# HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.88/2019.
Date of institution 22.03.2019.
Date of decision 09.08.2024.

Mohammad Siddique s/o Faiz-Ullah r/o Dhal Chattian Tehsil Hattian Bala District Jhelum Valley, Azad Kashmir.

Appellant

VERSUS

1. Fazal Hussain;
2. Gul Hussain sons of Abdullah r/o Dhal Chattian Tehsil Hattian Bala District Jhelum Valley, Azad Kashmir;
3. Deputy Commissioner Hattian Bala;
4. Assistant Commissioner Hattian Bala;
5. Tehsildar Hattian Bala;
6. Girdawar Circle;
7. Patwari Halqa Dhall Chattian.

Respondents

## CIVIL APPEAL

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

**PRESENT:**
Muddasar Hussain Abbasi, Advocate for the Appellant.
Raja Azeem Zahid, Advocate for Respondents No.1 & 2.

**JUDGMENT:**

Through the partial appeal at hand under Order 41 Rule 23 CPC, the judgment of the learned District Judge Jhelum Valley dated 26.02.2019 is being impugned and sought to be set-at-naught to the extent of consolidation of the suit of the appellant, herein, with another suit titled "Fazal Hussain Vs. Mohammad Siddique & others".

2. The present appellant by partially assailing the judgment of the learned District Judge Hattian Bala qua remand of the lis in order to club up with the buried suit of the respondents which had already stood rejected by the learned trial Court vide the judgment dated 28.08.2018, that too, no appeal, review or revision petition was filed against the same by the present respondents well within the prescribed period of limitation, resultant of which, judgment dated 28.08.2018 has attained finality.

3. During the course of arguments, the learned counsel for appellant, by pressing the grounds of appeal taken in the memo of appeal staunchly contended that the appellant being owner of the suit land comprising survey No.219 old, 458 new measuring 8 kanal 6 marlas is enjoying his peaceful possession over the same since decades, while the respondents claiming their rights in furtherance of sale deed manipulated wrong entries in the revenue record which became bone of contention between the parties and the present appellant while feeling threat to his property has filed a regular civil suit for declaration and permanent injunction before the trial Court on 03.02.2015 and trial Court after framing issues decreed the suit of the present appellant to the extent of permanent injunction while the

rest of the suit was not decreed ultimately, the matter was taken up in first appeal by the appellate fora, hence, the appellate Court reversed the judgment passed by the trial Court for permanent injunction in favour of the appellant and remanded the case to trial Court with the direction to club up the same with the buried suit which was previously rejected in year 2018. He further contended that the judgment delivered by the first appellate Court is against law and facts of the case. As the case titled, Fazal Hussain Vs. Mohammad Siddique instituted in the Court of learned Senior Civil Judge Hattian Bala was rejected vide decision dated 28.08.2018 and no legal remedy against the same was availed by the respondents, thus, the decision dated 28.08.2018 has attained finality. The learned counsel for appellant drew the attention of the Court towards operative part of the impugned judgment, wherein, the trial Court by referring the case No.44 (buried suit under Order VII Rule 11 CPC) and ordered for consolidation of the same with suit No.22 (relevant herein), he prayed for reversal of the judgment by asking for a decree of declaration and perpetual injunction in his favour according to evidence available on record.

4. While on the other hand, Raja Azeem Zahid advocate for respondents No.1 & 2 supported the judgment delivered by the first Appellate Court and contended that no illegality or irregularity has been pointed out by the appellant. Judgment passed by the first appellate Court is completely in accordance with law, he added.

5. I have heard the learned counsel for the parties and gone through the record of the case with my due care and caution.

6. Be that as it may, it is evident from the record that appellant is lawful owner and peaceful possessor of the suit land in furtherance of the registered sale deed dated 07.08.1974 while in juxtaposition, the respondents are claiming their so called rights in guise of sale deed dated 07.08.1988 and thereafter by tempering, inserted survey No.219 in the said sale deed and manipulated and maneuvered to get changes in the revenue record, resultant of which mutation No.499 came into being. It is also admitted position from the record that appellant and respondents are co-sharers and the suit land has not been partitioned in accordance with law between the parties. Controversial mutation No.499 has stood cancelled by the revenue authorities. Sale deed in favour of the appellant

has neither been challenged by anyone nor reversed and is completely holding the field which sounds in favour of existing rights of the appellant, thus, the appellant was entitled for declaration of his right in view of Section 42 of the Specific Relief Act. The trial Court has misconstrued the law on the subject by declining relief in favour of present appellant. We have summoned the record of the case No.44 from the relevant archive Hattian Bala and perused the record which reveals that suit No.44 was rejected by the Court in year 2018 and the said decision had attained finality which cannot be revived by the Court suo moto as to the extent of previous decision which attained finality. The first Appellate Court or for that matter, the Civil Court has become functus officio and had got no powers to revive any lis already decided by the said Court.

7. Liminality of powers is clear enough regarding scope of first and second appeal in CPC. Pristine that concurrent findings of fact recorded by two Court is not normally interfered by this Court embarking upon such double findings, unless some sort of perversity, deviation from law or for that matter, gross non-reading and mis-reading of evidence is floating from the record which called for indulgence attracting the conscience of this Court.

(Underlining is mine)

8. Concurrent findings of facts carry wisdom of two Courts, initially the wisdom of trial Court, who took up the case, conducted the trial, framed issues, taken evidence and then carried out a firsthand appraisal of the evidence available on record, subsequently, in first appeal, under Section 96 CPC, the first appellate Court by stepping in the shoes of the trial Court is clothed with powers to re-open the lis by embarking upon the issue wise finding of the trial Court in a way to concur or differ the same, whereas, in second appeal under Section 100 CPC scope of indulgence is narrow and bounded. Second appeal is only competent if some sort of misreading or non-readings is apparent on the face of the record or finding is arbitrary and capricious.

(Emphasis supplied)

High Court is not precluded to consider issue of fact if same has not been determined by the Courts below by reason of any illegality, omission, error or defect [1]. In codal language under Section 100 CPC second appeal lies in infra eventualities;

(a) The decision being contrary to law or usage having the force of law;

[1]. 2014 CLC 990+PLD 1955 SC 38+PLD 1984 SC 389.

(b) The decision having failed to determine some material issue of law or usage having the force of law;

The substantial error or defect in the procedure provided by this Code (CPC) or by any other law for the time being enforce, which may possibly have produced error or defect in the decision of the case upon the merit.

9. Except the supra mentioned grounds provided in Section 100 CPC, second appeal is not competent on any other ground in view of Section 101 CPC, vis a viz under Section 102 CPC, no second appeal lies in any suit of the nature cognizable by Courts of small causes, and in any other suit when the amount or value of the subject matter of the original suit does not exceed the amount or value as the provincial Government may by law determine. Trite when judgment of the Courts below is in variance, High Court has to make apple to apple comparison of the rival findings in order to arrive at just decision. If judgment of the trial Court is comparatively sound on factual yardstick and rings legal, rather than the findings of first appellate Court, then judgment of the trial Court should be preferred.

(Emphasis supplied)

10. Findings of trial Court based upon misreading and non-reading, thus, same was set-aside and judgment of

the trial Court was restored [2]. It is oozing from record that appellant by virtue of sale deed (registered instrument) is lawful owner of the suit land and the said land is continuously in his peaceful possession, thus, was justifiably entitled for decree of declaration and perpetual injunction, the trial Court has erred in law by declining the relief of declaration to the appellant and granted the piecemeal relief by issuance of decree of perpetual injunction. Judgment of the first Appellate Court is not in consonance with law there is no justification for remand of the lis and consolidation of the same with the already buried suit no.44 decided on 28.08.2018. Even otherwise, the buried suit No.44 was for restoration of mutation No.499 which was cancelled by the relevant revenue authority and it is not within provice of the Civil Courts to embark upon the matter of correction and entries in revenue record.

11. I am inclined to set-aside the judgment of the first Appellate Court and restore the judgment and decree passed by the Trial Court with certain modification in a way to pass a full-flag decree of declaration and perpetual injunction in favour of the appellant. Where the judgment and decree passed by the trial Court is reversed by the first

[2] . 2017 YLR 1476.

Appellate Court, apple to apple comparison of both the judgments is required in second appeal if conflicting findings are upon appraisal of evidence, then findings of the trial Court are liable to be preferred as the trial Court is master of facts of the case and conducted the trial, but this preference is justifiable in case where misreading of evidence is claimed in second appeal. Whereas, if conflicting findings are pertaining to somehow mixed question of law and fact then finding of the first Appellate Court is liable to be preferred over judgment of the trial Court. When two judgments are in variance to each other, portraying difference angles of appreciation of evidence, re-appraisal of the entire evidence in second appeal is required which is twofold to arrive at true prospective and nutshell of the evidence vis a vis appreciation of diversity as well.

(Underlining is mine)

12. It depicts from record that trial Court misread and non-read the evidence produced by the appellant quo declining declaratory relief to the plaintiff/appellant, herein. Registered sale deed in favour of the plaintiff is a legal and valid instrument which is holding the field, thus, in view of Section 42 of Specific Relief Act, the plaintiff has

made out a case for issuance of declaratory decree in his favour as well. Trite that High Court is not precluded to consider issue of the fact if same has not been determined or wrongly determined by the Courts below by reason of any illegality, omission, errors or defect [3].

For the above multiple reasons, judgment passed by the first Appellate Court is set-aside in toto while the judgment and decree passed by the learned trial Court dated 28.08.2018 is modified and a suit of the plaintiff/appellant is decreed in tone and tenure of the prayer clause by way of declaration and permanent injunction in favour of plaintiff/appellant. With no order as to costs. Appeal stands accepted. File be kept in archive.

Muzaffarabad.
09.08.2024 (Saleem) JUDGE

**Note:**- Judgment is written and duly signed. The office is directed to intimate the parties or their counsel accordingly.

JUDGE

**(Approved for Reporting)**

**JUDGE**

[3]. 2014 CLC 990+PLC 1955 SC 38+PLC 1994 SC 389.