SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT
Mohammad Azam Khan, C.J.
Ch. Muhammad Ibrahim Zia, J.

Civil Appeal No. 358 of 2014
(PLA filed on 29.03.2014)

Kamal Hussain s/o Khushi Muhammad, Caste Jat, r/o Pangpiran, Teshil and District Kotli.

…. APPELLANT

VERSUS

1. Muhammad Shabir s/o Jhalla, Caste Jat, r/o Pangpiran, Tehsil & District Kotli.

…. RESPONDENT

2. Karam Din s/o Kaka, Caste Jat, r/o Pangpiran, Teshil and District Kotli (deceased) represented by:

   (i) Gulzar Begum, widow,

   (ii) Rashid,

   (iii) Javaid,

   (iv) Munir,

   (v) Rafique,

   (vi) Basharat,

   (vii) Mehmood,

(viii) Khadim,

(ix) Zafar, sons,

(x) Salma, daughter of Karam Din, all resident of Saeri Garyallah, Teshil and District Kotli.

…. PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated 19.02.2014 in Civil Appeal No. 39/2008)

FOR THE APPELLANT: Mr. Masood A. Sheikh, Advocate.

FOR RESPONDENT NO1: Mr. Khalid Rashid Chaudhary, Advocate.

Date of hearing: 14.12.2016

JUDGMENT:

Ch. Muhammad Ibrahim Zia, J.— This appeal by leave of the Court arises out of the judgment of the High Court dated 19.02.2014, whereby the appeal filed by the appellant, herein, has been dismissed.

2. According to the summarized facts the appellant herein obtained a consent decree from the Court of Senior Civil Judge, Kotli on 12.06.2001 in respect of the land measuring 1 kanal, comprising survey No. 754, *khata* No.70/372, total measuring 4

kanal 7 *marla*, against Karam Din. The respondent, Muhammad Shabbir assailed this decree while filing a declaratory suit on the basis of right of prior purchase in the Court of District Judge, Kotli, alleging therein, that the consent decree in-fact has been obtained to defeat the right of pre-emption. The case was entrusted to the Additional District Judge, Shensa, Camp Kotli. After necessary proceedings, the learned Additional District Judge through the judgment dated 30.08.2008 decreed the suit in favour of the plaintiff. Dissatisfied, the appellant herein filed an appeal in the High Court which has been dismissed through the impugned judgment hence this appeal.

3. Mr. Masood Ahmed Sheikh, Advocate, the learned counsel for the appellant argued the case at some length. He discussed the factual proposition raised by the parties in their pleadings and stressed only on three points; firstly, that the plaintiff-respondent's suit was not maintainable as at the time of execution of the gift-deed, he waived his right according to the phraseology of the gift-deed, thus, he is estopped by his own conduct. The principle of law of waiver as well as acquiescence is fully attracted. The

Courts below have not properly appreciated this point. The second and most stressed argument is that the property relating to which the pre-emption suit has been filed is an urban immovable property and for maintaining the pre-emption suit against the urban property the criterion is quite different. The third point is that the person who falls within the categories enumerated in section 15 of the Right of Prior Purchase Act, 1993 B.k, is only competent to exercise the right of pre-emption, whereas the plaintiff is not co-sharer in the sold property, hence his suit was not maintainable. According to the counsel's version, for exercise of the right of pre-emption the pre-emptor must be a co-sharer in the property which has been sold out and not being the co-sharer in the remaining portion of the property. This aspect has also not been considered by the Courts below which amounts to violation of law. He further argued that the plaintiff-respondent failed to establish through any evidence that he is co-sharer in the suit property. He submitted that according to the entries of the revenue record, his total fractional share in the disputed survey number comes to 16 marlas whereas he had already transferred the land

measuring 1 kanal in excess of his share thus, there remains no share on the basis of which he may claim to be a co-sharer in the property. These are the vital points which have been ignored by the Courts below, hence, the judgments and decrees are not maintainable.

4. Conversely, Mr. Khalid Rashid Chaudhry, Advocate, the learned counsel for respondent No.1 forcefully defended the impugned judgment and submitted that the arguments advanced at bar on behalf of the defendant-appellant are totally misconceived, against the pleadings of the parties' evidence and the record of the case. The plaintiff-respondent is admittedly a co-owner and co-sharer in the property. This fact is not only admitted in the pleadings but also admitted by the attorney for the defendant-appellant in his Court statement. Therefore, the arguments which are not consistent with the produced evidence of the parties or the pleadings cannot be treated as legal one. The appeal has no substance which is liable to be dismissed with costs. He also referred to the case reported as *Khadim Hussain v. Muhammad Afzal & others* [2015 SCR 792] in support of his version.

5. We have considered the arguments of the learned counsel for the parties and examined the record

made available. According to the pleadings of the parties, the suit land was initially gifted by the plaintiff-respondent to one Karam Din (deceased proforma-respondent). The counsel for the appellant attempted to justify his arguments that the plaintiff-respondent, on the basis of the gift-deed Exh. "PC" executed by him has waived his right of pre-emption wherein it has been written:-

"مظہر کار قبہ موہوبہ سے کوئی تعلق واسطہ نہ رہا ہے"

We can not agree with the learned counsel for the defendant-appellant as the phraseology of the gift-deed indicates the intention of the donor that he has gifted the property permanently to the donee. Neither in this gift-deed there was any question of exercise of right of pre-emption nor he has waived the same. As the donee and donor are residents of one and the same locality whereas subsequently, the donee has transferred the land through a compromise decree to a person who is not resident of the locality. In this state of affairs, the plaintiff-respondent's right of pre-emption cannot be denied merely on the ground that in the gift-deed executed by him he has mentioned that

he has no concern with the gifted property. The argument is baseless, hence stands repelled.

6. So far as the other most important proposition raised is concerned that the plaintiff-respondent is not co-sharer in the property, appears to be weightless on the ground that on this factual proposition there are concurrent findings of facts recorded by the Courts below. Moreover, this fact is admitted according to the pleadings of the parties. The plaintiff-respondent in his plaint has categorically averred that the land comprising survey No. 754, total measuring 4 kanal 7 marla falls in his share and ownership out of which he has executed the gift-deed of the land measuring 1 kanal on 20.12.1988. These averments have been admitted as correct by the defendant-appellant. Same like in the other paragraphs of his plaint, he has categorically mentioned that he is a co-sharer and co-owner in the property. These averments have not been specifically denied. According to the principle of law governing the pleadings, evasive denial amounts to admission. Leaving aside this aspect the attorney for the appellant appeared as a witness

before the trial Court who has categorically admitted that:

"یہ درست ہے کہ مدعی کا رقبہ اراضی متدعویہ سے ملحق ہے۔ایک ہی کھیت ہے"

In his statement, he has not uttered a single word that the plaintiff-respondent is not a co-owner in the suit property. Thus, in the light of the pleadings of the parties and the evidence produced by them the Courts below have rightly recorded the findings of facts that the plaintiff-respondent is co-sharer in the property.

7. The defendant-appellant could not succeed to point out any misreading or non-reading of evidence, therefore, the findings of facts concurrently recorded by the Courts below cannot be disturbed or interfered with merely on the strength of the argument which does not find support from the law or record.

8. Leaving aside this aspect, even otherwise, the provision of section 15 of the Right of Prior Purchase Act, relied upon by the counsel for the defendant-appellant does not bring any fruits for him rather it supports the version of the plaintiff-respondent. It will be useful to reproduce here the same as under:-

> "15. Persons in whom right of prior purchase vests in urban immovable property.- The right of prior purchase in respect of urban immovable property shall vest---
>
> firstly: in the co-sharer of such property, if any;
>
> secondly: where the sale is of the site of the building or other structure, in the owners of such building or structure;
>
> thirdly: where the sale is of property having a stair case common to other properties in the owners of such properties;
>
> fourthly: where the sale is of property having a common outer entrance with other properties, in the owners of such properties;
>
> fifthly: where the sale is of a servient property, in the owners of the dominant property, and *vice versa*;
>
> sixthly: in the owners of property contiguous to the property sold."
>
> (*underlining is ours)*

If for the sake of argument it is presumed that the plaintiff-respondent is not a co-sharer in the property, even then in the light of the admitted facts especially the statement of the attorney of the appellant recorded

in the trial Court it is sufficient to grant decree in favour of the plaintiff-respondent as it has already been mentioned hereinabove that the attorney of the defendant-appellant has categorically deposed that:-

"یہ درست ہے کہ مدعی کا رقبہ اراضی متدعویہ سے ملحق ہے۔ایک ہی کھیت ہے"

Thus, in the light of the hereinabove reproduced provision of section 15 of the Right of Prior Purchase Act, if the plaintiff-respondent's suit does not fall in any other category at least it falls in the category "sixthly" which speaks that the right of prior purchase in respect of the urban immovable property vests in the owner of the property contiguous to the property sold.

In view of the hereinabove reproduced admission of the appellant that the plaintiff's land is contiguous to the property sold, his right of prior purchase stood admitted and fully established. Therefore for the reasons stated hereinabove, this appeal having no force is hereby dismissed. No order as to costs.

Muzaffarabad,
2017 J U D G E CHIEF JUSTICE