

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

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

Civil Appeal No. 275 of 2018
(PLA Filed on 23.6.2018)

1. Syed Haji Shah s/o Sitara Shah r/o village Ambore, Tehsil and District Muzaffarabad.
2. Murad Hussain s/o Maher Bukhash Sundhgali Chatter Domail, Muzaffarabad.
3. Memoona Shaheen d/o Mahar Bukhash r/o Sundh Gali Chatter Domail Muzaffarabad.

.... APPELLANTS

VERSUS

1. Irshad Ahmed Khan s/o Ali Gohar Khan r/o Jalalabad Muzaffarabad.
2. Mushtaq Ahmed Khan s/o Ali Gohar Ahmed r/o Lower Plate Muzaffarabad.

..... RESPONDENTS

(On appeal from the judgment of the High Court dated
24.4.2018 in Civil Appeal No. 247 of 2005)

FOR THE APPELLANTS: Sardar Pervaiz Akhtar,
Advocate.

FOR THE RESPONDENTS: Syed Shahid Bahar and
Amjad Hameed Siddique,
Advocates.

Date of hearing: 1.4.2019.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal by leave of the Court arises out of the judgment dated 24.4.2018 passed by the Azad Jammu & Kashmir in civil appeal No. 247 of 2005.

2. The facts necessary for disposal of the captioned appeal are that the appellants, herein, filed a suit for declaration-cum-perpetual injunction in respect of land bearing present survey No. 643 measuring 5 kanal and survey No. 644 measuring 4 kanal and 3 marla along with two shops, situated at Chatter Domail, Muzaffarabad, against the respondents, herein, before the Court of Civil Judge, Muzaffarabad on 11.1.2001. It was claimed that land comprising *Khasra* No. 51 measuring 30 kanal was allotted to plaintiff and out of the said land, plaintiff No.1 transferred land measuring 5 kanal through sale-deed and also handed over the possession of the same. It was averred that defendant No. 2 constructed the shops on the suit land, which are present on spot. It was

stated that the plaintiff obtained the possession of only 12 kanal and 7 marla out of the allotted land land and rest of the land was under the possession of Military. It was claimed that in February, 1995, 9 kanal land except the constructed shops was agreed to be sold to defendant No.1 for consideration of Rs.17,00,000/- and the sale-deed was executed on 26.2.1995. It was averred that at the time of sale-deed it was agreed that price of shops will be determined later on. It was further averred that the defendant with mala-fide intention filed a suit without determining the price of the shops, showing therein that he himself has constructed the shops, which was illegal and contrary to the facts. It was prayed that compromise decree dated 30.3.1995 may be set aside and the mutation entered in pursuance of the said decree may also be declared illegal. The suit was contested by the defendants by filing written statement, wherein it was stated that plaintiff has no cause of action and the said suit

has been filed with mala-fide intention, hence, the same is liable to be dismissed. It was further stated that the whole land is in possession of the defendants in pursuance of compromise decree dated 30.3.1995. The learned trial Court in light of the pleadings of the parties framed issues and directed the parties to lead evidence pro and contra. At the conclusion of the proceedings, the learned Civil Judge vide judgment and decree dated 5.1.2005 dismissed the suit for want of proof. Feeling dissatisfied from the said judgment and decree, the appellant, herein, preferred an appeal before the Additional District Judge, Muzaffarabad on 22.2.2005, which was dismissed vide judgment and decree dated 5.9.2005. The appellant, herein, felt aggrieved from the said judgment and decree of the Additional District Judge, filed an appeal before the Azad Jammu & Kashmir High Court. The learned High Court vide impugned judgment and decree dated 24.4.2018 has dismissed the appeal.

3. Sardar Pervaiz Akhtar Khan, the learned Advocate appearing for the appellants argued that the appellants struck a bargain in respect of the suit land vide agreement-to-sell dated 26.2.1995 in lieu of Rs.17,00,000/-. The respondents also filed a suit against the appellants and made believe the plaintiff that the remaining amount to the tune of Rs.9,00,000/- would be paid at the time of the execution of the sale-deed. The learned Advocate argued that the appellants accordingly made a statement before the Court for the purpose of decree of specific performance but the respondents, herein, while practicing fraud and deception obtained the decree of declaration regarding the suit land on 30.3.1995. The appellants, according to the learned Advocate, challenged the legality and correctness of the decree on the ground of fraud and deception and want of jurisdiction. The learned Advocate further argued that the suit was not entertainable by the Civil Judge, which was beyond the

pecuniary jurisdiction. The learned Advocate argued that on the afore stated points, the trial Court has not framed any issue although these points were duly taken before the 1st and the 2nd appellate Court but remained unattended. The learned Advocate argued that on the basis of an agreement-to-sell, which was an admitted position in view of the written statement of the respondents, herein, no decree for declaration can be passed in favour of the respondents in view of the pronouncements of this Court reported as 2006 SCR 92 and 2006 SCR 183. The learned Advocate argued that the learned High Court as well as the Courts below has acted in violation of law while endorsing and approving the judgment/decreed. He also referred to and relied upon the cases reported as 1999 SCR 449 and 2014 SCR 496 in this behalf. The learned Advocate argued that in presence of the documentary evidence the oral stand taken by the respondents cannot be believed and preferred and the learned Courts below have

violated the mandatory provisions of *Qunoon-ne-Shahad* Order. He placed reliance on the case reported as 2002 SCR 435. The learned Advocate argued that the judgment passed by the High Court as well as the 1st appellate Court and the trial Court badly suffers from misreading and non-reading of evidence. He invited the attention of the Court towards the agreement dated 10.4.2000 on the basis of which an additional issue was also framed. He argued that in view of this agreement the respondents have received back Rs.5,00,000/- and cancelled the bargain. He submitted that on the basis of this document, the price of the land was determined as Rs.15,00,000/- and it was further agreed that Rs.10,00,000/- shall be paid by the appellants to the respondents. The learned Advocate submitted that it was further agreed that decree dated 30.3.1995 would be got cancelled in view of the aforesaid development, but even then the respondent betrayed the appellants and did not act upon the agreement

dated 10.4.2000. The learned Advocate argued that the concurrent findings of fact cannot be interfered with if the same are based on proper appreciation of evidence, otherwise, it cannot be said that such like findings which are erroneous, capricious and perverse are immune from challenge in second appeal. He placed reliance on the cases reported as 2016 SCR 146 and 2011 SCR 114. The learned Advocate further argued that it is also wrongly held by the Courts below that the suit of the appellant was timer barred. The fact of the matter is that whenever fraud is known to the plaintiff, he can file suit from the date of knowledge and considering the averments made in the plaint and it cannot be said that the suit is beyond the prescribed period of limitation. The learned Advocate, in this regard, has placed reliance on the cases reported as 2011 SCR 214 and 1998 SCR 204. The learned Advocate argued that the suit land was an evacuee property, hence, declaratory decree could not be passed. He placed reliance

on the cases reported as 1999 SCR 494 and 2014 SCR 496. The learned Advocate further argued that the impugned judgment is against the pleadings of the parties and the grounds taken in the appeal being pure question of law can be raised at any time. In this regard the learned Advocate placed reliance on the cases reported as 2015 SCR 259 and 2003 SCR 142.

4. Syed Shahid Bahar and Amjad Hameed Siddique, the learned Advocates appearing for the respondents argued that the impugned judgment dated 27.3.2017 recorded by the learned High Court is perfectly justified and in accordance with law, which hardly requires any interference by this Court. They further argued that all the Courts below have concurrently come to the conclusion that the appellants, herein, have no case and the concurrent findings of facts recorded by the Courts below are immune from interference in second appeal and this Court also seldom interferes with such findings until and unless it

is shown that there is misreading and non-reading of the record/evidence or judgment is perverse, capricious and has been handed down in violation of law. The learned Advocates argued that the judgment and decree dated 30.3.1995 was passed on the basis of compromise, which is unambiguous and the same cannot be challenged on account of estoppel. The learned Advocates argued that a bare statement regarding the fraud and deception cannot be accepted until and unless the details of the fraud and forgery are listed in the pleadings and evidence is led in support thereof. The learned Advocates further argued that the suit of the appellant was time barred for having been filed after the prescribed period of limitation and all the Courts below have concurrently held as such. They argued that such concurrent findings cannot be upset by this Court even another view is possible after reappraisal of the evidence by this Court. In support of submissions the learned Advocates have placed

reliance on *Adalat Khan's* case (1995 SCR 151). They further argued that the respondents have made entire payment, the receipts of the same are appended with the concise statement and if any amount is outstanding that could be claimed instead of attaining the compromise decree and at the most the appellant can file a suit for recovery of amount. The learned Advocates argued that the appeal is liable to be dismissed for having been filed in absence of necessary party because one Meher Baksh, who was a beneficiary of the compromise judgment and decree, had died during the pendency of the appeal before the High Court. His legal heirs have not filed any appeal before this Court, hence, the decree is being un-advisable cannot be set aside in favour of the appellants and maintained to the extent of the other party. The learned Advocates placed reliance on the case reported as 2004 SCR 510.

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

the record of the case. The contention of Sardar Pervaiz Akhtar, the learned Advocate for the appellants that the judgment and decree dated 30.3.1995 was violative of law because the Civil Court cannot grant a declaratory decree under section 41 of the Administration of Evacuee Property Act, 1957, in the circumstances of this case, is devoid of any force. The jurisdiction of a civil Court is ousted only when declaration is sought against the Custodian. When there is a dispute of civil nature between the parties then the jurisdiction cannot claim to have been ousted. Reference can be made to a case reported as *Hassan Muhammad vs. Muhammad Din* (1997 SCR 292), wherein, in paragraph No. 6 of the report it was observed as under:-

“6. Next, it has been contended by the learned counsel for the appellant that as the suit land even after transferring the proprietary rights remains evacuee property, no pre-emption decree can be passed by the civil Court. It may be stated here that the matter has been dealt with by this

Court at some length in case entitled *Ghulam Hussain v. Muhammad Sarwar* (Civil Appeal No. 84 of 1996 decided on 20.6.1997), wherein it has been held that a civil Court is fully competent to pass a pre-emption decree even in case of evacuee property because in such an eventuality, the civil Court does not act in a way which is prejudicial to the interests of Custodian or the Rehabilitation Authorities; the bar to deal with the evacuee property by the civil Court would be attracted only to the cases where the exercise of such a jurisdiction offends against the interest of the Custodian or Rehabilitation Authorities.”

(Underlining is ours)

6. The contention of the Syed Shahid Bahar, the learned Advocate for the respondents that all the Courts below have concurrently come to the conclusion and the concurrent findings of facts cannot be disturbed under section 100 of the Civil Procedure Code by the High Court. We have also perused the entire evidence in the case. A perusal of the judgment and compromise decree reveals that the same

has been recorded by the learned trial Court on the basis of the statement of the appellants, herein. The appellants, herein, now cannot take an inconsistent position by saying that fraud has been committed. Law is well settled that a general allegation of fraud cannot be accepted until the details and manners of commission of fraud is proved by the party. The dispute between the parties appears regarding the adjustment of money which can be recovered through civil suit if proved.

The upshot of the above discussion is that findings no force in this appeal, it is hereby dismissed with no order as to costs.

JUDGE
Muzaffarabad.
8.4.2019.

CHIEF JUSTICE