

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE MAQBOOL BAQAR

MR. JUSTICE JAMAL KHAN MANDOKHAIL

AFR

Civil Appeal No. 42-P of 2016

(On appeal from the judgment of the Peshawar High Court Mingora Bench Dar ul Qaza Swat dated 30.03.2016 passed in C.R. No. 163-M of 2014)

Mushtaq ul Aarifin & others

Appellant(s)

Versus

Mumtaz Muhammad & others

.....Respondent(s)

For the Appellant(s):

Mr. Abdul Sattar Khan, ASC

For the Respondent(s)

Mr. Altaf Ahmed, ASC

Mr. Pervez Rauf, ASC

Ch. Akhtar Ali, AOR

Date of hearing:

20.10.2021

JUDGMENT

Jamal Khan Mandokhail, J.- The appellants have impugned the judgment dated 30.03.2016 passed by learned Peshawar High Court, Mingora Bench Dar ul Qaza, Swat, whereby the civil revision filed by the respondents was accepted, resultantly, the judgment and decree passed by learned Appellate Court dated 20.03.2014 were set aside and that of the learned Civil Judge, Buner dated 21.02.2013 restored.

2. Facts in brief are that the respondents-plaintiffs filed a suit for declaration, permanent injunction and possession against the appellants-defendants in the Court of learned Civil Judge Totalai Buner, claiming therein that they were the legal heirs of late Ali Ahmed, who was owner of the property in dispute (described in the plaint). It was contended that the property had fraudulently been mutated by the appellants-defendants, as such prayed the Court for correction of the entries. The suit was contested by the appellants. The trial Court decreed the suit. The

Appellate Court accepted the appeal filed by appellants-defendants and dismissed the suit. The learned High Court accepted the revision petition filed by the respondents-plaintiffs, set aside the judgment of learned Appellate Court and restored the judgment and decree of the trial Court, hence this civil appeal.

3. Heard the learned counsel for the parties and have gone through the record. The claim of the respondents-plaintiffs is that late Ali Ahmed was the owner of the land in dispute and they being legal heirs are entitled for his left over properties. The respondents-plaintiffs in order to prove their case, produced Mumtaz Muhammad (PW2) as their attorney, who in his cross examination replied to a question that he did not see any document proving the ownership of late Ali Ahmed in respect of property in question. He admitted the fact that before and after the settlement proceedings carried out in the year 1978, none including the respondents-plaintiffs challenged the revenue entries. He also admitted the fact that some buildings are in existence over the land in question for the last 14/15 years. Similarly, Raza Muhammad (PW3), aged about 54 years, while appearing on behalf of the respondents-plaintiffs, stated that from his memory, he saw the land in dispute in possession of the appellants-defendants as owners. He also confirmed the statement of PW2 to the effect that before and after the settlement proceedings in the area, none claimed the suit property. Syed Bacha (PW4) has also narrated the same facts that the appellants-defendants are occupying the property as owners since long and have constructed houses etc thereon. He showed his ignorance with regard to the ownership of late Ali Ahmed and stated that he did not see any document in this behalf. It is always the prime responsibility of the plaintiff to discharge initial burden of proof with regard to his/her claim as per the plaint. Perusal of the record would reveal that the statement of the attorney for the respondents-plaintiffs and their witnesses do not confirm the contents of the plaint. Besides, the respondents-plaintiffs are claiming to be the grandchildren of late Ali Ahmed but undisputedly, the immediate legal heirs of late Ali Ahmed did not claim their right of inheritance in respect of property in question in their life time. No documentary or oral evidence has been produced

to prove the ownership of late Ali Ahmed with regard to the property in question. The alleged pedigree table produced and relied upon by the respondents, is not an evidence to establish right of ownership.

4. As far as the contention of learned counsel for the respondents-plaintiffs that the appellants-defendants have not succeeded in proving their claim is concerned, it is a well settled principle of law that the plaintiffs cannot get benefit from the weaknesses of the defendants alone, rather they have to prove their case on their own strength. The initial burden of proof was upon the respondents-plaintiffs which they did not discharge, but the learned High Court has burdened the appellants-defendants for proving their stance which is not a correct approach.

5. To the contrary, the appellants-defendants claimed that the property in question has been gifted to them by the inhabitants of Musa Khel Tribe in lieu of religious services rendered by them. This fact has been admitted by the witnesses of the respondents-plaintiffs and such contention is further supported from the statements of witnesses produced by the appellants-defendants. By comparing the statements of witnesses produced by the parties, the quality of the evidence produced by the defendants is much higher than the evidence of the respondents-plaintiffs. Under such circumstances, the appellants-defendants have been able to substantiate their stance which they have taken in their written statement.

6. With regard to the contention of learned counsel for the respondents-plaintiffs that the issue of limitation was decided against the appellants-defendants, but such portion of the decision was not assailed either through appeal or cross objection, suffice it to observe here that section 96 of the CPC assign power to the superior court for judging soundness of the decision of the court subordinate to it. While exercising such power, the Appellate Court ought to call for the original record of the trial Court for reconsideration. After entertaining the appeal, the Appellate Court is required to frame points for determination on the basis of the record of the trial Court to consider and rehear the controversy afresh, both as regards to facts and law, as provided by Rule 31 Order XLI of the CPC. Besides, the issue of law is a substantial

issue which is required to be considered by the trial Court as well as the Appellate Court. Failing to challenge the decision of trial Court upon issue of law before the Appellate Forum through cross objection does not preclude a party to argue the matter to such extent before the Appellate Court nor the Appellate Court loses its jurisdiction to decide the question of law accordingly. Thus, in the sense, an appeal is a continuation of the original proceedings, that is why, the Appellate Court may uphold, modify or substitute its own judgment for that of the subordinate court. It may also pass an order in favour of a party, not appealing or failing to file cross objections, to secure the ends of justice.

7. In the case in hand, Issue No.2 was framed by the trial Court with regard to limitation for filing of the suit for declaration and possession. The trial Court has held that the suit is within time, despite the fact that it was filed by the respondents-plaintiffs in the year 2012 to challenge the revenue record prepared in the year 1977-78, during the settlement proceedings, whereas, they and their predecessors were out of possession of the property in question for decades. Though, no cross objections were filed by the appellants-defendants before the Appellate Court to challenge the findings of the trial Court to the extent of a portion of the judgment i.e. Issue No.2, but the Appellate Court has made its decision upon the said issue as well by exercising its power conferred upon it by Order 41 Rule 33 of the CPC, however, its findings on the issue of limitation were against the appellants. Undoubtedly, the period for filing of a declaratory suit, as provided by law of limitation is six years to be counted from the date of a cause of action. Since the cause of action, for the first time, accrued to the respondents-plaintiffs with effect from the time of completion of the revenue record as a result of the settlement proceedings of the year 1977-78, therefore, the present suit filed after such a long period of time, without any explanation, was barred by time, but the *fora* below (trial Court and the Appellate Courts) have come to a wrong conclusion in deciding the issue of limitation.

8. It is important to mention here that it is a right of every individual under Article 4 of the Constitution of the Islamic Republic of Pakistan to be dealt with in accordance with law. It is for this reason, the High Court has been bestowed with

supervisory jurisdiction of superintendence and control over the subordinate courts to such High Court to ensure dispensation of justice. Thus, whenever the High Court considers that the court(s) subordinate to it has/have exercised a jurisdiction not vested in it by law, or have failed to exercise a jurisdiction so vested, or exercised jurisdiction illegally or with material irregularity, it can take cognizance in exercise of its revisional jurisdiction to rectify the illegalities or/and irregularities in the judgments and orders of the subordinate courts, to secure the ends of justice. The learned High Court in the case in hand though has exercised its supervisory jurisdiction by entertaining the revision petition against the judgments and decrees of the Courts subordinate to it, but it did not consider the facts and circumstances of the case in its true perspective, hence, it too, instead of rectifying the illegalities and irregularities committed by the trial Court and the Appellate Court, discussed herein above, came to a wrong conclusion. Under such circumstances, the judgments and decrees of the trial Court and the learned High Court as a whole, while that of the Appellate Court to the extent of finding on the issue of limitation, are not sustainable.

9. For the foregoing, this civil appeal is allowed. The judgments and decrees of trial Court and the learned High Court are set aside and that of the learned Appellate Court dated 02.03.2014 with above modification are hereby restored.

Judge

Judge

B-IV
Islamabad,
20.10.2021
K.Anees/-

APPROVED FOR REPORTING