

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

W.P No. 186-P of 2023.

Malik Jamshed s/o Shams Ud Din and others Vs. Ghafoor Khan s/o Abdul Mutalib & 05 others.

Present: Mr. Abdul Sattar Khan, Advocate, for petitioners.
Mr. Afroz Ahmad, Advocate, for respondents.

Date of hearing: 23.10.2025.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Impugned through this petition is the judgment and order of learned Additional District Judge-IV, Mardan dated **15.09.2022**, whereby Civil Revision of the petitioners against the order of learned Civil Judge-VI, Mardan dated **25.06.2021** dismissing their application filed under section **12(2) CPC** against the judgement & decree in **Civil Suit No.445/1** with a cost of Rs. 25,000/-, was dismissed.

2. Essential facts are that the Ghafoor Khan, respondent No.1, through Civil Suit No.445/1 instituted on 19.07.2011, sought a declaration to the effect that he, along with his partners, was the owner in possession of land measuring 200 Kanal on the strength of Mutation No.756, as detailed in the headnote “A” the plaint, pertaining to the revenue estate of Cheel, Tehsil Takht Bhai, District Mardan. He asserted that the said mutation had not been properly reflected in the *Jamabandi* for the year 1991-92, rendering the relevant entries incorrect and inoperative against his rights. He further stated that Pervez Khan (son of Abdul Mutalib), Said Jafar (son of Minhajuddin), and Said Umar Jan (son of Minhajuddin) were his co-owners and partners in possession. Accordingly, he prayed for correction/rectification of the revenue record and for a decree of perpetual injunction. In the said suit of Abdul Ghafoor, only the Patwari Halqa, Tehsildar, and ADK were arrayed as defendants. The said defendants being revenue officials did not appear before the Court and were proceeded against *ex*

parte. Upon conclusion of evidence, the learned trial Court decreed the suit vide judgment and decree dated 09.09.2012. Subsequently, on 28.02.2015, the present petitioners filed an application under Section 12(2) CPC, contending that they were the owners in possession of the property in question but were neither impleaded as parties nor heard, despite their proprietary rights being directly affected by the decree passed in favour of the respondent/plaintiff. It was asserted that the subsequent entries made in the revenue record on the basis of Mutation No.2388 dated 22.05.2012 were erroneous and detrimental to their rights. The petitioners alleged that the decree had been obtained through fraud and misrepresentation, thereby infringing upon their lawful ownership. The said application was resisted by the decree-holders/respondents on various legal and factual grounds. After submission of the written reply, the learned trial Court framed the following issues:

- i) Whether impugned decree dated 19.03.2012 in case titled Ghafoor Khan Vs. Patwari Halqa" in suit No.445/1 of 2011 was obtained through fraud or misrepresentation?
- ii) Whether the petition is within time?
- iii) Whether the petitioner is entitled to the relief as prayed for?
- iv) Relief.

After recording of evidence, the learned trial Court dismissed the application under Section 12(2) CPC with costs of Rs. 25,000/- Aggrieved thereby, the petitioners filed a civil revision, which was also dismissed through the impugned order. Hence, the present petition.

3. Arguments heard record perused.

4. It is not in dispute that the petitioners are co-owners of the property in question. It is also an admitted fact that the other private co-owners were not impleaded as defendants in the suit, even though the plaintiff was seeking rectification of entries in the revenue record which inevitably required alteration in the

ownership structure. Despite seeking rectification of 200 Kanal of land, the plaintiff neither specified from whose share the adjustment would be made nor arrayed any such individual as a defendant. The only defendants were the revenue officials i.e., Patwari Halqa, Girdawar Circle, and Tehsildar, who were not owners of the land and had no authority to transfer or adjust ownership shares in favour of the plaintiff. Their role was purely administrative, limited to maintaining the revenue record and implementing court orders. It is an admitted fact that pursuant to the decree, a mutation was attested in favour of the plaintiff, and his shares were corrected accordingly. The petitioners, however, appear in the revenue record as the persons from whose holdings the deduction was made. A *Goshwara-e-Milkiyat* prepared by the petitioners themselves was placed on record, showing their ownership both prior to and subsequent to the attestation of the correction mutation. It reflects that the petitioners' ownership under Mutation No.1966 originally stood at 25 Kanal 07 Marla, which, after the rectification, was reduced to 18 Kanal 05 Marla. If, therefore, any deduction was made from the petitioners' share pursuant to the impugned decree, the question arises as to how such deduction could have been lawfully effected when the petitioners were not parties to the suit. In law, a necessary party is one in whose absence no effective decree can be passed. Hence, if the petitioners' proprietary rights were affected by the decree, their non-joinder rendered the proceedings defective and the decree liable to challenge. Reliance may be placed on the cases of *Doctor Imran Manzoor and another vs. Mst. Nighat Bahar Khanum and 10 others* (2015 CLC 1428), *Ahmad and others vs. Nazir Ahmad and others* (2019 CLC 1841), and *Allah Ditta vs. Ahmad Ali Shah and others* (2003 SCMR 1202).

5. The pivotal question in proceedings under Section 12(2) CPC is whether fraud or misrepresentation was practiced upon the Court, and if so, who was affected by it. It defies logic why the

petitioners, whose shares were subsequently reduced through the correction mutation, were not impleaded as parties to the original suit. This omission, coupled with the alteration of their ownership record, *prima facie* indicates that they were necessary parties whose exclusion vitiated the decree. Although learned counsel for the respondents, Mr. Afroz Ahmad, Advocate, argued that the petitioners had failed to summon the Patwari/AOK or challenge the order dismissing their application for additional evidence, such technical objections cannot override a substantive illegality. Once the Court concludes that a legal irregularity or material illegality was committed by the courts below, such defect cannot be allowed to persist, for it is a settled principle of law that one illegality cannot justify another.

6. In view of the foregoing discussion, it would be appropriate to determine whether, through attestation of Correction Mutation No.2388, any portion of the petitioners' property was in fact transferred to the decree-holders, and if so, to what extent. If this issue is decided in the affirmative, the decree shall stand set aside and the original suit revived; otherwise, the application under Section 12(2) CPC shall be deemed dismissed. Accordingly, on acceptance of the instant petition, the judgments and orders of both the courts below are set aside, and the matter is remitted to the learned trial Court with the direction to record the statements of the Patwari Halqa and the concerned District Qanoon-go (ADK/SOK/NOK/AOK). They shall produce and place on record the *Goshwara-e-Milkijat* of both parties, showing their ownership and entitlement before and after the attestation of the correction mutation, indicating specifically the quantum of land, if any, deducted from the petitioners. The learned trial Court shall conclude this exercise within a period of three months, if not earlier, after issuance of notices to all concerned. Upon evaluation of the evidence recorded after remand, the learned trial Court shall decide the application under Section 12(2) CPC strictly in

accordance with law. With these observations, the petition stands disposed of. No order as to costs.

Announced.
23.10.2025.

-Sd-
JUDGE

(SB) Hon'ble Mr. Justice Muhammad Naeem Anwar.
Asif Jan Sr. S.S.