

HIGH COURT OF AZAD JAMMU AND KASHMIR

Civil Appeal No.202/2010;
Date of inst. 30.12.2010;
Date of hearing. 27.09.2022;
Date of decision. 29.09.2022.

1. Naseeba Begum wife of Muhammad Rasheed;
2. Shoukat Parveen wife of Aftab Hussain;
3. Naemat Jan wife of Muhammad Shabbir Khan,
caste Narma r/o Mang Bajri Kafal Garh Tehsil Hari
Ghel District Bagh.

.....Appellants

VERSUS

1. Raja Muhammad Sabir Hussain Khan s/o Raja
Muhammad Hussain Khan;
2. Shahzad Sabir;
3. Sajid Sabir,
4. Junaid Sabir S/o Raja Sabir Hussain Khan, caste
Narma R/o Mang Bajri Tehsil & District Bagh;
5. Muhammad Jamil Khan;
6. Muhammad Farooq Khan S/o Rehamdil Khan,
caste Narma R/o Kafal Garh Mang Bajri Tehsil &
District Bagh.

..... Respondents

CIVIL APPEAL

Before:— Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Raja Abrar Hussain, Advocate for the appellants.
Sardar K.D.Khan, Advocate for the respondents.

JUDGMENT:

The captioned appeal has been filed against the judgment and decree recorded by learned District Judge Bagh, dated 30.09.2010, whereby judgment and decree dated 15.02.2008 passed by learned Civil Judge

Bagh has been set aside and the case has been remanded to the trial Court for fresh decision.

Precise facts forming background of the captioned appeal are, Mst. Sakina Begum, now survived by appellants herein, filed a suit for declaration, cancellation of gift deed dated 16.03.2004, perpetual injunction and possession against respondents herein in the court of Civil Judge Bagh on 12.04.2004 stated therein that the suit land was allotted to the father of plaintiff. It was averred that after the death of her father on 30.04.1991, a decree for proprietary rights in favour of legal heirs of her father was issued by the Custodian however inadvertently the name of plaintiff was not mentioned in the decree. On 29.05.2003 she came to know that her brother has executed an exchange deed regarding entire legacy of her father. On 02.06.2003, the plaintiff appointed defendant No.1 as her attorney to proceed in the court of Custodian for entering her name in the decree dated 30.04.1997 and for further proceedings in this regard. It was further averred that the plaintiff did not authorize his attorney to transfer the land however, defendant No.1 by practicing fraud and forgery, without notice to the plaintiff got entered the authority to transfer the land in the power of attorney. It was alleged that on 07.01.2004, the Custodian directed to enter the name of plaintiff in the decree dated

30.04.1997 and mutation No.84 dated 02.07.1997 was attested in the light of rectified decree. It was contended that defendant No.1 through illegal agreement without notice of the plaintiff, transferred 16 marla land of plaintiff to defendant No.5 and 6 and obtained compromised decree dated 21.08.2003 and on the basis of said decree dated 21.08.2003 got attested mutation dated 17.03.2004, thus all the illegal actions committed by defendant including gift deed dated 16.03.2004 executed by defendant No.1 in favour of defendants No.2 to 4 regarding whole share of the plaintiff measuring 2 kanal 12 marla are illegally, anomalous, inoperative and ineffective against the rights of the plaintiff. The defendants contested the suit by filing written statement by claiming that compromise decree dated 17.02.2004 has been passed on the basis of statement of counsel of the plaintiff, thus, she is bound by the said decree. The learned trial Court framed issues in the light of pleadings of the parties, provided them opportunity to lead evidence and at the conclusion of the proceedings, cancelled gift deed dated 16.03.2004, however, dismissed the suit to the extent of decree dated 17.02.2004. Feeling aggrieved, both the parties preferred separate appeals before District Judge Bagh. The learned District Judge Bagh annulled the judgment and decree passed by the trial Court and remanded the case for fresh decision vide its

impugned judgment and decree dated 30.09.2010, hence the captioned appeal.

The learned counsel for the appellant vehemently argued that the learned first Appellate Court miserably failed to judicially ponder the controversy and anomalously remanded the case while setting aside the judgment of the trial Court which was justified to the extent of cancellation of gift deed. The learned Advocate further argued that a copy of decree which was challenged through amended suit was also available on the file of trial Court but the trial Court failed to take into consideration the same. The learned Advocate contended that respondents by practicing fraud have deprived the appellants from their legal rights of legacy of their inheritance, therefore, the impugned judgment entails to be set at naught by maintaining the judgment of the trial Court to the extent of cancellation of gift deed and impugned decree dated 17.02.2004 also liable to be rescinded.

The learned counsel for the respondents supported the impugned judgment and submitted that two other suits regarding the suit land are subjudice before the trial Court, therefore the Court below has rightly remanded the case for fresh decision by consolidating all the connected cases in order to avoid

contradictory judgments, hence the appeal filed by appellant is liable to be dismissed.

I have heard the learned counsel for the parties and perused the record of the case with utmost care and caution.

It is not denied by the defendants-respondents that the gift deed dated 16.03.2004 was executed through attorney of Mst. Sakeena Begum namely Raja Sabir Hussain Khan in favour of his children. This question hardly requires any deliberation that attorney cannot transfer the land through a gift deed to his kith and kin without prior special permission of the principal. The respondents-defendants failed to brought on record any proof with regard to obtaining special permission for transfer of land by Raja Sabir Hussain Khan attorney in favour of his sons, therefore, on this sole ground the gift deed dated 16.03.2004 deserved to be revoked. The learned trial Court in a correct manner relied upon the judgments of the superior Courts while resolving issue No.7. Further reliance in this regard can be placed on 2010 SCR 311, PLJ 2009 SC 118, 2007 SCMR 85 and 1997 SCMR 1811. So the observations recorded by the trial Court for setting aside gift deed dated 16.03.2004 are quite in accordance with the law of land hence, entails to be sustained.

A perusal of record further reveals that plaintiff-appellant through amended suit also challenged decree dated 17.02.2004. The learned trial Court while deciding issue No.9 simply observed that plaintiff failed to place the certified copy of decree dated 17.02.2004. A perusal of file of trial Court reveals that Photostat copy of decree dated 17.02.2004 was available at page 40 of the file, however the same was neither certified nor tendered in evidence hence, not considered by the trial Court. It is pertinent to note here that defendants-respondents did not deny the issuance of decree dated 17.02.2004, hence merely on the fact that the same was not exhibited cannot be ousted from consideration and the observations recorded by the trial Court that the plaintiff failed to place on record even photo copy of decree dated 17.02.2004 are against the record. It is also pertinent to mention here that the learned counsel for the appellant filed an application before this Court for placing its certified copy dated 17.02.2004 but counsel for the respondents failed to file objections on the application despite availing several opportunities. The certified copy of decree dated 17.02.2004 is necessary to be considered for just decision of the case and under Order XLI Rule 27 CPC appellate court if deems necessary for decision of the case, may allow a party to produce additional evidence either oral or documentary at any stage. The

decree dated 17.02.2004 is a certified document, hence there is no doubt in the authenticity of the same and as stated above is necessary to be considered for just decision of the case, hence the application is allowed and the same is made part of the file. A perusal of decree dated 17.02.2004 reveals that the same to the extent of Mst. Sakina Begum, now survived by appellant herein, was cognovit and the cognovit was submitted by learned counsel for Mst. Sakina Begum appointed by Raja Muhammad Sabir Khan, respondent No.1 herein being attorney of Mst. Sakina Begum for which he was not authorized as per contents of power of attorney dated 02.06.2003 because the attorney was executed with regard to the cases pending for and against the principal while the suit which stood decreed vide impugned decree dated 17.02.2004 was filed on 21.08.2003 after execution of power of attorney dated 02.06.2003, thus on the face of record the decree dated 17.02.2004 is fraudulent and on the basis of a cognovit furnished by an incompetent person, thus the decree dated 17.02.2004 was also liable to be set aside but the learned trial Court skipped to ponder the relevant record of the case in this regard, in its true spirit and perspective by reaching at a wrong conclusion which is justified to be extinguished as Courts are to administer justice and should not be handicapped from the shackle of the technicalities because said decree

has been maliciously obtained to on the basis of said cancelled gift deed and to grab the legal rights of appellants and when this Court is convinced that all said proceedings are tainted with malice then such relief even can be granted by exercising inherent powers of Section 151 of CPC for safe dispensation of justice and to avoid the multiplicity of proceedings because in presence of that decree the cancellation of gift deed would be futile.

The First Appellate court has not decided the case on its merits and remanded the same to the trial Court for fresh decision on the grounds that plaintiff has not challenged the power of attorney executed in favour of respondent No.1 herein. This observation of the first Appellate Court depicts that the presiding officer of the Court below was either ignorant of law or failed to understand in hand controversy as it was not necessary to challenge the power of attorney before the Court as the principal did not deny the execution of power of attorney rather she claimed that attorney misused the said power of attorney and she also cancelled the said power of attorney through cancellation deed (ابطال نامہ) dated 12.04.2004, hence the same was not required to be challenged in the suit. The other reason mentioned by first Appellate court for remand of the case was that some other suits regarding the same land are subjudice before the trial Court. The record of said suits was

neither produced before the first Appellate Court as the same is not appended with the file of trial Court nor respondents bothered to produce the same before this Court to justify the remand of the case by the first Appellate Court, thus, in absence of any record it could not be presumed that whether any suit regarding the same land is subjudice before the trial Court or those suits are interlinked or necessary to be decided simultaneously and if these suits are decided separately there is an apprehension of contradictory judgments. Even otherwise, the present controversy only pertains to a malicious gift deed by attorney in his own favour which is not liable to be sustained in any condition and the impugned decree is also based on said gift deed. In these circumstances the observations made by the first Appellate Court are not maintainable rather are based on presumptions, conjectures and surmises.

It is also appropriate to resolve here that under law if a person challenges a judgment, decree or order only on the ground of fraud and misrepresentation, he shall seek the remedy of filing an application before the Court which passed the final judgment, decree or order and not by filing a separate suit, however, when the validity of a judgment, decree or an order is challenged on other grounds apart from those mentioned in section 12(2) CPC, then a suit for cancellation of the decree can

competently be filed. Reliance can be placed on 2016 SCR 525. In the case in hand the plaintiff/appellant challenged the decree dated 17.02.2004 apart from fraud and misrepresentation also on the ground of fake agreement, without notice to the plaintiff and without lawful authority. For ready reference para (iii) of the application filed for grant of amendment in the suit is reproduced as under:-

یہ کہ دعویٰ کے ضمن نمبر 5 کے اختتام پر بذیل عبارت تحریر کرنی مطلوب ہے کہ "نیز مدعا علیہم نمبر 5 نے مدعا علیہ نمبر 1 سے ملی بھگت کرتے ہوئے نام نہاد فرضی اقرار نامہ باہمی بدوں علم و اطلاع مدعیہ تحریر کرتے ہوئے نمبرات خسره متذکرہ بالا 392، 389 سے رقبہ تعدادی 16 مرلہ حصہ مدعیہ حاصل کر لیا ہے اور اصل اقرار نامہ کی رو سے عدالت جناب سول جج صاحب باغ کی زیر کار مسل نمبر 83 دیوانی رجوعہ 21.08.2003 میں بر بنائے راضی نامہ فیصلہ عدالت معہ پرچہ ڈگری حاصل کر لیا اور اس کی روشنی میں بخت خود انتقال مصدقہ 17.03.2004 بھی درج کروا کر بخت خود گرداوری از ربیع سال 2003 تا خریف سال 2003 پر بھی اپنے قبضہ کا اندراج کروا لیا اور مدعا علیہ نمبر 1 کی اعانت سے مدعیہ کی عدم حاضری میں اس رقبہ پر غیر قانونی قبضہ کر لیا جو کہ فیصلہ عدالت معہ ڈگری پرچہ و انتقال، خسره گرداوری میں عمل، اقرار نامہ باہمی متذکرہ بالا حقوق مدعیہ پر غیر موثر و کالعدم تھے۔"

As stated above the plaintiff challenged the decree dated 17.02.2004 also on the other grounds apart from those mentioned in Section 12(2) CPC, hence, the suit was competently filed.

It is not out of context to state that the learned District Judge through the impugned order remanded the case for fresh decision and has not decided the appeal on its merits therefore, decision of the case on its merits by this court will deprive the parties from a right of appeal but this case has already consumed more than 18 years, therefore, the remand of the case to the first appellate

Court for decision on its merits would not be in the interest of justice because sufficient record is also available before this Court to decide the same on its merits, hence in exercise of inherent jurisdiction of this court, the case is decided on its merits.

The upshot of the above discussion is, the judgment recorded by the first Appellate Court is hereby set at naught while modifying the judgment and decree recorded by the trial Court, the suit filed by Mst. Sakina Begum is decreed with cost in the manners that the gift deed dated 16.03.2004 and decree dated 17.02.2004 alongwith mutation dated 17.03.2004 are hereby revoked as void ab initio by declaring that plaintiff is entitled to take possession of the suit land from defendants in accordance with law.

Muzaffarabad,
29.09.2022.

-Sd-
JUSTICE

Approved for reporting.

-Sd-
JUSTICE