

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

FAO 1/2021 CM(57/2021)
CM(6862/2023).

ABU HASSAN

...Appellant(s)

Through:Mr. Baber Bilal Malik, Advocate.

VERSUS

MOHAMMAD HASSAN AND ORS.

Through:Mr. R.A. Jan, Sr. Advocate with
Mr. Wahid Lone, Advocate

...Respondent(s)

CORAM:

HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE.

ORDER
05.08.2025

01. Heard learned counsel for both sides. Perused the record.
02. A civil suit came to be commenced by respondent No. 1- Mohammad Abdullah on file No.05/N on **02.05.2018** before the Court of Principal District Judge, Kargil.

03. In the said suit, the respondent no. 1 herein, as being the plaintiff and as such dominus litis, had chosen his opponent/s to figure as defendant/s in his suit.

04. Mohammad Mussa, the respondent No. 2 herein, was chosen to be the contesting defendant in the suit, whereas two more persons, namely, Mohammad Sadiq and Abdul Hussain, both introduced as sons of Mohd. Ibrahim, came to be named as proforma defendants without any suit reliefs being sought or set up against the two.

05. In the suit, the respondent No. 1, as plaintiff, claimed the reliefs which are reproduced hereinunder:

“a. For a declaration that the plaintiff is the owner of the land situated at Karbathang Kargil measuring 1 Kanal and $\frac{1}{2}$ Kanal of land which is purchased from the defendant No. 2 and 3 by way of sale agreement.

b. For a permanent injunction restraining the defendant from proceeding with the

construction of house on the plaintiff and as described in the plaintiff.

- c. For mandatory injunction against the defendants directing him to remove the material and stone from the plaintiff land which he has already dumping on the land of the plaintiff, and demolished the partly raised the construction.
- d. Any other relief may be granted to the facts and circumstances of the case.”

06. The proceedings in the civil suit came to be taken *ex-parte*.

07. On the basis of the evidence led from the end of the respondent No. 1/plaintiff, the suit came to be decreed by the Court of Principal District Judge, Kargil, by virtue of a judgment and decree dated 13.12.2019.

08. While the decree claimed by the respondent No. 1/plaintiff was for declaration with consequential relief relatable to suit land situated at Yokma Thang (Khurbathang), Kargil, but the decree which actually came to be passed by the Court of learned District

Judge, Kargil and well accepted by the respondent No. 1/plaintiff is to the following effect:

“An ex-parte decree is passed in favour of the plaintiff and against the contesting defendant to the extent that the plaintiff being in possession of the suit land measuring “-1-” Kanal situated at Khurbathang Kargil. The contesting defendant is restrained from raising construction on the suit land and whatsoever construction raised by him on suit land shall be removed by him by way of his own cost and shall not interfere in suit land in any manner. There is no order as to cost.”

09. The proforma defendants, namely, Mohammad Sadiq and Abdul Hussain reckoned themselves to be aggrieved of the decree so passed by the Principal District Judge, Kargil, in ex-parte proceedings and thus invoked Order 9 rule 13 of the J&K Code of Civil Procedure, Svt 1997, as it was then in force

and applicable, and thereby sought setting aside of the *ex-parte* decree dated **13.12.2019**.

10. In their said application, the two applicants, namely, Abul Hassan and Mohammad Abass came forward with a plea that there was no service of summons upon them in the suit and consequently, the *ex-parte* proceedings in the civil suit were misconceived, thereby enabling them an occasion to invoke Order 9 rule 13 of the Code of Civil Procedure, Svt 1997 for seeking setting aside of *ex-parte* decree dated **13.12.2019**.

11. In their said application, the two applicants, namely, Abul Hassan and Mohammad Abass also referred to the subject matter of the civil suit, the document referred therein by the respondent No. 1, as being the plaintiff, its legal implications, effect and validity so on and so forth even to the extent of asserting that the suit property was not defined in the plaint.

12. The said application of the applicants came to be considered by the learned Principal District

Judge, Kargil and dismissed by virtue of an order dated **26.12.2020**.

13. In fact, the application filed by the two applicants/proforma defendants invoking Order 9 rule 13 of the J&K Code of Civil Procedure, Svt 1977, being time- barred, was accompanied by an application for condonation of delay which too was dismissed in terms of said composite order dated **26.12.2020**.

14. It is against the said adjudication of the learned Principal District Judge, Kargil, in terms of the order dated **26.12.2020**, one of two applicants Abdul Hassan, the appellant herein, came forward with institution of present appeal invoking Order 43 rule 1(d) of the J&K Code of Civil Procedure, Svt., 1977 challenging the impugned order with an end objective of getting the impugned order dated **26.12.2020** set aside and also of setting aside of ex-parte judgment and decree dated **13.12.2019**.

15. Mr. Baber Bilal Malik, learned advocate for the appellant, Abdul Hassan has very passionately and

vehemently argued that the appellant is victim of misapplication of procedure by the Court of Principal District Judge, Kargil as a result whereof a decree has come to be generated against which the appellant generating grievance of every sort and nature, present and prospective and therefore, it is rendered pressingly essential for the appellant to get the same set aside in terms of Order 9 rule 13 of the J&K Code of Civil Procedure, 1977.

16. The submissions of advocate Mr. Baber Bilal Malik for the appellant Abdul Hassan are made with sound effect but count not to be sound in law.

17. This Court is of the informed understanding that it is an inherent call/choice of a suit or as plaintiff to choose as to whom he/she intends to sue and seek relief in a civil suit to be solicited in the form of a decree.

18. Order 1 rule 3 of the J&K Code of Civil Procedure Svt., 1977 (akin to the Code of Civil Procedure, 1908 now applicable in the UT of Jammu and Kashmir), identifies a person who is to be joined

as a defendant in a civil suit by envisaging that a defendant is a person against whom any right to relief in respect of some act, transaction or series of acts or transactions is alleged by a plaintiff to exist against such person/s.

19. By applying mandate of Order 1 rule 3 of the J&K Code of Civil Procedure Svt., 1977, the respondent No. 1, as being the plaintiff, in his suit had chosen the respondent No. 2- Mohammad Mussa to be the principal defendant against whom the respondent No. 1, as being the plaintiff, was coming up with the suit for enforcing right to reliefs purportedly existing against him. There was no relief of any bind and effect whatsoever sought/intended against two proforma defendants even though in the suit there was a context setup in relation to the proforma defendants but nevertheless at the end of the day there was no relief being asked/sought by the respondent No. 1, as being the plaintiff, against the two proforma defendants. The presence of said two proforma defendants in the eyes of law and that

being the J&K Code of Civil Procedure Svt., 1977 was as good as for name sake defendants in the civil suit.

20. The aforesaid aspect is confirmed from the tone and tenor of the decree which came to be passed by the Court of Principal District Judge, Kargil, wherein the relief sought by the respondent No. 1, as being plaintiff, was kept restricted only to the grant of injunction in his favour against the contesting defendant, i.e., respondent No. 2.

21. In order to meet the pressing submission of Mr. Baber Bilal Malik, learned counsel that even by reference of their status as being proforma defendants, two proforma defendants had every right to seek their re-entry for contest in the suit by getting the *ex-parte* decree set aside on the strength of the plea that they were never served to join the contest of the suit, this Court mooted to the appellant's learned counsel a ponderable situation that if the respondent No. 1, as being the plaintiff, would have simply named the respondent No. 2 to

the exclusion of proforma defendants in the civil suit with pleadings setup as it is and had earned the decree, as eventually came to be earned by him against the respondent No. 2, then would in that eventuality the proforma defendants could have put to exploit Order 1 rule 10 of the J&K Code of Civil Procedure Svt., 1977 by approaching the trial court to revive the civil suit otherwise decreed, be it *ex-parte* or otherwise, and say that since they were necessary parties to the suit as such in their absence decreeing of the suit against the respondent No. 2 in favour of the respondent No. 1 was bad and that they be allowed an entry in the civil suit and an opportunity to contest the same.

22. Learned Counsel, Mr. Baber Bilal Malik, very candidly admitted that Order 1 rule 10 of the J&K Code of Civil Procedure Svt., 1977 (akin to Code of Civil Procedure, 1908) does not conceive and/or provide for such a contingency.

23. By same analogy, the contingency, which in the present case the proforma defendants intended to

apply by seeking setting aside of the *ex-parte* decree was as good as being a non-party in a civil suit decreed in favour of the plaintiff against the defendant, and then an applicant seeking to have revival of the suit by being made a party on account of being necessary party and then to have the liberty of contesting the suit.

24. On the other hand, Mr. R. A. Jan, learned Senior Advocate assisted by Mr. Wahid Lone, learned advocate has delved upon a very nuanced position of law that the entire exercise at the end of the appellant herein and before that by the two applicants/proforma defendants namely Abul Hassan and Mohammad Abass before the Court of Principal District Judge, Kargil was nothing but an exercise and effort in futility in the sense that Order 9 rule 13 of the J&K Code of Civil Procedure Svt., 1977 (akin to Code of Civil Procedure, 1908) by its very text is available at the disposal of a defendant against whom a decree in *ex-parte* is operating meaning thereby the defendant whose rights in the

context of definition of word “Decree” in section 2(2) of the Code of Civil Procedure, 1908 has been conclusively determined by a civil court with respect to the matter in controversy is the one who is reckoned to be one vested with a right to seek setting aside of *ex-parte* decree.

25. By referring to this provision of order 9 rule 13 of the Code of Civil Procedure, Svt 1977 (akin to the Code of Civil Procedure 1908), Mr. R. A. Jan, learned Senior Advocate submits that the two applicants were not even entitled to lay an application seeking setting aside of *ex-parte* decree in reference.

26. Mr. R.A. Jan’s reading and understanding of case is that at first instance invoking Order 9 rule 13 of J&K Code of Civil Procedure Svt., 1977 was not available to the two applicants/proforma defendants and despite that adjudication thereupon having been done in their application by the Court of learned Principal District Judge, Kargil still

renders the outcome legally valid admitting of no interference in the present appeal.

27. This Court finds itself in line and tune with point of law principle highlighted by Mr. R. A. Jan, learned Senior Advocate with respect to the true scope and role of Order 9 rule 13 of Code of Civil Procedure, Svt., 1977. The Court below i.e. learned Principal District Judge, Kargil did not apply its attention to said aspect and scope of Order 9 rule 13 the J&K Code of Civil Procedure, Svt., 1977 and if it would have been so spared then it would not have taken the Court of Principal District Judge, Kargil to spend and spare energy and pages for the disposal of the application of the appellant except simply reciting Order 9 rule 13 of the Code of Civil Procedure, Svt., 1977 and then holding that there is no decree at all against the applicants warranting to be set aside by context of it being an *ex-parte* and then dismissing said application on that count.

28. The Court of learned Principal District Judge, Kargil stretched itself to come up with some

observations in its impugned order which are uncalled for and of prejudicial nature and to that extent the observations in the impugned order dated **26.12.2020** shall be read to be nonest, but the principal outcome as set out in the impugned order shall stand which is dismissal of the application of the applicants/proforma defendants for setting aside *ex-parte* decree in reference.

29. In the light of the aforesaid, this Court finds that the present appeal also is fated to fail and is accordingly **dismissed**.

30. Nothing observed herein be it expressly or inferentially, or for that matter by the Court of learned Principal District Judge, Kargil in its order dated **26.12.2020** shall mean or be meant to be any observations on merits of rights and claims inter se the respondent no. 1 vis-à-vis the appellant with respect to subject property of the suit.

(Rahul Bharti)
Judge

SRINAGAR
05.08.2025
Bisma