

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.271/2019.
Date of institution 27.08.2019.
Date of decision 25.10.2023.

1. Zahir Hussain Shah;
2. Tahir Hussain Shah;
3. Shahid Hussain Shah sons;
4. Mst. Shamim Bibi;
5. Mst. Tasleem Bibi;
6. Mst. Waseem Bibi daughters of Syed Lahl Hussain Shah, r/o Bandi Syedan Tehsil Hattian Bala District Jhelum Valley.

Appellants

VERSUS

1. Mirza Asif;
2. Mirza Zaffar;
3. Mirza Ayaz;
4. Mirza Arif;
5. Mirza Abid, sons of Jamal Deen, r/o Mozia Sarak Chinari Tehsil Hattian Bala District Jhelum Valley;
6. Tehsildar Revenue Tehsil Headquarter Hattian Bala.

Respondents

CIVIL APPEAL

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Syed Atif Mushtaq Gillani, Advocate for the Appellants.
Mohammad Yaqoob Khan Mughal, Advocate for Respondents.

JUDGMENT:

The captioned appeal has been filed against the judgment and decree passed by the learned District Judge Jhelum Valley dated 29.07.2019, whereby, the suit filed by

the appellants, herein, for declaration cum perpetual injunction and possession was dismissed for want of proof.

2. Succinct facts germane to the disposal of instant appeal are that firstly the appellants, Zahir Hussain Shah & others filed a suit for declaration cum possession in the Court of Senior Civil Judge Hattian Bala which later on was transferred to the learned District Judge Hattian Bala. It has been averred in the suit that the land comprising survey No.30 old, new 136 measuring 03 marla, land old survey No.30, new 137 measuring 02 marla (Ghairmumkin shops) situated at Mozia Chinari Tehsil Hattian Bala District Jhelum Valley was shown into the ownership of predecessor in interest of appellants, Lal Shah who died in 2012, thereafter, the land was transferred to the appellants and upon the suit land five shops and five rooms were constructed by deceased Lal Shah which were destructed during the earthquake of 2005. It has been stated that the debris in shape of steel rod was sold by the father of appellants and due to death of appellants' father they could not look after the land and defendants No.1 to 5 therein by taking unfair advantage of this, have established a 'Wagon Adda' upon the suit land who are earning 50/60 thousands per month and the defendants with the connivance of the

revenue officials had also entered themselves as “Ghairmoroosi possessors’ in the revenue record. As per contents of suit, the defendants were asked time and again to handover the possession of the land to the appellants but they have continuously refused from doing so. In the written statement, it has been averred that the defendants/appellants, had no cause of action at all and the suit is clearly time barred which is liable to be dismissed under Order VII Rule 11 of CPC. It has also been stated that regarding the suit land a meeting (Jirga) was held between the parties at Chinari under the supervision of Haji Sharbat Hussain Khan and it was decided in the meeting that the land which was secretly and surreptitiously got decreed by Lal Hussain to his name, he will hand over the possession of the land to the claimant and it was also decided that the defendants will pay Rs.8,50,000/- to Lal Hussain Shah and after receiving the amount, Lal Hussain Shah will get cancelled the fake and fabricated decrees and mutations as the land in dispute was taken on rent by Lal Hussain Shah who regularly paid the annual rent to the land owners and finally prayed for dismissal of the suit with costs. Defendants/respondents, herein, also filed a suit for specific performance of contract cum perpetual injunction

against the appellants, herein. The learned District Judge consolidated both the suits and in light of pleadings of the parties framed 19 issues and directed the parties to lead their evidence. After completion of the proceedings, the suit filed by the appellants, herein, was dismissed for want of proof, however, the suit of respondents Mirza Asif & others was decreed in their favour, vide the impugned judgment and decree dated 29.07.2019, hence, this appeal for setting aside the judgment of the Court below.

3. The learned counsel for the parties in light of the Court order submitted written arguments. In the written arguments filed on behalf of appellants, the grounds taken in the appeal have mostly been reiterated and it has been stated that as per Chapter II of the Specific Relief Act, the powers of Civil Court are discretionary in nature and the same can be exercised only when there is no alternate remedy, so, for cancellation of decree issued in favour of Lal Hussain, respondents could have approached the proper forum. It has further been alleged that fake and fictitious writing does not come into the definition of Contract, furthermore, the suit filed by the respondents does not fulfil the requisites of Specific Relief Act, so, the decree under appeal could not be issued. It has also been

alleged that decree issued in favour of appellants' father remained unchallenged which has never been challenged at any forum by the respondents. It has further been alleged that under Article 78 of Qanun-e-Shahadat, in order to prove the execution of any instrument, it is necessary to produce at least two marginal witnesses of the said script who shall verify that the said document has been prepared and signed in their presence but in the instant matter the fact was other way round as the witnesses produced on behalf of respondents No.1 to 5 have not supported the contents of Exh. PA which clearly manifests that the said instrument is fake and fictitious. Lastly, it has been prayed that while accepting the appeal, the impugned judgment and decree dated 29.07.2019 may be set-aside and the suit filed by the appellants, herein, may be decreed.

4. In the written arguments filed on behalf of respondents, it has been stated that the respondents have successfully proved their claim before the Court below as the instrument regarding the decision of 'Jirga' is admitted one which fulfill all the legal requirements, so, any agreement verbal or written between the parties which may show the transfer of any immovable property in which consideration has also been mentioned is called 'agreement

to sell or contract' and the parties are bound to complete and confirm the conditions of that agreement. It has been stated that the Court below has passed the impugned judgment and decree after deep analysis of the record and evidence produced on behalf of the parties. It has been averred that the appellants have failed to prove their case before the Court below, so, the learned Court below has rightly decreed the suit in favour of plaintiff/respondents, herein. Finally, it has been requested that while dismissing the appeal, the judgment and decree may be upheld.

5. I have gone through the written arguments as well as record of the case with my utmost care and caution.

6. An appeal to a Court is like a complaint filed to appellate Court with the allegations that the applicant has not been treated in accordance with law by the Court of original jurisdiction or that an illegality or material irregularity or mis-exercise or non-exercise of jurisdiction has been committed in his case. It is the continuation of the original proceedings before the higher forum for testing the soundness of decision of the lower Court ¹. The appeal in hand is first civil appeal under section 96 CPC. First appeal is continuity of suit in which whole case would become

¹. 2011 CLC 304

reopen ². In first appeal the findings of the trial Court are liable to be tested by all angles by the lens of law closely and minutely standard of proof and quality of evidence in the case are to be audited by the 1st appellate Court in order to come to right conclusion and avenue of interference is vast enough rather than 2nd appeal.

7. Through judgment and decree impugned herein suit No.8 titled “Mirza Asif Hussain Bs. Sabir Hussain” for specific performance and suit No.22 titled “Sabir Hussain Shah Vs. Mirza Asif” have been consolidated and after clubbing up were decided by way of dismissing the suit No.8, suit No.22 filed by the answering respondents, herein, was decreed as prayed for. The proposition involved in the lis is to some extent novel one as the trial Court decreed the suit for performance of the “Decision of the Elders” (فیصلہ جگہ برادری). At the outset, it is useful to reproduce Section 12 of the Specific Relief Act herein, below:-

12. cases in which specific performance enforceable except as otherwise provide in this chapter, the specific performance of any **Contract** may in the discretion of the court be enforced.

In an action for specific performance, it is necessary for the plaintiff to prove the existence of a concluded Contract

². 2017 CLC Note 183 (P 206).

between himself and the defendant and that he was ready and willing at all material dates to perform his part of the Contract ³.

8. Equity which governs the right of the parties in case of specific performance of contract to sell real estate look not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place really and in substance intended more than that it should take place within a reasonable time. Only the suit for specific performance of the agreement is competent, if in the background of the controversy there is any agreement/contract which is yet to be concluded, that too the said agreement is in the attire of modalities provided in the Contract Act.

9. A party cannot take benefit of principle of part performance u/s 53 A, Transfer of Property Act 1882 when a transaction was not reduced into signed by the parties ⁴. **Equitable relief in shape of declaration or specific performance cannot be extended in favour of a plaintiff/claimant who takes the law in his own hands by**

³. Sauki Sah & others Vs. Mohamaya Parsad Singh & others AIR 1934 Patra 518.

⁴. Ghulam Rasool Vs. Muhammad Hussain PLJ 2000 SC 331.

any way i.e dispossess a person connected with controversy or for that matter as per record come with similar conduct which disentitle him for discretionary relief.

So far as the Contract is concerned, it is based upon offer and acceptance. Section 37 of the Contract Act 1872, postulates obligations of the parties to contracts. It is trite law that an agreement not enforceable by law is itself void and therefore cannot be termed as a contract.

(underlining is mine)

The law of the land does not countenance approve of deciding a matter by a “Jirga” (council of elders) where a decree has been passed in order to sit over the same qua its implied reversal.

Relevancy and admissibility of the alleged recital (decision of Jirga) is also a question mark requires ponderance and specific finding by the trial Court in view of the (Qanoon-e-Shahdat) 1984. Facts which are relevant may not be admissible. A fact is relevant if it is logically probative or disprobative of the fact in issue which requires proof while in juxtaposition, a fact is admissible if it is relevant and not excluded by any exclusionary provision, express or implied mode of proof and standard of proof as provided in Article

70 to 89 of the Qanoon-e-Shahdat on the yardstick of primary and secondary evidence are the points going to the roots of the case but remained unattended by the trial Court in very inception of the suit and thereafter at the time of final adjudication.

10. Misreading of evidence is also oozing from the judgment and decree impugned herein, as factum of payment of amount and even number of the people who participated in the "Jirga" asbestia of Head of the "Jirga" are the factor inter alia for remand of the case. Point of law and facts emerging from pleadings are required to be mulled over and considered by the learned Judge are vide infra:-

- i. whether the decree of Jirga (counsel of elders) comes within the definition of Contract as envisaged in Section 12 of the Specific Relief Act and Contract Act and whether the same can be regarded as a concluded contract between the parties;
- ii. Whether the alleged recital decision of Jirga through which amount of more than seven lacs rupees is alleged to be paid to the other party and rest of the amount is outstanding, in such like eventuality was not required to be registered in view of Section 17 of the Registration Act 1908;
- iii. Whether presence of only three persons is sufficient to constitute a "Jirga" and can be regarded as such particularly when the head of the meeting has not produced as a witness;

- iv. Whether a decree passed by a competent Court of law can be nullified merely on the basis of decision of an alleged "Jirga" and whether such like decree even erroneous or void can be set-aside without challenging the same under law;
- v. Whether both suits have been filed within prescribed period of limitation in view of Article 3 of the Limitation Act;
- vi. Whether the decree of 1983 passed in favour of the respondents was validly and competently passed by the Court dealt with the matter.

11. In a nutshell, the instant appeal is accepted, the judgment and decree dated 29.07.2019 is set-aside and the case is remanded to the trial Court with the direction to decide the suits denovo after revisiting and resettling the issues already framed; avoiding unnecessary adjournments without influencing from the observation made supra by this Court, suit shall be decided by the trial Court completely in accordance with law by divulging its own wisdom. File of the Court shall be kept in archive. Record of the trial Court be sent back.

Muzaffarabad.

25.10.2023 (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