

SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT

Ch. Muhammad Ibrahim Zia, C.J.
Ghulam Mustafa Mughal, J.

Civil Appeal No. 42 of 2017
(PLA filed on 17.11.2016)

1. Muhammad Shabir,
2. Muhammad Kabir,
3. Mst. Shazia Begum,
4. Mst. Nazia Begum,
5. Mst. Aziz Begum,
6. Mst. Zubaida Begum widow of Ali Akbar Khan, caste Janjua, Rajpoot r/o Chor, Tehsil Dheerkot, District Bagh.

.... APPELLANTS

VERSUS

1. M. Arif Khan s/o Abdul Khan, caste Tazyal r/o Dhak Dheerkot, District Bagh.
2. Muhammad Amjad Arif s/o Muhammad Arif, caste Tazyal r/o Dhak Dheerkot, District Bagh.

..... RESPONDENTS

(On appeal from the judgment & decree of the High Court dated 20.9.2016 in Civil Appeal No.7 of 2016)

FOR THE APPELLANTS: Syed Nazir Hussain
Shah Kazmi, Advocate.

FOR THE RESPONDENTS: Raja Khaliq Dad Khan,
Advocate.

Date of hearing: 12.4.2017

JUDGMENT:

Ghulam Mustafa Mughal, J.— This appeal by leave of the Court has been directed against the judgment and decree passed by the High Court on 20.9.2016 in civil appeal No. 7 of 2007, whereby, the appeal filed by the appellants, herein, against the judgment and decree passed by the learned Additional District Judge, Dhirkot dated 31.12.2014 has been dismissed.

2. The relevant facts forming the background of the captioned appeal as stated are that Ali Akbar, predecessor-in-interest of the appellants, herein, brought a suit for declaration and cancellation of an exchange-deed executed on 14.1.1999 against the defendants in the Court of Civil Judge, Dhirkot on 19.1.2009. It was averred that the land comprising khasra No. 1562, measuring 2 kanal 4 marla, situated in village Chor, Tehsil Dhirkot was in possession and ownership of the plaintiffs as a result of family

settlement. Defendant No. 1, herein, agreed to transfer his land comprising khasra No. 1343, measuring 3 kanal 9 marla in lieu of the plaintiffs' land comprising khasra No. 1562 and an exchange-deed was executed and registered on 14.10.1999. It was claimed that the exchange-deed dated 14.10.1999 has not been acted upon/implemented in letter and spirit because neither the plaintiff nor defendant No. 1 has transferred the possession of the land on the basis of the said exchange-deed. It was further averred that the plaintiffs time and again demanded for delivery of possession of the land in question comprising khasra No. 1343 to defendant No. 1, but he has not honored his commitment and not transferred the land. In fact, defendant No.1 has got executed the exchange-deed dated 14.10.1999 by practicing fraud and with malafide intention. The suit was contested by the defendants by filing written statement on 3.11.2009. The trial Court framed the issues in light of the respective pleadings of

the parties on 18.11.2009. The parties led evidence in support of their respective claim. At the conclusion of the proceedings, the learned Civil Judge, Dhirkot vide judgment and decree dated 28.2.2014 dismissed the suit for want of proof and on account of limitation as well as on the basis of estoppel. Ali Akbar, predecessor-in-interest of the plaintiff-appellants, felt aggrieved from the judgment and decree dated 28.2.2014 went in appeal before the Additional District Judge, Dhirkot on 21.3.2014. After hearing the parties, the learned Additional District Judge, Dhirkot dismissed the appeal vide judgment and decree dated 31.12.2014. The appeal filed against the judgment and decree passed by the learned Additional District Judge, Dhirkot has also been dismissed by the learned High Court vide judgment and decree dated 20.9.2016.

3. Syed Nazir Hussain Shah Kazmi, the learned Advocate for the appellants, argued that the plaintiffs have never transferred their land to

defendant No.1 on the basis of exchange-deed dated 14.10.1999 because defendant No.1 has not honored his commitment and refused to transfer his land as per conditions of the exchange-deed. The learned advocate further contended that this fact was proved before the trial Court through the cogent evidence and the report of the commission but the learned Civil Judge as well as the Additional District Judge failed to take into consideration the same and the conclusion reached at by the Courts below is erroneous, capricious and is against the record. He further argued that even the learned High Court has misread the important piece of evidence and came to the erroneous conclusion. The learned advocate argued that the defendant-respondent, herein, has got transferred the land of the plaintiffs by practicing fraud and the exchange-deed is not covered by any provision of law because the parties have not changed their hands by delivering the possession of the suit land agreed

to be transferred through impugned exchange-deed.

4. Conversely, Raja Khaliq Dad Khan, the learned advocate for the defendant-respondents, has controverted the arguments advanced on behalf of the appellants and submitted that the Courts below after proper appraisal of the documentary as well as oral evidence led by the parties have come to the conclusion that the exchange-deed in question was executed with the consent of the parties and the possession of the exchanged land was also transferred on spot by demarcation. In this regard, the learned advocate has placed reliance on Ex. 'DA' & 'DB' and a copy of *khasragirdawri* Ex. 'DC'. The learned advocate contended that the concurrent findings of fact cannot be interfered with lightly until and unless it is shown that these findings are based on wrong assumptions of facts or suffer from misreading or non-reading of the record as well as the evidence. The learned advocate contended that the suit was

barred by limitation and was liable to be dismissed on account of the principle of estoppel. In support of his submission, the learned advocate has placed reliance on the following cases (1) *Azmat Hussain Kayani & 2 others vs. Ansa Bibi & 4 others* [2016 SCR 496] (2) *Muhammad Sadiq vs. Muhammad Rafique & 19 others* [2016 SCR 525] and (3) *Muhammad Jamroze vs. Raja Muhammad Sabir & another* [2016 SCR 1150]

5. We have heard the learned counsel for the parties and perused the record of the case. A perusal of the record reveals that the parties have executed an exchange-deed on 14.10.1999, whereby they have exchanged their landed property situated in Dhirkot, Tehsil Bagh. Ali Akbar, predecessor-in-interest of the appellants, herein, has transferred his land comprising khasra No. 1562 measuring 2 kanal 4 marla to defendant No.1 and the said defendant in return has transferred his land comprising khasra No.

1343, measuring 3 kanal 19 marla. As per report of the *Patwari*, which is available on the file as annexure Ex. 'DA' reveals that the property was demarcated on spot on 16.10.1999 and the possession of the same was delivered to the parties in presence of the respectables of the locality. A *Tatima* has also been prepared which is available on the record as annexure 'DB', The entries regarding the possession of the land was also made in the copy of *khasragirdawri* Ex. 'DC'. In view of the above authentic record, the stand of the plaintiff- appellants, herein that the land comprising khasra No. 1562, measuring 2 kanal 4 marla has never been transferred to defendant No.1, is misconceived.

6. Syed Nazir Hussain Shah Kazmi, the learned advocate for the plaintiff-appellants, has heavily relied upon the report of the Commissioner. We have also minutely perused the said report which is ambiguous and has rightly not been relied upon by the learned Civil

Judge as well as the first appellate Court. From the averments made in the plaint as well as the evidence led by the respondents, it is categorically proved that the suit has been filed after a period of three years without claiming any exemption of limitation as visualized by Order VII, CPC. The question of alleged fraud has not been proved then it was enjoined upon the plaintiffs to bring the suit within a period of three years. It has rightly been contended by Raja Khalid Dad Khan, the learned advocate for the defendant-respondents that the concurrent findings of fact recorded by the Courts below cannot be disturbed mere on the ground that after reappraisal of the evidence another conclusion is possible. The concurrent findings of fact if are based on the proper appraisal of evidence and record then the same are binding on the High Court, therefore, we cannot disturb the same.

7. As stated above in the present case, the delivery of possession is supported by the

documentary as well as the oral evidence led by the defendants, therefore, the suit filed on behalf the plaintiffs for cancellation of the exchange-deed was time-barred and he was also estopped by his conduct, hence, cannot take an inconsistent position regarding non-delivery of the possession.

In light of above discussion, we have found no substance in this appeal, therefore, the same is hereby dismissed with no order as to costs.

Muzaffarabad,

.4.2017

JUDGE

CHIEF JUSTICE

Date of Announcement 18.04.2017