IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KH. MUHAMMAD NASIM
MR. JUSTICE RAZA ALI KHAN

CIVIL APPEAL No. 16 OF 2020

(Against the Judgment dated 05.07.2019 passed by the High Court of AJ&K in civil appeal No. 57 of 2014)

1. Kh. Muhammad Azam,
2. Kh. Nawaz Ali,
3. Kh. Ghazanfar Ali, sons,
4. Tahira Kousar d/o kh. Ali Muhammad (deceased) r/o Chakothi Tehsil and District Hattian Bala, presently r/o Ada Dhaki Muzaffarabad.

... Appellants

VERSUS

1. Khadim Hussain son,
2. Ghulam Hussain,
3. Mir Hussain,
4. Abdul Rasheed sons,
5. Mst. Fatimi daughter of Kala (deceased).
6. Abdul Hameed,
7. Mohammad Rafique,
8. Mohammad Shafique sons,
9. Parveen Akhtar,
10. Noreen Akhtar,
11. Fareen Akhtar daughters of Abdul Majeed, all residents of Dabi Darthar Tehsil and District Hattian Bala.

... Respondents

Appearances:

For the appellants: Ch. Amjad Ali, Advocate.

For the respondents: Raja Shujat Ali Khan, Advocate.

Date of hearing: 09.05.2023

JUDGMENT

RAZA ALI KHAN, J:- Challenged before us is the judgment dated 05.07.2019, rendered by the learned High Court passed in civil appeal No. 57 of 2014, whereby the writ petition filed by the respondents, herein, has been accepted.

2. The brief facts forming the background of the captioned appeal are that Khadim Hussain, respondent No. 1, herein, filed a suit for declaration-cum-adverse possession on the basis of alleged oral sale dated 01.08.1969, pertaining to land comprising survey No. 21, measuring 15 kanal and survey No. 22, measuring 5 kanal, total measuring 20 kanal, situate in village Chakothi, District Jehlum Vally/ Hattian, before the learned Sub-Judge Hattina Bala, on 13.04.1983. Kh. Ali Muhammad, predecessor-in-interest of the appellants, herein, resisted the suit by filing written statement on 13.11.1983 and also filed a cross suit No. 209 on 03.07.1986 for decree of possession on the basis of ownership of suit land comprising survey No. 21, measuring 15 kanal. The said suit was also resisted by the other side by filing written statement. In the first suit filed by respondent No.1, herein, the evidence of the parties had been recorded and the case had been fixed for arguments, however, due to institution of the cross suit, both the suits

were consolidated, and additional issues were framed. The learned trial Court at the conclusion of the proceedings, vide judgment and decree dated 31.05.1988, issued the decree of adverse possession in favour of respondent No. 1, whereas, the cross-suit filed by Kh. Ali Muhammad was dismissed. The aforesaid judgment and decree dated 31.05.1988, was challenged through an appeal before the District Judge, Muzaffarabad, however, during the pendency of the appeal, respondent No.1, herein, withdrew his suit No. 115, with the permission to file the fresh one. Consequently, respondent No.1, herein, filed a fresh suit for decree of specific performance of an agreement to sell dated 09.10.1982, pertaining to the suit land before the trial Court on 04.11.1990. The learned trial Court/Additional Sub Judge, Muzaffarabad, conducted fresh proceedings in the case while consolidating both the suits i.e. the newly instituted suit No. 132 of respondent No. 1 and previous suit No. 209 filed by Kh. Ali Muhammad. After concluding the proceedings, the learned trial Court vide judgment and decree dated 31.05.1999, while accepting the suit of respondent No.1, herein, issued the decree of specific performance in his favour, and dismissed the cross suit No. 133, filed by the predecessor of appellants, herein, for possession of the land. The appellants, herein, feeling aggrieved, filed an appeal before the District Judge, Hattian Bala by challenging the judgment and decree dated 31.05.1999. The learned District Judge Hattian Bala after necessary proceedings accepted the appeal and dismissed the suit filed by respondent No.1, herein, on account of limitation and non-payment of consideration amount, whereas, the decree of possession was granted in suit No. 133 in favour of the appellants, herein through the judgment dated 25.03.2014. The appeal before the High Court was

preferred by the respondents, herein, against the judgment and decree passed by District Judge Hattian Bala dated 25.03.2014, which stood accepted and ultimately the judgment of the first appellate Court/Additional District Judge, Hattian Bala has been set-aside, through the impugned judgment dated 05.07.2019.

3. Ch. Amjad Ali, the learned Advocate appearing for the appellants submitted that the impugned judgment of the learned High Court is quite against law, the facts and the record of the case. He submitted that suit filed by respondent No.1, herein, was barred by limitation but the learned High Court has misinterpreted Article 113 of Limitation Act, 1908 and also misconstrued the recitals of alleged agreement to sell dated 09.10.1982. He added that as per the conditions of agreement to sell, the performance of same was subject to provision of State Subject Certificate of the vendee and payment of remaining consideration amount within a period of 2/3 months but respondent No.1, herein, failed to perform the same, hence, the father of the appellants refused the performance of said agreement to sell while instituting the cross-suit No. 209, but respondent kept mum for more than eight years and later on, instituted suit No. 132 for specific performance which was barred by limitation. He further submitted that the observation of the learned High Court in the impugned judgment is self-contradictory and is the result of mis-reading and non-reading of evidence. The learned High Court also fell in error of law while holding that the agreement to sell is admitted by Kh. Ali Muhammad (*predecessor of appellants, herein*), whereas, the perusal of the record and the evidence reveals that the contents of the alleged agreement to sell are not only denied by him but he also produced strong and cogent evidence in rebuttal. The

learned Advocate contended that the contents of alleged agreement to sell are not proved through evidence of Khadim Hussain rather depositions made by him and the witnesses are self-contradictory which are not confidence inspiring, hence, the decree for specific performance of such agreement is not warranted. The impugned judgment of the High Court is based on surmises and conjectures as neither the High Court discussed the evidence brought on record by the parties nor kept in mind principle of probability while handing down the judgment. He further contended that the ownership of the appellants is an admitted fact and is also proved through evidence. The suit land was given to the respondent for cultivation, the fact is also substantiated through evidence, therefore, the appellants, herein, are entitled for the possession of the suit land as owners of the same. The learned Advocate finally submitted that while accepting the instant appeal, the impugned judgment of the High Court may be set-aside.

4. Contrarily, the learned Advocate representing the respondents, Raja Shujat Ali Khan, submitted that the arguments advanced on behalf of the learned counsel for the appellants are misconceived. He submitted the learned High Court after detailed deliberation of the record and facts of the case, has passed the impugned judgment which does not suffer from any legal infirmity. He submitted that the agreement to sell dated 09.10.1982, was executed by the predecessor of the appellants in favour of respondent No.1, pertaining to the suit land subject to the availability of the state subject, and according to the contents of the said agreement no specific date was fixed for executing the sale-deed, hence, the limitation starts from the date of refusal of vendor to execute the sale-deed. He added that in Azad Jammu and Kashmir, the limitation for filng the suit

regarding the specific performance in respect of agreement to sell, is fixed as six years, in this way, the respondent filed a suit forthwith within the limitation when the appellate refused to execute the sale-deed. He contended that even otherwise, the second suit was filed after permission of the District Judge during pendency of an appeal against the decree of the Sub-Judge issued in favour of the respondents, when the deed of agreement to sell was found. The suit was within limitation as such and no appeal was filed by the appellant against the permission to file the fresh suit. The learned Advocate argued that the appellants have miserably failed to prove the stance through evidence. The appellant while recording his statement before the trial Court also admitted that contents of agreement to sell, therefore, the learned High Court has not committed any illegality while handing down the impugned judgment. He further argued that the appellants have also failed to prove this fact that the suit land was given to respondent No.1 for cultivation, in this situation, the learned High Court was justified in allowing the appeal and setting-aside the judgment of the District Judge. He prayed that this appeal is also not maintainable which is liable to be dismissed.

5. We have heard the learned counsel for the parties and gone through the record of the case made available. It divulges from the record that the most stressed point involves in the case in hand is regarding the limitation. The learned counsel for the appellants stated that the previous suit filed by Khadim Hussain in the year 1983, was based on the same agreement-to-sell dated 09.10.1982, and according to Article 113 of the Limitation Act, 1908, the maximum limit for filing a suit for specific performance of contact is three years so the suit filed by the respondents, herein, is barred by limitation. For resolving this controversy, we had to probe the record in

detail. The learned trial Court also framed a specific issue No. 6 in this regard that: -

"تنقیح نمبر6: کیا دعویٰ خادم حسین بغرض دادرسی تعمیل مختص اندر معیاد ہے (بذمہ مدعی بالمقابل خادم حسین)"

6. The perusal of the record show that earlier, in the year 1983, respondent No.1, filed a suit for declaration-cum-adverse possession on the basis of the oral sale dated 01.08.1969, whereas, a cross suit was also filed by the predecessor of the appellants, herein, which were consolidated and ultimately decided in favour of respondent, however, during the pendency of appeal, he, with the permission of the Court, withdrew the suit to file a fresh one and he filed the fresh suit before the trial Court on the basis of the agreement to sell dated 09.10.1982. The learned trial Court, again, issued a decree in favour of respondent No. 11 and dismissed the other suit filed by the appellants for possession of the suit land. The learned first appellate Court on appeal reverse the findings of the learned trial Court and observed as under: -

"لہذا بوجوہات متذکرہ بالا یکجا فیصلہ و ڈگری زیر اپیل عدالت ماتحت ایڈیشنل سب جج مظفر آباد مصدرہ 31.05.1999 منسوخ کیا جا کر دعویٰ استقرار حق تعمیل معاہدہ مختص عنوانی خادم حسین بنام خواجہ علی محمد مسل نمبر 238/132 رجوعہ 04.11.1990 خارج کرتے ہوئے دعویٰ دخلیابی اراضی عنوانی خواجہ علی محمد بنام خادم حسین وغیرہ مسل نمبر 209/133 رجوعہ 03.07.1986 میں ڈگری دخلیابی اراضی متدعویہ مندرجہ خسرہ نمبر 21 تعدادی 15 کنال معہ مکان و شاملات و حصہ کا ہچرائی، راستہ، پانی، درختان ثمر دار و بے ثمر دار وغیرہ واقع موضع چکوٹھی تحصیل و ضلع ہٹیاں بالا بدیں طور صادر کی جاتی ہے کہ مدعا علیہم قبضہ اراضی متدعویہ حوالے مدعی علی محمد (وارثان موجودہ اپیلانٹس) کریں۔ نیز مدعا علیہم خادم حسین وغیرہ کو بذریعہ حکم امتناعی پابند کیا جاتا ہے کہ وہ تاوقتیکہ منتقلی قبضہ بدست اپیلانٹس (وارثان مدعی علی محمد) اراضی متدعویہ میں کسی بھی طور پر صورت موقع تبدیل کرنے، ترقی حیثیت کرنے سے باز و ممنوع رہیں۔ نیز اندراجات محکمہ مال نسبت اراضی متدعویہ جو اپیلانٹس (وارثان علی محمد) کے حقوق کے مغائر ہیں وہ کالعدم اور غیر موثر ہیں"

7. This judgment and decree of the first appellate Court was further assailed before the High Court. The High Court while declaring the suit for specific performance of the

contract dated 09.10.1982, filed by Khadim Hussain within limitation, set-aside the finding recorded by the first appellate Court and restored the judgment and decree of the trial Court. The learned High Court in the impugned judgment has mainly observed that the time period of 02/03/ months mentioned in the agreement to sell is relating to the payment of outstanding amount of Rs. 13000/- and not for limitation for filing the suit. The relevant portion of the impugned judgment is reproduced hereunder for better appreciation: -

> "10. The 1" Appellate Court is of the opinion that mentioning of 02/03 month time in agreement-to-sell relates to limitation for filing the suit on the basis of this agreementThis is not a true perception of the matter because mentioning of 02/03 months time relates to payment of outstanding amount of Rs. 13,000/-As regard, limitation for filing of suit, it has been agreed by Kh. Ali Mohammad, the executor that a sale-deed would be registered as soon as Khadim Hussain provides his State Subject Certificate and pays outstanding amount of Rs13,000/-There is no evidence on record that the executor demanded the outstanding amount of Rs13,000/- from Khadim Hussain or that Khadim Hussain provided his State Subject Certificate and demanded for execution of sale-deed. Article 113 of the Limitation Act deals with the situation which provides period of three years for specific performance of contract and it has been mentioned in column 03 of the relevant article that time from which period begins to run shall be the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused."

8. It may be observed here that Respondent No. 1 did not bring on record his earlier suit filed in 1983, as well as his application for withdrawal of his suit and permission to file a new suit. Furthermore, even the second suit, which is the subject of this appeal, fails to disclose that plaintiff-respondent No. 1 filed an earlier suit and withdrew it with permission to file the new suit. However, the defendant-

appellant, herein, has narrated the facts in his written statement about the earlier suit and the withdrawal of same by the plaintiff-respondent No.1. According to the record, respondent No. 1 in the earlier and subsequent suits, the consideration amount of the agreement to sell is the same, namely Rs. 36000/-, and the remaining amount to be paid is also the same, namely Rs. 13000/-. The first suit was filed in 1983 on the basis of an oral agreement to sell an adverse possession, while the second suit was filed in 1990 on the basis of an agreement to sell deed executed in 1982.

9. From the perusal of record it reveals that the consideration and outstanding amounts in the previous and subsequent suits are the same, namely Rs. 36000/- and Rs. 13000/-. This fact alone is sufficient to draw the conclusion against respondent No. 1, that the same transaction dated 09-10-1982 was the actual cause of action in the earlier suit, but due to the unavailability of the deed of agreement to sell, he concealed the same from the Court and concocted the plea of oral agreement-to-sell and adverse possession in his first suit to succeed in Court. If there had been any transaction other than the agreement to sell dated 09.101982, the consideration amount must have been less or different from the amount specified in the said agreement-to-sell deed. Furthermore, even if it is assumed that an oral agreement to sell existed previously, reference to that agreement must have been made in the deed of agreement-to-sell made in 1982.

10. Another aspect of the case is that respondent No.1 was the acceptor/second party to the oral and written agreement-to-sell. Had the agreement-to-sell been made with any of his predecessors-in-interest, he would have had the argument to the effect that he had no knowledge of the agreement-to-sell made in 1969 or 1982. When he himself was the acceptor/second party to the written agreement-to-sell, then there is it obvious truth that he was very well aware

of its existence. If he wanted to have succeeded his suit for specific performance of agreement-to-sell, then it was his first suit, wherein he should have based his claim on basis of agreement-to-sell made in 1982. However, he chose to fiction the pleas of oral agreement-to-sell and adverse possession, possibly due to the non-availability of the deed of agreement-to-sell or for reasons best known to him.

11. The above findings have strengthened our opinion in resolving the issue of limitation against respondent No.1. Because he was a party to the written agreement-to-sell, the limitation period began against him when he filed his first suit in 1983, because he and defendant, predecessor-in-interest, were both aware of the written agreement-to-sell, but the Court was not. It is a settled principle of law that in a suit for specific performance of an agreement-to-sell, the question of whether the suit was instituted after the period of limitation under Art.113, Limitation Act, 1908, if a date is fixed for performance of an act in the agreement, the period of limitation begins from the said date; if no such date is fixed, the period of limitation begins from the date of refusal. Respondent No.1 alleges in his second suit in paragraph No. 2 of the plaint that the defendants have refused to execute a contract of sale based on an agreement-to-sell since a week or ten days. For appreciation the same is reproduced herein, which is as under: -

"یہ کہ ہر چند مدعاعلیہ کو کہا گیا کہ وہ حقوق مدعی کو درست تسلیم کرتے ہوئے اراضی متدعویہ کا بیعنامہ بحق مدعی کرادیوے لیکن وہ بعد دارومدار ہفتہ عشرہ سے صاف انکار ہو چکا ہے"

However, the fact that respondent No.1 filed the previous suit in 1983 was proof that the defendant, the appellants' predecessor-in-interest, had refused to execute the sale deed, prompting respondent No.1 to approach the Court for specific performance of the agreement-to-sell, albeit

on the basis of a fabricated plea. The counsel for the respondent has taken stance that as the second suit was filed after permission of the District Court to withdraw the earlier suit and file the second suit for specific performance of agreement-to-sell and appellants did not challenge the said order of the District Court, which has finality, therefore, the limitation shall stand counted from the filing of the second suit. The order of the District Court for permission of withdrawal of the suit and filing of fresh suit is not part of record of the instant case. In absence of the said order of the District Court, we are unable to make us convinced that permission to file the fresh suit ipso facto absolved the legal liabilities of the plaintiff-respondent No.1, herein, in fresh suit and limitation is condoned. We may also put in this regard and cannot subscribe to the proposition that the Court, which grants permission to withdraw the earlier suit and grants permission to file new suit legally stands in position to preempt and settle the legal issues going to be arisen in the second suit, which is yet to be filed, as was in the instant case.

12. As a result, we are unanimous in our contention that the filing of the earlier suit was by fiction of law, and that the date of refusal of the agreement-to-sell by the defendant, the appellants' predecessor-in-interest, marked the start of the limitation period. The limitation had started running from the date of refusal to execute contract of sale by the defendant, when respondent No.1 filed the first suit in 1983, against the defendant. As a result, the limitation of three years under article 113 of the Limitation Act, 1908, had come to end in 1986.

13. In conclusion, respondent No.1’s second suit for specific performance of the agreement-to-sell is barred by limitation, and the appeal by the appellant is allowed.

JUDGE **JUDGE**

Rawalakot,
15.05.2023
Approved for reporting.