

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case No. RFA No. 41/2023
CM No.6414/2023

Reserved on:- 01.10.2026

Pronounced on 09.10.2026
Uploaded on:- 09.10.2026

Whether the operative part or
full judgment is pronounced:-Full

1. Commissioner Secretary,
PMGSY, Govt., of J&K,
Civil Secretariat, Jammu.
2. Executive Engineer,
PMGSY Division Batote.
3. Assistant Executive Engineer,
PMGSY, Sub Division, Ramban.

.....Appellant(s)

Through: Ms. Mehar Bali, Advocate vice
Mr. Ravinder Gupta, Advocate.

Vs.

Mohd. Iqbal
s/o Abdul Gani,
R/o Ghari Tehsil Rajgarh,
District Ramban.

..... Respondent(s)

Through: Mr. Azmat Ullah, Advocate.

CORAM: HON'BLE MR. JUSTICE SHAHZAD AZEEM, JUDGE

JUDGMENT

1. This Civil First Appeal is directed against the judgment and decree dated 30 August 2022 passed by the learned Principal District Judge, Ramban (the trial Court), in Suit, titled "**Mohd.**

Iqbal vs. Commissioner Secretary, PMGSY and others", whereby the trial Court decreed the suit and held the plaintiff entitled to recover ₹ 7,20,000/- from the defendants, together with interest @ 7.5 % per annum from the date of institution of the suit till its realisation.

2. For convenience, the respondent hereinafter shall be referred to as the "plaintiff" and the appellants as the "defendants".

FACTS

3. The plaintiff sued the defendants for ₹ 7,20,000/- as damages to a double-storey house constructed over survey No.611, at 25 km point of the Karol-Kumate road, village Kumate, Tehsil Rajgarh, District Ramban. His case, briefly stated, was that earth cutting for construction of the Karol-Kumate road, had created an apprehension of land slide; that the defendants did construct a protection wall, but with sub-standard material and without following construction norms, so that the wall was not strong enough to retain the soil; and that in March 2014, after little rain, the wall slipped and the house was damaged. The suit was founded on the alleged negligence of the defendants.

4. The defendants filed a written statement, they raised the defence that suit was not maintainable, inasmuch as ₹ 1,75,000/- had already been paid to the plaintiff; that a breast wall on the rear side of the road was partially damaged by rains in 2014 and was

immediately repaired; that the plaintiff thereafter demolished the old house and, of his own choice and without technical approval, built a multi-storey house at the same spot; and that the damage was the result of the plaintiff's own negligence, and not of any negligence of the Department. The defendants further pleaded that an assessment made at the instance of the District Legal Services Authority was not an admission of liability.

5. On the pleadings, the trial Court framed the following issues:

“1. Whether the plaintiff is owner in possession of the land bearing Khasra No. 611 beneath his house situated at village Kumate Tehsil Rajgarh District Ramban? OPP

2. Whether the aforesaid house of the plaintiff is damaged by the defendants on account of construction of Karol-Kumate road resulting into loss to the tune of Rs.7,20,000/- ? OPP.”

FINDINGS OF THE TRIAL COURT

6. The trial Court, on the evidence, decided both issues in favour of the plaintiff.

7. On issue No.1, the defendants neither seriously disputed ownership or possession in the written statement, nor led any evidence to the contrary. The trial Court accordingly held the plaintiff to be the owner in possession of the land falling in survey

No.611, and the house situate at village Kumate, Tehsil Rajgarh, District Rajgarh.

8. On issue No.2, the defendants denied that the damage was caused by their negligence, but they led no evidence in defence, though opportunity was granted. On the evidence led by the plaintiff, and particularly because the defendants produced none, the trial Court held that the house was damaged by the negligence of the defendants, and decreed the suit for recovery of ₹ 7,20,000/.

SUBMISSIONS

9. The appellants challenge the judgment and decree on the ground that the plaintiff had already been paid ₹ 1,75,000/- for damage to the old house; that whatever damage thereafter caused was the result of rain in 2014 and of his own negligence; that the plaintiff re-built the house without technical approval, at the very spot where the old house had stood; and that he failed to prove use of sub-standard material. In the absence of such proof, it is urged, the trial Court erred in law in fastening liability upon the appellants.

10. Principal ground is that the trial Court omitted to frame an issue on whether the damage was caused by sub-standard material used in the protection wall, which was not strong enough to hold the soil during the rain fall of March, 2014; and a further issue on whether the plaintiff, after demolishing the old house, constructed

a multi-storey house at the same spot of his own choice, without adopting norms, technical consultancy or approval of the competent authority, so that the heavy structure cracked by undue settlement of the foundation.

11. Per contra, learned counsel for the respondent submits that the findings rest strictly on the pleadings and on the evidence led by the plaintiff, that they suffer from no perversity, illegality or misreading, and that the appeal deserves to be dismissed.

12. Heard learned counsel for the parties. The record has been perused.

POINT FOR DETERMINATION

13. The point that arises is whether, the defendants having participated in the trial without contending that the issues were not properly framed, without putting the relevant questions to the plaintiff's witnesses, and without moving an application under Order XIV Rule 5 of the CPC, they can at the appellate stage ask that additional issues be framed and the suit remitted; and whether, on a re-appreciation of the evidence, the decree calls for interference.

ANALYSIS

14. To discharge the burden, the plaintiff examined four witnesses.

15. PW-1 Mohd. Iqbal (plaintiff), deposed that cutting of the Karol-Kumate road gave rise to an apprehension of damage to his house; that the defendants constructed a protection wall; that the wall was damaged in heavy rain; and that his house was in consequence, damaged and developed cracks. In cross-examination, he stated that when the road was under construction, he removed the old house and built a new one upon the assurance of the Department that a protection wall would be constructed adjacent to the house, and that thereafter there would be no danger to it.

16. PW-2 Punjab Singh in cross examination deposed that, had the Department constructed a proper protection wall, the house of the plaintiff would not have been damaged.

17. PW-3 Sandeep Kumar, Patwari Halqa Kumate, Ramban, proved the ownership and possession of the plaintiff. PW-4 Mohd. Ayuob assessed the damages; at the relevant time he was posted as AEE (PMGSY). In cross-examination he admitted that, in hilly areas, houses are often damaged by heavy rain, but the house of the plaintiff was damaged because of cutting of the road. He further deposed that the house of the plaintiff developed cracks, that the structure still stands, and that the assessment was made of that house.

18. Read together, the depositions, including what emerged in cross-examination, are that the house was damaged by cutting of the road and by a protection wall which did not serve its purpose.

19. The appellants had the opportunity to suggest, in cross-examination, that the damage was not attributable to sub-standard material in the protection wall, or that it resulted from construction of the new house without norms and technical advice. No such suggestion was put to any witness.

20. They also failed to apply under Order XIV Rule 5 of the CPC for amendment of the issues, or for framing of an additional issue. Having chosen to participate in the trial without protest, and left the plaintiff's witnesses substantially unchallenged on the very point, they cannot treat non-framing of a more particular issue as a ground to re-open the case. A First Appeal is a continuation of the suit. This Court must decide it on the record, after re-appreciation of the evidence.

21. Order XLI Rule 25 is narrower, and the power under it is discretionary. Where the Court against whose decree, the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame the issues and refer them for trial, with a direction to take the additional evidence required and to return

finding. It is not a power to set aside the decree merely because a differently worded issue can be imagined. Order XL1 Rule 27 may be invoked only in the circumstances stated in that rule, additional evidence is not admitted to enable a party to patch up a weak case, or to fill an omission of its own making.

22. It is well settled that non-framing of an issue is not fatal where the parties knew the case they had to meet. Where a party goes to trial knowing the controversy, neither a want of particularity in the pleadings nor the non-framing of an issue causes prejudice, and the omission becomes immaterial. Omission to raise a point in so many words in the pleading is a mere irregularity, where it took the other side by no surprise and caused no prejudice. Where the parties went to trial fully knowing the rival case, and led the evidence not only in support of their own contention but in refutation of the other side, it cannot be said that absence of any issue was fatal to the case, or that there was a mis-trial which vitiates the proceedings. The defect, if any, in framing a proper issue is a ground for interference only where it has caused prejudice; where a party was misled as to the facts in issue to be proved, or was shut out from evidence. Prejudice is the test. Participation with knowledge of the controversy negatives it.

23. There is, besides, a statutory remedy before the trial Court. Order XIV Rule 5 of the Code empowers the Court, at any time before passing the decree, to amend the issues or to frame the

additional issues. A defendant who reads the issues, finds them wanting, and nonetheless leads and meets the evidence without protest, acquiesces in the trial. The right to insist upon a further issue is then lost as a matter of right. It may still be considered if the omitted point goes to jurisdiction, or if the record shows that the party was in fact prejudiced and could not, with diligence, have raised it. Neither exception is suggested here. The issues now proposed are pure questions of fact, and both lie within the pleadings which the defendants themselves filed, or which they had to meet.

24. The plaintiff's witnesses deposed that the house was damaged by cutting of the road and on account of the Department. That is the subject matter of issue No.2. The complaint of the defendants is not that this point was never tried. It is that the point was tried, and that they did not cross-examine upon it. Failure to cross-examine a witness on a material part of his deposition is a forensic choice. It is not a defect in the framing of issues, and it is not a ground for a second opportunity. An assertion left unchallenged, where the opportunity to challenge it existed, binds the party who had that chance.

25. The multi-storey reconstruction, the absence of technical approval, and settlement of the foundations are taken from the written statement. They are an answer to issue No.2, namely, that the damage, if any, was not on account of the road but of the

plaintiff's own building. Under Section 101 and 103 of the Evidence Act, which governed the trial, the burden of proving that answer lay upon the defendants, if they wished the Court to accept it. They needed no separately numbered issue in order to lead that evidence, to put it to the plaintiff's witnesses, or to examine an Engineer. Order XIV Rule 5 of the Code remained open to them until the decree was passed. They did not take recourse to it. A party cannot keep back its defence, take a chance on the judgment, and then ask the appellate Court to try the defence it did not press.

26. The defendants knew the plaintiff's case of sub-standard material and of damage from cutting of the road. They pleaded prior payment, immediate repair of the breast wall, and the plaintiff's own re-construction. Defendants filed written statement and participated in the trial. The omission to question the witnesses on these points is an omission on their part. Both sides knew the rival case. Absence of a more particular issue cannot, by any stretch, be called a mis-trial.

27. The Order XLI Rule 25 of the Code can be press into service only where three things appear together; first, that a material proposition in the pleadings was never tried, even under issue No.2; second, that evidence upon it is absent for a reason other than the appellants' own failure to lead it or to cross-examine; and, third, that this Court cannot reach a right decision of the suit upon

the merits without it. However, appeal is brought within none of these three eventualities.

28. The witnesses of the plaintiff having deposed, including in cross-examining, that the damage resulted from cutting of the road and from the Department, the failure of the defendants to put the relevant questions does not re-open the trial.

29. At this stage, it is also deemed proper to deal with two further matters, though not framed as separate issues, so that decree is not left open upon them.

30. The plea that ₹ 1,75,000/- had already been paid was a plea in defence. It was not shown to have been admitted. No evidence was led nor any witness on that aspect has been examined, despite under Section 103 of the Evidence Act, the burden of that particular fact lay on the defence; secondly, on quantum, PW-4, the Assistant Executive Engineer, who made the assessment, supported the loss. The figure was not dismantled in cross-examination, and the defendants led no counter-valuation. The sum of ₹ 7,20,000/-, therefore, rests on evidence which the defendants chose not to meet.

31. On a re-appreciation of the evidence, issue No.1 was rightly decided. The plaintiff is the owner in possession of land and house constructed thereon in survey No.611. On issue No.2, the evidence of the plaintiff, unchallenged on the material points and un-

answered by any evidence in defence, supports the finding that the damage was caused by cutting of the road and by failure of the protection wall. The trial Court rightly place the burden on the defendants. No illegality or perversity is found in the judgment and decree holding the defendants liable in the sum of ₹ 7,20,000/- for the cracks and damage to the house of the plaintiff.

32. For the foregoing reasons, the judgment and decree dated 30 August 2022 passed by the trial Court in File No.02/Civil Suit titled “**Mohd. Iqbal vs. Commissioner Secretary, PMGSY and others**”, granting compensation for the damage, is affirmed, resultantly, instant civil first appeal is dismissed.

33. There shall be no orders as to costs.

34. The record be sent down with due dispatch.

(SHAHZAD AZEEM)
JUDGE

JAMMU
09.10.2026
Surinder

Whether the order is speaking?	Yes
Whether the order is reportable?	Yes