

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Civil Appeal No.51 of 2017
(PLA filed on 21.11.2016)

Abdul Waheed Khan son of Muhammad Nazir Khan alias Nazir Hussain, caste Tazyal, r/o Narrul, Tehsil and District Bagh.

....APPELLANT

VERSUS

1. Mir Akbar Khan son of Sikandar Khan, caste Tazyal, r/o Mukhiala, Tehsil Dhirkot, District Bagh.

....RESPONDENT

2. Sumandar Khan son Puno Khan,
3. Mst. Sadiqa Begum widow of Puno Khan,
4. Mst. Sharifa Begum,
5. Shera Begum, daughters of Dalil Khan,
6. Fareed,
7. Zahoor,
8. Irshad, sons of Nazir Begum (late),
9. Manshad Khan,

10. Shahzad,
11. Abdul Majeed, sons of Irshad Begum alias Arsha Begum,
12. Muhammad Hafeez,
13. Muhammad Zareef, sons of Mst. Nazira Begum (late), caste Sheikh, r/o Makhyala, Tehsil Dhirkot, District Bagh.

..... PROFORMA RESPONDENTS

(On appeal from the judgment and decree of the High Court dated 07.10.2016 in civil appeal No.109 of 2014)

Civil Appeal No.186 of 2017
(Filed on 07.07.2017)

Abdul Waheed Khan son of Muhammad Nazir Khan alias Nazir Hussain, caste Tazyal, r/o Narrul, Tehsil and District Bagh.

....APPELLANT

VERSUS

1. Mir Akbar Khan son of Sikandar Khan, caste Tazyal, r/o Mukhiala, Tehsil and District Bagh.

....RESPONDENT

2. Summandar Khan (deceased) son of Puno Khan through legal heirs:-

- (i) Zubaida Begum widow,
 - (ii) Arshad Khan son,
 - (iii) Naheed Begum daughter,
 - (iv) Khalida Begum daughters of Sumandar Khan,
3. Mst. Sadiqa Begum widow of Puno Khan,
 4. Mst. Sharifa Begum,
 5. Shera Begum, daughters of Dalil Khan,
 6. Fareed,
 7. Zahoor through legal heirs:-
 - (i) Mst. Robina Begum widow,
 - (ii) Inzaman Khan,
 - (iii) Rizwan Khan,
 - (iv) Danish Khan sons of Muhammad Zahoor
 8. Irshad, sons of Nazir Begum (late),
 9. Manshad Khan,
 10. Shahzad,
 11. Abdul Majeed, sons of Irshad Begum alias Arsha Begum,
 12. Muhammad Hafeez,
 13. Muhammad Zareef, sons of Mst. Nazira Begum (late), caste Sheikh,

r/o Makhyala, Tehsil Dhirkot, District
Bagh.

..... PROFORMA RESPONDENTS

(On appeal from the order of the Registrar of
this Court dated 13.06.2017)

FOR THE APPELLANT: M/s Sardar Muhammad
Arif Khan and Sajid
Hussain Abbasi,
Advocates.

FOR THE RESPONDENT: Mr.Asghar Ali Malik,
Advocate.

Date of hearing: 14.11.2017

JUDGMENT:

Raja Saeed Akram Khan, J.— Appeal
No.51 of 2017 by leave of the Court has been
filed against the judgment and decree passed
by the High Court on 07.10.2016, whereby the
appeal filed by the respondent, herein, has
been accepted, whereas, appeal No.186 of
2017 has been filed against the order passed
by the Registrar of this Court through which
the application filed by the appellant for

bringing on record the legal heirs of proforma respondents No.2 and 7, in appeal No.51, has been dismissed.

2. The necessary facts giving rise to appeal No.51/17 are that the plaintiff-respondent, herein, filed a suit for declaration and possession of the suit land on the basis of right of prior purchase with the prayer for cancellation of the sale-deed dated 27.1.2006, in the Court of Civil Judge *Dhirkot* on 13.5.2006. It was averred in the plaint that the land comprising survey Nos. 64, 65, 68 and 62 *khewat* Nos. 393, 395, 403, 394 measuring 19 *kanal*, 14 *marla* and 02 *sarsai*, situate at village Makhyala, was in the ownership of defendants No.2 to 15, therein. Defendants No.2 to 15, by practicing fraud sold the land measuring 7 *kanal* through a forged sale-deed to defendant-appellant, herein, against a consideration of Rs.35,000/-

and also transferred the possession of the same, whereas, in the sale deed with mala fide intention the sale price has been shown as Rs.5,00,000/-. The plaintiff also raised many other grounds in support of the plaint. The defendant-appellant, herein, resisted the suit by filing written statement. The trial Court after due process of law dismissed the suit filed by the plaintiff-respondent, herein, vide judgment and decree dated 27.4.2012. The judgment and decree of the trial Court was challenged by the plaintiff in the Court of learned Additional District Judge, Dhirkot which was also dismissed. The plaintiff approached the High Court through an appeal challenging the concurrent findings recorded by the Courts below. The learned High Court through the impugned judgment and decree while accepting the appeal, set aside the judgments and decrees passed by the Courts

below and decreed the suit filed by the plaintiff. The learned High Court also directed the plaintiff to deposit the consideration amount within one month's time in the trial Court failing which the suit shall be deemed to be dismissed. Hence, this appeal by leave of the Court.

The facts of the other appeal filed against the order of the Registrar are that the appellant on 01.06.2017 filed an application for bringing on record the legal heirs of proforma respondents No.2 and 7. The learned Registrar after seeking objections from the other side dismissed the application on the ground of limitation vide order dated 13.06.2017.

3. M/s Sardar Muhammad Arif Khan and Sajid Hussain Abbasi, Advocates, the learned counsel for the appellant argued that the

impugned judgment passed by the High Court is based on non-appreciation of law on the subject and the facts of the case which is not maintainable. They submitted that the learned High Court disturbed the well reasoned concurrent findings recorded by the Courts below without pointing out any misreading or non-reading of evidence or any violation of law. They forcefully contended that even the decree passed by the High Court is not fulfilling the requirements of a pre-emption decree as assigned under the provisions of Order XX, Rule 14 CPC. They prayed for setting aside the impugned judgment and decree.

While arguing the other appeal filed against the order of the Registrar they submitted that the appellant is residing at Rawalpindi and he had no knowledge about the death of proforma-respondents No.2 and 7

and when he came to know, he immediately filed the application for bringing on record their legal heirs. The learned Registrar without taking into consideration the facts and circumstances of the case dismissed the application. Thus, the impugned order is liable to be set aside.

4. On the other hand, Mr. Asghar Ali Malik, Advocate the learned counsel for the respondent, strongly opposed the arguments advanced by the learned counsel for the appellant. He submitted that the impugned judgment is perfect and legal which is not open for interference by this Court. He contended that the respondent proved his case by producing un-rebutted evidence. The Courts below failed to appreciate the record in a legal manner, therefore, the High Court after proper appreciation passed the decree in favour of the plaintiff-respondent. He prayed

for dismissal of appeal. The learned counsel for the respondent also supported the order passed by the Registrar of this Court through which the application filed by the appellant for bringing on record the legal heirs of respondent No.2 to 7, was dismissed.

5. We have heard the learned counsel for the parties and perused the record made available. At first, we have examined the appeal filed against the order passed by the Registrar of this Court. The record shows that the learned Registrar vide order dated 13.06.2017, dismissed the application filed by the appellant for bringing on record the legal heirs of proforma respondents No.2 and 7, on the ground of limitation. In the application, the appellant took the stand that he is residing at Rawalpindi and had no knowledge about the death of proforma respondents No.2 and 7. When he came to know about the fact he

immediately filed application for bringing on record their legal heirs. The appellant mentioned the dates of death of proforma respondents No.2 and 7 as 25.04.2017 and 30.05.2017, respectively. On the other hand, the respondent has not mentioned any specific date of death of the said proforma respondents and also not brought on record any evidence in this regard. The respondent only mentioned that they were died much earlier to November 2016. The learned Registrar has not accepted the dates mentioned in the application by the appellant as correct on the ground that in support of the contents of application no affidavit was filed. It may be observed here that although, the application of the appellant was not supported by an affidavit, but the stance taken by the respondent was also ambiguous one and not supported by any evidence; moreover, in view

the peculiar facts of the instant case, the impleadment or non-impleadment of the legal heirs of the deceased, proforma respondents, might have not affected the case of either party. In such state of affairs, when the respondent has not rebutted the version of the appellant with certainty; by providing any authentic proof in support of his claim and no legal right of the respondent was affected by the impleadment of the legal heirs of proforma respondents No.2 and 7, then the learned Registrar was not justified to dismiss the application while accepting the version of the respondent. Thus, the appeal is accepted and impugned order passed by the Registrar is hereby vacated. The office is directed to incorporate the names of the legal heirs of proforma respondents No.2 and 7 in the concerned record.

6. So far as, the main appeal of the appellant filed against the judgment and decree passed by the High Court, is concerned, we have minutely examined the record. The record shows that this Court while granting leave has formulated the point; whether the impugned judgment and decree passed in pre-emption suit, fulfils the requirements of Order XX, rule 14, CPC or not. Keeping in view the controversy involved in the matter in hand, before attending the merits of the case, we would like to examine the point formulated in the leave granting order. Before proceedings further it will be advantageous to reproduce here the relevant portion of Order XX, rule 14, CPC which reads as under:-

“14. Decree in pre-emption suit: (1) Where the Court decrees a claim to pre-emption in respect of a

particular sale of property and the purchase-money has not been paid into Court, the decree shall—

- (a) specify a day on or before which the purchase-money shall be so paid, and
- (b) direct that on payment into Court of such purchase-money together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a) the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2)

(a).....

(b).....”

After going through the relevant provision of law reproduced hereinabove, it appears that while passing the decree in pre-emption suit the Court concerned shall specify the day on or before which the purchase-money shall be deposited. The word 'purchase-money' denotes the amount which is determined or fixed by the Court while granting the decree. In the matter in hand, as per contents of the sale-deed the land in dispute was sold against a consideration of Rs.5,00,000/-. The respondent while filing the suit for pre-emption taken the stance that the actual price of the land paid to the vendor is Rs.35,000/-. In this regard, the trial Court also framed a specific issue and the parties produced evidence in support of their respective claims. The burden of proof of the said issue was on the plaintiff-respondent. The trial Court decided the issue against the plaintiff and the first appellate

Court upheld the resolution passed by the trial Court on this issue. The learned High Court has not attended and resolved this pivotal point involved in the matter and even has not specified the purchase-money while passing the decree in favour of the plaintiff-respondent. The relevant portion of the decree passed by the High Court is reproduced here which reads as under:-

“It is ordered that by accepting the appeal of the appellant, the impugned judgments and decrees passed by both the courts below are hereby set-aside and the suit filed by the appellant/plaintiff to the extent of suit land measuring 7 kanal situated at village Mukhiala Tehsil Dhirkot District Bagh pertaining to survey Nos.62, 64, 65 & 68 out of 19 kanal 14 Marla 2 Sarsai is decreed in favour of appellant/plaintiff, herein. The plaintiff-appellant shall deposit the

consideration amount within one month before the trial Court, failing which, the suit of the plaintiff shall deem to be dismissed.”

As the learned High Court has not specifically mentioned the purchase-money of the land in dispute, therefore, it can safely be concluded that the decree passed by the learned High Court is not consistent with the statutory provision of law i.e. Order XX, rule 14 CPC which cannot be maintained. In such circumstances, when the impugned judgment as well as decree is not maintainable, then we do not intend to consider the other points involved in the matter in hand and deem it proper to remand the case to the High Court to decide the same afresh.

In view of the above, this appeal is accepted and the case is remanded to the learned High Court with the direction to decide

the same afresh in accordance with law after providing fair opportunity of hearing to the parties. No order as to costs.

Mirpur,
____.11.2017

JUDGE

JUDGE

