

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.209/2017.
Date of institution 08.12.2017.
Date of decision 29.04.2023.

1. Raja Zafar-Ul-Haq.
2. Raja Sajid Hussain, (sons).
3. Asifa Jabeen.
4. Afifa Sajjad, (daughters).
5. Tanzifa Shaheen.
6. Reshman widows of Raja Sajjad Khan, caste Khakha, R/o village Salmiya Tehsil Chakkar, District Jehlum Valley, AJ&K.

....Appellants

VERSUS

1. Basharat Hussain.
2. Muhammad Toufiq (sons).
3. Tabassam Shagufta daughters of Raja Shaukat Ali Khan.
4. (i) Mst. Tabassum (daughter) (ii) Zaheer-ud-Din husband of Mst. Fareeda Khanum, R/o Salmiya Tehsil Chakar, District Jehlum Valley.
5. Nadeem Manzoor.
6. Nuzhat Ansar widow of Raja Ansar Khan, deceased.
7. Shahid Manzoor (sons)
8. Mst. Saiqa Manzoor.
9. Mst. Irum Manzoor (daughters)

Legal heirs of Feroz Khan, deceased.

10. (i) Anjam Khan (ii) Najam Khan (sons) (iii) Mst. Shamim Begum widow of Feroz Khan, late, R/o Sund Galli Tehsil and District Muzaffarabad.

Legal heirs of Raja Nisar Hussain Khan, deceased.

11. (i) Muhammad Yasir Khan (ii) Muhammad Zulfiqar Khan (sons) (iii) Mst. Ghosia bibi (daughter) (iv) Shamima begum widow of Raja Nisar Hussain Khan, R/o Salmiya Tehsil Chikar, district Jehlum Valley.
12. Muhammad Asif Khan.
13. Saqib Hussain Khan.
14. Mst. Rasheeda Begum.

Legal heirs of Mst. Jabeen Akhtar, deceased.

15. (i) Anzar Hussain (ii) Azkar Hussain (iii) Naqash Hussain (sons) (iv) Mst. Nabeela bibi (v) Mst. Sameela bibi (vi) Mst. Shobina bibi daughters of Mst. Jabeen Akhtar, R/o Salmiya, Tehsil Chikar, district Jehlum Valley.
16. Nasreen Akhtar. (daughters)
17. Raja Farooq Haider Khan (son).
18. Mst. Shameema Begum.

19. Mst. Noureen Haider.
20. Mst. Taskeen Haider.
21. Zarqa Javed, D/o R.M. Haider Khan R/o Dharam pura Lahore.
22. Shabnam Haider D/o R.M. Haider Khan R/o England.
23. Mst. Sumera Haider.
24. Mst. Jaweria, daughters of Raja Haider Khan R/o England.
25. Manzoor Sajjad (sons).
26. Mst. Rabia Sajjad.
27. Mst. Ayesha Sajjad (daughters).
28. Aftab Ahmed Khan.
29. Raja Muhammad Afzal Khan (sons).
30. Raja Badar Muneer Khan.
31. Raja Dilpazeer Khan.
32. Raja Shahab-ud-Din.
33. Raja Naveed-ud-Din, sons of Raja Hidayat-Ullah Khan.
34. Amina Haider (widow).
35. Raja Haider Ali (son).
36. Merab Fatima.
37. Anaya Fatima, daughters of Raja Badar-ud-Din Zaffar (deceased son of Raja Hidayat-ullah Khan). R/o villages Salmiya and Bhagsar, Tehsil Orri, District Jehlum Valley.
....Real-Respondents

Legal heirs of Mst. Safeena Begum, deceased.

38. (i) Tehseen Khan S/o Safeena Begum (deceased) R/o village Salmiya Tehsil Chikar, District Jehlum Valley (ii) Fazeelat D/o Mst. Safeena Begum (deceased) R/o Andra-Seri, Tehsil Chakar, District Jehlum Valley.
39. Atta-Al-Mubarik.
40. Hameeq-Al-Behar.
41. Ahmed Asif (sons).
42. Rajba, daughter.
43. Muhammad Asif Khan, Husband of Mst. Naseem Akhtar (deceased daughter of Raja Muhammad Nawab Khan), R/o village Andra-Seri, Tehsil Chakar, District Jehlum Valley.

....Proforma-Respondents

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Civil Appeal No.210/2017.
Date of institution 08.12.2017.

1. Raja Zafar-Ul-Haq.
2. Raja Sajid Hussain, (sons).
3. Asifa Jabeen.
4. Afifa Sajjad, (daughters).
5. Tanzifa Shaheen.

6. Reshman widows of Raja Sajjad Khan, caste Khakha, R/o village Salmiya Tehsil Chakkar, District Jehlum Valley, AJ&K.

....Appellants

VERSUS

1. Raja Badar Munir Khan.
2. Raja Dilpazeer.
3. Raja Shahab-ud-Din Khan.
4. Raja Naveed-ul-Hassan, sons of Raja Hidayat-ullah Khan.
5. Amina Haider (widow).
6. Raja Haider Ali (son).
7. Meerab Fatima.
8. Anaya Fatima, daughters of Raja Badar-ud-Din, R/o Bhagsar Tehsil Orri, District Jehlum Valley.

.....Real-Respondents

9. Nadeem Manzoor.
10. Nuzhat Ansar widow of Raja Ansar Khan, deceased.
11. Shahzad Maznoor, sons of Raja Manzoor Khan, caste Khakha, R/o village Salmiya, Tehsil Chakar, district Jehlum Valley.

.....Real-Respondents

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Civil Appeal No.211/2017.
Date of institution 08.12.2017.

1. Raja Zafar-Ul-Haq.
2. Raja Sajid Hussain, (sons).
3. Asifa Jabeen.
4. Afifa Sajjad, (daughters).
5. Tanzifa Shaheen.
6. Reshman widows of Raja Sajjad Khan, caste Khakha, R/o village Salmiya Tehsil Chakkar, District Jehlum Valley, AJ&K.

....Appellants

VERSUS

1. Raja Badar Munir Khan, son of Raja Hidayat-ullah Khan, R/o Bhagsar, Tehsil Orri, District Jehlum Valley.
2. Nadeem Manzoor.
3. Nuzhat Ansar, widow of Ansar Manzoor.

.....Real-Respondents

4. Shahzad Maznoor, son of Raja Manzoor Khan, caste Khakha, R/o village Salmiya, Tehsil Chakar, district Jehlum Valley.

.....Real-Respondents

Civil Appeal No.191/2017.
Date of institution 02.11.2017.

1. Raja Nadeem Manzoor.
2. Mst. Nuzhat Ansar, widow of Raja Ansar Manzoor.
3. Muhammad Shahzad Manzoor sons.
4. Mst. Saiqa Manzoor.
5. Iram Manzoor daughters of Raja Manzoor Khan, caste Khakha R/o Salmiya Tehsil Chikar, district Hattian Bala.

....Appellants

VERSUS

1. Raja Badar Munir Khan.
2. Raja Shahab-ud-Din.
3. Raja Naveed-ud-Din sons of Raja Hidayat ullah.
4. Amina Haider widow.
5. Haider Ali son.
6. Meerab Fatima.
7. Anaya Raja daughters of Badar-ud-Din R/o Bhagsar, tehsil Hattian Bala, district Jehlum Valley.
8. Raja Basharat Hussain.
9. Muhammad Tofeeq sons.
10. Mst. Shagufta Tabassum D/o Raja Shaukat Ali Khan, R/o Salmiya Tehsil Chikar, district Jehlum Valley.

.....Real-Respondents

11. Raja Zafar-ul-Haq Khan.
12. Raja Sajid Hussain, sons.
13. Asifa Jabeen.
14. Afeefa Sajjad, daughters.
15. Tazeema Shaheen.
16. Reshman, widow of Raja Sajjad Khan.

....Proforma-Respondents

CIVIL APPEALS

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

M/S Syed Mushtaq Hussain Gillani, Mr. Lakhi Zaman and Syed Atif Mushtaq Gillani, Advocates for the appellants.
Syed Nazir Hussain Kazmi, Advocate for respondents.

Judgment:

The captioned appeals have been directed against the judgment and decree passed by the learned District Judge Hattian/Jhelum Valley dated 03.10.2017.

As the common questions of facts and law are involved in the titled appeals, therefore, these are clubbed up and are decided through this single Judgment.

Summarized facts necessary for disposal of the titled appeals are that Raja Badar Munir Khan instituted suit for declaration alongwith perpetual injunction and suit for specific performance against defendants/ respondents Raja Zafar-ul-Haq and others, while Raja Zafar-ul-Haq and others plaintiffs/appellants instituted amended declaratory suit cum joint possession and Raja Nadeem Manzoor etc. instituted declaratory suit, possession and prayed to cancel the agreement to sell against Raja Badar Munir and others defendants before District Judge Jehlum Valley (hereinafter shall be referred as trial Court). The suit filed by Raja Badar Munir Khan against defendants Raja Zafar-ul-Haq and others in file No.16 alleged that the suit land bearing survey No.93 old present 201 measuring 2 marla situated at village Sarran are in the ownership of Muzaffar Khan. The

plaintiff further alleged that the said land was purchased by father of plaintiff from real owner Muzaffar Khan and two stories shops were constructed upon the said land. Later on the said land was transferred by father to the plaintiff through agreement to sell dated 26.09.1995, which under the possession and in use of plaintiff. Lastly, plaintiff prayed that a declaratory decree cum perpetual injunction may be granted in his favour against the defendants.

On filing of the suit, defendants were summoned who appeared before the trial Court and submitted cognovit on 12.12.1996 and accepted the claim of the plaintiff, while defendants No.2 to 5 prayed to make party in the lis on 31.12.1996, accordingly ordered and they submitted written statement wherein the claim of the plaintiff has been negated in toto.

In the suit bearing No.14 titled “Raja Badar Munir and others vs. Basharat Hussain and others”, the plaintiffs claimed that the land survey No.93 old, survey numbers 195/1, 200 and 202 (new), total land measuring 13 kanal 14 marla situated at village were in the ownership of Muzaffar Khan according to revenue record. It was further claimed that the suit land was purchased by the father of plaintiff as well as proforma defendants through the agreement to sell dated 06.02.1988 in lieu of Rs.2 Lac 60 thousand and was taken into possession. It was alleged that Muzaffar Khan was died whose legal heirs are

defendants No.1 and 2 are live. Later on their legal heirs have refused to execute the sale deed despite receiving of the amounts. Finally the plaintiff prayed for issuance of a decree.

Defendants were summoned by the trial Court, who appeared before the court and filed congnovit and claimed of the plaintiff was accepted alongwith receiving of consideration amount Rs.80,000/-.

In suit No.15, the plaintiffs claimed decree of land total measuring 753 kanal 11 marla on the basis of joint possession alongwith prayer to issue perpetual injunction against the defendants Basharat Hussain and others and also prayed to restrain the respondents to transfer the land to any other person.

Defendants submitted written statement wherein the claim of the plaintiffs has been negated in toto and lastly prayed for dismissal of the suit.

In suit No.10 instituted by Raja Nadeem Manzoor and others-plaintiffs claimed for issuance of declaratory decree on the basis of ownership and prayed to cancellation of agreement to sell dated 09.04.1977 and 06.02.1988 regarding suit land survey number 93, old number present numbers 195/1, 200, 201, 202, total land measuring 13 kanal 14 marla situated at village Sarran, against the defendants Raja Badar Munir and others. While, the defendants refuted the whole claim of the plaintiffs by submitting written statement before trial Court and

prayed for dismissal of the suit being time barred as well as under Order 7 Rule 11 of CPC.

The learned trial Court in light of the pleadings of the parties framed 09 issues. Both the parties also submitted evidence in support of their respective claim. The learned trial Court, after hearing the arguments of the parties decreed the declaratory suit No.16 cum perpetual injunction regarding land survey No.93 old 401, measuring 01 marla 03 sarsai 18 feet constructed shops situated at village Sarran in favour of plaintiff Raja Badar Munir Khan against the defendants Raja Zafar-ul-Haq and others, in light of agreement dated 09.04.1977 as a gift deed, while in file No.14 the decree of specific performance with perpetual injunction was also issued in favour of plaintiffs regarding land survey number 93 old 195. 200-202 total land measuring 13 kanal 14 marla situated at village Sarrar, while the cross suits No.10 and 15 were dismissed for want of proof and barred by time, vide impugned judgment and decrees, hence, the above titled appeals.

M/s Syed Mushtaq Hussain Gillani and Syed Atif Mushtaq Gillani, Advocates submitted written arguments on behalf of appellants, reiterated the facts and grounds as narrated in the appeals and vehemently contended that the impugned judgment and decree are the outcome of the misreading and non-reading of the evidence by the learned District Judge, Jehlum Valley as the evidence produced by the parties have not been

appreciated properly. The learned counsel vehemently contended that the impugned land is common inherited property of the parties, which is yet to be partitioned and the parties to the lis are the jointly in possession of the impugned land while the law is settled that the decree of perpetual injunction cannot be passed against the co-sharers. The learned counsel staunchly submitted that the learned trial Court passed a decree beyond the scope of the pleadings and while relying upon the evidence on the point which has not been agitated in the pleadings, because the real respondent No.1 has stated in his plaint that his father was purchased the impugned land through the sale from Raja Muhammad Muzaffar Khan, on the other hand, an agreement dated 09.04.1977 has been exhibited during the evidence, which is neither a sale deed nor fulfills the criteria of a gift deed, moreover, real respondent No.1 has not prayed in his suit to declare that the impugned agreement dated 09.04.1977 as a gift deed, therefore, the impugned judgment and decrees are liable to be set aside on this point too. In support of his submission, the learned counsel referred to and relied upon 2018 SCR 20 and 282. The learned counsel forcefully contended that the judgment and decree of the learned District Judge is based on the admission of one Shaukat Ali Khan S/o Raja Muhammad Afzal Khan, whereas, all the other legal aspects of the case have completely been ignored, firstly, the agreement to sell itself confers/creates no right to the party, secondly, no decree of declaration and

perpetual injunction could legally be passed on the basis of an agreement to sell and thirdly if for the sake of argument, there exist any provision of law, or relaxation available in the law to consider the agreement to sell as sale or gift deed, even in such circumstances, the decree could have only been passed up to the extent of the share of Raja Shaukat Ali Khan and not up to the share of any other person. The learned counsel alleged that both documents i.e. agreement dated 09.04.1977 and 06.02.1988 are concocted and fabricated and have fraudulently been prepared by the real respondents after the death of Raja Muhammad Muzaffar Khan as the signature upon both the documents are not matching with each other. The learned counsel zealously contended that the statements of the witnesses are contradictory which cannot be relied upon but the learned court below considered the same against the law and facts, hence, the impugned judgments and decrees are against the law and facts, which is liable to be set-aside. The learned counsel finally prayed for acceptance of the appeals.

Syed Nazir Hussain Kazmi, the learned counsel for the respondents while controverting the arguments of the learned counsel for the appellant contended that the learned trial Court has rightly appreciated the evidence of the parties and passed the decree in favour of respondents in a judicious manner. He submitted that the plaintiff has proved the case by producing his oral as well as documentary evidence while the appellants herein

have failed to prove their stance. He vehemently contended that the learned trial Court after perusing the whole record arrived at right conclusion, which needs no interference by this Court. He submitted that the witnesses produced by the plaintiff has completely supported the version of the plaintiff/respondent and in light of evidence produced by him the learned trial Court after perusing the same properly concluded the matter in a right way. The learned counsel staunchly contended that the agreement Exh.PA dated 09.04.1977 has been proved through their marginal witnesses as well as Patwari concerned. The learned maintained that after filing of the suit, cognovits was filed by one Shaukat Ali and admitted the claim of the plaintiff/respondents and also prayed for issuance of a decree. The learned counsel forcefully contended that the plaintiff has also proved the other document Exh.PB, agreement by producing his witnesses who testified the said document. The learned counsel defended the impugned judgment and decree on all four corners and lastly prayed for dismissal of the appeals.

I have perused the written arguments submitted on behalf of the parties and gone through the record of the case with due care.

A perusal of record shows that the plaintiff-respondent Raja Badar Khan instituted two suits, one for declaratory suit and other for suit for specific performance regarding land survey number 93 old 195/1, survey number 200

and 202 total land measuring 13 kanal 14 marla and land under survey number 201 measuring 2 marla situated at village Sarran before District Judge, Hattain/ Jehlum valley against the defendants/appellants. In suit No.16, the plaintiff took a stance that the land old survey number 93, 201 new measuring 2 marla was in the ownership of Muzaffar Khan, which was purchased by father of plaintiff Raja Hadayat-ullah Khan through agreement to sell and built two shops over there, which was later on through an agreement dated 26.08.1995 was handed over to the plaintiff. It was claimed that the plaintiff had obtained decree of declaration regarding said shops from the court on 08.09.1996. The plaintiff took stance that the real owner Muzaffar Khan was died issueless, whose single legal heir was his brother Raja Shoukat Ali Khan, defendant. The file reflects that defendant Raja Shoukat Ali Khan on filing of the aforesaid suit, appeared before the trial Court/District Judge Hattian filed cognovit and admitted the claim of the plaintiff Raja Badar Munir, however, during proceedings defendants respondents No.2 to 5 appeared before the trial Court and filed application for arraying them as parties in line of respondents and they were incorporated in the line of respondents by the trial Court vide order dated 05.03.1998 who submitted written statement and refuted the whole claim of the plaintiff. In support of claim, the plaintiff produced an agreement to sell dated 09.04.1977 and 06.02.1988 before the trial Court. The plaintiff in support of the aforesaid documentary evidence

also produced oral evidence. The witness Habib-ullah is an old man deposed in his statement that:-

”مدعی نے پہلے دو مرلے کا اقرار نامہ کیا جس کا مظہر گواہ ہے۔ ہبہ نامہ مظفر خان نے ہدایت اللہ کے حق میں دیا۔ ہدایت اللہ مدعیان کا دادا تھا۔ اقرار نامہ سال 1977 میں ہوا تھا۔ اقرار نامہ Ex.PA دیکھ لیا ہے۔ جس پر مظہر کا دستخط Ex.PA/1 درست ثبت ہے۔ جرح میں کہتا ہے کہ اقرار نامہ شاہ صاحب نے لکھا تھا مظہر نام نہ جانتا ہے۔ وقت صبح 12 بجے کا تھا۔ علم نہ ہے کہ اسٹامپ پیپر کس نے لیا۔ مظہر نے اقرار نامہ لکھا ہوا دیکھا۔ مظہر کے علاوہ دستخط سرفراز نے کئے تھے۔ دستخط جج کی دوسری منزل پر کئے تھے۔ مظہر کو یاد نہ ہے سرفراز کے علاوہ اور کون کون تھا۔ یہ غلط ہے کہ Ex.PA مظفر خان کے فوت ہونے کے بعد جعلی و فرضی طور پر بنایا گیا ہے۔ یہ غلط ہے کہ مدعیان مظہر کی برادری کے تھے اس وجہ سے مظہر نے اقرار نامہ پر دستخط کئے۔“

Another witness Sarfraz Ahmed S/o Muhammad Azeem Khan also narrated in his statement recorded before the trial Court as under:-

”فریقین اور اراضی متدعو یہ کو جانتا ہوں لیکن خرید و فروخت کا علم نہ ہے۔ ہم بیٹیاں آئے ہوئے تھے۔ ان کی تحریر ہوئی تھی کہ دکان کی جگہ 18x24 فٹ ہدایت اللہ خان کو دی۔ یہ بھی علم نہ ہے کہ پیسوں کی دی یا مفت دی۔ اس کے بعد منیر صاحب اور مدعیان قابض ہوئے اور دکان ہدایت اللہ نے تعمیر کی۔ اقرار نامہ Ex.PA دیکھ لیا ہے جس پر مظہر کا دستخط Ex.PA/2 درست ہے۔ جرح میں کہتا ہے کہ Ex.PA کا علم نہ ہے کہ اقرار نامہ کس سال ہوا۔ شاید 1986-87 میں ہوا۔ اقرار نامہ الطاف شاہ یا مشتاق شاہ نے لکھا تھا۔ لکھتے وقت مظہر کے علاوہ حبیب اللہ گواہ مظفر خان اور ہدایت اللہ کے علاوہ کوئی نہ تھا۔ تصدیق کروائی تھی یا نہیں مظہر کو علم نہ ہے۔ اقرار نامہ جس وقت لکھ رہے تھے اس وقت مظہر اور حبیب اللہ کو کھٹے بلا کر ہدایت اللہ لایا تھا۔ مظہر اور حبیب اللہ کی موجودگی میں لکھا گیا تھا۔ لکھنے کا سال، مہینہ، دن یاد نہ ہے۔ مظہر کو علم نہ ہے کہ مظفر خان نے اقرار نامہ کے دستخط اردو میں کئے تھے یا انگریزی میں کئے تھے۔ البتہ دستخط کئے تھے۔ یہ غلط ہے کہ اقرار نامہ کر کے نہ دیا تھا اور یہ بھی غلط ہے کہ اقرار نامہ جعلی و فرضی ہے۔“

The aforementioned marginal witnesses of the agreement to sell supported the version of the plaintiff, while the scrivener of the said agreement Syed Anwar Shah also testified the aforesaid agreement Ex.PA.

While one of the defendant Shaukat Ali, who is real brother of Muzaffar Khan, filed cognovits on 12.12.1996 and admitted the stance of the plaintiff and also prayed for issuance of decree in favour of plaintiff-Raja Badar Munir regarding land survey No.93, present survey 201.

In suit No.14 Raja Badar Munir Khan and others prayed for decree of specific performance regarding land survey

number old 93, present 195/1, 200, 202 total land measuring 13 kanal 14 marla. In the aforesaid suit, it was claimed that the suit land was transferred by land owner Muzaffar Khan through agreement dated 06.02.1988 in lieu of Rs.02 Lac 60 thousands and also delivered the possession to the plaintiffs. The said claim has been proved by the plaintiff by producing oral as well as documentary evidence before the trial Court. Witnesses, Abdul Rehman, Bashir Hussain and Syed Anwer Shah (petition writer) also confirmed the claim of the plaintiffs. One of the witnesses of defendant Raja Ansar Manzoor also affirmed the stance of the plaintiff while recording his statement before the trial Court and in his examination-in-chief he stated that:-

”سراں والی اراضی راجہ مظفر خان کے پاس تھی، کچھ بروئے خانگی تقسیم ہوئی تھی۔ راجہ مظفر خان مظہر کے حقیقی تایا تھے۔ ان کی تمام جائیداد منقولہ وغیرہ منقولہ کی ذمہ داری مظہر پر تھی جس کی مظہر نگرانی کرتا تھا۔۔۔۔۔ جرح میں کہتا ہے کہ ”تمام شرکاء کھیوٹ بروئے خانگی تقسیم جو 60/70 سال قبل ہوئی تھی پر قابض ہیں۔“

The inheritance of Muzaffar Khan was transferred through mutation No.13 to Shaukat Ali Khan, who filed cognovits and admitted the claim of the plaintiff and also accepted the received amount Rs.80000 as a consideration money. The plaintiffs Raja Badar Khan etc. proved their claim as alleged in their suit No.16 and 14 through oral as well as documentary evidence in the trial Court.

While, the suits of the plaintiffs/appellants Raja Zafar-ul-Haq and Raja Nadeem Manzoor regarding declaration as well as joint possession and request for cancellation of the agreement to sell have also rightly been appreciated by the

learned trial Court. Both the suits were dismissed for want of proof as well as being time barred.

A perusal of whole record shows that the plaintiffs/respondents proved their claim by producing cogent and convincing evidence before the learned trial Court and learned trial Court in my considered view has rightly appreciated the evidence of the parties and arrived at just conclusion. The learned trial Court has rightly decided the case after formulating issues according to the pleadings of the parties, hence need not to be indulgence by this Court.

Admittedly, the parties in the lis are co-sharers. If any one of the so-sharers is reluctant regarding out of box partition and is reluctant to factual position then proper course as per law i.e. chapter 9 of the Land Revenue Act, 1967, he can file an application for partition of the land as per fractional shares and the relevant revenue officer under section 135 of the above Act is under legal obligations to proceed into the matter in order to get the property partitioned in accordance with law vis a vis if factum of private partition is admitted than under Section 149 of the land Revenue Act, 1967 confirmation and validation of the same is required. The issue No.8 has rightly been resolved by the court below in a legal fashion among other issues. (underlining is ours)

Civil disputes are to be decided in light of the preponderance of probabilities of evidence, meaning thereby that

in whose favour evidence is leaning much more he has to succeed.

Combine analysis of the issues framed and thereafter resolved by the Court revealed that trial Court amicably dealt with the matter by proper appreciation of evidence. Material issues are issue No.2, 6, 7, 8. For the safe administration of justice, we have appraised the evidence available on record and particularly focused upon above material issues. The trial Court while dealing issue No.2 i.e. کیا دعویٰ مدعیان اندر معیاد ہے properly resolved the same completely in accordance with law. Most pivotal issue is issue No.8 which is useful to reproduce as infra:-

دستفیع نمبر 8:-

کیا مدعی ڈگری استقر ارتق دخل مشترک نسبت اراضی کھیوٹ نمبر 3/3 30 کنال 5 مرلہ 6/5 تعدادی 125 مرلہ 7/7 تعدادی 163 کنال 16 مرلہ 8/8 تعدادی 42 کنال 13 مرلے 9/8 تعدادی 254 کنال 2 مرلہ جملہ تعدادی 616 کنال 4 مرلہ واقع موضع سلمیہ کھیوٹ نمبر 13/31 تا 22 تعدادی 68 کنال 2 مرلہ موضع سرائ 117/104 تعدادی 13 کنال موضع دھنی شاہدرہ کھیوٹ نمبر 1/1 تعدادی 56 کنال 5 مرلہ موضع کڑلی ہڑیالہ جملہ تعدادی 753 کنال 11 مرلہ تحصیل ہٹیاں ضلع مظفر آباد میں والد خود کی حد شریک حصہ دار ماکان دلا پانے کا مستحق ہے؟ اگر ہاں تو کس طرح؟ (بذمہ مدعی راجہ سجاد خان تردید مدعا علیہم)

It is reflecting from statement of the plaintiff Raja Sajjad Khan that private partition of the suit land was carried out between the parties.

اہم حصہ شہادت مدعی سجاد جو قابل توجہ ہے۔
سراں والی اراضی راجہ مظفر خان کے پاس تھی۔ جکو بروئے خاکگی تقسیم منتقل ہوئی تھی۔

As per statement of Ansar Manzoor factum of private partition of the suit land carried out 60/70 years back and all the co-sharers as per private partition are possessing their respective shares. Patwari of the relevant village also deposed in his

statement that legal heirs of Muzaffar Khan are Shoukat Ali and Fareeda Begum and his share was transferred in favour of his brother Shoukat Ali vide mutation No.13. As Farida Begum one of the legal heirs of Muzaffar Khan was abandoned, hence, she was not party in the lis, thus, to the extent of her fractional shares and rights in the property cannot be infringed, consequent of instant adjudication.

The Hon'ble Supreme Court while dilating upon the identical proposition quo concurrent finding of fact in the case titled **Adalat Khan vs. Fazal Hussain 1995 SCR 151**, held as under:-

“Even if different conclusion form 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 of evidence is made out or a grass illegality is shown to have been committed while appreciating evidence.”

Similarly in the case titled Fazal Karim vs. Abdul Manaf 1997 SCR 226, it was held as under;

“It is practically a settled law that concurrent finding of fact recorded by the trial Court and the 1st Appellate Court cannot be disturbed by the High Court, howsoever erroneous they may be”

While the Juxta-position same view has been taken by the Hon'ble Supreme Court of Pakistan regarding the subject,

ready reference in this regard is **2022 SCMR 1454 – 2015 SCMR 1081 – 2007 SCMR 1602 – 2022 SCMR 1231.**

Thus, concurrent findings of fact normally cannot be grounded, as High Court in second appeal cannot without sufficient reasons interfere with concurrent findings of fact of the Courts below.

From Indian jurisdiction in the case titled Deva vs. Sajjan Kumar 2003 Supreme Court cases page 481, it has been held, that:-

“in second appeal under Section 100 CPC impugned judgment and decree is only liable to be interfered with when a very important piece of evidence in the nature of an admission by defendant has been overlooked by the Courts below”

Same view has been taken in the case titled “Sayeda Akhtar Vs. Abdul Ahad 2003 Supreme Court cases page 52.”

Be that as it may under Section 100 CPC no second appeal is competent except on the grounds enumerated in Section 100 of the CPC. It is useful to reproduce Section 100 CPC as infra:-

Section 100. – Second appeal. – Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely:

- a. the decision being contrary to law or usage having the force of law;
- b. the decision having failed to determine some material issue of law or usage having the force of law;

- c. a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

In this case none of the grounds mentioned in Section 100 CPC are oozing from record & memo of appeal and the appellant has failed to point out any misreading or non-reading of evidence, thus, second appeal is not competent.

Chronological list of cases in this regard is as under;
 2016 CLC 243 – 2016 CLC 421 – 2020 CLC 1848 – 2015 YLR 1602 – 2008 YLR 69 – 2017 YLR 1151 – 2017 YLR 2459 – 2014 CLC 874 – PLD 1984 SC 389 – PLJ 1996 SC 1128 – 2009 MLD 296 – PLD 1984 SC AJK 138.

Scope of second appeal where there are concurrent findings of courts below, is not at much variance with that of revision under CPC, since for succeeding in such second appeal appellant has to prima-facie establish that impugned decision is either contrary to law or substantial error or defect in procedure is found while deciding the matter.¹

Second appeal is to be looked into through lens of Section 100 CPC in a mathematical manner keeping in view the avenue of indulgence provided in law, even another view from evidence other then taken concurrently by the two courts below is possible. (underlining is ours)

¹ 2021 CLC 1537.

In the light of what has been stated above, finding no force in the instant appeals, the same are hereby dismissed. Resultantly judgment and decree of the learned trial Court is hereby upheld.

Appeals fail.

Muzaffarabad.
29.04.2023.

JUDGE

Approved for reporting