

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE SARDAR TARIQ MASOOD

MR. JUSTICE AMIN-UD-DIN KHAN

MR. JUSTICE JAMAL KHAN MANDOKHAIL

(AFR)

Civil Appeal No.1421 of 2015

(On appeal from the judgment dated 06.05.2015 passed by the Peshawar High Court, D.I.Khan Bench in C.R.No.334-D of 2012.)

PirFazal Rabbani & others

...Appellants

Versus

Ghulam Akbar & others

...Respondents

For theAppellants:

Syed Mastan Ali Zaidi,ASC.
Mr. Mehmood Ahmed Sheikh, AOR.

For the Respondents:

Syed Abid Hussain Shah, ASC.

Date of Hearing:

30.11.2021

ORDER

AMIN-UD-DIN KHAN, J.Appellants filed a petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 for grant of leave against the judgment and decree dated 6.5.2015 passed by the learned Peshawar High Court, D.I.Khan Bench whereby Civil Revision No. 334-D of 2012 filed by the appellants was dismissed.

2. This Court on 16.12.2015 granted leave to appeal, therefore, the petition was converted into the instant appeal. Leave granting order is reproduced:

“Contentds, *inter alia*, that where according to the entries made in the record of rights the petitioners are recorded as owners and the respondents as

tenants on payment of half share of produce, mere entry of mutation which was subsequently cancelled cannot confer any right on the respondent; that the High Court was required to reappraise the entire evidence when the Court of first instance and that of appeal are at variance with each other in view of the dicta rendered in the case of **Madan Gopal and 4 others v. MaranBepari and 3 others**(PLD 1969 SC 617),**Alloo v. Sher Khan and others**(PLD 1985 SC 382),**Abbas Ali Shah and 5 others v. Ghulam Ali and another**(2004 SCMR 1342),**Abdul Aziz v. Khuda Dad Khan**(2004 SCMR 1046),**Karim Bakhsh through LRs and others v. Jindwadda Shah and others**(2005 SCMR 1518),**Muhammad Din and others v. Mst. Naimat Bibi and others**(2006 SCMR 586),**Muhammad Hassan v. Khawaja Khalil-ur-Rehman**(2007 SCMR 576)and**Q.B.E. Insurance (International) Ltd v. Jaffar Flour and Oil Mills Ltd**(2008 SCMR 1037)and that where the impugned judgment does not evince any such exercise, it cannot be maintained.

2. Points raised need consideration. We, therefore, grant leave to appeal in this petition.

C.M.A.No.6680/2015

3. Notice for a short date.”

3. We have heard the learned counsel for the parties. There are concurrent findings of facts recorded by the two courts below. Initially the suit of the plaintiffs-respondents for declaration and in the alternative for specific performance was dismissed but the findings were reversed by the learned first appellate court and suit was decreed and the said decree was upheld by the learned High Court. The cause of action for filing the suit is that mutation No. 65 Exh.PW-2/1 for sale of the suit land in favour of Ghulam Sarwar, predecessor of respondents, by FazalSubhani, predecessor of the appellants, was entered on 3.6.1969 and subsequently as per endorsement in the said mutation, the mutation was cancelled on the basis that the event of transaction of sale has been cancelled. Plaintiffs-respondents produced 08 witnesses including

plaintiff. The original plaintiff appeared as PW-5 and produced the documentary evidence to prove the transaction of sale and entrance of mutation by *Patwari* as well as subsequent proceedings conducted by the revenue officials whereby it is endorsed that "*bund sawal*" in accordance with the procedure for 6th June 1969 has been issued in the name of the seller. There is an endorsement that on the request of Haq Dad, Member Union Council, the "*bund sawal*" was ordered to be issued by the Naib Tehsildar. HaqDad appeared as PW-4 and stated his version, which confirms the endorsement and proceedings of the said mutation. The case of the appellants was that Ghulam Sarwar was their tenant upon the suit land and he has wrongly claimed the sale in his favour and entrance of mutation No. 65. When confronted with the learned counsel that in Exh.PW-1/1 copy of Register HaqdaranZameen for the year 1967-1968 Ghulam Sarwar is not recorded as tenant or in possession over the suit land. In one khasra number, FazalSubhani the owner himself is recorded in possession whereas upon all the other khasra numbers other persons are recorded as cultivators (tenants) and in Column No. 12 which is "*KhanaKaifiyat*" it contains the endorsement that mutation No. 65 was entered on 3.6.1969 whereas it was cancelled on 29.12.1971, learned counsel is unable to rebut these facts. Register HaqdaranZameen produced for the year 1983-1984 contains the entry of ownership of FazalSubhani whereas Ghulam Sarwar has been mentioned in possession as cultivator as "*GhairDakheelKaar*". If the case of the appellants is admitted that Ghulam Sarwar predecessor of respondents¹ was cultivator as tenant at the time of alleged entrance of mutation that fact is not

confirmed by the documentary evidence, whereas after the entrance of mutation the entry of possession of the predecessor of plaintiffs-respondents at least confirms that they were put to possession though it is mentioned as "*GhairDakheelKaar*", that is why the revenue officials do not mention the entry of possession on the basis of any agreement because for mentioning of that entry under any agreement they are required to attest a mutation first of that event that may be the transfer of possession under any agreement, thereafter, they can endorse the entry of possession on the basis of any mutation or agreement. It is normal practice that revenue officials take the easy way, normally mention the entry as tenant instead of attesting the mutation for any other event and mentioning that endorsement in the column of possession. Further the endorsement of cancellation of mutation on the ground that the sale transaction has been cancelled between the parties now at least confirms that there was a sale transaction and transaction money was paid and mutation was entered and proceedings were carried on, on this mutation. When confronted with the learned counsel that whether the appellants have challenged these entries before any forum, the answer is in the negative. In these circumstances, by producing the voluminous oral as well as documentary evidence plaintiffs-respondents have proved the entrance of mutation and proceedings conducted by the revenue officials thereupon and subsequent cancellation when came in the knowledge of the plaintiffs-respondents they resorted to the remedy before the civil court through filing a suit which is subject matter of this appeal. In the suit though a declaration and in the alternative specific performance was prayed, in the circumstances

of the case, when the transaction of sale consideration was proved to be paid to the owner, the possession was delivered, the only action remains with the revenue officials to attest a mutation, if parties have completed their part of contract. In the peculiar circumstances of this case, the suit for declaration was competent and rightly decreed by the learned first appellate court and upheld by the learned revisional court. Even otherwise, at the most the form for specific performance was required which prayer is also available in the suit filed by the plaintiffs-respondents. In this view of the matter, we cannot disagree with the findings of the two fora below. This appeal being devoid of any force stands dismissed.

Islamabad, the
30.11.2021
(MazharJaved Bhatti)

“APPROVED FOR REPORTING”