

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No.100 of 2018
(PLA filed on 02.04.2018)

1. Shahzada Begum, widow,
2. Naheeda Begum d/o Syed Miskeen Shah,
3. Zahid Hussain Shah s/o Ghulam Ahmed Shah,
4. Muhammad Akram s/o Shahnawaz,
5. Muhammad Akram s/o Ali Asghar,
6. Muhammad Mehmood s/o Kalu,
7. Muhammad Mumtaz,
8. Muhammad Imtiaz Khan,
9. Muhammad Riaz sons of Muhammad Shareef, respondents No.1 & 2 r/o Hattian Bala, No.3 village Dabbar Kailan, No.4 and 9 village Nawgran, No.5 and 7 village Khanda Bela and No.8 village Bandi Mohri, Tehsil Hattian Bala, District Jehlum Valley.

.... APPELLANTS

VERSUS

1. Syed Talib Hussain Shah s/o Syed Mehmsoom Shah r/o Village Hattian Bala, District Jehlum Valley.

....RESPONDENT

2. Deputy Commissioner/Collector District Jehlum Valley.
3. Assistant Commissioner.
4. Tehsildar.

5. Naib Tehsildar.
6. Girdawar Circle.
7. Patwari Halqa Hattian Bala, Tehsil Hattian Bala,
District Jehlum Valley.

.....PROFORMA-RESPONDENTS

(On appeal from the judgment of the High Court dated
12.03.2018 in Civil Appeal No.169 of 2017)

FOR THE APPELLANTS: Ch. Shoukat Aziz,
Advocate.

FOR THE RESPONDENTS: M/s Jamshed Ahmed Butt
and Muhammad Fareed,
Advocates.

Date of hearing: 12.11.2018.

JUDGMENT:

Ghulam Mustafa Mughal, J.— The titled appeal by leave of the Court has been directed against the judgment dated 12.03.2018, passed by the Azad Jammu & Kashmir High Court in Civil Appeal No.169 of 2017.

2. The facts forming the background of the captioned appeal are that Syed Talib Hussain Shah, respondent, herein, challenged the legality and

validity of the sale-deeds registered on 01.04.1998, 12.12.1989, 03.10.1998 and 06.01.2000 along with mutations entered on the basis of these sale-deeds through a suit for declaration and perpetual injunction in the Court of Senior Civil Judge Hattian Bala on 02.06.2017. It was stated by the plaintiff-respondent No.1, herein, in the plaint that the land comprising survey No.1 (old), measuring 8 *kanal*, 1 *marla*, was in the ownership of the plaintiff and defendants No.1 and 2 in view of a compromise decree dated 16.10.1995. It was claimed that on the basis of the aforesaid decree, the plaintiff is owner of half of the property, measuring 4 *kanal* on western side, whereas, half of the land from eastern side is in the share and ownership of defendants No.1 and 2. It was stated that after settlement, new number khasra has been entered as khasra No.49. It was further claimed that the plaintiff and defendant No.3 entered into an agreement for construction of shops which could not be completed and he could

not construct the same. It was further stated that thereafter the plaintiff entered into a fresh agreement with defendant No.4 to construct shops on the spot. It was further stated that defendant No.4 has made some construction on the spot as a result of fresh agreement and he has also entered into another agreement with the plaintiff with respect to the land situated at the river side. It was further stated that later on it transpired that the land purchased from defendants No.1 and 2 has further been divided into number khasras 49/530 measuring 5 *marla*, 49/530 measuring 5 *marla*, 49/527 and 49/607 measuring 2 *marla*, total measuring 8 *kanal*, 5 *marla*, 5 *sarsai*, situated at village Hattian Bala. It was claimed that the plaintiff is owner of the suit land from western side and the defendants has no concern with the said land. It was also stated that the sale-deeds have been executed in absence of the plaintiff. The appellants, who were defendants before the trial Court filed an application under Order VII, rule 11, CPC for

rejection of the plaint on 27.06.2017 on the ground that the plaint is barred by limitation as well as the same is hit by the principle of *res judicata*. The plaintiff filed objections on this application on 25.07.2007. The learned trial Court after hearing the parties vide judgment dated 28.08.2017, rejected the plaint on the ground that the suit is not maintainable on the principle of *res judicata*. It was observed that the plaintiff has already filed a suit in respect of the suit land on 17.04.2017 and the same was dismissed on 31.05.2017. It was further observed that the validity and genuineness of the sale-deeds which have now been challenged, was admitted. Feeling aggrieved from the judgment and decree dated 28.08.2017, passed by the learned Senior Civil Judge Hattian Bala, an appeal was filed before the District Judge Hattian Bala on 30.08.2017, by the real-respondents, herein. The learned District Judge Hattian Bala vide judgment dated 22.09.2017, maintained the judgment of the Senior Civil Judge

Hattian Bala dated 28.08.2017, for the reason that the suit was not competent on the ground of Order II, rule 2, CPC. Feeling dissatisfied, the respondents, herein, filed second appeal before the Azad Jammu & Kashmir High Court on 12.10.2017. The learned High Court after necessary proceedings through the impugned judgment dated 12.03.2018 has accepted the appeal and remanded the case for fresh decision.

3. Ch. Shoukat Aziz, the learned Advocate appearing for the petitioners argued that the impugned judgment passed by the learned High Court is illegal, against law and the record, hence, is not maintainable. The learned Advocate further argued that the respondent, herein, earlier on 17.04.2017, filed a suit for declaration-cum-perpetual injunction against the appellants, herein, in the Court of Senior Civil Judge Jehlum Valley. He added that on the application filed by the appellants, herein, the suit was rejected under Order VII, Rule 11, CPC, vide judgment dated 31.05.2017. The

learned Advocate further argued that the judgment dated 31.05.2017 has attained finality for having not been challenged before any higher forum. The learned Advocate submitted that the respondent, herein, again filed a suit on the same cause of action for cancellation of sale-deeds dated 01.04.1998, 20.12.1999, 03.10.1999 and 06.01.2000 along with mutations entered on the basis of these sale-deeds as well as agreement to sell date 13.04.2012. The learned Advocate further submitted that possession was also sought by the plaintiff/respondent, herein. He added that on the application filed by the appellants, herein, the suit was rejected by the learned trial Court vide judgment dated 28.08.2017 and the appeal filed by the respondent, herein, was also dismissed by the learned District Judge with some modifications vide judgment dated 22.09.2017. The learned Advocate further submitted that the respondent, herein, filed second appeal before the Azad Jammu & Kashmir High Court on

12.10.2017 which was accepted by the learned High Court through the impugned judgment dated 12.03.2018 and the case was remanded for fresh decision on merit. The learned Advocate argued that the learned High Court has not appreciated the record in its true perspective and has referred only the judgment dated 31.07.2017 which was not the subject-matter of the appeal before the High Court. The learned Advocate further argued that the dismissal of the suit subsequently vide judgment dated 28.08.2017 by the learned Senior Civil Judge Hattian Bala and the judgment of the learned District Judge Jehlum Valley dated 15.03.2018 have not been considered entirely by the learned High Court. The learned Advocate contended that the claim of the respondent, herein, was on the basis of compromise decree and he has no concern with the suit land which has been alienated by the appellants from their own share. The learned Advocate further argued that the appellants, herein, have raised

construction of multistory building which has been stayed due to which irreparable loss is likely to be suffered by the appellants.

4. Conversely, M/s Jamshed Ahmed Butt and Muhammad Fareed, the learned Advocates appearing for the respondent argued that the earlier suit filed by the respondent, herein, has no nexus with the present controversy. According to the learned Advocates, the subsequent suit was based on different cause of action as prayer for cancelation of sale-deeds in prayer-clause was included, therefore, it cannot be said that the suit was not maintainable on the ground of *res judicata*. The learned Advocates submitted that where factual inquiry is required, the framing of issues and providing opportunity of hearing to the parties is requirement of law and dismissal of the suit for technical reasons has not been approved by the superior Courts.

5. We have heard the learned Advocates representing the parties and have gone through the

record of the case. A perusal of the earlier suit and the judgment dated 03.05.2017, reveals that in the said suit the plaintiff has not challenged the sale-deed as well as agreement to sell categorically mentioning the same in the pleadings, however, some passing remarks have been listed. The learned trial Court rejected the plaint under Order VII, Rule 11, CPC, on the ground that the same does not disclose any cause of action. Legally, a plaintiff is not precluded from filing fresh plaint on the same cause of action after removing the defects. Moreover, in the subsequent suit, the prayer and the relief sought was totally different. The subsequent suit was filed for declaration and cancellation of sale-deeds along with mutations as well as agreement to sell dated 13.04.2012, which has been rejected by the learned trial Court and the appeal filed against the judgment and decree of the trial Court was also dismissed by the learned District Judge. In our estimation, the questions raised in the

plaint could not be decided without having written statement from the other side and framing issues as well as recording evidence of the parties. The learned High Court has considered the entire case of the parties and thereafter has remanded the same for decision on merit. The contention of Ch. Shoukat Aziz, the learned Advocate for the appellants that the High Court has not seen the subsequent dismissal order passed by the learned Senior Civil Judge Hattian Bala as well as the order passed in appeal by the learned District Judge Jehlum Valley, is not correct. We have not found any legal infirmity in the impugned judgment of the learned High Court. The question of applicability of principle of *res judicata* and Order II, Rule 2, CPC, was to be examined in light of the evidence brought on the record and examination of earlier pleadings. These questions being questions of fact cannot be decided in vacuum.

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

Before parting with, in view of the emergent nature of the case, we would like to direct the trial Court to decide the main suit within a period of 3 months.

Muzaffarabad.
14.11.2018

JUDGE

JII

JUDGE

JII