

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.

Ghulam Mustafa Mughal, J.

Civil Appeal No.01 of 2018

(PLA filed on 21.11.2017)

Hanif Khan s/o Nawab Khan, caste Tazyal, r/o Kotli,
Tehsil Dhirkot, District Bagh, Azad Kashmir.

.... APPELLANT

VERSUS

1. Muhammad Hanif Khan s/o Bahawal Khan, r/o Kotli, Tehsil Dhirkot, District Bagh, Azad Kashmir.
2. Shoukat Khan,
3. Afrooza Begum wife of Khursheed, r/o Kotli, Tehsil Dhirkot, District Bagh, Azad Kashmir.
4. Zareefa Begum w/o Muhammad Shafique, r/o Kotli, Tehsil Dhirkot, District Bagh.
5. Gulshan Begum wife of Nisar Khan, r/o Narwal, Tehsil Dhirkot, District Bagh.
6. Shamshad Begum wife of Waqar daughter of Sher Ahmed Khan, caste Tazyal, r/o Kotli, Tehsil Dhirkot, District Bagh.

.....RESPONDENT

7. Usman Azam,

8. Ghazanfar Azam,
9. Nayyar Azam,
10. Ehsan Azam,
11. Shahnaz Begum sons and daughters of Azam Khan,
wife of Waqar Khan, caste Tazyal, r/o Kotli,
District Bagh.

..... PROFORMA-RESPONDENTS

[On appeal from the judgment and decree of the High
Court dated 22.09.2017 in Civil Appeal No.147 of
2009]

FOR THE APPELLANT: Sardar Atta Ellahi
Abbasi, Advocate.

FOR THE RESPONDENTS: Mr. Muhammad
Yaqoob Khan
Mughal, Advocate.

Date of hearing: 06.12.2018.

JUDGMENT:

Ghulam Mustafa Mughal, J.— The captioned appeal by leave of the Court arises out of the judgment and decree dated 22.09.2017, passed by the Azad Jammu & Kashmir High Court in Appeal No.147 of 2009.

2. Precise facts giving rise to the captioned appeal are that Muhammad Azam Khan s/o Bagga Khan, predecessor-in-interest of proforma respondents, herein, transferred the suit land in favour of Muhammad Hanif Khan s/o Sajawal Khan, respondent, herein, in lieu of Rs.500,000/- vide sale-deed dated 25.05.2001. Muhammad Hanif Khan s/o Nawab Khan and Sher Ahmed Khan filed a suit for pre-emption on the basis of right of prior purchase, in the Court of Civil Judge Dhirkot on 25.09.2001. It was averred that they are co-sharers in the suit land and have preferential right of purchase vis-à-vis defendant No.1. It was further averred that before transfer of the suit land, no notice was given to the plaintiffs, as was required by the relevant law. It was claimed that in order to defeat the right of prior purchase of the plaintiffs, the consideration amount has arbitrarily been mentioned as Rs.5,00,000/- in the sale-deed, whereas, fact of the matter is that the land has been sold for Rs.300,000/- which is the genuine

market value of the same. The suit was contested by defendant No.1 by filing written statement, pleading therein, that the plaintiff has no right of prior purchase vis-à-vis defendant No.1 because he has improved his status before institution of the suit and has become co-sharer in the suit land on the basis of exchange-deed dated 15.08.2001. It was stated that bargain was struck for 500,000/- rupees which amount was paid by the plaintiff to defendant No.2 and market value of the land is also the same. It was claimed that the plaintiff has become co-sharer in the same *khewats*, hence, the suit is liable to be dismissed. Muhammad Hanif Khan s/o Nawab Khan, appellant, herein, pre-emptor, also filed a separate suit for declaration and cancellation of the exchange-deed dated 15.08.2001 against Muhammad Hanif Khan s/o Sajawal Khan, respondent No.1, herein, on 01.02.2007, in the same Court. It was claimed that the suit land is in the ownership of plaintiff and on 15.08.2001 defendant

No.1 in connivance with defendants No.2 and 3 has executed an exchange-deed fraudulently and on the basis of the said exchange-deed, mutation No.120 has been got entered in the revenue record on 19.08.2001. He also challenged the legality and correctness of the mutation No.120. It was averred that the exchange-deed dated 15.08.2001 is fraudulent and concocted because delivery of the possession has not been taken place on the basis of the same, hence, exchange is not complete. It was stated that the exchange-deed has been effected in fact to defeat the right of pre-emption of the plaintiff. This suit was contested by the defendants by filing written statement, whereby, the claim of the plaintiff was refuted. The learned trial Court consolidated both the suits and framed issues in light of the pleadings of the parties. Thereafter, the parties are directed to lead evidence in support of their respective claim and at the conclusion of the proceedings, the learned trial Court vide judgment and decree dated 23.07.2008, dismissed the suit filed

on the basis of right of prior purchase. The other suit was also dismissed for want of proof. The

consolidated judgment and decree dated 23.07.2008, passed by the learned trial Court, was challenged by way of appeal before the learned Additional District Judge Dhirkot on 22.09.2008. After necessary proceedings, the learned Additional District Judge Dhirkot vide judgment and decree dated 09.10.2009, dismissed the appeal. Feeling aggrieved from the judgment and decree dated 09.10.2009, passed by the learned Additional District Judge Dhirkot, the appellant, herein, filed appeal before the Azad Jammu & Kashmir High Court on 23.12.2009 which also met the same fate and was dismissed through the impugned judgment and decree dated 22.09.2017.

3. Sardar Atta Ellahi Abbasi, the learned Advocate appearing for the appellant, argued that the Courts below have not

appreciated the record as well as law on the point in its true perspective, hence, the judgments and decrees recorded by them are erroneous, perverse and arbitrary. The learned Advocate further argued that the exchange-deed dated 15.08.2001 was *mala fide* and has been executed in order to defeat the right of pre-emption of the appellant, herein. The learned Advocate further argued that even otherwise, the execution of the exchange-deed was not proved as two marginal witnesses have not been produced as was required by Qanoon-e-Shahadat, 1984. The learned Advocate further argued that the vendee has not become cosharer in all the *khewats*, therefore, the findings recorded by the learned trial Court are against the record, hence, are liable to be reversed. The learned Advocate has also filed two

separate applications; one, for correction in the memo of appeal; and the other for transposition of respondents No.3 to 6 in line of the appellants, submitting therein, that inadvertently respondents No.3 to 6, who are legal heirs of Sher Ahmed Khan, one of the pre-emptor, have been listed in line of the real-respondents which were to be entered as proforma-respondents. He submitted that they may be transposed in line of the appellants. In support of this contention he placed reliance on the cases reported as *Mehr Allah*

Ditta and another vs. Muhammad Ali & another

[PLD 1972 SC 59] and *Ghulam Yasin vs. Shah Nawaz & 5 others* [PLD 1996 Lahore 695]. The learned Advocate has further placed reliance on the following cases:-

- I. *Haji Nazir Ahmed vs. Raja Muhammad Saeed and 11 others* [2010 SCR 231]

- II. *Raja Muhammad Saeed Khan vs. Haji Nazir Ahmed* [PLJ 2007 SC (AJ&K) 89]
- III. *Mst. Rasheeda Begum vs. Muhammad Yousaf and others* [2002 SCMR 1089]
- IV. *Ghulam Begum and 10 others vs. Khan Muhammad Khan & another* [PLD 1984 SC (AJ&K) 38]
- V. *Muhammad Khan vs. Mst. Rasul Bibi* [2007 PSC 1274]

4. Conversely, Mr. Muhammad Yaqoob

Khan Mughal, the learned Advocate appearing for the respondents argued that concurrent findings of fact recorded by the Courts below are immune from disturbance in appeal before this Court. He further argued that no perversity, misreading or non-reading has been shown by the appellant in the judgments recorded by the Courts below, therefore, it cannot be said that the same are illegal. The learned Advocate further argued that the defendant-respondent, herein/vendee has improved his status before institution of the suit and has become co-sharer in the *khewat* on the basis of exchange-deed dated 15.08.2001, therefore, the suit for pre-emption has

rightly been dismissed by the Courts below. The learned Advocate further argued that the plaintiff had no right to challenge the exchange-deed on the ground listed in the plaint and the subsequent suit was also not maintainable, therefore, appeal may be dismissed.

5. We have heard the learned counsel for the parties and have gone through the record of the case in light of their respective arguments. A perusal of the record reveals that vide sale-deed dated

25.05.2001, the land measuring 15 *kanal*, 12 *marla*, from *khewat* No. 89, belonging to Muhammad Azam Khan, vendor, was transferred in favour of

Muhammad Hanif Khan s/o Sajawal Khan.

Muhammad Hanif Khan s/o Nawab Khan and Sher Ahmed Khan filed a suit for pre-emption in respect of the suit land on the basis of right of prior purchase vis-à-vis defendant/vendee on 25.09.2001 in the Court of Civil Judge Dhirkot. This suit was contested

by the defendants by filing written statement. After execution of the sale-deed dated 25.05.2001, and before institution of the suit, the vendor and the vendee executed an exchange-deed on 15.08.2001, on the basis of which, it was claimed by the vendee that he has become a co-sharer in the suit land and has improved his status before institution of the pre-emption suit, hence, the same is liable to be dismissed. A perusal of the sale-deed dated 25.05.2001, reveals that the vendor has stated his whole share in *khewat* Nos.70 and 89 in the saledeed, however, he transferred 15 *kanal*, 13 *marla* land from *khasra* No.9 (*mosooma seri*) which as per his stand is in his exclusive ownership on the basis of family settlement. It may be stated that *khasra* No.9 is a part of *khewat* No.89 in which the vendee has become co-sharer on the basis of exchange-deed dated 15.08.2001. Under section 21 of the preemption Act, the vendee can improve his status before institution of the suit and not after that. In view of above, the

findings recorded by the Courts below does not suffer from any illegality. The Courts below rightly came to the conclusion that the defendant/vendee has equal right vis-à-vis preemptor and his pre-emption suit is not maintainable. We also approve these findings.

6. The contention of the learned counsel for the appellant that the exchange-deed dated 15.08.2001 has not been proved as 2 marginal witnesses have not been produced, hardly arises in this case. This principle applies in the cases where the execution of the document is denied by the parties to the document. The other contention of the learned Advocate that the exchange-deed dated 15.08.2001 is not complete as neither the ownership was transferred nor the exchange in fact taken place, has also no force. This is a question of fact and to this extent the Courts below have rightly come to the impugned conclusion. It is well settled law and practice of this Court that concurrent findings of fact recorded by the Courts below cannot be disturbed unless some

misreading and non-reading of the record is noticed. The learned counsel for the appellant has filed two applications; one, for correction in the memo of appeal in the terms that respondents No.3 to 5 may be listed as proforma respondents; and the second, for transposition of these respondents in line of the appellants. So far as transposition in the line of appellants is concerned, we are of the view that after expiry of limitation for filing the appeal, this request is not considerable in a pre-emption suit, hence, application for this purpose is rejected, however, so far as entering of respondents No.3 to 6 as proforma respondents, is concerned, that does not affect the merits of the case, therefore, this application is accepted. Respondents No.3 to 6 shall be entered as proforma respondents in the memo of appeal.

The upshot of the above discussion is that finding no force in this appeal, the same is hereby dismissed. No order as to costs.

	JUDGE	CHIEF JUSTICE
Muzaffarabad.	JII	