

HIGH COURT OF AZAD JAMMU AND KASHMIR

Civil Appeal No. 89/2012.
Date of Institution. 19.03.2012.
Date of Decision. 15.06.2022.

1. Muhammad Mahmood, son.
2. Nasim D/o Sahib Dad.
3. Muhammad Ayaz.
4. Riaz S/o Maqsood Begum W/o Allah Ditta Mughal by caste R/o Sector 7, Dadyal Tehsil Dadyal District Mirpur.

..... Appellants

VERSUS

1. Imtiaz Sheraz.
2. Fayyaz.
3. Ayaz, sons.
4. Zarka, Daughter.
5. Karamat Hussain S/o Sattar Din.
6. Zar Begum.
7. Nasim Akhtar D/o Fazal Hussain.
8. Asif Begum , widow.
9. Shahzad C hohan.
10. Jabran Chohan, sons.
11. Nazia Rizwan.
12. Naila Rizwan.
13. Alia Rizwan.
14. Fozia Rizwan.
15. Sonia Rizwan Daughters of Muhammad Rizwan Chohan by caste R/o Sector 7 Dadyal Tehsil Dadyal.
16. Administrator Municipal Town committee Dadyal
17. Estate Officer Municipal Committee Dadyal Tehsil Dadyal District Mirpur.

Respondents

18. Muhammad Bashir S/o Sahib Dad Mughal by caste R/o Sector 7 Dadyal.

Pro-forma-Respondent

**APPEAL AGAINST THE JUDGMENT AND DECREE OF
ADDITIONAL DISTRICT JUDGE DADYAL MIRPUR
DATED 21.12.2012**

Before:— Justice Mian Arif Hussain, J.

PRESENT:

Ch. Muhammad Anwar, Advocate for Appellants.
Raja Khalid Mahmood, Advocate for Respondents.

JUDGMENT:

The captioned appeal has been preferred against the consolidated judgment and decree recorded and passed by Additional District Judge, Dadyal, dated 21.02.2012, whereby, the suit filed by the respondents herein was decreed, whereas, suit filed by the appellant herein was dismissed for want of proof.

Succinctly, facts forming the background of the captioned appeal are that Mumtaz Ali Chohan, respondents, herein, preferred a declaratory suit cum possession, whereas, Muhammad Mahmood and others, appellants herein preferred a suit for declaration in the Court of Additional District Judge, Dadyal. In the suit filed by the Mumtaz Ali Chohan and others, respondents, herein, it is averred that plots no.807,808 measuring one Kanal situated at Dadyal Hamlat through an allotment order no.568 are owned by the plaintiff and proforma respondent whereas real defendants have no concern with the said plots. It is further stated that father of plaintiff in the year 1967, constructed two houses upon a piece of land consisting 10/10 marlas land by expensing huge amount and later on ten years ago constructed a double storey building in plot no.807 and constructed a hall measuring 30 feet in plot no.808. It is claimed that mother of defendants being an effectee of "Mangla DAM" was allowed to reside temporarily in house

situated in plot no.807 on humanitarian ground. It is claimed that plaintiff and other co-sharer were in England. In year 1996 defendants were asked to pay rent at the rate of Rs. 1500 per month, upon which, they agreed but when after two years plaintiffs came back to Pakistan and found that no rent has been deposited in plaintiff's account. On inquiring, defendants requested to waive of the previous rent and for receiving the rent in future, plaintiffs nominated his relative named "Altaf" to collect the same. It is claimed that till the year 2001, defendants paid the rent but thereafter they stopped the payment, upon which notice was served to defendants to evict the home as result of which they killed his son and left the house. It is claimed that on 12.06.2008 defendants occupied the house forcibly, whereupon, defendants were asked to pay rent outstanding to the tune of Rs. 1206000/- or to evict the house and hand over the possession of plot cum house but they have declined to accept the claim of the plaintiffs. With the said assertion, a decree for declaration cum delivery of possession has been solicited.

The suit was contested by the defendants by filing written statement, wherein, the claims of plaintiff were refuted in tot on legal and factual scores as well.

Subsequently, Muhammad Mahmood and others appellants herein preferred a suit of declaration claiming therein that plot no.807 measuring 10 marlas situated at Sector no.7 Dadyal Tehsil Dadyal District Mirpur has been

purchased by plaintiff's mother from Fazal Hassan, predecessor of defendants through oral agreement in consideration of amount Rs. 400. It is claimed that after purchase of said plot, plaintiffs after constructing a house have been residing therein as lawful owners and possessors of the said plot, whereas, defendants have no concern with the said plot no.807. It is claimed that defendants with the connivance of others have transferred the ownership of the disputed plot in their favour which being illegal, result of fraud is liable to be declared void and set aside.

The said suit was resisted by the defendants by filing written statement, wherein, they have refuted the claim of the plaintiff in toto on legal and factual grounds as well.

After consolidating both the suits, out of divergent pleadings of parties, as many as 11 issues along with six additional issues were framed and learned trial Judge directed the parties to lead evidence in support of their respective claims. After hearing the parties, the learned Additional District Judge Dadyal, vide judgment and decree dated 21.02.2012 has dismissed the suit filed by Muhammad Mahmood and others, appellants herein for want of proof whereas the suit filed by the Mumtaz Ali Chohan has been decreed.

Feeling dissatisfied from the aforesaid judgment and decree, Muhammad Mahmood and others have preferred an appeal before this Court.

Arguments heard.

The learned counsel for appellants after narration of facts of the case at some length contended that appellants herein have proved their claim of purchase of disputed piece of land in the year 1967 and in view of nature of property, the provisions of Registration Act and Transfers of Property Act were not applicable because within limits of Municipality, the mode of alienation of plot stands different one but the learned trial Court failed to comprehend the process of alienation of suit land. It is urged that issue no.2 has been decided in favour of appellants through which the learned trial Court has categorically opined that the house has been constructed by the appellants herein. The learned counsel further added that a necessary issue in respect of improvements in the suit land must be framed and cost of improvement must be determined but the said question has not been addressed. The learned counsel maintained that in rival suit, respondents have claimed the value of suit property as Rs. 40,00,000/- meaning thereby that at least, appellants herein have made improvements with the cost of an amount of Rs. 40,00,000/- and in such an eventuality, how they without awarding compensation could be evicted from the suit property. The learned counsel urged that during the pendency of appeal, an application for introducing amendment in the plaint was brought on record which was disallowed but the learned Apex Court disposed of the appeal with the observation that sufficient material regarding claim of the improvements is on the record and the Court is

competent to award a relief which it deems fit. It is claimed that in said circumstances, if the suit is not decreed in favour of appellants, even then, they deserve for compensation of improvements.

Conversely, the learned counsel representing the respondents herein contended that appellants herein miserably failed to bring on record a single piece of evidence regarding purchase of suit property and it is very much clear that suit property is within ownership of the respondents. The learned counsel urged that neither the claim of improvements in their plaint has been taken by the appellants herein nor a "single word" while recording their evidence in respect of improvement has been uttered, so, without claiming and proving improvements appellants cannot be awarded any compensation. The learned counsel maintained that trial Court has rightly recorded its findings, which do not warrant any interference by this Court, hence, appeal being devoid of substance be dismissed with costs.

After having heard the arguments of learned counsel of both sides, I have also gone through the record made available at the file with utmost care and caution.

Initially, appellants herein brought a suit for declaration before trial Court and subsequently respondents herein instituted a suit of declaration cum possession in respect of disputed property. In their plaint, appellants herein claimed that plot no.807 has been purchased by them from Predecessor of defendants / respondents herein and

after purchasing the said plot, they have constructed a double storey building over the said plot whereas, respondents herein took a version that disputed plot and house constructed over plot no.807 was within ownership of their predecessor which was given to the appellants herein on humanitarian grounds and subsequently the rent agreement was executed between the parties but the appellants herein failed to comply with the terms and conditions of rent agreement, hence, they are liable to be evicted from the disputed piece of land.

Both the said suits were consolidatedly heard and disposed of by learned Additional District Judge vide judgment and decree dated 21.02.2012 impugned herein through which the suit of the appellants herein was dismissed for want of proof, whereas, rival suit filed by the respondents has been decreed.

From the perusal of judgment impugned herein it reflects that number of issues along with additional issues were framed. In respect of divergent claims of the parties regarding construction of the house over the suit land, issue no.2 to 4 and additional issue no.4 were framed.

While recording his findings in respect of said issues, the learned Additional District Judge has opined that house has been built by "mother" of the appellants herein and ultimately issue no.2 has been recorded in favour of appellants herein, whereas, issue no. 3 and 4 in respect of claim of respondents herein have been decided against them.

Admittedly, the respondents herein have not challenged the findings of the trial Judge in respect of said issues, meaning thereby, that the claim of the appellants herein in respect of construction of house over the disputed plot has been accepted by the learned trial Court but while determining validity of said improvements over the suit land, the learned trial Judge, has observed that construction over a piece of land without entitlement has no legal sanctity whereas while recording findings on additional issue no.4 the learned trial Judge has opined that the cost of improvements has not been claimed.

To my mind, before recording findings on legal position or sanctity of improvements over the suit land, it was necessary to determine the value of improvements but the said question has not been addressed by the trial Court.

Undoubtedly, no specific claim in respect of improvements in terms of "cost of expenditure" has been brought on record by the appellants herein but from the perusal of written statement filed on behalf of the appellants herein in a rival suit, appellants have categorically taken a plea in para no.2 that they have constructed a house over the disputed plot with the cost of Rs. 50,00,000/- but in view of this said claim, no issue was framed. From the record, it appears that an application for amendment in the plaint on behalf of the appellants during the pendency of appeal was preferred which was disallowed by this Court. Though, appeal of appellants herein, was also got dismissed by the Hon'ble

apex Court but the Hon'ble Apex Court while disposing of the appeal has observed that appellants in para no.2 of their written statement has already taken the said the version.

Under the above circumstances, I am of the view that in the light of claim of appellants herein regarding improvements taken in para no.2 of written statement filed in a rival suit, an issue regarding determination of cost of improvements must be framed, because without framing relevant issues, it cannot be inferred that parties have definitely produced their whole evidence regarding their claims. The object of framing of issues being that the controversies put by the parties are narrowed to particular points to be settled and determined by the Court. Issues determine nature of onus and right of party to open evidence. The sole purpose is to invite attention of parties to real part needing consideration, so, it is the primary duty of the Court to frame appropriate issue arising from pleadings. It is worth mentioning that Court could frame any issue, even, if not raised in the pleadings, nonetheless, it would come to the notice during the course of evidence.

keeping in view the overall circumstances of the case, it is observed here that it is an admitted position that question of improvements over the disputed piece of plot has been decided in favour of appellants herein and said findings reordere d by trial Court have not been assailed by respondents herein, therefore, before recording the validity and sanctity of such improvements, it deems necessary that

cost of improvements must be brought on record, hence, in order to achieve the said purpose an additional issue needs to be framed which follows as :

"Whether the defendants (Muhammad Mahmood and others) have constructed a house over the disputed piece of land with the cost to the tune of Rs. 50,00,000/-, if so, what's its effect on the suit ? (OPD)"

The crux of the above discussion is that for determination the real and whole controversy, the cost of improvements must be determined and for this purpose, trial Court failed to frame the relevant issue and in view of plea of appellants herein raised in their written statement filed in the rival suit, an additional issue has been framed herein above, which after recording the evidence needs to be decided, hence, while accepting the appeal in hand, judgment and decree impugned herein is set aside and the case is remanded to the learned Court seized with the lis with the direction that after recording the evidence of the parties, in respect of said issue, matter be decided afresh.

Mirpur.
15.06.2022.

JUDGE

Judgment has been written and duly signed. The office is directed to intimate the learned counsel for parties through notices.

JUGDE