

## **HIGH COURT OF AZAD JAMMU & KASHMIR**

Civil Appeal No.106/2018.

Date of institution 05.10.2018.

Date of decision 25.05.2022.

1. Mohammad Azam Khan s/o Fazal-Din Caste Sudhan r/o Banjonsa Tehsil Rawalakot;
2. Mst. Dil Jan d/o Fazal Deen wife of Burhan Ali Khan Caste Sudhan r/o Naryola Tehsil Trarkhal District Sudhnuti;
3. Babar Hussain s/o Abdul Hussain Caste Sudhan r/o Trarkhal from the wedlock of Makhan Jan d/o Fazal-Din Khan;
4. Mohammad Shafi s/o Khan Mohammad Khan husband of Mst. Akram Jan deceased;
5. Mohammad Ishfaq s/o Mohammad Shafi Caste Sudhan r/o Banjonsa from the wedlock of Mst. Akram Jan;
6. Mst. Zubaida wife of Baber Hussain Caste Sudhan r/o Naryola Tehsil Trarkhal District Sudhnuti legal heirs of Mst. Akram Jan d/o Fazal-Din Khan;
7. Salamat Jan wife of Nazir d/o Fazal-Din Caste Sudhan r/o Rehara Tehsil Rawalakot District Poonch.

Appellants

VERSUS

1. Mohammad Bashir Khan s/o Baloch Khan Caste Sudhan r/o Banjonsa Tehsil Rawalakot from the wedlock of Mst. Masahib Bi wife of Baloch Khan d/o Gohar Ali Khan;
2. Gulfraz Khan;
3. Sarfraz Khan;
4. Sheraz Khan sons;
5. Shamshad Begum;
6. Shakeela Khanum daughters of Wazir Mohammad from the wedlock of Mst. Ashram Jan d/o Baloch Khan from the wedlock of Mst. Masabi d/o Gohar Ali Khan;
7. Wazir Mohammad Khan s/o Mosoo Khan husband of deceased Ashram Jan Caste Sudhan r/o Jandali Tehsil Rawalakot District Poonch legal heirs of deceased Mst. Ashram Jan Caste Sudhan r/o Jandali Tehsil Rawalakot;

8. Tehsildar Revenue Rawalakot;
9. Girdawar Circle Banjonsa;
10. Patwari Halqa Banjonsa.

Respondents

**CIVIL APPEAL**

***Before:- Justice Syed Shahid Bahar, J.***

**PRESENT:**

Ch. Mohammad Riaz, Advocate for the Appellants.  
Mohammad Yaqoob Khan Mughal and Sardar Naqeeb Azad Khan, Advocate for the Respondents.

**JUDGMENT:**

The captioned appeal has been directed against the judgment and decree passed by the learned Additional District Judge Rawalakot dated 15.08.2018, whereby, while maintaining the impugned judgment and decree passed by the learned Senior Civil Judge Rawalakot dated 30.08.2017, the appeal filed by the appellants, herein, was dismissed being weightless.

2. Precise facts of the supra titled appeal are that plaintiffs/respondents, herein, filed a suit for declaration before the Court of learned Senior Civil Judge Rawalakot on the ground that the predecessor in interest of plaintiffs and respondent Roshan Ali Khan was the owner of the land comprising new survey Nos. 1511, 1419, 601, 1540, 1541, 1772, 1535, 1534, 1418, and 1737 measuring 47 kanal 09 marlas situated in Mozia Banjonsa Tehsil Rawalakot and after his death the property equally devolved between his

two sons namely Gohar Ali Khan and Jangi Khan. Jangi Khan died leaving his two sons namely Fazal-Din Khan and Baloch Khan. Gohar Ali Khan purchased the land bearing survey No.849 old, new 1804 measuring 17 kanal 15 marlas but in the present settlement the land purchased by Gohar Ali Khan was reduced as 16 kanal 09 marlas, so, including inherited property Gohar Ali Khan was the owner of the 40 kanal 13 marlas of the land. Gohar Ali Khan died in Dogra Regime leaving his one daughter namely Mst. Masahib Bi and two nephews. As per law  $\frac{1}{2}$  share of the father's property was to be given to his daughter Mst. Masahib Bi and  $\frac{1}{2}$  share was to be devolved/transferred to his two nephews namely Fazal-Din and Baloch Khan but the nephews with the connivance of the revenue officials got transferred the whole property of Gohar Ali Khan to their names whereas, Masahib Bi was remained in possession of the inherited property. It has been stated that as per settled law no one can be deprived from his inherited property mere on the basis of wrong entry of mutation in the revenue record and soon after the death of any person the property should have been devolved to the legal heirs as per his/her or their fractional shares, so, Mst. Masahib Bi was the owner of  $\frac{1}{2}$  of the share from her father's property, hence, as per law her legal heirs were entitled to get the

land measuring 20 kanal 2 marlas. The suit land is in the possession of the plaintiffs and plaintiff No.1, has constructed a house over the suit land by spending 3 million rupees and the graves of predecessor in interest of plaintiffs i.e. Masahib Bi and Gohar Ali Khan are also situated in the land comprising old survey No. 849 and new survey No.1804 measuring 16 kanal 19 marlas and finally it has been requested that a direction may be given to the revenue department to correct the record to the extent of ownership of Mst. Masahib Bi, i.e. 17 kanal 16 marlas.

3. On filing of the suit, the defendants were summoned by the trial Court and defendants Nos. 8 to 12 filed cognovits and they also recorded their statements. However, defendants Nos. 1 to 7 filed written statement in the manner that the plaintiffs have no cause of action and the suit is barred by limitation and the predecessor in interest of plaintiffs and defendants was Roshan Ali Khan who had two sons Jangi Khan and Gohar Ali Khan to whom the property was equally devolved and Gohar Ali Khan was childless and two nephew Baloch Khan and Fazal Din Khan were his legal heirs, so, the share of Gohar Ali Khan was transferred to his nephew. It has further been averred that Mst. Masahib Bi was not the daughter of Gohar Ali Khan, so, the land measuring 17 kanal 19 marlas was neither given to

Mst. Masahib Bi nor her legal heirs/plaintiffs and finally they requested that the suit may be dismissed being baseless.

4. The learned trial Court in the light of pleadings of the parties framed as many as six issues and directed the parties to lead their evidence. The learned trial Court after completion of the trial while deciding the two pivotal issues in favour of the plaintiffs, accepted the suit and declared that the plaintiffs are the legal heirs of Mst. Masahib Bi d/o Gohar Ali Khan and further direction has been given to the revenue officials to enter the share of Mst. Masahib Bi and to whole of her legal heirs vide judgment and decree dated 30.08.2017. Feeling aggrieved from the aforesaid judgment and decree defendants/appellants, herein, filed an appeal before the learned Additional District Judge Rawalakot which also met the same fate vide judgment and decree dated 15.08.2018, hence, the captioned appeal for setting aside both the impugned judgments and decrees of the Courts below.

5. In compliance of the Court order both the parties have submitted their written arguments, whereby, the grounds of pleadings have mostly been reiterated and appellants prayed for setting aside the impugned judgments and decrees of both the Courts below as the

same have been passed contrary to facts and law on the ground that Mst. Masahib Bi was not the real daughter of Gohar Ali Khan but in a very little age she came to the house of Gohar Ali Khan with her mother. Whereas, in the written arguments filed on behalf of respondents, it has been stated that both the Courts below have passed the impugned judgments and decrees in a legal fashion and no misreading or non-reading of evidence have been committed by the trial as well as 1<sup>st</sup> Appellate Court. Finally requested for dismissal of the appeal.

6. I have gone through the record appended with the appeal as well as written arguments filed on behalf of the parties.

7. Civil matters are decided by the Courts of law on the rational and yardstick of the doctrine of preponderance of probability of evidence as in whose favor evidence on record is much more tilting and likely to succeed. Instant lis has been decided by both the Courts below concurrently in the same manner. Scope of 2<sup>nd</sup> appeal is confined only to the grounds stated in Section 100 CPC, such right is permissible if impugned decision is contrary to law or same has been rendered without deciding some material issue of law or there has been any

error of procedure provided by law. Parameters envisaged in Section 100 of CPC are as infra:-

- (a). Where decision of the lower Court is contrary to law or usage having force of law;
- (b). where the Court below has failed to determine the material issue of law, or usage having the force of law;
- (c). where while disposing of is a substantial error or defect in the procedure as provided in the codal scheme of CPC or any law for the time being enforced in existed, which could possibly have produced error or defect in the decision of the case upon merits.

8. While dilating upon the concurrent findings of two Courts below, High Court cannot disturb such like findings of fact even if erroneous however, gross an inexcusable the error may except on strong legal ground which may tantamount to interference on a question of law. The Apex Court in catena of precedents, has laid down that if second appeal is not based upon grounds mentioned in Section 100 CPC, can be rejected, ready reference in this regard is [2013 YLR 2000 (SC AJK)].

9. Issue wise finding given by the Court of 1<sup>st</sup> instance and findings of 1<sup>st</sup> Appellate Court through which the same have been endorsed and approved are completely in line with the scheme of law and facts of the case. The respondent/plaintiff party has succeeded to prove their suit before the trial Court through cogent and concrete evidence, while in juxtaposition the appellants instead of

rebutting the stance of respondents (Plaintiffs in the trial Court) strengthened the case of the respondents which reveals from the statement of the one of "Azad Khan" who when confronted in cross-examination admitted that Nazir and Bashir are sons of Mst. Masahib Bibi d/o Gohar Ali Khan and further added in admission that Gohar Ali Khan was grandfather of Nazir & Bashir Khan (Respondents). It is celebrated principle of law taking breath from the law of evidence that things admitted need not to be proved. I am fortified to follow the dicta of Hon'ble Supreme Court of Azad Jammu & Kashmir in this regard some of vertical precedents relied are enumerated infra:-

1992 SCR 265 a case titled "Mohammad Suleman Vs. Razia Bibi  
 1995 SCR 151 a case titled "Adalat Khan Vs. Fazal Hussain  
 1997 SCR 226 a case titled "Fazal Kareem Vs. Abdul Manaf

The nub of above discussion is that the instant 2<sup>nd</sup> appeal fails, which is dismissed accordingly. The parties are left to bear their own costs.

Muzaffarabad.  
 25.05.2022 (Saleem)

-Sd-  
 JUDGE

**Note:-** Judgement is written and duly signed. The office is directed to announce the judgment in presence of the parties or their counsel accordingly

-Sd-  
 JUDGE