

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.10/2017.
Date of institution 23.02.2017.
Date of decision 30.07.2022.

1. Mohammad Khan;
2. Afsar Jan widow;
3. Adalat Khan;
4. Sadaqat Khan;
5. Shafaqat Khan sons;
6. Haneefa Begum;
7. Safeena Begum;
8. Shaheena Begum;
9. Asteena Begum;
10. Rizwana Begum daughters of Nadir Khan Caste Narma r/o Kafal Ghar/Mong Bajri District Bagh Azad Jammu & Kashmir.

Appellants

VERSUS

1. Abid Hussain shah;
2. Liaquat Hussain Shah;
3. Akhter Hussain Shah;
4. Nazakat Hussain Shah;
5. Zahid Hussain;
6. Khurshida Begum;
7. Nosheen Akhter daughters of Sarwar Shah Caste Syed r/o Village Mong Bajri, Tehsil Hari Ghel District Bagh Azad Kashmir.

Respondents

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Sardar Iftikhar Ahmed, advocate for the Appellants.
Sardar Tahir Anwar, Advocate for the Respondents.

JUDGMENT:

The captioned appeal has been directed against the judgment and decree passed by the learned District Judge Bagh dated 29.11.2016, whereby, the judgment and

decree passed by the learned Civil Judge Bagh dated 12.09.2012 was maintained.

2. The succinct facts of the supra titled appeal are that plaintiffs/appellants, herein, filed a suit for declaration cum perpetual injunction before the learned Civil Judge Bagh on the ground that the father of defendants namely Sarwar Shah filed a suit for possession against the father of plaintiffs in respect of the land measuring 2 kanal 16 marla comprising survey Nos. 137, 157, 157 min and survey No.138 land measuring 4 kanal 11 marla situated at Mozia Mong Bajri and the said suit was dismissed by the learned Civil Judge Bagh on 12.07.1961 declaring that the father of defendants was not the owner of the suit land as the same was given by the Raja of Poonch for Shrine and from survey No.138 the land measuring 2 kanal 5 ½ marla was under the possession of the predecessor in interest of the plaintiffs, however, the defendants while showing the aforesaid survey Nos. as legacy of their father, got transferred to their names but the land is under the possession of the plaintiffs. It has been stated that all the mutations 107 to 110 are against the law and judgment dated 12.07.1961, are liable to be cancelled and in this regard, the defendants were time and again asked to be restrained from snatching the

possession of the land and all the attested mutations may be got cancelled but they refused to do so.

3. The defendants also filed a cross suit for declaration and possession on 26.05.2003 stating therein that the land from old survey No.138 measuring 4 kanal 11 marla out of which 4 kanal 9 marla has been entered as 'Aabi Awal' and 2 maral of the land has been shown in the possession of Shrine and the said entry was made in 1964 Bik. and in the present settlement old survey No.138 has been given a new survey number as survey No.156, wherein, the land measuring 1 kanal 18 marla has been shown under the possession of defendants Nos. 1 and 2 and the rest of the land as per record has been reserved for Shrine and the suit land has been shown in the possession of the plaintiffs, Abid Hussain Shah & others continuously from four generations and after the death of Sarwar Shah, the Predecessor in interest of plaintiffs, the defendants are the owners of the land through attested mutation No.110.

4. After filing of both the suits, the defendants were summoned by the trial Court who filed their written statement, whereby, the contents of plaints were refuted in toto and in each of the written statement, it has been stated that the plaintiffs have no cause of action, the suit

has been filed after prescribed period of limitation, therefore, the same may be dismissed with costs.

5. The learned trial Court after consolidating both the suits framed as many as seven issues and directed the parties to lead their evidence. After completion of the trial, the learned Civil Judge Bagh dismissed the suit for declaration cum perpetual injunction and cancellation of the mutations for want of proof and decreed the suit filed by plaintiff Abid Hussain Shah against Mohammad Khan & others in the terms that the land comprising survey No.156, measuring 1 kanal 18 marla situated at Mozia Mong Bajri is under the ownership of plaintiffs Abid Hussain Shah & others vide the impugned judgment and decree dated 12.09.2012. Feeling aggrieved from the impugned judgment and decree of the trial Court, plaintiffs/appellant, herein, filed an appeal before the learned District Judge Bagh on 17.10.2012, which also met the same fate vide the impugned judgment and decree dated 29.11.2016, hence, the supra appeal for setting aside the impugned judgments and decrees of both the Courts below.

6. The learned counsel for appellants vehemently argued that while accepting the appeal the impugned judgments and decrees passed by the Courts below may be set aside. The learned counsel virtually reiterated the

averments raised in the memo of appeal and submitted that while passing the impugned judgments and decrees, the Courts below misread and non-read the evidence of the parties. The learned counsel maintained that appellants had possession over the disputed land since their forefathers and the father of defendants got attested fake and fictitious mutations Nos. 107 to 111, which are liable to be cancelled. Finally, prayed for setting aside the judgments and decrees of the Courts below.

7. Conversely, the learned counsel for respondents submitted that learned counsel for 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. The learned counsel further argued that the suit land is in the ownership of respondents, so the mutation in this regard were also attested as per law. The learned counsel defended the impugned judgments and decrees on all counts and prayed for dismissal of the appeal with exemplary costs.

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

9. A perusal of record shows that the plaintiffs/appellants, herein, filed a suit for declaration cum perpetual injunction in respect of suit land mentioned hereinabove against defendants/respondents, herein, in the trial Court which was resisted by the defendants, predecessor-in-interest of appellants, herein, & others by filing written statement. A cross suit for declaration and possession was also filed by the respondents, herein. After consolidating both the suits, the trial Court framed issues and directed the parties to produce their evidence in support of their respective claim. Although the suit of father of respondents, was dismissed but in this regard issue No.3 was framed, wherein, it has been declared that the Mortgage Deed Exh. "PA" was not written and executed in accordance with law and it is admitted that Sultan Shah s/o Peer Nadir Shah was childless, so, inheritance/legacy of Peer Nadir Shah was transferred to Haider Shah, Yousaf Shah, Sarwar Shah and thereafter, was transferred to Abid Shah respondents, herein, so, the aforesaid transaction or transfer was quiet in accordance with law. The appellants are the claimant of the land measuring 2 kanal and 5 ½

marla but no entry in the revenue record pertaining to the aforesaid survey No.138 has been shown and on the basis of a Photostat copy of the Mortgage Deed, the appellants are the claimant of the ownership.

10. The learned trial Court in the light of record and pleadings of the parties has rightly declared that the suit land is in the ownership of Peer Nadir Shah and after the death of Sultan Shah (childless) his property was rightly transferred to the respondents and in this regard the mutations were also got attested in accordance with law. The plaintiffs/appellants have also failed to prove their case by documentary as well as oral evidence, as one of the witness produced on behalf of the appellants in cross-examination deposed that he never asked the appellants how they took the land which is under their possession and he further stated that he is unable to describe that how the appellants got the possession of the suit land. Similarly, all the other witnesses produced by the appellants have failed to explain the ownership of the suit land, they only deposed that the suit land was given by the "Maharaja Poonch" to Peer Nadir Ali Shah as gift. So, the as per my opinion, respondents have amply proved their case by producing cogent oral as well as documentary evidence that they are

the heirs of Peer Nadir Shah and all the mutations in this regard have been rightly attested and executed.

11. Trial Court after dilating upon each issue passed the impugned judgment and decree which was rightly upheld by the first appellate Court while concurring the judgment and decree passed by the trial under law. I have also scrutinized the whole evidence produced by the parties and came to the conclusion that no misreading and non-reading of evidence has been committed by the Courts below while passing the impugned judgments and decrees. However, the learned counsel for appellants have miserably failed to point out any misreading and non-reading of evidence committed by the Court below while passing the impugned judgments and decrees, as such, same need not to be interfered with by this Court.

12. It is well settled principle of law that concurrent findings of fact could not be disturbed unless and until it is specifically pointed out by the appellants, litigant party that which part of evidence oral or documentary or which evidence as a whole was misread and non-read. Similar proposition has been resolved by the apex Court in a case titled Akhtar Hussain & others Vs. Raja Mohammad Zarin

Khan [1993 SCR 114] wherein it has been observed as under:-

Evidence—

--A general allegation of misreading or non-reading of evidence would not render the concurrent findings of fact open to challenge—It is necessary for the party to specifically point out the witnesses whose statements were misread and support the contention by certified copies of the said statements.”

A Similar proposition has been resolved by the apex Court in another case titled Adalat Khan Vs. Fazal Hussain & another [1995 SCR 151] the relevant portion of which is reproduced as under:-

CONCURRENT FINDING OF FACTS.

“---Even if a different conclusion from the one reached by the Courts below is possible, the High Court is not legally competent to disturb the findings until and unless a case of non-reading or misreading of evidence is made out or a gross illegality is shown to have been committed while appreciating evidence of a witness.”

Cursory survey of record/evidence reveals that witnesses produced by the appellants instead of endorsing and strengthening their stance controverted and negated their claim particularly

witness Zahoor Khan s/o Baloch Khan during the cross-examination stated that:-

”مظہر نے کبھی مدعیان سے نہ پوچھا تھا کہ اراضی متدعوویہ جو ان کے قبضہ میں ہے کیسے لی ہوئی ہے۔ مظہر نہ بتا سکتا ہے کہ مدعیان کا قبضہ کیسے ہوا ہے۔ مظہر کو ملکیت کے بارہ میں علم نہ ہے۔“

another witness Abdul Qadir s/o Al Gohar reiterates that:-

”مظہر نہ بتا سکتا ہے کہ اراضی متدعوویہ کا کون مالک ہے البتہ قابض مدعیان ہیں۔“

likewise the witness Mohammad Shabir s/o Mohammad Shear said:-

”مظہر کو علم نہ ہے کہ اراضی متدعوویہ کس کی ملکیت ہے۔“

The thrust of the arguments advanced on behalf of the appellants is claiming rights in light of a Mortgage deed dated 25.02.1954, while the same has lost its value according to the decree dated 12.07.1961. All seven issues have been resolved and decided by both the Courts below in purely legal fashion concurrently. Worth mentioning that civil cases are to be decided in light of the doctrine of preponderance of probabilities of evidence i.e. in whose favour it tilts much more, he will succeed. The Hon'ble Supreme Court of Azad Jammu & Kashmir in the case titled "Mohammad Arif Vs. Mohammad Boota & others reported as 2007 SCR 363 dealt with the similar proposition as under:-

“There is concurrent finding on the question of fact that the plaintiff has failed to prove the execution of agreement to sell. No misreading or non-reading of evidence was found to have been committed by the lower Courts. The learned counsel for the appellant wants fresh appreciation of evidence. It is well established principle of law that where there is concurrent finding on the question of fact, then this Court shall not embark upon the fresh appreciation of evidence while considering second appeal even if erroneous view has been drawn by both the lower Courts.”

The sequel of above discussion is that finding no force in the instant appeal, as such, the same is hereby dismissed with no order as to costs.

Muzaffarabad.
30.07.2022 (Saleem)

-Sd-
VACATION JUDGE