

**HIGH COURT OF AZAD JAMMU & KASHMIR**

Civil Appeal No.257/2019.

Date of institution 09.08.2019.

Date of decision 08.06.2022.

1. Mohammad Bashir Khan s/o Baloch Khan;
2. Zahid Hussain s/o Mohammad Bashir Khan Caste Sudhan r/o Banjonsa Tehsil Rawalakot District Poonch, Azad Kashmir.

Appellants

VERSUS

1. Mohammad Azam Khan s/o Fazal Din Khan;
2. Safina Begum widow;
3. Jameel Khan;
4. Shakeel Khan;
5. Nadeem Khan;
6. Zaheer Khan;
7. Amran Khan;
8. Zohaib Khan;
9. Irfan Khan sons;
10. Robina wife of Mohammad Ishtiaq;
11. Rozina wife of Haroon Sarwar;
12. Anees Ahmed son;
13. Salamat Jan;
14. Karamat Jan;
15. Salma daughters;
16. Nazira Begum alias Jeeda Begum widow of Mohammad Sharif Khan;
17. Sabeeha widow;
18. Husnain Younis;
19. Zulqarnain Younis sons;
20. Aimen Younis;
21. Aqsa Younis;
22. Unsa Younis daughters of Mohammad Younis Caste Sudhun r/o Banjonsa Tehsil Rawalakot District Poonch, Azad Kashmir.

Respondents

**CIVIL APPEAL**

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

**PRESENT:**

Mohammad Yaqoob Khan Mughal, Advocate for the Appellants.

Ch. Mohammad Riaz, 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 28.05.2019, whereby, while upholding the judgement and decree passed by the learned Senior Civil Judge Rawalakot dated 13.12.2018, the appeal filed by the appellants, herein, was dismissed.

**I. COMPENDIOUS FACTS OF THE APPEAL IN HAND:-**

Plaintiff/appellants, herein, Mohammad Bashir Khan filed a suit for declaration and cancellation of consent decree dated 31.08.1991 before the learned Senior Civil Judge Rawalakot/trial Court on the grounds that defendant No.3 in favor of defendant No.1 and 2, made an agreement to sell pertaining to the land comprising 8 kanal 12 marla out of the total land measuring 86 kanal 17 marla bearing old survey Nos. 284,902,990,887,888,839 min, 839 min,930, 849, new survey Nos. 601, 1511 ,1418, 1419, 1534,1535,1772,1773,1540,1541, and 1804 and later on, defendant Nos. 1 and 2 by filing a suit for specific performance got issued a consent decree dated 31.08.1991

and showed their possession of the land bearing survey Nos. 839 min old and present survey No. 1773, whereas, the said survey number through private partition was firstly in possession of the father of plaintiff and after his demise the same was in the possession of the plaintiff and the defendants had no nexus with the aforesaid land and regarding the said land, the plaintiff by filing a suit for declaration cum perpetual injunction got issued a decree dated 30.09.2004 against the defendants. It has further been averred that in survey Number old 839 min, total land measuring 34 kanal 06 marla situated at Mozia Banjosa, Baloch Khan and Fazal Din Khan father of plaintiff and defendant No.3 were the owners of  $\frac{1}{2}$  of the share i.e. 17 kanal 03 marla and the rest of the land was transferred to the other sharers as per their respective shares and the father of the plaintiff was in possession of the land as per private partition. It has been averred that in the present settlement, out of the aforesaid survey numbers two further survey Numbers i.e. 1772 and 1773 were created/made and in survey No.1773, the plaintiff is in possession upon the land measuring 19 kanal 14 marla and the father of defendant No.3, Fazal Din, had sold the land measuring 07 kanal 01 marla from his share which was

taken back by the plaintiff through decree dated 30.11.1980 by filing a suit for prior purchase and after selling the land 7 kanla 1 marla, Fazal Din, the father of defendant No.3 was the owner of only 24 kanal 19 marla and after his death the property was divided among legal heirs and as per law the share of defendant No.3 was 7 kanal 6 marla, however, he made an agreement to sell in excess to his fractional share, so, he was not allowed by law to sell the land in excess to his share, hence, a consent decree dated 31.08.1991 and on the basis of it, mutation No.1586 dated 30.07.1992 are ineffective inoperative and void ab-initio.

## **II. DEFENDANTS' VERSION IN TRIAL COURT:-**

On filing of the suit, the defendants were summoned by the trial Court who filed amended written statement, whereby, it has been stated that the plaintiff has no cause of action and the suit is time barred as the decree was issued on 31.08.1991 and the suit was filed on 18.10.2004 and not a single word has been used by the plaintiff regarding the decree and after selling 7 kanal 1 marla land, if the remaining land of the father has been transferred by the defendant No.3 to defendants Nos. 1,2 through a consent decree the same is ineffective and inoperative upon the ownership and share

of the plaintiff, and the decree was well within the knowledge of appellants. Finally the defendants prayed for dismissal of the suit.

### **III. ENSUING PROCEEDINGS IN TRIAL COURT AND FIRST**

#### **APPELLATE COURT:-**

The learned trial Court in the light of pleadings of the parties framed 5 issues and six more additional issues were framed and the trial Court directed the parties to lead their evidence. After completion of the trial, the learned Senior Civil Judge Rawalakot **dismissed** the suit for **want of proof** and being **barred by limitation** vide judgment and decree dated **13.12.2018**. Feeling aggrieved from the aforesaid judgment and decree, the appellants, herein, filed an appeal before the learned Additional District Judge Rawalakot which also met the same fate, vide the impugned judgment and decree of the Court below dated **28.05.2019**, hence, the captioned appeal for setting aside the impugned judgments and decrees of both the Courts below.

#### **IV. PROCEEDINGS IN THIS COURT:-**

As per direction of the Court both the parties have filed their written arguments,

whereby, the grounds raised in the pleadings have mostly been reiterated.

**a. APPELLANTS' SUBMISSIONS:-**

In the written arguments filed on behalf of the appellants, it has been stated that both the Courts below have misread and non-read the evidence, record and law referred by the appellants and instead of resolving the real controversies between the parties, the Courts preferred those points which were not disputed. The consent decree issued in favor of Mohammad Sharif & others could not be issued as per law because the appellant was necessary party and was not impleaded as party and without impleading him, no effective decree could have been issued.

**b. RESPONDENTS' SUBMISSIONS:-**

In the written arguments filed on behalf of the respondents, it has been averred that the appellants filed suit for declaration and cancellation of consent decree against the defendants after passing more than 13 years despite, having the knowledge of such decree and both the Courts below have passed the impugned judgments and

decrees in legal fashion and no misreading or non-reading of evidence have been committed by the Courts below and concurrent findings of fact cannot be disturbed unless and until it is perverse or outcome of misreading or non-reading of evidence available on record.

2. **I have gone through the record of the case as well as written arguments filed on behalf of the parties carefully.**

**V. DETERMINATION BY THE COURT:-**

Appeal in hand is a **second appeal** filed under **Section 100 of the Code of Civil Procedure, 1908 (CPC)** through which the concurrent verdict of the two Courts below has been assailed. Considering the roadmap envisaged in the codal as well as in the judge-made law, narrow corridors are provided to indulge and embark upon the findings concurrently recorded by the two Courts, thus, I have given utmost care and caution with full devotion and zeal to the matter and minutely perused the judgments impugned herein, as well as record of the Court of first instance besides oral and documentary evidence, for the safe administration of justice.

3. As per pleaded stance of the parties, in lis the entire gamut of the case revolves around the “consent decree” dated 26.08.1991 which was passed in the suit filed by one M. Sharif (decree holder) against M. Azam (judgment debtor) on the basis of an agreement to sell which was purportedly filed on 26.08.1991 and decreed on 31.08.1991, just within a short span of 5 days, in single terms, a decree of ownership was passed by the trial Court (dealt with the matter in light of an agreement to sell). Case simpliciter in light of pleaded stance, evidence (oral as well as documentary) available on record is that whether under law a declaratory suit and a decree of ownership is permissible on the basis of an agreement to sell and whether law of limitation puts any hindrance or comes as a barrier in way of a person who was not a party in any lis, particularly where matter pertains to the joint and undivided property among the co-sharers that too, when the property is likely to be sold out to an alien one (other than co-sharers) without arraying all the co-sharers as party in the suit as well as factum of possession over the suit land which as per record seems tilting in favour of appellants, M. Bashir Khan and one another (plaintiff in the suit).



4. Before having juxtapose analysis of both the impugned judgments and parting with the decision, **it is worth-mentioning that as per celebrated principle of law Courts of law in civil cases have to record findings in favour of the party in whose favour the material has been brought on record rather than other party, creates preponderance of probability and the cumulative analysis and appreciation of evidence creates preponderance of probability in favour of a litigant party which could be made base for adjudication and definitely in such like circumstances, a party to lis who proved his stance with upper edge to other side quo evidence on record deserve decree in his favour as a fruit of his proof.** My view is supported by the verdict of the Hon'ble Supreme Court and Supreme Court of Pakistan as well. Ready reference in this regard is case law titled **"M. Aziz Khan & others Vs. M. Hanfi and others reported as [2012 SCR 115]**, while other ready references in this regard are as follows

- i. **PLD 1981 SC AJK 118** titled **"Ghulam Mohammad Vs. Mohammad Ashraf;**
- ii. **1982 CLC 1309** titled **"Aksar Ali Vs. Fazal Karim;**
- iii. **2000 SCR 166** titled **"Haji Mohammad Idrees Vs. Ch. Mehmood Ahmed & others"**

**iv. 2010 SCR 231 titled "Haji Nazir Ahmed Vs. Raja Mohammad Saeed.**

5. Litigation between the parties is spread over decades having a chequered history. Controversy before this Court in the instant second appeal pertains to the legality of the impugned concurrent findings on the strength of certain grounds of attack put forth by the appellants as infra in composite manner: -

The appellants made challenge to the concurrent finding by voicing that father of the appellant No.1 namely Baloch Khan and father of the respondent No.1 namely Fazal Din Khan were real brothers/siblings and were admittedly co-sharers. Appellant No.1 in addition to devolvement of ancestral property (from paternal side) was deserving his share from the suit land (devolved upon her mother as being one of co-sharer). It is further added to the extent of survey No.839, as per domestic arrangement, 17 Kanal 3 Marla out of the said survey number was in possession of Baloch Khan and Fazal Din Khan with mala-fide intentions sold out the same to one Khan Mohammad. Resultantly, appellant No.1 by exercising his right of prior purchase took back the said land by way of obtaining decree from the Court of law. Thus, it is an admitted position that to the

extent of survey number 839, no further share of Azam Khan/respondent is remaining. As per Family Settlement, respondent, Azam Khan, is holding landed property bearing survey number 990 old, 1418/1419 new, measuring 11 Kanal 19 Marla and which even otherwise, is according to his fractional share of the respondent, Azam Khan, in the property. Besides, it has further been pleaded as a ground of attack that in fact M. Azam Khan in order to infringe the rights of the appellants and to drag them in unnecessary litigation by assuming himself sole owner of the property executed an agreement to sell in favour of one M. Sharif, father of respondents Nos. 1,3,4,5, and 6 to the extent of suit land measuring 8 Kanal 12 Marla. It is suffice to establish that as the transaction was purportedly done with unclean hands and was outcome of mala-fide and connivance as the respondent, Azam Khan, instead of properly executing a sale deed opted to manage a suit against himself and within few days after tendering cognovits got decreed the suit in guise of his consent.

6. By voicing against concurrent finding, the appellants attacked the impugned decision that both the Courts below have failed to attend to the verdict of the Hon'ble Supreme Court rendered in the case titled "M.

Sharif Vs. M. Azam” pertaining to property bearing survey No.839 measuring 17 Kanal 3 Marla. Furthermore, he alleged that survey No.839 is completely in continuous possession of previously Baloch Khan and now appellants which is unequivocally reflecting and oozing from the revenue record/documentary evidence produced before the trial Court. He further portrayed that M. Azam Khan, respondent himself has approached the revenue officer quo partition of the suit land, where, he himself admitted the stance of the appellants to the extent of possessory rights of the appellants pertaining to survey No.1773 measuring 19 Kanal 14 Marla, which is pending adjudication before the Revenue Officer on account of pending of another suit to the extent of fractional share of mother of appellant No.1.

7. The crux of the ground of attack is that the trial Court as well as first Appellate Court not only brushed aside/non-read and mis-read the evidence but kept aside the judge-made law pronounced by the Hon’ble Supreme Court in plethora of precedents.

8. Now coming back to the judgment and decree passed by the Court of 1<sup>st</sup> instance dated 13.12.2018, passed by the learned Senior Civil Judge Rawalakot

wherein, the matter was initially dealt with in summary manner by discarding the suit on misconception of law that the same was not maintainable against the consent decree but finally the matter was remanded by the Hon'ble Apex Court, and, in second round of litigation, the Court of 1<sup>st</sup> instance after necessary proceedings in light of the pleadings of the parties framed as many as eleven issues by ascertaining and fixing onus of proof of the issues and ultimately in light of the onus determined by the issues so framed, the appellants/plaintiffs produced oral as well as documentary evidence available on the record with the file of trial Court. From plaintiff's side, one M. Ashraf, Abdul Hussain and M. Yousaf as well as M. Bashir (one of the appellant/plaintiffs) came in witness box and got recorded their statements, while from respondents' side, witnesses namely M. Habib, M. Saleem and respondent, M. Sarwar (late) got recorded their statements and ultimately in light of oral and documentary evidence, the Court of first instance passed the judgment and decree dated 13.12.2018 by rendering issue wise findings. It is in the fitness of things

to reproduce issues framed by the Court of first instance:-

تنقیح نمبر ۱۔ کیا مدعیان کو بنائے دعویٰ حاصل ہے؟ (بذمہ مدعیان)  
 تنقیح نمبر ۲۔ کیا دعویٰ مدعیان اندر معیا ہے؟ (بذمہ مدعیان)  
 تنقیح نمبر ۳۔ کیا دعویٰ ہذا پر اصول اشابل Resjudicata کا اطلاق ہوتا ہے؟ (بذمہ مدعا علیہم)  
 تنقیح نمبر ۴۔ کیا قبالی ڈگری محررہ 31.08.1991 اور انتقال 1586 محررہ 30.07.92 جعلی، فرضی، فراڈی اور زائد از حصہ مدعا علیہ نمبر ۳ ہونے کی بناء پر قابل منسوخی ہے اگر ہاں تو کس طرح؟ (بذمہ مدعیان)  
 تنقیح نمبر ۵۔ کیا مدعا علیہم ۲، ۱، مدعا علیہ نمبر ۳ سے مصالحتی ڈگری 31.08.91 تحت قانون لے رکھی ہے جو ناقابل چیلنج ہے اگر ہاں تو کس طرح؟ (بذمہ مدعا علیہم، تردید مدعیان)

9. While resolving the issue No.1, which is pertaining to the accrual of cause of action, the trial Court dealt with the same in an arbitrary manner by brushing aside the evidence available on record and declaring that the plaintiff/appellants have got no cause of action at all. Even otherwise, for example, if it is assumed that plaintiffs got no cause of action then the suit was hit by **Order VII Rule 11, CPC**, and was liable to be rejected accordingly, instead of embarking upon the factual matrix and merits of the case.

10. When the matter is between the co-sharers, admittedly that too the joint property is yet to be partitioned by way of meters and bounds between the co-sharers in accordance with the scheme of West Pakistan Land Revenue Act, 1967, by the Revenue

Officer as well as the application in this connection is already pending adjudication, wherein, possessory rights of the appellants have already stood admitted by the respondents' side, thus, how it could be said that as a co-sharer and having equipped with possession over the suit land (flowing from the documentary as well as oral evidence) that appellants despite admittedly co-sharers in the joint undivided property have got no cause of action to attack a consent decree obtained in collusive manner, wherein, they were not arrayed as party, thus, after going through the record, I am of the view that both the Courts below have not dealt with issue No.1 in a legal fashion and turned a deaf ear to the evidence available on record (in form of oral and documentary) which simultaneously is tantamount to mis-read and non-read the evidence, culminating indulgence of this Court to embark upon such finding and in such eventuality, finding of such nature could not be approved and are not sacrosanct/immune to interfere in such proceedings. For the safe administration of justice, juxtapose version of the parties is the need of the hour to be reproduced as infra:-





11. Glance juxtapose analysis of the above tabulated stance is suffice to hold that reply of the above specific stance is **evasive** which as per law amounts to **admission**. Law is well established that every allegation of fact in the plaint, if not denied specifically or by necessary implication or not traversed (denied expressly) or stated to be not admitted in the pleadings of the defendant, shall be construed to be admitted as envisaged under **Order VIII Rule 5** of the Code of Civil Procedure, 1908 (CPC). Reliance in this regard is placed on the case law referred hereunder:-

**i. Bashir Ahmed & 3 others Vs. Mohammad Aslam &**

**6 others reported as 2003 SCMR 1864;**

**ii. Ghulam Rasool through L.Rs. & others Vs.**

**Mohammad Hussain & others reported as PLD 2011**

**SC 119.**

Appellants, party despite fact they are co-sharers (claiming possession over the suit land had not been arrayed party in the suit along-with other co-sharers) that too, the aforesaid suit was decreed in summary manner within a short span of 6 days in shape of consent decree, without following the Codal formalities of CPC, question is how law of limitation could **stricto sensu** come as barrier in the way of appellants party in order to attach the same by way of filing suit,

moreover, fraud has been alleged (which is oozing from the record as how in collusive manner decree was obtained). Factum of possession pleaded by the appellants specifically in para No.7 has been admitted by the respondents on account of evasive denial of the same on part of the respondents, how a stranger was competent to obtain a consent decree from the joint land without arraying the necessary parties (co-sharers) in the line of respondents as the party particularly when the stranger is beneficiary of the same.

12. Now coming back to oral evidence brought on record by the plaintiffs. The witness M. Ashraf stated in the manner that:-

”قبضہ اراضی بشیر کے پاس ہے) اراضی متدعو یہ کا نمبر خسرہ 839 ہے۔ اراضی متدعو یہ بشیر کے قبضہ میں ہے۔“

By way of cross-examination no question had been put to the said witness regarding this assertion. Likewise the other witness Abdul Hussain also endorsed the possession of appellant Bashir and said:-

” اراضی متدعو یہ بشیر کے قبضہ میں ہے۔ پہلے والد مدعی کے قبضہ میں تھی۔ پہلے بشیر کا مکان بھی بنا تھا اب ٹوٹا ہے۔“

This portion of the evidence remained unrebutted. Witness Mohammad Yousaf also repeated and reiterated the version of the appellant party by alleging:-

”ارضی متدعو یہ خانگی تقسیم میں بلوچ خان کے حصہ میں آئی اسکے بعد بشیر مدعی کے قبضہ میں ہے۔ ارضی متدعو یہ پرا عظیم خان کا قبضہ نہ ہے۔ مدعا علیہم (رسپانڈنٹس) کبھی ارضی پر قابض نہ رہے ہیں۔“

Appellant Bashir himself came in witness box and got recorded his statement completely in line with the averments made in the plaint. While in juxtaposition, only two witnesses have been produced namely M. Habeeb and Mohammad Saleem as well as one of the respondent Mohammad Sarwar got recorded his statement.

Mohammad Habeeb stated that:-

”محمد اعظم نے بشیر کے خلاف تقسیم ارضی کا کیس کر رکھا ہے کسی معاہدہ بیع کا علم نہ ہے۔ یہ درست ہے کہ مظہر مدعا علیہم کو فائدہ دینے کے لیے شہادت دے رہا ہے۔“

Other witness produced by the respondent's side, one Mohammad Saleem said regarding factum of possession that:-

”ارضی متدعو یہ پر مظہر کے علم کے مطابق کوئی قابض نہ ہے۔“

At the outset it transpires that non-reading and misreading of evidence is apparent from the face of both the findings recorded by the Courts below. Factum of possession has already stood proved through oral as well as documentary revenue record, no rebuttal available, which remained overlooked by the Courts below. Fraud vitiates all solemn proceedings as has been held in various case law i.e.

- i. **“Mohammad Younis Khan & 12 others Vs. Government of NWFP through Secretary Forest**

**and Agriculture, Peshawar and others reported as**

**1993 SCMR 618;**

**ii. Lal Din & others Vs. Mohammad Ibrahim**

**reported as 1993 SCMR 710;**

**iii. Ghulam Farid and another Vs. Sher Rehman**

**through L. Rs. reported as 2016 SCMR 862.**

Court of law should not remain as a mute observer, a decree obtained in collusive attempt by passing the necessary parties and in tricky manner, that too within few days in deviation of Codal formalities cannot be endorsed and allowed to remain in field when an aggrieved one made a challenge to same.

13. So far as the second issue is concerned which is pertaining to limitation and the same has been resolved by both the Courts below in favour of respondents against the appellant party. Keeping aside the fact that the appellant party was neither impleaded as party in previous suit decreed in year 1991 nor the limitation could come as a barrier in the way of appellant party that too factum of possession and other main assertions of the appellant party have almost admitted by the other side by making evasive denial and failed to bring on record any documentary or oral evidence in rebuttal. It has been laid down by the

Hon'ble Supreme Court in case titled "Zaffar alias Mumtaz & another Vs. Mst. Sajjad Begum & others reported as **[2014 SCR 1549]** that admitted facts needs not to be proved as well as material disposition unchallenged in cross-examination amounts to admission by any stretch of imagination, if the agreement to sell for a while was executed by the respondent party even then decree of ownership and consent decree was not competent and the proper course was to ask for performance of contract, in this regard reliance is placed on the case law reported as **[PLJ 2000 SC AJ&K 34]** titled Azad Govt. & others Vs. Haji Abdul Rasheed.

14. As the appellants have successfully proved their possession over the suit land and the Hon'ble Supreme Court in a case titled "Khalid Hussain & others Vs. Haji Mohammad Rafique & others" reported as **[2008 SCR 207]** has held that Civil Courts are bound to dive deep into and be careful while such like cases in which they have been by compromise, evasive denial and through unregistered deed and documents admitted to get declaration of titled or ownership through judgment or decree of Civil Court to detriment of other owners or parties having legal right or claim. Moreover, it was also held that "It is the legally duty

of presiding officer to see that Codal Provisions are strictly applied". Vis-à-vis, in **2018 SCR 20**, a case titled "Mohammad Ayub & others Vs. Ali Zaffar & others" the Hon'ble Supreme Court has held that the Courts have to decide the cases on the basis of pleadings of the parties and material propositions raised and dispute in light of proof brought on record. Further held that the prayer for grant of a decree as owners on the basis of an agreement to sell in the light of statutory provisions as well as principle of law enunciated by the Court cannot be granted. While dealing with the proposition of limitation, the Hon'ble Supreme Court in a case titled "Muhammad Sultan Vs. Sardar Begum" reported as **[2005 SCR 80]** has held that no limitation runs against a person who was not a party to the proceedings which adversely affects his rights. Question of limitation is applicable against that party who is contesting the claim and despite knowledge of the adverse order failed to challenge the order well in time in the Court of competent jurisdiction.

15. Furthermore, the Hon'ble Supreme Court in another case titled "Khaliq Nawaz & others Vs. Azad Govt. & others" **[2017 SCR 1504]** has laid down that ---Limitation--if the judgment and decree is void in the eye of law then

question of limitation can be ignored. Application on part of the respondent Azam Khan quo partition of the land before the revenue officers and its pendency is an admitted fact reflecting from record, contents of application are self-evident on transpiring quo possession of appellant Bashir Khan, that too decree for perpetual injunction pertaining to the suit land in favour of Bashir Khan appellant, dated 30.09.2004 had attained finality up to the Hon'ble Apex Court vide decree dated 08.02.2011.

16. Main and legal aspect of the lis remained unattended and unaddressed by both the learned Courts below as to whether suit for declaration was permissible under law in the light of an agreement to sell (which itself creates no rights quo ownership), decree of declaration was in accordance with law and could have been allowed to remain in field?. Both the Courts below lost sight of the fact that land between the parties being admittedly a joint land and possession of the same as per available record tilts in favour of the appellant Bashir Khan, thus, how declaratory decree could be passed in light of an agreement on the back of other co-sharers particularly Bashir Khan appellant. Regular partition is yet to be made and till then all co-sharers are joint owners. In vertical precedent titled

“Mohammad Yousaf Khan Vs. Board of Revenue reported as **2001 SCR 324**, the Hon’ble Supreme Court held as infra:-

“In law every co-sharer is deemed to be the owner of every piece and parcel of the land unless the same is regularly partitioned.”

Same view has been taken by the Hon’ble Apex Court in a case titled “Abdul Sattar Vs. Tariq Aziz [**1999 SCR 151**].

17. Fraud has specifically been alleged and transpires from the record. It has been laid down in a case titled “Abdul Aziz Khan Niazi & others Vs. Mst. Salma Rehman & another” reported as [**1992 CLC 777**], where the fraud was apparent on the face of record and proceedings of suit, decree obtained as a result thereof was, liable to be annulled, thus, the finding upon issue No.2 is not in accordance with law, suit was liable to be decreed in light of preponderance and probabilities of evidence by ignoring limitation on account of collusion and fraud flowing from the pleadings and evidence.

18. As issues Nos. 1 & 2 were material in fact and composite findings after juxtapose perusal of evidence has already been given in above paras by dealing with issue No.1 and 2, therefore, finding upon other issues is not required to be given. In **Section 107 CPC** powers of Appellate



Court have been prescribed. It is useful to reproduce Section 107 of CPC.

“107. Powers of Appellate Court....(1) Subject to such contains and limitations as may be prescribed, an Appellate Court shall have power.....

- (a) to determine a case finally;
  - (b) to remand a case;
  - (c) to frame issues and refer them for trial;
  - (d) to take additional evidence or to require such evidence to be taken;
- (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”

No cavil with the proposition that appeal is continuation of the suit and under the above Section i.e. 107 CPC, the appellate Court has all powers which are vested in the trial Court, such powers are adequately supplemented by the provisions of **OXLI Rule 33** read with **OXLI rule 24 CPC**. Gross misreading and non-reading of documentary and oral evidence is reflecting and floating from both the judgments rendered by both the Courts below, thus, interference is required. Substantial error/defect in procedure, oozing from the record, particularly pertaining to consent decree of 1991 which was passed within few days after filing the suit, findings arrived at by the Courts below are outcome of misreading and non-reading of evidence on record. Conclusions are drawn by ignoring evidence, particularly factum of possession. Ready reference in this regard is **2016 SCR 1150** titled “Mohammad Jamroz Vs. Mohammad

Bashir”. In the case titled “Akhtar Khan Vs. Sarwar Khan [2003 SCR 128], it has been laid down as under:-

“Concurrent findings of fact are open to attack if the same are not supported by any evidence or otherwise are unreasonable or perverse.”

**a. NUB OF THE INSTANT LIS:-**

By accepting this instant 2<sup>nd</sup> appeal, both the impugned judgments and decrees recorded by the learned Senior Civil Judge Rawalakot dated 13.12.2018 as well as learned Additional District Judge Rawalakot dated 28.05.2019, are hereby set-aside and suit of the appellants is accordingly decreed, consequent of which the judgment and decree dated 31.08.1991 passed by learned Additional Sub Judge 1<sup>st</sup> Class Rawalakot, is declared as, collusive, illegal and void ab-initio, having no legal consequences.

Muzaffarabad.  
08.06.2022 (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

**APPROVED FOR REPORTING**

-Sd-  
JUDGE