the estate of "Shewa" which is undivided property of the proprietary body of the estate concerned; that TMO/respondent No.1 has got no authority to declare it as public property; that the tribunal has got exclusive jurisdiction to entertain the matter; that without recording of evidence, the tribunal could not decide the fate of application and that this court has wrongly held the property is thoroughfare/ public property which is against the fact as such, the order under review is perverse, fanciful, against the fact and law, thus, require to be reviewed.

06. Contrarily, learned AAG assisted by Mr. Muhammad Khan, Legal Advisor and Abdul Waheed, presently posted as

TMO Banda Daud Shah, Karak contended that the scope of review is very limited wherein only an error which is floating on the surface of record can be rectified and if any person is aggrieved from the correctness or validity of the order, he at the best could challenge the same in the next higher forum.

07. Arguments heard and record perused.

08. No doubt, this court has got ample power to review its judgment/ order provided the same suffers from arithmetical/ clerical errors, in consonance with the provisions of section 114 read with order XLVII Rule-1 of the Code of Civil Procedure but this cope cannot be enlarged to declare the order as illegal or against the law.

09. Perusal of record reveals that in the Jamabandi for the year 2014-15 Khata No.470 (min) Survey No.1659 is recorded as:

شاملیات دیہہ حسب رسد لوگہ وادی مندرجہ شجرہ نسب سابق بااستثنائے مالکان قبضہ۔

Since the nature of property was mentioned as *Shara-e-aam* (شارع عام) / thoroughfare measuring 07-kanals 14-marlas as *"Ghair Mumkin Rasta"*. It was not the case of petitioners that they have not encroached upon this property rather they have contended that their houses exist in the property since time immemorial and that there is no thoroughfare. Presumption of truth is attached to the entries of revenue papers in accordance with section 52 of Land Revenue Act, 1967, though it is rebuttable but in the instant case the entries of revenue papers

were never challenged before appropriate forum. Likewise, the entries of revenue papers were not even challenged or questioned before tribunal and as well before this court. Even today learned counsel for petitioners contended that this is their own/ private property which could not be termed as thoroughfare.

10. Undoubtedly, tribunal has got exclusive jurisdiction, as constituted under section 12 of the Khyber Pakhtunkhwa Public Property (Removal of Encroachment) Act, 1977, (hereinafter referred as **(The Act of 1977).** The jurisdiction of tribunal has property been mentioned/ elaborated under section 13 of the Act, 1977 which for convenience is reproduced as under: -

> "13. A Tribunal shall have exclusive jurisdiction to adjudicate upon a dispute that any property is not a public property or that any lease or licence in respect of such public property has not been determined for the purpose of this Act."

11. It is pertinent to mention that jurisdiction of the matters pertaining to the property as defined in section 2 (h) are exclusively to be tried by the tribunal, recording which no other court has got jurisdiction to entertain and adjudicate upon. Bar of jurisdiction regarding public property in consonance with section 11 for ready reference is reproduced as under: -

> "11. (1) No Civil Court shall have jurisdiction to entertain any proceedings, grant any injunction or make any order in relation to a dispute that any property is not a public property, or that any lease or licence in respect of such public property has not been determined for the purpose of this Act, or anything done or intended of purported to be done under this Act.

> (2) All suits, appeals and applications relating to encroachment or disputes referred to in sub-section (1) and pending in any court shall abate on the coming into force of this Act:
>
> Provided that a party to such suit, appeal or application may, within thirty days of the coming into force of this Act, file a suit before a Tribunal in case of a dispute that any property is not a public property or that any lease or licence in respect of such public property has not been determined. "

12. It is significant to mention that notice was issued to the petitioner on 22.5.2017 whereas they have approached to the tribunal through their application dated 12.7.2017. Law provides that any person who has been served with the notice for alleged encroachment by the authority/ government, if he feels aggrieved may prefer a review petition to the government or authority under section 4 of the Act of 1977. Though, without seeking review the aggrieved person may approached to the tribunal for determination as to whether the property described in the notice/ subject matter of the notice is public property or not. The apex court in case title **"Mian Hakim Ullah and 2 others Vs. Additional District Judge/ Tribunal, Nowshera and 4 others" (1993 SCMR 907)** has dilated upon the jurisdiction of the tribunal in the following terms.

> "These disputes are triable exclusively by the Tribunal constituted under section 12 of the Act. It is, therefore, quite obvious that of in a review application filed under section 4 of the Act against an order passed under section 3, ibid, the party takes the ground that the property in respect whereof the order has been passed by the Authority, under section 3, ibid, is either not a public property or its lease or licence has not been determined for the purposes of the Act, the Authority will not be able to decide the Review Application for want of jurisdiction to adjudicate upon such disputes. Sub-rule (2) of rule 4

> is squarely designed to take care of such a situation, and in such a case, the Authority hearing a review application under section 4 of the Act instead of dismissing the review application for want of jurisdiction can refer the dispute, tinder rule 4 (2) of the Rules, to the Tribunal for adjudication. Rule 4(2) of the Rues, therefore, does not come in conflict with section 4, or contravenes any other provision of the Act. On the contrary, it supplements and promotes the objectives and working of the Act. We, therefore, do not find any inconsistency between sub-rule (2) of rule 4 of the Rules and the provisions of the Act."

13. Next point for review of the judgment is that the property is Shamilat-e-deh in which they have constructed their houses and that are the proprietary body, the owners if it, suffice it to say that neither this was the plea of petitioners before tribunal nor before this court in earlier round of litigation. Be that as it may, this court in a matter arising from the judgment of the civil court pertaining to the Shamilat property has discussed the factum of thoroughfare in case **titled "Raees Khan and others Vs. Samra Ali Shah and others" (1997 CLC 349)** wherein it was held that:

> "There is a difference between the thoroughfare and a private path. A thoroughfare, which happens to be Shamilat, is used and enjoyed by every person of the village irrespective of the fact whether he is owner or not, and a person if recorded its owner cannot convert it to his own use as laid in PLD 1996 Peshawar 19, but if there is a private path, then an owner thereof shall certainly have a right of use and conversion according to his own requirements and choice. Such a path shall be as good property and ownership as any other property can be. PLD 1985 Peshawar 99 (ii) can be conveniently quoted in support of this proposition."

Admittedly and undeniably the property is Shamilat-e-deh, thus, notwithstanding that the petitioners are its owners or not, it is a public property, duly recorded in revenue papers as "Public

path" (راستہ عام), therefore, no one including the petitioners could convert it as per their whims, wishes and need.

14. It is also settled proposition of law that the review is not meant for re-hearing of the matter. Scope of the review is always very limited and confined to the basic aspect of the case which was considered in judgment but if the grounds taken in support of the petition were considered in the judgment and decided on merits, the same would not be available for review in the form of re-examination of the case on merits under section 114 which reads as:-

> "114. [Review. -(1) Subject as aforesaid, any person considering himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.
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> (b) by a decree or order from which no appeal is allowed by this Code, or
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> (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order. And the Court may make such order thereon as it thinks fit".

15. Likewise, ORDER XLVII (REVIEW) Rule 1, further states that: -

> **(1) Application for review of judgment.** –
>
> (1) Any person considering himself aggrieved –
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.
>
> (b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,
and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review".

16. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order which cannot be disturbed. It is beyond any doubt or dispute that the review court does not sit as a court of appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In nutshell the power of review can be exercised for correction of a mistake and not to substitute a view.

17. There is no cavil with the proposition that if the Court has taken a conscious and deliberate decision on a point of law or fact and disposed of the matter pending before it, review of such order cannot be obtained on the grounds that the Court took an

erroneous view or that another view on reconsideration is possible, more-so review also cannot be allowed on the ground of discovery of some new material, if such material was available at the time of hearing but not produced. Likewise, the Hon'ble Supreme Court of Pakistan in case titled **"Sajid Mehmood versus Muhammad Shafi"** reported in **(2008 SCMR 554)** has also held that: -

> "The exercise of review jurisdiction does not mean a rehearing of the matter and as finally attaches to the order, a decision, even though it is erroneous per se, would not be a ground to justify its review."

18. I have gone through the judgment under review and found that as per the controversy and the points raised in writ petition were properly decided, learned counsel for the petitioner could not point out any such error which is floating on the surface of record for the purpose of exercising of jurisdiction under section 114 CPC. Thus, for the reasons discussed above, this review petition is dismissed being without substance.

ANNOUNCED.
21.04.2021.
Ihsan.

JUDGE

S.B (Hon'ble Mr. Justice Muhammad Naeem Anwar).