

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT

Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

1. Civil Appeal No. 22 of 2013
(PLA filed on 29.03.2013)

1. Punnu Khan (deceased),
2. Ali Shan,
3. Murdan Ali alias Mohammad Alam s/o Faqeer,
Caste Jat, r/o Saharthala, Tehsil Dudyal, District
Mirpur.

.... APPELLANTS

VERSUS

1. Akhar Hussain s/o Ali Shan r/o Shaharthala, Tehsil
Dudyal, District Mirpur.
2. Ali Asghar, son (deceased), represented by:
 - (i) Aqsar Jan, widow,
 - (ii) Aftab,
 - (iii) Nasir,
 - (iv) Zulfiqar Ali, sons,
 - (v) Riffat Bibi daughter of Ali Asghar
3. Dolat Begum w/o Fazal Hussain d/o Ali Shan,
4. Anayat Begum, widow,
5. Zaffar Mehmood Zar,
6. Mazhar Zar Mohammad,
7. Zaheer Mahmood,
8. Ghazanfar Mahmood Zar, sons,
9. Mst. Nazman Shaheed,

10. Mst. Waheeda Kousar d/o Mohammad Zar Khan,
caste Jat r/o Sarthala, Tehsil Dudyal, District
Mirpur.

.... RESPONDENTS

(On appeal from the judgment of the High Court dated
14.02.2013 in Civil Appeal No. 617/2009)

FOR THE APPELLANTS: Mr. Muhammad Reaz
Alam, Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Sabir,
Advocate.

2. Civil Appeal No. 133 of 2016
(Filed on 26.07.2016)

Arfan Mahmood s/o Punu Khan, caste Jat r/o Sarthala,
Tehsil Dudyal, District Mirpur.

.... APPELLANT

VERSUS

1. Akhar Hussain s/o Ali Shan r/o Shaharthala, Tehsil
Dudyal, District Mirpur.
2. Aqsar Jan, widow,
3. Aftab,
4. Nasir,
5. Zulfiqar Ali, sons,
6. Riffat Bibi daughter of Ali Asghar r/o Sarthala,
Tehsil Dudyal, District Mirpur.
7. Dolat Begum w/o Fazal Hussain d/o Ali Shan,
8. Anayat Begum, widow,
9. Zaffar Mehmood Zar,

10. Mazhar Zar Mohammad,
11. Zaheer Mahmood,
12. Ghazanfar Mahmood Zar, sons,
13. Mst. Nazman Shaheed,
14. Mst. Waheeda Kousar d/o Mohammad Zar Khan,
caste Jat r/o Sarthala, Tehsil Dudyal, District
Mirpur.

.... RESPONDENTS

15. Zafar Mahmood,
16. Nasir Mahmood,
17. Ansar Mehmood,
18. Amjad Mehmood, sons,
19. Musarat Nazir,
20. Rukhsana Shaheen,
21. Farzana Kousar daughters of Punnu Khan r/o
Sarthala, Tehsil Dudyal, District Mirpur.

.... PROFORMA RESPONDENTS

(On appeal from the order of the Additional Registrar of
Supreme Court dated 27.06.2016)

FOR THE APPELLANT: Mr. Muhammad Reaz
Alam, Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Sabir,
Advocate.

Date of hearing: 14.12.2016

JUDGMENT:

Ch. Muhammad Ibrahim Zia, J.— This appeal by leave of the Court is addressed against the judgment of the High Court dated 14.02.2013 whereby while accepting the appeal filed by Akhtar Hussain a decree for specific performance of the contract dated 14.03.1951 has been granted, whereas, the appeal filed by appellant No. 1, Punno Khan, has been dismissed.

2. The necessary facts giving rise to Civil Appeal No. 22/2013 are that the appellants, herein, filed a suit for declaration against Ali Asghar and others in the Court of Civil Judge Dudyal on 09.04.2002. It was claimed that the land comprising survey No. 304, measuring 1 *kanal* 7 *marla* situate at village Seharthala was in their ownership. The entries made in the revenue record in favour of defendant-respondents are illegal and without justification. The plaintiff-appellants prayed for possession of the suit land occupied by the respondents as tenants on the basis of title. The respondents (Ali Asghar and others) contested the suit by filing written statement in which they claimed that the appellants have got no cause of action and the suit

is liable to be dismissed under the principles of estoppel and acquiescence. Moreover, the suit is barred by limitation. It was further alleged that the suit land was sold by Punnu Khan to the father of respondents No.1 to 3 vide agreement-to-sell dated 14.03.1951 against a consideration of Rs. 900/-. The plaintiff after receiving the consideration amount transferred the possession of the suit land to the respondents. It is further alleged that the respondents have constructed a house on the suit land.

3. Ali Asghar and others also filed a cross suit for specific performance of agreement to sell dated 14.03.1951 against the appellants in the same Court on 09.07.2002. It was averred in the suit that the land comprising survey No. 145 measuring 1 *kanal* 8 *marla* situate at village Seharthala, was purchased by them through an agreement-to-sell dated 14.03.1951 and since then they are in possession of the same. They prayed for a decree for specific performance of agreement to sell. The suit was contested by the appellants by filing written statements.

4. The learned Senior Civil Judge Dudyal, after necessary proceedings vide consolidated judgment and

decree dated 27.3.2006 dismissed both the suits filed by the contestant parties. Against the judgment and decree of trial Court, appeals filed by both the parties before learned Additional District Judge Dudyal also met the same fate. The judgment and decree of the learned Additional District Judge Dudyal was challenged by Punnu Khan and Akhtar Hussain through preferring separate appeals before the High Court. The High Court while accepting the appeal filed by Akhtar Hussain dismissed the appeal filed by Punnu Khan through the impugned judgment, hence this appeal by leave of the Court.

5. The appeal No. 133/16 has been filed against the order of the Additional Registrar dated 27.06.2016 whereby the application for impleading the legal heirs of Punnu Khan, who died during pendency of appeal before this Court, has been disallowed being filed beyond the prescribed period of limitation

6. Mr. Muhammad Reaz Alam, Advocate, the learned counsel for the appellants after narration of necessary facts seriously objected to the impugned judgment of the High Court and submitted that the learned High Court fell in error of law and facts while

handing down the impugned judgment. The suit land is admittedly in the ownership of the appellants which was temporarily given in possession of the respondents for cultivation purpose. The High Court has wrongly disturbed the concurrently recorded findings of facts and unnecessarily relied upon Exh.PI, the so called agreement to sell dated 14.03.1951. Neither the agreement has been proved according to law nor it has any legal status. The suit filed by the respondents on the face of it was not maintainable and time barred, whereas, the appellants proved their suit through legal evidence, specially, documentary evidence. Thus, according to settled principle of law the decree of possession be passed in their favour while setting aside the impugned judgment. So far as the question of death of one of the parties is concerned, it has no effect on the fate of the case in the light of principle of law laid down by this Court vide an interlocutory order dated 05.01.2012 passed in the case titled *Zaffar alias Mumtaz and others vs. Sajjad Begum and others* (Civil Appeal No. 45/2008 decided on 17.04.2014). He further argued that the High Court has wrongly declared the so called agreement as 30 years' old

document, whereas, according to the principle of law laid down by this Court such document is not executed according to statutory provisions of law, hence, not reliable. He referred to the case reported as *Mst. Aziza Begum and others vs. Muhammad Hussain Khan (deceased) and others* [2013 SCR 563].

7. Conversely, Ch. Muhammad Sabir, Advocate, the learned counsel for the respondents seriously opposed the appeal on the ground that the appellants have got no legal cause of action to challenge the impugned judgment. The appellants miserably failed to prove the averments made in the plaint through any cogent evidence. They have taken incorrect stand that the suit land was given for cultivation in the year 1997-98 but could not succeed to prove the alleged fact rather even from their own produced documentary evidence it is clearly established that the land remained in possession of the respondents since long on the basis of private sale transaction. He submitted that infact the land was purchased by the respondents. Although, no sale-deed was registered but the deed executed was infact a private sale in furtherance of which the possession was handed over to the

respondents and the entry of *Khangi Beh* (خانگی بیعہ) was incorporated since long in the revenue record, specially, in the record of rights. The appellants failed to challenge the entry or claim the possession of the land, thus, the private sale between the parties is an admitted fact. The respondents in the knowledge of the appellants built a house on the land, thus, they enjoyed the proprietary rights of the land as owners. According to the celebrated principle of law the respondents are owners of the land on the basis of sale transaction. If at all it is deemed invalid then in that case their long standing possession over the land on the basis of defective sale also disentitled the appellants from claiming any right regarding the property, hence, their suit is barred. The High Court should have passed the declaratory decree in favour of the respondents instead of specific performance. This Court is vested with vast powers to grant the relief which is not appealed from the judgment, therefore, for doing complete justice the declaratory decree may kindly be passed in favour of the respondents. He referred to the cases reported as PLD 1966 SC 505, 1997 CLC 1231, PLD 1961 (W.P) Lah, 372, PLD 1975 Lah 489, PLD 1994 SC 162, PLD

1991 Peshawar 111, PLD 1991 Peshawar 204, 1997 CLC 1231, 1990 CLC 1381 and submitted that this appeal is liable to be dismissed.

8. During pendency of this appeal one of the appellants, Punnu Khan, died. For substituting his legal heirs an application was filed before the Additional Registrar, Mirpur on 09.09.2013 which was resisted by the respondents being time barred. While conducting the proceeding, the Additional Registrar allowed the parties to produce evidence for resolution of this factual controversy and after completion of the proceeding on appreciation of the evidence the application was found time barred. However, the question whether due to non-substitution of legal heirs within limitation there will be partial abatement of appeal or in toto, was left open to be resolved by the Court. Against the order of the Additional Registrar dated 27.06.2016 the appeal titled *Arfan Mehmood vs. Akhtar Hussain and others* (No. 133/16) has been filed.

9. Mr. Muhammad Reaz Alam, Advocate, the learned counsel for the applicant-appellant after narration of necessary facts submitted that the legal heirs of the appellant, Punnu Khan (deceased), were

not in knowledge of the pendency of the appeal. They got knowledge of the same after his death on scrutiny of the record available at home, thus, from the date of knowledge the application was filed with a few days delay. In these circumstances, there is sufficient reason for condonation of delay of few days. The fact that the legal heirs of the deceased were not in knowledge of the pendency of appeal has been proved through evidence. The order of the Additional Registrar is against law and the facts. He further submitted that if at all the application for substitution of legal heirs is not within time, then the appeal cannot abate in toto because there are two other appellants, hence, the appeal can survive. He submitted that while accepting the appeal and setting aside the order of the Additional Registrar, the legal heirs of Punnu Khan be substituted.

10. Conversely, Ch. Sabir Hussain, Advocate, the learned counsel for the respondents strongly opposed the appeal and forcefully defended the impugned order of the learned Additional Registrar and submitted that the application has been filed after almost two weeks' delay. In such cases it is the duty of the party to satisfactorily explain the delay of each and every day.

The appellants have taken a very vague and ambiguous stand. The evidence produced by them also negates their version, thus, the Additional Registrar has passed the order according to law which is based upon proper appreciation of the evidence and does not call for any interference. So far as the question of partial or toto abatement of the appeal is concerned, according to the factual proposition involved in this case the deed on the basis of which the decree has been granted in favour of the respondents was solely executed by Punnu Khan and the impugned judgment and decree is also passed only against him excluding the other co-appellants. In this state of affairs, the appeal shall abate in toto.

11. We have considered the arguments of the learned counsel for the parties. In view of the importance of proposition which goes to the root of the case it is felt advised to firstly decide the appeal filed against the order of the Additional Registrar titled *Arfan Mehmood vs. Akhtar Hussain and others* (No. 133/16). Admittedly, the appeal titled *Punnu Khan vs. Akhtar Hussain and others* filed against the judgment of the High Court dated 14.02.2013 was pending before this Court. During pendency of this appeal the appellant

Punnu Khan died on 13.05.2013 as is evident from the certificate issued by the Doctor produced by the appellant as Annexure "PA/1". The appellant produced the witnesses namely, Amir Shehzad, Zahid Iqbal and also got his own statement recorded. All the witnesses and the appellant himself clearly deposed in their statements that the other co-appellants, Ali Shan and Mardan Ali, who are brothers of deceased Punnu Khan and uncles of the appellant fully participated in the funeral ceremony of the deceased Punnu Khan. They have got cordial relations with the deceased Punnu Khan and his legal heirs. In this state of affairs, it is not possible that the matter of pendency of appeal filed by the appellant's father was not in the knowledge of the appellant. It is suffice to refer the portion of appellant's own statement which reads as follows:-

"--- مردان علی مظہر کے چچا ہیں اور علی شان بھی مظہر کے چچا ہیں جنہوں نے بھی والد مرحوم کے ہمراہ اپیل ہذا دائر کر رکھی تھی۔ مردان علی اور مظہر مستقل طور پر گھر پر ہی موجود ہوتے ہیں۔ والد کے فوت ہونے پر مظہر کے چچا علی شان، امجد محمود، عنصر محمود، مسرت نذیر، رخصانہ شاہین اور فرزانہ کوثر ماتم پر آئے تھے۔ اور علی شان اور مظہر کے بھائی جنازہ میں شریک ہوئے۔ عنصر محمود، امجد محمود، مسرت نذیر، رخصانہ شاہین، فرزانہ کوثر نے مظہر کو اپیل ہذا میں مختار مقرر کیا تھا۔ مختار نامہ 5 جون 2013 کو مظہر کو دیا گیا۔"

The appellant's own statement negates his version. In this state of affairs the order passed by the learned Additional Registrar does not suffer from legal

infirmary which is quite consistent with the principle of law and evidence brought on record. Therefore, the appeal filed by *Arfan Mehmood* has no substance which is dismissed.

12. In the above context it is obviously clear that the appeal filed by Punnu Khan due to his death and in absence of legal heirs is not maintainable. Now the question arises whether the appeal due to non-impleadment of legal heirs of Punnu Khan will abate in toto or can survive to the extent of other two co-appellants, Ali Shan and Mardan Ali. For determination of this legal proposition the nature of the impugned judgment and decree is of vital importance. The learned High Court has passed the decree as follows:-

“It is ordered that the appeal is accepted and decree for specific performance of the contract dated 14.03.1951 is hereby granted in the term that vendee Punnu Khan or his legal heirs shall execute sale deed in favour of vendees against the received amount in respect of the suit land within two months. Failing which Nazir of the Court shall execute sale deed on behalf of Punnu Khan and others, vendors.”

The same is the operative paragraph of the impugned judgment, thus, it is clear that the impugned judgment and decree was passed only against Punnu Khan excluding the other co-appellants (herein).

Moreover, the record further reveals that against the judgment of the first appellate Court only Punnu Khan filed an appeal before the High Court and the other co-complainants, Ali Shan and Mardan Ali have not preferred any appeal. The appeal filed by Punnu Khan has also been dismissed through the impugned judgment and decree, thus, it is clear that the impugned judgment and decree was solely passed against Punnu Khan and due to his death and in absence of his legal heirs the appeal is not competent and it will abate in toto.

As due to the conclusion drawn on the proposition of non-substitution of legal heirs of the deceased appellant, Punnu Khan, within time the appeal has been declared to abate in toto, thus, no deliberation on merits of the case is required. Consequently, the appeal filed against the judgment of the High Court dated 14.02.2013 stands dismissed in the result of abatement in toto. No order as to costs

Muzaffarabad,
_.01.2017

JUDGE

JUDGE