

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Mohammad Azam Khan, C.J.

Masood Ahmed Sheikh, J.

1. Civil Appeal No.221 of 2015  
(PLA filed on 21.4.2015)

1. Abdul Raheem,
2. Abdul Rasheed (sons) of Muhammad Din from the wedlock of Mst. Marian, d/o Meer Alam r/o Chatter Domail, Tehsil and District, Muzaffarabad.

.... APPELLANTS

**VERSUS**

1. Ahsan,
2. Gulfan,
3. Imran,
4. Faizan,
5. Shahid, sons,
6. Naseema Suleman, widow of Muhammad Suleman, r/o Sund Gali, Tehsil and District, Muzaffarabad,
7. Adnan, son,
8. Maryum,
9. Nazish,
10. Sheeba, daughters,
11. Mst. Mushahida, widow of Fazal-ur-Rehman Qurehsi,
12. Muhammad Yousaf Qureshi,
13. Mst. Zainab Bibi,
14. Mst. Zulekhan Bibi, daughters of Abdul Rehman, r/o Chatter Domail, Sund Gali, Tehsil and District, Muzaffarabad.
15. Revenue Department, through Tehsildar, Muzaffarabad.

..... RESPONDENTS

16. Muneer, s/o Safder,

17. Muhammad Fareed,
18. Muhammad Shafique,
19. Muhammad Reafique from wedlock of Mst. Akbar Jan, d/o Muhammad Din,
20. Abdul Hai,
21. Abdul Samad,
22. Abdul Jabbar,
23. Ubaid-ur-Rehman, sons,
24. Fomia,
25. Shabina,
26. Fazia, daughters, from the wedlock of Mst. Fatim Jan (Nazim Jan) alias, w/o Abdul Rehman,
27. Mst. Bibi Jan, w/o Muneer, r/o Sund Gali, Tehsil and District, Muzaffarabad.

..... PROFORMA RESPONDENTS

(On appeal from the judgment and decree of the High Court dated 19.2.2015 in Civil Appeal No. 103 of 2007)

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FOR THE APPELLANTS: Mr. Muhammad  
Yaqoob Khan  
Mughal, Advocate.

FOR THE RESPONDENTS: Mir Tanveer  
Husaain, Advocate.

2. Civil Appeal No.222 of 2015  
(PLA filed on 20.4.2015)

1. Muhammad Ehsan,
2. Gulfam,
3. Umrain,
4. Fazain,
5. Shahid, sons,
6. Naseem Bibi, widow of Muhammad Suleman,
7. Adnan,

8. Usman, sons,
9. Marryum,
10. Nazish,
11. Sheeba, daughters,
12. Mst. Mushaida, widow of Fazal-ur-Rehman,
13. Muhammad Yousaf, sons of Abdul Rehman, residents of Sund Gali, Tehsil and District, Muzaffarabad.

.... APPELLANTS

### **VERSUS**

1. Abdul Rasheed,
2. Abdul Rahim, sons,
3. Akbar Jan, daughter of Muhammad Din,
4. Muneer, s/o Safdar,
5. Muhammad Fareed,
6. Muhammad Shafique,
7. Muhammad Rafique, sons of Abdul Rasheed,
8. Mst. Nazam Jan, w/o Abdul Rahim,
9. Bibi Jan, w/o Mineer, presently r/o Sund Gali, Tehsil and District, Muzaffarabad.

..... RESPONDENTS

(On appeal from the judgment and decree of the High Court dated 19.2.2015 in Civil Appeal No. 103 of 2007)

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FOR THE APPELLANTS:      Mir Tanveer  
Husaaain, Advocate.

FOR THE RESPONDENTS:    Mr. Muhammad  
Yaqoob Khan  
Mughal, Advocate.

*Date of hearing:*      4.5.2016.

**JUDGMENT:**

**Masood Ahmed Sheikh, J.—** Both the captioned appeals by leave of the Court arise out of the same judgment of the High Court dated 19.2.2015, whereby the appeal filed by Muhammad Ahsan and others has partly, been accepted, while the appeal filed by Abdul Raheem and another has been dismissed. Since both the appeals arise out of the same judgment and decree and relate to the same matter, hence, these are being disposed of through this single judgment.

2. The background of the case is that Abdul Rasheed and another, plaintiff-appellants, herein, filed a separate suit on 3.9.1992 for specific performance of agreement-to-sell dated 21.3.1982, regarding the land comprising survey No. 898-min, measuring 2 *kanal*, situated in Sundh-Gali, Chatter Domail, which was dismissed for non-prosecution vide order of the trial Court dated 17.6.1995. Thereafter, Abdul Rasheed and his brother filed another suit to obtain the share of

her mother (late) Marian from the defendant Abdul Rehman.

3. Abdul Rehman, ancestor of Muhammad Ehsan and others, filed a suit for declaration, perpetual injunction and possession in the Court of Sub-Judge, Muzaffarabad against Abdul Rasheed and others, on 28.7.1992, in respect of the land comprising survey No. 898 (old), 1451 (new), measuring 18 *kanal*, 17 *marla* and new *khasra* No. 14551/1, measuring 11 *kanal* to the extent of 2 *kanal*, that he is an owner of the land and the agreement-to-sell dated 21.3.1982, written between the plaintiff and defendants, is time barred, ineffective and against the rights of the plaintiff. He also sought perpetual injunction.

After necessary proceedings, the trial Court dismissed both the suits through separate judgments and decrees dated 12.8.2009 and 31.5.2005 respectively. The appeal filed before the District Judge also failed. Both the parties went in appeals before the High Court. The

appeal filed by Muhammad Ehsan and others has partly been accepted while the appeal filed by Abdul Raheem and others has been dismissed by the High Court through the impugned consolidated judgment and decree dated 19.2.2015. Now both the parties have approached this Court through the instant appeals by leave of the Court.

4. Mr. Muhammad Yaqoob Khan Mughal, Advocate, the learned counsel for the appellants in appeal No. 221 of 2015, and for the respondents in appeal No. 222 of 2015, has argued that the impugned judgment and decree of the High Court is against law and the facts and also suffers from misinterpretation of record. He further argued that the appellants Abdul Raheem and another filed a suit for declaration along with perpetual injunction as well as possession of the suit land before the Sub-Judge, Muzaffarabad, claiming therein that they are entitled in the inheritance left by their mother, Marian, daughter of Mir Alam. The

respondents, Muhammad Ehsan and others, in reply to para 4 of the plaint, admitted that the mother of the appellants (late) Marian was real sister of Abdul Rehman. The trial Court dismissed the suit of the appellants. The District Judge while maintaining the judgment and decree passed by the trial Court, dismissed the appeal of the appellants, herein. However, in continuation of cross-appeal, two appeals; one on behalf of the present appellants and others and; another on behalf of the respondents were filed before the High Court. The High Court while handing down the impugned judgment and decree has not bothered to discuss the view taken by the appellants, herein, in the plaint as well as in the appeal before it. He maintained that the mother of the appellants, Marian, was real sister of Abdul Rehman, the predecessor-in-interest of the respondents, herein. The respondents have deprived the appellants of her mother's share in the land in dispute. He further maintained that Marian was entitled for 1/3

share, whereas, Abdul Rehman was entitled for 2/3 share out of total land measuring 72 *kanal*. Further, 2 *kanal* land out of total land was given to the appellants by Abdul Rehman in his life time through an agreement-to-sell dated 21.3.1982. The rest of the land including the share of Marian remained in possession of Abdul Rehman. The respondents, on the one hand, in their written reply have admitted this fact but at the same time have categorically denied to give the appellants the share falling in the inheritance of their mother, Marian. According to them in the light of custom of Dogra regime, the appellants cannot claim the share of their mother but they miserly failed to prove such custom through any piece of evidence or legal provision. The learned counsel further maintained that the appellants are entitled for suit land even subject to the partition of the land. The High Court, in the impugned judgment has altogether overlooked the share falling in the inheritance of Mst. Marian and the agreement-



to-sell effected between the parties, therefore, the impugned judgment of the High Court is not sustainable.

5. On the other hand, Mir Tanveer Hussain, Advocate, the learned counsel for the respondents in appeal No. 221 of 2015 and for the appellants in appeal No. 222 of 2015, has partly defended the impugned judgment of the High Court against Abdul Raheem and another and stated that Muhammad Ehsan and others were entitled for possession of the suit land, therefore, the impugned judgment has rightly been passed to this extent, however, the particular portion of the impugned judgment, challenged before this Court is not correct. He maintained that the case of the respondents before the trial Court was fully established. The plaint of the appellants Abdul Raheem and others was entirely contradictory to the agreement relied by them before the trial Court. Even the appellant, Abdul Raheem has not impleaded in his suit as a necessary party. The

report of the Commission submitted before the trial Court was also in favour of the respondents that the disputed land is admittedly in respondents' possession. The appellant Abdul Raheem and another are not at all entitled for any relief rather according to operation of law they have relinquished from the land through agreement-to-sell. They are also not entitled under the law of land enforced during the Dogra Regime in the Jammu & Kashmir, therefore, the impugned judgment to the extent of payment of costs of improvements to the appellants is not maintainable.

6. We have heard the learned counsel for the parties and also gone through the record made available.

7. While drafting the proposed judgment, it transpired that File No. 487/Civil titled as "*Abdul Rahseed vs. Abdul Rehman*" instituted on 3.9.1992, before the Sub-Judge, Muzaffarabad and File No. 72/Civil, titled as "*Abdul Raheem vs. Mst. Muhammad Jan*" instituted on

18.6.1997, before the Civil Judge/Traffic Magistrate, Muzaffarabad are not available. Therefore, the referred files were summoned from the trial Court. In compliance of Court order, it has been reported by the District and Sessions Judge, Muzaffarabad that file No. 487/Civil is not available, whereas file No. 400/A was reconstructed as its original file has been destroyed during the devastating earthquake of Oct, 2005. Hence, we have proposed to decide the lis in the light of the record available before us.

8. One Abdul Rehman son of Mir Alam, on 28.7.1992 filed a civil suit titled "*Abdul Rehman vs. Abdul Rahseed*" for declaration along with perpetual injunction and possession as consequential relief and averred that the land measuring 2 *kanal* mentioned in agreement-to-sell dated 21.3.1982, out of total land measuring 18 *kanal*, 17 *marla* recorded in survey No. 898 (old), 1451 (new) and sought declaration that the said agreement executed between the plaintiffs

and defendants in the titled suit has become infructuous and is not executable being time barred. It is further averred that there is no consideration amount paid in execution of the said agreement-to-sell for which no mutation has been sanctioned in favour of the defendants, therein. Consequently, the agreement-to-sell has lost its sanctity. It is further averred that the defendants are intending to interfere in the other land of the plaintiffs bearing survey No. 1451 measuring 12 *kanal*, 17 *marla* and survey No. 1451/1 measuring 11 *kanal* *Shamilat-e-Deh* land, total measuring 29 *kanal*, 17 *marla*, which is in the ownership and possession of the plaintiffs. The possession of the land measuring 2 *kanal* along with a built-up house over there, was also sought. Abdul Rehman died during the proceedings and he was replaced by his legal heirs, Muhammad Suleman and others and on the death of Muhammad Suleman, he was replaced by his legal heirs Ehsan and others, respondents, herein, in appeal titled *Abdul*

*Raheem and another vs. Ehsan and others* and the appellants in the cross appeal. The trial Court's file No. 400-A/Civil, on the face of it appears to have been reconstructed after the devastating earthquake of Oct, 2005, which contains a copy of plaint titled *Abdul Rehman vs. Abdul Rahseed and others* filed on 28.7.1992; a copy of agreement dated 21.3.1982; copy of *parcha Khatooni* of survey No. 1530 and 1451, old survey No. 877, 878 and 898; *Kham Parcha Khatooni* of survey No. 1451 of land measuring 11 *kanal*.

File No. 400-A/Civil also contains a copy of another civil suit filed by Abdul Rasheed and Abdul Raheem against Abdul Rehman, a suit for specific performance of agreement dated 21.3.1982 executed on 22.3.1982, whereby they claimed the execution of agreement-to-sell regarding land survey No. 898 min, measuring 2 *kanal* in pursuance of agreement-to-sell dated 21.3.1982. However, the copy of the order of the trial Court is also available, which shows that

the civil suit titled *Abdul Rahseed vs. Abdul Rehman* was dismissed for non-prosecution vide order dated 17.6.1995. After dismissal of this suit for non-prosecution, neither any subsequent suit nor any application for restoration of the said suit appears to have been filed.

9. The available record reveals that the suit titled “*Abdul Rehman vs. Abdul Rahseed*” filed on 28.7.1992, was dismissed by the trial Court on 28.3.2004 for want of proof. The learned Judge in the trial Court concluded its judgment in the terms that Abdul Rehman, predecessor of respondents, Muhammad Ehsan and others relied upon agreement-to-sell dated 21.3.1982 and sought cancellation of it, whereas, the agreement-to-sell contains that the whole amount of consideration has been paid and they have obtained land measuring 2 *kanal* from survey No. 898-min. The plaintiffs, after receiving the whole consideration amount has no cause of action, even the suit filed by the

plaintiffs was ten years barred by limitation as the agreement-to-sell was effected between the parties 10 years prior to filing of the suit. The learned Judge in the trial Court also concluded that the witnesses produced by the plaintiffs could not corroborate that there was any outstanding amount at the time of executing the said agreement-to-sell. The suit was also dismissed on the ground that the defendants-appellants, are intending to snatch the possession from the plaintiffs-respondents, herein, which was also not proved through evidence.

Abdul Rehman and Abdul Rasheed also filed a suit on 18.6.1997 before the Civil Judge, Muzaffarabad to obtain the share of her mother (late) Marian from the defendant Abdul Rehman. The learned Judge in the trial Court while dismissing the suit of Abdul Raheem and others vide judgment and decree dated 31.5.2005 concluded that the plaintiffs (Abdul Raheem and others) claimed that they are entitled to get the

share of their mother, however the matter pertains to determine the share of the parties in the land. Before determination of shares of the parties, it was enjoined upon the plaintiffs to show their ownership in the land through revenue record. Even the plaintiffs did not challenge any mutation whereby they could prove their case with regard to obtaining the share of their mother Marian (late). It is evident from the record that the matter between the parties relates to the estate of (Late) Mir Alam, in which Abdul Rehman and Marian, being legal heirs of Mir Alam, were entitled. The cases between both the rival parties were not contested properly, therefore, the judgment and decree of the trial Court in both the cases is correct.

10. Before further deliberation on the case, it will be appropriate to reproduce here the contents of the decree passed by the High court in appeal titled *Muhammad Ehsan and others vs. Abdul Rasheed and others*, which are as under:-



“It is ordered that, Muhammad Ehsan & others (descendants) of Abdul Rehman, plaintiffs, are entitled to decree in the tone that they are owners of the land under survey No. 1451 measuring 18 kanals 17 marlas situated in sundgali village chatter Tehsil Muzaffarabad. It is further held that Muhammad Ehsan & others, appellants, are in possession of Shamlat Deh land under survey No. 1451/1 measuring 11 kanals situated in village Chatter and they shall not be ejected, therefrom, without due course of law. A decree for possession of land under survey No. 898 measuring 2 kanlas in village Chatter is also issued in favour of Muhammad Ehsan & others in the tone that they are entitled to specific possession of the land on payment of costs of improvements made in the suit land. Value of improvements may be calculated during execution proceedings.

Appeal filed by Appellants is accepted in the above stated terms.”

11. From the perusal of available record, it appears that admittedly (late) Marian was real sister of Abdul Rehman, predecessor-in- interest of the respondents, Muhammad Ehsan and others. Mst. Marian was also entitled to the estate of Mir Alam, deceased. She was a co-

sharer in the land left by Mir Alam according to *Sharia* Law. A perusal of judgment of the High Court also reveals that she was recorded as co-sharer in the revenue record earlier, however, an agreement referred to by the High Court written on behalf of Abdul Raheem and others, real sons of Marian has been treated under misconception. In this agreement dated 21.3.1982, Abdul Rasheed and Abdul Raheem, both have agreed upon retaining the land measuring 2 *kanal* in their possession, whereupon they have built up their residential houses. They also admitted the possession of Abdul Rehman son of Mir Alam on the rest part of estate left by Mir Alam. This agreement does not transpire that Abdul Raheem and Abdul Rehman both have relinquished permanently from the share of their mother, Marian. It was simply written for correction of revenue record and that Abdul Rehman is in possession of the rest part of the estate left by Mir Alam. It does not confer any right of exclusive ownership of

Abdul Rehman excluding Abdul Raheem and Abdul Rahseed, real sons of Marian (late). Even we do not find any evidence from the record that Marian, in her life, had relinquished her right from the estate of late Mir Alam, therefore, this agreement was written just to correct the revenue record regarding the possession of Abdul Rehman as owner and nothing else. The learned Judge in the High Court has not considered this agreement in its true perspective. Another agreement in the files is available, a study of same transpires that it was written on the same date i.e. 21.3.1982 by which Abdul Rehman sold the land measuring 2 *kanal* in the hands of Abdul Raheem and Abdul Rasheed in consideration of amount received by him. The High Court while handing down the impugned judgment has not considered this agreement in pursuance of which Abdul Rasheed and Abdul Raheem filed a suit for specific performance, therefore, the learned Judge in the High Court has erred in law under

misconception of record. The agreement-to-sell referred to above is not material before us to decide the lis as on the basis of this agreement Abdul Rahseed and Abdul Raheem filed a suit for specific performance before the trial Court on 3.9.1992, copy of which is available with the record and an order dated 17.6.1995 is also available in the file whereby the suit titled *Abdul Rasheed and others vs. Abdul Rehman and others* filed by Abdul Rasheed and Abdul Raheem for specific performance of contract, was dismissed for non-prosecution.

12. The trial Court has rightly concluded and decided the case of both the rival parties, herein. The judgments and decrees passed by trial Court are quite in accordance with the pleadings and evidence of the parties, which needed no interference. The impugned judgment and decree of the High Court appears to have been passed without application of judicial mind and appreciation of evidence in the light of the

pleadings and evidence adduced by the parties, hence, the same is not sustainable.

12. Before parting, we observe here that admittedly, Marian, the predecessor-in-interest of the appellants Abdul Raheem and others was real sister of Abdul Rehman, predecessor-in-interest of respondents, Ehsan and others. The matter between the parties relates to the determination of inheritance of Mir Alam between the legal heirs. The legal heirs of Marian are at liberty to approach the competent forum/Court of law for redressal of their grievance.

The nutshell of the above discussion is that appeal No. 221 of 2015, titled *Abdul Raheem and others vs. Eshan and others* is accepted. The impugned judgment of the High Court is set aside. The judgments & decrees of the trial Court in both the rival cases, are restored, while the cross appeal

222 of 2015 titled *Muhammad Ehsan and others vs. Abdul Rahseed and others*, having no force is hereby dismissed. There will be no order as to costs.

JUDGE  
Muzaffarabad  
. 2016.

CHIEF JUSTICE