

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.141-A/2018.
Date of Institution 02.07.2018.
Date of decision 18.02.2025.

1. Raj Wali;
2. Bibi Hoor widow;
3. Mohammad Ashraf;
4. Mohammad Iqbal;
5. Mohammad Shafi sons;
6. Hussan Bano;
7. Dilshad daughters of Bagh Wali Caste Mughal r/o Kail Dheri Tehsil Sharda District Neelum.

Appellants

VERSUS

1. Resham Jan widow;
2. Shabir Ahmed;
3. Shafique sons;
4. Bibi Jan d/o Abdul Rehman;
5. Gul Noor wife of Mohammad Iqbal Mughal;
6. Mohammad Aslam;
7. Shafi sons;
8. Sohaib;
9. Khadija;
10. Ayesha;
11. Perveena;
12. Maryam;
13. Jameela;
14. Hussan Zadi daughters of Muqarrab Khan Caste Mughal r/o Kail Medan Tehsil Sharda District Neelum;
15. Patwari Halqa Kail Tehsil Sharda.

Respondents

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

IN THE PRESENCE OF:

Mohammad Yaqoob Khan Mughal, Advocate for the Appellants.
Fazal Mehmood Baig, Advocate for the Respondents.

JUDGMENT:

The captioned appeal has been directed against the judgment and decree passed by the learned District Judge Neelum dated 24.05.2018, whereby, the judgment and decree

passed by the learned Civil Judge Sharda dated 13.12.2017 was set-aside.

FACTUAL NARRATIVE.

2. Plaintiffs/respondents, herein, filed a suit for declaration cum possession against appellants, herein before the learned Civil Judge Sharda on the ground that they are the owners of the land comprising khewat No.52/92 survey No.807 measuring 2 marlas and survey No.808 measuring 3 marlas alongwith two shops situated at Mozia Kail Galli Bazar Tehsil Sharda through mutation No. 389. It has been stated that predecessor in interest of plaintiffs namely Abdul Rehman (late) handed over the shops temporarily to the defendants and in this regard an agreement was made between the parties that the disputed shops shall remain in the possession of the defendants for 15 years and in return, the predecessor in interest of plaintiffs will cut grass from the defendants' land and during the life of the predecessor in interest of plaintiffs, the defendants remained vigilant to the agreement but after his death, upon expiry of the time mentioned in the agreement, the plaintiffs asked for possession of the shops, the defendants refused to do so, hence, the plaintiffs filed a suit for possession.

3. The defendants after institution of the suit submitted written statement stating therein that defendant Raj Wali purchased the land from Muqarrab Khan through an agreement to sell dated 15.11.1973 in lieu of Rs.600/- and

constructed shops upon the land and they are in possession of the same for 33 years and no promise was made to the predecessor in interest of plaintiffs, hence, they have no locus standi to file the suit and lastly prayed for dismissal of the suit.

4. Plaintiff/appellants, herein, also filed a cross suit for declaration and specific performance of the agreement to sell dated 15.11.1973 against defendants Mohammad Aslam & others in the manner that Raj Wali purchased the land from Muqarab Khan through an agreement to sell dated 15.11.1973 in lieu of Rs.600/- and constructed shops upon the land and they are in possession of the same. As per plaintiff's version, it was agreed upon the parties that Muqarrab Khan, (Vendor) will execute a registered sale deed in favour of (Vendee) Raj Wali regarding the suit land but he died one year ago, hence, prayed for a decree for a specific performance.

5. The defendants also filed objections/written statement in the manner that the suit is barred by limitation and the plaintiff has no cause of action, and lastly prayed for dismissal of the suit. The learned trial Court in light of pleadings of the parties framed four issues and directed the parties to lead their evidence and after necessary proceedings, dismissed the suit filed by respondents, herein, for want of proof and decreed the cross suit titled "Raj Wali Vs. Aslam & others" vide the impugned judgment and decree dated 13.12.2017. Feeling aggrieved from the said judgment and decree, respondents

Resham Jan & others and Mohammad Aslam & others filed two separate appeals before the learned District Judge Neelum, who accepted the appeals and set-aside the judgment and decree of the learned trial Court through its judgment and decree dated 24.05.2018, hence, this appeal for setting aside the impugned judgment and decree of the learned District Judge.

ARGUMENTATION.

VERSION Of The APPELLANTS.

6. The learned counsel for appellants while reiterating the grounds taken in the memo of appeal vehemently contended that in light of agreement to sell dated 15.11.1973 they purchased the land in dispute from the father of the respondents namely Muqarrab Khan and constructed shops upon the said land, hence, they are in possession of the suit land since 1973. He further argued that the verdict of the learned Court below that an agreement to sell was unregistered and having no legal back, but as per law, such like instruments need not to be registered. The learned counsel further contended that the learned trial Court has rightly appreciated the evidence while passing the impugned judgment and decree, however, the learned 1st appellate Court set-aside the

judgment without any legal justification, hence, prayed for setting aside the judgment and decree of the learned District Judge.

RESPONDENTS' VERSION.

7. The learned counsel for respondents contended that as per Section 17 of the Registration Act 1908, adopted in Azad Jammu & Kashmir, all the documents/instruments for transfer of the immovable property must be registered, so, the alleged agreement was an unregistered document which creates no rights in appellants' favour, hence, the same was rightly rejected by the learned Court below. He further contended that respondents are the owners of the disputed land in light of the record and evidence whereas the appellants are entered as "Ghairmoroosi" and as per law, the possession of the appellants is unlawful, moreover, the suit filed by the appellants was barred by limitation. The learned counsel while defending the judgment and decree of the learned Court below prayed for dismissal of the appeal with costs.

8. Pro and contra arguments have been heard, record perused.

VERDICT.

9. I have gone through the agreement to sell dated 15.11.1973, a perusal of which shows that the same has been written upon a simple paper and no details of the land i.e. survey number and khewat numbers etc. has been entered in the said

instrument. Moreover, the suit on the basis of said document was filed on 01.08.2008 approximately after elapsing 35 years and as per para No.3 of the plaint, Muqarrab Khan died one year prior to the filing of the suit and if any agreement to sell was made in favour of respondent No.1, therein, the suit regarding the matter preferably should have been filed during the lifetime of Muqarrab Khan. Any document which is required to be compulsorily registerable would not be received in evidence, if it is not registered. Unregistered sale deed relied upon does not confer any right and not the same be received evidence at any stage of the proceedings. As per Article 113 of the Limitation Act, 1908, the limitation provided for filing such like suits is 03 years, whereas, the plaintiff filed suit for declaration and specific performance of the said agreement to sell dated 15.11.1973 in year 2008 which was hopelessly time barred, hence, the learned Court below has rightly set-aside the impugned judgment and decree passed by the learned Civil Judge Sharda dated 13.12.2017 and committed no illegality or perversity in this regard, therefore, the judgment and decree impugned, herein, being passed in line with the scheme of law needs not to be interfered with by this Court.

10. Be that as it may agreement to sell dated 15.11.1973 relied and sought to be performed and enforced by the appellant party on the strength of its language cannot be equated, termed and treated as a sale deed, mere insertion of

words اراضی مسمی راجولی ولدشاہ گل سنگھ کیل پرفروخت کردی ہے۔ creates no legal rights in favour of the appellant party qua claiming ownership of the suit property. The only remedy existing under law was to seek performance of the agreement by filing suit, that too, within prescribed period of limitation. Sale under law requires execution of sale deed duly attested as per Registration Act, 1908, otherwise, any document/agreement whatever clear its language could not be treated as a sale deed. By duplex angles, neither the document/agreement dated 15.11.1973 has been proved qua its enforcement within a prescribed timeline nor it can be equated or treated as a sale deed.

11. The person who could unravel the mystery of the same, but in his lifetime the appellants have failed to bring the cause before the Court of law, having said that doctrine of preponderance of probabilities of evidence will come into play for the purpose of weighing the comparative evidentiary value of the evidence. I have made an apple-to-apple comparison of both the judgments and decrees (in variance of each other) with due care and caution, issue wise findings of the 1st appellate Court are coached by law, thus, merits no interference at all.

12. Doctrine of mutuality is a fundamental brick in the foundation of contract sought to be enforced, best, cogent and concrete evidence in this regard is statement of

the parties of the agreements, coupled with scribe and marginal witnesses. Mutuality is essential in a suit for specific performance of a contract and the Court will not pass a decree for specific performance of a contract unless the plaintiff also could be compelled to specifically perform the part of the obligation ¹. It is a fundamental rule of equity that a contract will not be specifically enforced unless it is obligatory on both the parties, nor unless both parties at the same time as it is executed have the right to resort to equity for specific performance of it, the contract must be capable of specific performance be mutated ². Onus to prove execution of agreement of sale lay upon plaintiffs and it is for them to exhaust all satisfactory modes of its execution. Onus to prove agreement to sell is on plaintiff ³, even otherwise, relief claimed is not flowing from the contents of the referred agreement. It is a question of construction whether the execution of the further contract is a condition of the terms of bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through in the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not

1. AIR 1933 Pat 306.

2. AIR 1965 All 83

3. 2003 MLD 410+2003 MLD 453.

recognize a contract to enter into a contract. In the later case, there is a binding (concluded) contract and the reference to the mere formal document may be ignored ⁴.

13. It is an admitted fact reflecting from the record that appellant Raj Wali filed a suit for specific performance of an alleged agreement to sell on 01.08.2008, whereas, the alleged agreement to sell was written and came into being on 15.11.1973 after one year of death of the Muqarrab Khan (who allegedly agreed to sell the suit land). Barrier of limitation provided for bringing a case before a competent Court (having jurisdiction over the matter) cannot be lifted, neither it can be condoned (unless a case is made out qua exception under Article 5 of the Limitation Act) nor the Court is empowered even to entertain the lis which is not within the statutory prescribed period of limitation.

Underlining is mine

The only exception to this mandatory requirement is provided in Article 81 of the Qanun-e-Shahadat Order 1984 which postulates that in case of admission of a party to an attested document required by law to be attested. It is useful to reproduce the Article 81 of the Qanun-e-Shahadat Order 1984 as infra;

⁴. AIR 1946 Pc 97.

“81. Admission of execution by party to attested document. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.”

Article 81 is an exception to the general rule contained in Article 79 and this exception must be read in light of the words used in it by so reading this section, the meaning is that examination of an attesting witness will not be necessary for the purpose of proving the execution of the document required by law to be attested if the executant admits execution ⁵.

In the light of what has been stated above, the instant appeal being shorn of merit is hereby dismissed, with no order as to the costs. Findings of 1st Appellate Court are upheld. File shall be kept in archive.

Muzaffarabad.
18.02.2025 (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

⁵. AIR 1917 Cal 693 @ 694