

Date of hearing: 30.9.2015.

### Order

The above titled 2nd appeal has been filed against the judgment and decree passed by the learned District Judge Bhimber on 09.05.2009, whereby the judgment and decree passed by the learned Civil Judge Samahni on 15.12.2006 was maintained.

2. Facts forming background of the captioned appeal are that the plaintiffs/appellants, herein filed a suit for declaration and perpetual injunction in respect of land, comprising Khewat No. 197/192 Khata No. 1257/1162 Khasra No. 2100, 1031 measuring 7 *kanal* and Khewat No. 197 Min Khata 1259/1163 Khasra Nos. 1027, 2098, 2099 measuring 6 *kanal* 8 *marlas* total measuring 13 *kanal* 8 *marlas* situated in village Chowki, Tehsil Smahni District Bhimber, against Muhammad Kareem and others, defendants /respondents, in the Court of Civil Judge Samahni on 12.01.2004. It was averred that the plaintiff and pro-forma defendant are co-sharers in the disputed land and Defendants No. 1 to 10 illegally and without partition, want to snatch the possession of the suit land. It was averred that Defendants No. 01 to 10 are going to change the nature of the land and intend to transfer the same. It is further averred that if the defendants succeed to dispossess or deprive them, the plaintiffs will suffer an irreparable loss and prayed for decree of the suit land.

3. On filing of the suit the defendants were summoned. They appeared before the Court and filed separate written statements. In the written statement filed on behalf of Defendants No. 1 to 10 and 11 to 15, it is stated that plaintiffs have no cause of action. It was further averred that they are co-sharers in the suit land through family partition of Khasra Nos. 2100, 1031 land measuring 7 *kanal* situated in village Chowki and the same is in their sole ownership, whereas, Defendants No. 1 to 7 are co-sharers since 1960-65. The defendants prayed for dismissal of the suit.

4. The learned trial Court, in light of the pleadings of the parties, framed issues and the parties were directed to produce evidence. After completion of trial the learned trial Court dismissed the suit *vide* judgment and decree dated 15.12.2006. Feeling dissatisfied from the said judgment and decree, the plaintiff filed an appeal before the District Judge, Bhimber on 09.01.2007. The learned District Judge, Bhimber after hearing the parties dismissed the appeal and maintained judgment and decree passed by the learned Civil Judge Samahni. Feeling aggrieved from the said judgment and decree, the appellants have filed the instant second appeal before this Court.

5. Raja Khalid Mehmood Khan, Advocate the learned counsel for the appellant argued at length and contended that both the learned Courts below fell in error while interpreting the law pertaining to controversy and appreciating the evidence of the appellants. The learned counsel maintained that the judgments and decrees passed by the Courts below are result of misreading and non-reading of evidence. The learned counsel craved that both the Courts below have wrongly dismissed the suit. The learned counsel vehemently contended that the suit land is yet to be partitioned which is joint property of the parties. It was further submitted that after the institution of the suit and issuance of temporary injunction on 12.01.2004 a sale deed of 9 *marlas* has been executed by Defendant No. 1 in favour of Defendant No. 11 on 17.01.2004, which is of no legal effect being executed during pendency of the suit. The learned counsel referred the statement of witness of plaintiff named Pervaiz Ishfaq Patwari and defendant witness Patwari Ahmed Din and contended that note on the copy of Jamabandi is not exhibited and contended that the defendant/vendor has alienated 9 *marlas* land in excess of his share and termed the sale deed as illegal ab-initio and contended that the Court below have failed to appreciate the evidence of the parties and strongly criticized, that the learned District Judge has passed the impugned judgment in derogation of order 20 Rule 5 of CPC without resolving each issue separately. Lastly the learned counsel prayed for setting aside the judgments and decrees passed by the Courts below while accepting, the appeal. The learned counsel referred an un-reported case titled "*Sadiq Hussain Shah vs. Syeda Gudo Fatima Kazmi and other*" passed by the apex Court on 23.04.2015.

6. On the other hand, Mr. Babar Ali Khan, Advocate, appearing on behalf of respondents repudiated the stance of the learned counsel for the appellants and stated that both the Courts below have rightly passed the resolution. He further submitted that there are concurrent findings recorded by the Courts below, which cannot be disturbed as there is no misreading and non-reading of evidence. He added that appellants badly failed to prove that they are in possession of disputed land or the property is un-divided. The learned counsel argued that the sale deed was executed on 17.12.2004 whereas the notice/status quo was served upon the defendant on 06.02.2004 hence the impugned instrument of sale is legal one and is also within the share of the vendor out of khewat. The learned counsel further supported the impugned judgments and decrees on all four corners and stated that the possession of the respondents over the land in dispute is admitted and the appellants failed to prove their claim through cogent evidence. The learned counsel prayed for dismissal of the appeal and referred the following case law:--

1. PLD 1978 S.C. (AJ&K) 75,
2. 2007 SCR 363.
7. I have heard the learned counsel for the appellant and gone through the record carefully and minutely.

8. Before commenting upon the merits of the case, it will be appropriate to discuss the case law referred to and relied upon by the parties. The learned counsel for the appellant referred an unreported judgment of the apex Court passed in *Sadiq Hussain Shahs case*, wherein the Supreme Court of Azad Jammu & Kashmir has laid down the following principle on the proposition of concurrent findings.

10. The arguments of the learned counsel for the respondents that there are concurrent findings recorded by all the Courts below which cannot be disturbed, has also no substance. It is now settled that the superior Courts always reluctant to interfere with the concurrent findings recorded by the Courts below, however, in case of any misreading or non-reading of evidence of the Courts below the superior Courts have intervened. Reliance can be placed on a case reported as *Muhammad Riaz vs. Muhammad Riyasat & 8 others* (2008 SCR 308) wherein it has been observed that:-

"5....I, do not entertain any second view on the point that the concurrent findings of facts are open to attack and can be recalled by this Court if the same are not supported by any evidence or otherwise are unreasonable or perverse."

As we have observed in the preceding paragraphs, that all the Courts below failed to appreciate the record in its true perspective and also misread the evidence brought on record, therefore, in such state of affairs the concurrent findings recorded by the Courts below are not maintainable."

9. The case law referred by the learned counsel for the respondents are on the point of concurrent findings as well as on the transfer of property by a co-sharer in possession of a specific field number in excess of his share etc. The relevant excerpts are reproduced here under:-

a. 2007 SCR 363:

In this case the apex Court has observed in Para No. 8, which reads as under:-

"There are concurrent findings on the question of fact that the plaintiff has failed to prove the execution of agreement-to-sell. No misreading or non-reading of evidence was found to have been committed by the lower Courts. The learned counsel for the appellant wants fresh appreciation of evidence. It is well established principle of law that where there are concurrent findings on the question of fact, then this Court shall not embark upon the fresh appreciation of evidence while considering second appeal even if erroneous view has been drawn by both the lower Courts".

(b) PLD 1978 SC AJ&K75, the case titled *Mustafa Khan and others vs Muhammad Khan & another*; the august Court observed in Para 8 at page 77 which reads as under:-

"8. After careful examination of the law on the point and the facts of this case, we are of the view that a co-sharer in possession of specific field numbers can validly transfer such land, even if his share in such specific field numbers exceeds share, provided it does not exceeds over all entitlement of the share in the whole land. Of course, the vendee's rights will be subject to adjustment on partition. But such a sale cannot be legally challenged on the mere ground that the land sold exceeds the share of the vendor in the specific numbers.

ii. The apex Court at page 79 of above case, also observed in the following words.

"Looked from another angle we came to the same conclusion. It is conclusively established that the possession of the vendor in a specific field number was due to family arrangement. It is true that such an arrangement does not extinguish the title of other co-sharers, but so far as the factum of such a possession and sale of the specific field numbers is concerned, it certainly debars other co-sharers to get back such possession or challenge the sale. This is, of course, subject to adjustment at the time of partition as would have been the case of the vendor had not sold the land. Section 115 of the Evidence Act comes to the aid of vendee in such a case. Mr. justice Muneer Ahmed, former Chief Justice, Supreme Court of Pakistan in his Principles and Digest of the Law of Evidence Vol. II, Pakistan Edition, page 1296 says ;

"Family arrangements are arrangements between the members of a family for the preservation of its peace or property. The principles upon which such arrangements are enforced in England are settled in the case of *Williams v. Williams*. Such arrangements are constantly entered into in this country, and, where they have been acted upon and acquiesced in, the Court will not look so much to the adequacy of the consideration as the motive and conduct of the parties. In a settlement of a doubtful right truth may be on either side, but the essential effect of the settlement is that further trouble or investigation is put an end to and a settlement is concluded to restore harmony. The consideration for such a settlement is the mutual promise made, or forbearance shown, by one party to the other. In the absence of fraud or undue influence, it is not, therefore, open to either party to resile from it afterwards, and the settlement is binding not only on the parties but on their sons and descendants. A family settlement is binding, even though a limited owner is a party to it. Where parties settle a family dispute amicably, take a share of the property, enter into possession and subsequent sell or mortgage the items allotted to them, they are stopped from questioning the settlement."

iii. In paras 10 and 11 of the above judgment, the Honble Supreme Court of AJ&K concluded that:-

"10. In view of this we hold that the appellants suit is otherwise too hit by the doctrine of estoppels as because of the family arrangement they are precluded from claiming their shares in the specific field numbers in possession of the vendor.

The net result of the above discussion is that on the basis of the legal position above, we find no flaw in a sale by a co-sharer in exclusive possession of specific field numbers provided such a sale does not exceed vendors share in the overall land."

12. The crux of the arguments of the learned counsel for the appellant are that the respondent alienated the land out of specific Survey No. 1031 which is a commercial property. In light of above dictum of the apex Court of Azad Jammu & Kashmir it is evident that the total land alienated by the vendor pertains to Survey No. 1031 which was according to record in exclusive possession of the vendor/Respondent No. 1, who alienated the land through sale deed on 03.12.1995 in favour of Khursheed Ahmed and Muhammad Ramzan measuring 2 marlas. Through another sale deed dated 09.06.1999 Muhammad Kareem alienated the land in favour of his sons Respondents No. 2 to 7 measuring 5 kanals 5 marlas. The Respondent No. 1 also executed the impugned sale deed in favour of Respondent No. 11 on 17.01.2004 measuring 9 marlas. It is worth mentioned that the sale deed of the property measuring 5 marlas registered dated 16.08.2003 has been executed by Respondent No. 2 (Muhammad Khalil) out of property alienated in his favour by his father, Respondent No. 1 through sale deed dated 09.06.1999. It is obvious that Muhammad Karim executed only three sale deeds dated 03.12.1995 of the property measuring 2 marlas and vide sale deed dated 09.06.1999 measuring 5 Kanals 5 marlas and sale deed dated 17.01.2004 (impugned sale deed) of the property measuring 9 marlas, total alienated land in 5 kanals 16 marlas, the total land of survey number 1030 and 1031 min.

13. It is also evident from the evidence referred by the learned counsel for the appellant that the total land of Field No. 1031 was 5 kanals 16

18. The gist of above discussion is that the above titled appeal is hereby dismissed with no order as to the costs.

Order announced. The file shall be consigned to record after due completion and sending back record of the Courts below.

(R.A.) Appeal dismissed