

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT

Mohammad Azam Khan, C.J.

Ch. Muhammad Ibrahim Zia, J.

Civil Appeal No. 52 of 2015

(PLA filed on 10.12.2014)

Abdul Rauf s/o Niaz Muhammad Khan, Caste Chib r/o
Kotehra Khanka, Tehsil Charhoi, District Kotli.

.... APPELLANT

VERSUS

1. Muneer Begum widow,
2. Muhammad Majeed,
3. Khursheed Ahmed,
4. Zahar Ahmad,
5. Shoukat,
6. Khushal,
7. Idrees, sons,
8. Bashir Begum,
9. Manza Begum,
10. Dilshad Begum,
11. Ruqaya Begum,
12. Shahnaz Kosar, daughters of Ramzan deceased,
13. Mohammad Akbar s/o Qudratullah,
14. Maqbool Begum, widow,
15. Qumar ul nisa,

16. Zahara Begum,
17. Shaheen Akhtar d/o Summander Khan,
18. Majeed Begum, widow,
19. Aurangzeb,
20. Mehmood Khan,
21. Maqsood Khan, sons,
22. Shameem Begum,
23. Noreen Begum,
24. Parveen Begum d/o Hadiayat Ullah,
25. Hafeezullah Khan,
26. Sarwar Begum, widow,
27. Mohammad Irfan, son,
28. Shahnaz Begum,
29. Mehtab Begum, daughters of deceased Raheem Dad Khan s/o Molvi Dad Khan,
30. Gulzar Hussain, son,
31. Tasveer Begum daughter of Abdullah, deceased,
32. Muhammad Akram,
33. Muhammad Iqbal s/o Aziz Ullah, Caste Chib r/o Kotehra Khankah, Tehsil Charhoi, District Kotli.

.... RESPONDENTS

34. Mohammad Arif s/o Niaz Mohammad,
35. Qamar-un-Nisa,
36. Badar-un-Nisa,
37. Rani, daughters,

38. Nazir Begum, widow of Niaz Mohammad Khan, caste Chib r/o Kotehra Khankah, Tehsil Charhoi, District Kotli.

.... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 22.10.2014 in Civil Appeal No. 04/2011)

FOR THE APPELLANT: Raja Khalid Mehmood Khan, Advocate.

FOR THE RESPONDENTS: Raja Hassan Akhtar, Advocate.

Date of hearing: 21.12.2016

JUDGMENT:

Ch. Muhammad Ibrahim Zia, J.— The captioned appeal by leave of the Court is the outcome of the judgment of the High Court dated 22.10.2014, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The necessary facts for disposal of this appeal are that the respondents, herein, filed a declaratory suit for cancellation of mutation No.229 and correction of revenue record in respect of the land comprising (old) survey Nos. 267, 270, 323, khewat No. 4, Khata No. 95/74, (new) survey Nos. 705, 715,

716, 721 and 724, khewat No. 7, khata No. 60/95, situate at village Kotera Khanqah, in the Court of Civil Judge Kotli. Muhammad Akbar and others also filed a declaratory suit against Muneer Begum and others on 22.02.1997. The learned trial Court after necessary proceedings vide consolidated judgment and decree dated 31.01.2008 dismissed the suit filed by the respondents, herein, being filed beyond the period of limitation, whereas, the other suit was dismissed under Order II, Rule 2 of Civil Procedure Code. The respondents filed an appeal before the District Judge, Sehensa which was accepted vide judgment dated 29.11.2010 and the case was remanded for decision afresh. The appeal filed before the High Court failed, hence this appeal by leave of the Court.

3. Raja Khalid Mehmood Khan, Advocate, the learned counsel for the appellant after narration of necessary facts submitted that initially two suits were filed before the trial Court. After consolidated proceedings, the suit which has given rise to this appeal was dismissed by the trial Court on the ground of limitation, whereas, the other suit was dismissed by applying the principle of constructive resjudicata under

the provisions of Order II, Rule 2 of Civil Procedure Code. The trial Court, after due appreciation of the whole material and evidence, recorded detailed judgment while attending all the issues raised in the case. The suit was filed by the respondents-party after a period of almost 35 years which on the face of it is time barred and no further proof is required. In the suit the mutation No. 229 attested on 17.04.1960 has been challenged through the plaint which was filed on 05.04.1995. The first appellate Court failed to apply the judicial mind and while setting-aside the findings of the trial Court remanded the suit on wrong assumptions. The illegal judgment of the first appellate Court has been upheld by the High Court through the impugned judgment which amounts to miscarriage of justice. The plaint was not maintainable as nothing in the plaint was mentioned that the suit is filed within limitation. The impugned judgments are not maintainable, therefore, while setting-aside the same the judgment of the trial Court be restored.

4. Conversely, Raja Hassan Akhtar, Advocate, the learned counsel for the respondents forcefully defended the impugned judgments on the ground that

the first appellate Court has pointed out the framing of unnecessary issues by the trial Court, whereas, in the light of pleadings of the parties the facts are admitted and there was no controversy requiring framing of issues. Same like, on issue No. 7, which was relating to the limitation, the findings were recorded against the appellant-defendant. These findings have not been challenged, thus, attained finality. He further argued that according to the nature of suit the question of limitation does not arise as it is continuous wrong. The plaintiff-respondents are admittedly owners of the property, hence, they cannot be deprived of their right of ownership merely on the ground of some illegal entries in the revenue record. The judgment of the trial Court is self-contradictory. On one hand the issue of limitation has been resolved against the appellant-defendant and on the other hand the suit has been dismissed on the same ground. He further argued that the learned High Court in the impugned judgment has wisely observed that the first appellate Court due to illegality and material irregularity pointed out in the trial Court judgment remanded the case and nothing has been recorded against any of the party. In view of

the peculiar facts of the case, the proper course was remand of the case, hence, this appeal is not maintainable.

5. We have paid our utmost attention to the arguments advanced on behalf of the parties and also gone through the record of the case. Through the impugned judgment the learned High Court upheld the judgment of the first appellate Court, thus, the controversy relates to the decision of first appellate Court. In this state of affairs, the judgment of the first appellate Court has to be properly considered and appreciated. The first appellate Court has accepted the appeal and set aside the judgment of the trial Court on two grounds (i) framing of unnecessary issues; and (ii) limitation. Both the parties in their arguments have not properly attended these material propositions. Prima facie, the conclusion drawn by the first appellate Court regarding issues No. 1 and 2 appears to be correct appreciation of the matter. As the factual propositions, subject-matter of these issues, are admitted by the parties, therefore, according to law there was no requirement of framing these issues, hence, issues No. 1 and 2 shall be deemed deleted.

6. So far as the observation of the first appellate Court regarding issue No. 3 is concerned, it is not according to law. The proposition of abandonment of right of tenancy by one Shair s/o Hasna, occupancy tenant, is an admitted fact to this extent. However, the dispute appears to be regarding the effect of his abandonment of the tenancy right as the disputed mutation No. 229 has been attested in favour of one of the co-sharers by excluding the other co-owners of the suit property. Thus, in fact the controversy to be resolved is whether after abandonment of the tenancy rights by the occupancy tenant the entries in the revenue record should be incorporated in favour of all the owners or in favour of one of them. Therefore, to the extent of issue No. 3 the judgment of the learned first appellate Court requires modification and the issue No. 3 has been rightly framed by the trial Court which has to be properly decided.

7. The other moot point is of limitation. The counsel for the respondents has rightly pointed out that the trial Court decided issue No. 7 against the appellant-defendant but at the same time dismissed the suit being time barred, thus, the decision of the

learned trial Court appears to be inconsistent. Moreover, it is proved from the record that the mutation has not been sanctioned in the estate or village rather it has been sanctioned in some other village. The plaintiffs have categorically averred in the plaint that the mutation was kept secret and on gaining knowledge they have challenged the same. This aspect has not been properly appreciated by the trial Court in the light of pleadings of the parties and evidence brought on record.

8. Moreover, for resolution of the basic controversy the matter of limitation has to be considered from another angle. According to the pleadings of the parties both the parties are admittedly owners of the suit property. Whether mere sanction of mutation in favour of one of the owners deprives the other owners from their rights. Similarly, whether the mutation is only to the extent of cultivation and possession or on its basis the rights of other owners have been extinguished. As the plaintiffs have been continuously recorded as owners of the property, thus, this situation prima facie gives rise to continuous cause of action.

In view of peculiar facts and circumstances of this case, subject to hereinabove stated modification, the remand of the case to the trial Court appears to be proper and just course. This appeal stands disposed of in the above terms with the direction to the trial Court to decide the matter within a period of four months from communication of this order. No order as to costs.

Muzaffarabad,
____.01.2017

JUDGE

CHIEF JUSTICE