HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.77/2021;
Date of institution 06.05.2021;
Date of decision 05.09.2022.

1. Mohammad Irshad;
2. Taj Mohammad sons of Mehdi;
3. Faqeer Mohammad;
4. Ghulam Hussain;
5. Mohammad Siddique;
6. Abdul Rehman;
7. Mohammad Rasheed sons;
8. Zainab Jan;
9. Fehmeeda Jan;
10. Khalifa Jan daughters of Mohammad Alam;
11. Mohammad Nisar s/o Shahmeer Caste Janjua r/o Tehsil Dhirkot District Bagh.

Appellants

VERSUS

1. Ishfaq Khan;
2. Mohammad Ishaq Khan;
3. Mohammad Khursheed Khan sons of Abdul Khan;
4. Azhar Khan;
5. Nayyer Khan sons;
6. Balqees Begum;
7. Azra Begum;
8. Shabnum Begum daughters;
9. Mst. Naqsha Begum widow of Zain Mohammad Khan Caste Tezyal r/o Tehsil Dhirkot District Bagh;

Real Respondents

10. Rakham Jan d/o Mohammad Alam Caste Janjua r/o Tehsil Dhirkot District Bagh.

Proforma Respondent

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:
Raja Nasir Latif Khan, advocate for the Appellants.
Raja Shoukat Hayyat, Advocate for the Respondents.

JUDGMENT:

The captioned appeal has been directed against the judgment and decree passed by the learned Additional District Judge Dhirkot dated 27.02.2021, whereby, while dismissing the appeal filed by the plaintiffs/appellants, herein, the judgment and decree passed by the trial Court dated 30.10.2019, was upheld/maintained.

2. The succinct facts for disposal of the captioned appeal are that plaintiffs/appellants, herein, filed a suit for declaration against the defendants/respondents before the learned Civil Judge Dhirkot on the ground that the land comprising survey No.1025 measuring 4 kanal 5 marla, survey No.1024 measuring 11 kanal 9 marla, survey No.1027 land measuring 11 kanal 17 marla situated at Mozia Dhirkot District Bagh was entered in the ownership of plaintiffs and Proforma defendants Nos. 5 to 16 therein, in the revenue record and the land bearing survey Nos. 1024, 1025 measuring 15 kanal 14 marla was the sole share of the father of the plaintiffs and Proforma defendants who in their life orally exchanged their share of the land to the father of defendants Nos. 1 to 4 namely Abdul Khan and the said Abdul Khan in response to that

exchange, handed over the land comprising survey No.40 (old) 17 (new) measuring 16 kanal 15 marla and after the said exchange deed, both the parties got possession of the land but the ownership of the parties to the extent of exchanged land has not been implemented in the revenue record and in this regard, after the death of fathers of the plaintiffs and defendants, the plaintiffs also filed a suit against the defendants to get implemented the oral exchange deed in the revenue record and in that suit during the course of arguments both the parties came into the agreement that they will get implemented the shares as per oral exchange deed, therefore, the Court dismissed the suit. It has further been averred that the plaintiffs time and again asked the defendants to complete the process of ownership of the exchanged land by making statement otherwise give back the land of the plaintiffs but all in vain, hence, the plaintiffs filed a suit for declaration and cancellation of the oral exchange deed in respect of the land comprising survey numbers 1024 and 1025 total measuring 15 kanal 14 marlas situated at Mozia and Tehsil Dhirkot District Bagh.

3. On filing of the suit, the defendants were summoned by the trial Court and Proforma defendant No.10 filed written statement in the terms that the plaintiffs and

defendants earlier filed a suit pertaining to the same matter i.e. for implementation of the oral exchange deed in the revenue record, which was decided on 23.03.2001, so the suit filed by the plaintiffs is hit by the principle of estopple, the suit is also time barred. The father of the plaintiffs and Proforma defendants had transferred the land in the light of oral exchange deed and the land is being in the possession and ownership of the defendants and the defendants had made improvement in the suit land by spending more than 20 million rupees. Finally, prayed for dismissal of the suit with costs. The learned trial Court in the light of pleadings of the parties framed as many as 9 issues and directed the parties to produce their evidence in respect of their claim raised in the pleadings. Trial Court after completion of the trial and hearing the parties dismissed the suit filed by the plaintiffs/appellants, herein, for want of proof, being barred by time and badly hit by the principle of estopple, vide the impugned judgment and decree dated 30.10.2019. Feeling aggrieved from the above-mentioned judgment and decree plaintiffs/appellants, herein, filed an appeal before the learned Additional District Judge, Dhirkot, which also met the same fate, hence, this appeal.

4. The learned counsel for the parties in compliance of the Court order submitted written arguments. In the written

arguments filed on behalf of the appellants it has been stated that while accepting the appeal the impugned judgments and decrees passed by the Courts below may be set aside as the Courts below while passing the impugned judgments and decrees misread and non-read the evidence of the parties. It has further been alleged that appellants time and again asked the defendants to get implemented the oral exchange deed so that the entry in the revenue record may be shown in the names of both the parties as per oral exchange but they refused to do so, therefore, the possession of the land may be given back to the appellants as the defendants have refused to implement the exchange deed despite several requests, so, the supra process of implementation could not be completed due to non-cooperation of the respondents, as respondent No.2 has admitted that the exchange of the land was done but the same could not be implemented, so, admitted facts needs not to be proved. Finally, prayed for setting aside the judgments and decrees of the Courts below. The learned counsel for the appellants in support of his version referred to and relied upon the following case law:-

1995 CLC 136;
2002 SCR 38;
2008 CLC 1340;
1995 SCMR 705;
2018 SCR 20.

5. In the written arguments filed on behalf of the respondents, it has been stated that the appellants have miserably failed to point out that which evidence or part of evidence, documentary or oral, was misread or non-read by the Courts below, as such, concurrent finding of facts could not be reversed merely on the assumption of appellants without pointing out specifically which evidence was misread or non-read. It has further been alleged that the land in dispute had been transferred to the defendants as per exchange deed and in the light of oral exchange, both the parties are in possession of the land as per their shares and earlier on the same cause of action, the plaintiffs have already filed a suit, so, the learned Courts below have rightly declared the suit of the appellants as barred by limitation and hit by the principle of estopple. It has further been stated that estopple and resjudicata debars of Court from exercising its jurisdiction to determine the lis it has attained finality, whereas, the doctrine to issue estopple is invoked against the party of such issue is decided against herein, he would be stopped from raising the same in the letter proceedings the doctrine at res-judicata creates a different kind of estopples. The learned counsel relied upon the following case law:-

AIR 2005 SC 1050;
2018 SCR 122;

2013 SCR 172

6. I have heard the learned counsel for the parties and perused the available record cautiously.

FACTUAL MATRIX OF THE CIVIL LIS.

The present appellant M. Arshad Khan s/o Mehdi Khan brought a civil suit Number 91 on 24.06.2014 before the Court of Civil Judge Dhirkot with a specific prayer articulated as under:-

''لہذا من مدعی مستدعی ہے کہ بعد کری استقرار حق بمد ما مامہ معہ دخلیابی سب اراضی نمبرات خسرہ 1025 تعدادی 4 کنال 5 مرلے، 1024 تعدادی 11 کنال 9 مرلے جملہ تعدادی 15 کنال 14 مرے واقع موضع وتحصیل دھیرکو مدیں مضمون کہ مدعاعلیہم اراضی تبادلہ شدہ کنک عملدرآمد یکارڈمال میں کرانے سے قاصر رہے ہیں ما مامہ اب رہے۔مدعاعلیہم اراضی مملوکہ مدعی می مدعاعلیہم کنک قبضہ واپس کر۔ ما بند ہیں۔بجز می مدعاعلیہم 1 تا 4 صادر فرمائی جاکر می مدع علیہ کو دخل اراضی ازاں مد مدرہ ما جائے۔''

It is oozing from the record that 2 cross suits pertaining to the same subject matter were filed by the same parties against each other round about two decades back. Description and titled of both the above mentioned suits is reproduced for brining clarity:-

مسل نمبر 133 خالص دیوانی رجوعہ 28.11.98
زین محمد خان ولد عبدل خان بنام مہدی ولد حسنو مہ یگراں
دعویٰ استہ ما استحقاق ر مانی تبادلہ

مسل نمبر 3 خالص دیوانی رجوعہ 07.01.99
محمد ماج محمد پسران مہدی ولد حسنو بنام زین محمد خان وغیرہ
دعویٰ استقرار حق بمد ما مامہ معہ دخلیابی اراضی

Both the above titled suits were consolidated by the Court and after compliance of necessary codal formalities issues were

also framed but subsequently at evidence stage on 21.03.2001, both the parties unanimously requested the Court that as both the suits are not maintainable on account of oral agreement quo exchange of property, thus, the same be disposed of accordingly, in other words, they requested for dismissal of the suits. It is useful to reproduce the relevant para of the judgment dated 27.03.2001:-

''تنہ مالا کے بعد ہر دو مقدمات میں شہادت طلب ہو رہی تھی کہ وکلاء فریقین نے مورخہ 21.03.2001 لب کے نوٹس یا کہ ہر دو مقد مانی تبادلہ کی منسوخی کی نسبت ہیں جو کہ قابل رفتار نہیں ہیں، لہذا ہر دو دعاوی کو مطابق یکسو کیا جائے اس ضمن میں بحث وکلاء عب ہوئی وکلاء فریقین نے اپنے مئوقف میں ظاہر ما مہ کا قانو ر کوئی تصور نہیں ہے اس لیے ہر دو دعاوی کو مطابق قانون یکسو کیا جائے۔''

Resultantly the learned Civil Judge Dhirkot rejected both the suits on the basis of want of cause of action and limitation. It is crystal clear from above para that decision dated 27.03.2001 was rendered by the Court on request and consent of both the parties and same has also attained finality that too law does not recognize oral agreement to sell. There is no provision in Transfer of Property Act, 1882 regarding oral exchange of property, thus, neither the same can be annulled as same is non-existent in the eye of law. Declaratory relief in view of section 42 of the Specific Relief Act is discretionary as well unclean handed approach and suppression of fact is fatal.

7. Law does not allow a party to blow hot and cold in the same breath. Concurrent finding recorded by both the

Courts below are completely in line with the scheme of law. Mohammad Arshad present appellant, who was party in the previous lis himself prayed for disposal of the lis on account of its non-maintainability, subsequently he cannot be allowed to question the rejection of the suit and take different/contrary stance as he is estopped by his own conduct as well. The Hon'ble Supreme Court of Azad Jammu & Kashmir has already ordained in plethora of pronouncements that concurrent findings of facts recorded by two Courts cannot be disturbed unless a case of misreading or non-reading arises. Ready reference is M. Siddique Khan Vs. Zareen Khan [2016 SCR 1712].

8. Although rejection of plaint and dismissal of suit are distinct legal concepts, rejection of plaint that is not dismissal of suit is not resjudicata that much is also established from Order VII Rule 13 CPC which does not preclude a fresh plaint on rejection of the previous suit. Ready reference in this regard is PLD 2012 SC 247 titled "Abdul Kareem Vs. Floreda Builders".

9. Apart from the fact Saga of the instant lis is altogether different, present appellant alongwith other

parties in previous lis themselves admitted that such like suits pertaining to oral exchange of property are not maintainable, thus, disposed of and the above referred previous suit was rejected on their request and consent, then how after two decades they could come with volta face to reagitate the waived and acquired stance, hence, the suit of the plaintiff on multiple reasons has no substance as well as not maintainable.

10. It is settled principle that incompetent, frivolous and time barred suits are liable to be burried from their inception and even in such circumstances, it is duty of the Court without there being an application to invoke the provisions of Order VII Rule 11 of CPC, so that the other side may not be put in such litigation as well as to save the time of the Court too, ready reference in this regard is Raja Ali Shah Vs. Messers Essam Hotel Limited [2007 SCMR 741]. Previous adjudication on the same cause of action, between the same parties that too, on the basis of request and consent of the parties is a barrier in the way of fresh suit, that too, when the previous decision had attained finality and the appellant kept mum instead of moving

forward for round about two decades. Thus, law help vigilant and not indolent.

The nub of the above discussion is that the titled civil appeal fails which is dismissed. The parties are left to bear their own costs.

Muzaffarabad . -Sd-
05.09.2022 (Saleem) JUDGE

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

-Sd-
JUDGE