

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

C.R No.309-M/2020 with C.M No.481-M/2023

Khadim Ahmad Vs. Muhammad Zahir Shah

Present: *Mr. Abdul Nasir, Advocate for petitioner.*

Muhammad Nabi and Mr. Akbar Khan Kohistani,
Advocates for Respondent.

Najib ur Rahman, son of the applicant in C.M No.481-
M/2023.

Date of hearing: **12.02.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- The instant petition filed u/s 115 of the Code of Civil Procedure, 1908 (C.P.C) has been directed against the judgment and decree of the learned Additional District Judge-III, Upper Dir dated 30.09.2020, whereby his appeal against the judgment and decree of the learned Civil Judge, Dir Upper at *Sheringal* dated 06.02.2020 decreeing the suit of the respondent/ plaintiff, was dismissed.

2. Precise facts, as per contents of the plaint, are that Muhammad Zahir Shah, the respondent No.1, has filed a suit for declaration against the present petitioner Khadim Ahmad to the effect that the property as described in the headnote *alif* of the plaint situated at *Serai patrak* is his ownership in possession on the strength of sale deed dated 23.06.2008 and the petitioner /defendant could not deny his right of ownership, as such, his act of denial pertaining to the ownership of the respondent/ plaintiff is ineffective upon his rights. Prayers for recovery of possession and perpetual injunction

were also sought. It was averred in the plaint that the respondent/ plaintiff is the resident of *Patrak* and as such owner of constructed and agricultural property; that he has entered into an agreement of sale on 23.06.2008 with Sahibzada Khurshid Islam, Sahibzada Tahir Islam, Sahibzada Irshad Ullah sons of Sahibzada Syed Ahmad Jan residents of *Patrak*, by which, he has purchased the disputed property in lieu of sale consideration of Rs.20,00,000/- and since then he is owner in possession of it; that the respondent/ defendant is interfering in his possession and when he was asked by the respondent/ plaintiff to abstain, he refused. Suit was resisted by the petitioner/ defendant through his written statement on different legal and factual objections with a plea that he is owner in possession of the disputed property on the strength of sale deed dated 02.01.1992 to the extent of 128 X 128 feet in lieu of sale consideration of Rs.3,31,000/- from Sahibzada Syed Ahmad Jan (predecessor in interest of the vendors of the respondent/plaintiff); that he alongwith his brothers have constructed houses and the alleged sale agreement, through which, the plaintiff claims himself to be the owner of the property is against the facts, forged and concocted because the predecessor in interest of the vendors of the plaintiff had already transferred the property in his favour. Parties were allowed to adduce their evidence. The plaintiff himself entered into the witness box as PW-1 and produced Sher Muhammad as PW-2 and Amir ur Rahman as PW-5, the marginal witnesses of the deed dated 23.06.2008. The petitioner/ defendant produced five witnesses including himself and marginal witnesses Habib Sarwar and Umara Khan as DW-4 & DW-

5, respectively. After completion of evidence, the suit was decreed by the learned trial Court through its judgment and decree dated 06.02.2020, where-against appeal of the petitioner/ defendant was dismissed by the learned Appellate Court through its judgment and decree dated 30.09.2020, hence, this petition.

3. C.M No.481-M of 2023: This application has been filed by Habib Ahmad s/o Hazrat Muhammad for his impleadment by asserting himself to be owner of the property and after getting the knowledge approached to the learned trial Court for setting aside of the judgment and decree through an application u/s 12 (2) C.P.C, which is still pending adjudication. He alleged himself to be the owner in possession of the property and as such is a necessary party to the suit. This application was resisted by the respondent/ plaintiff and arguments of Mr. Muqadar Khan, Advocate representing the applicant were heard on 08.12.2023, however, during the course of arguments, learned counsel was questioned about the document of title pertaining to the suit property, which the applicant has not annexed with the application and he requested for time to place on file those documents but today neither the applicant nor his learned counsel is in attendance, however, Najib ur Rahman, his son, who also remained as his attorney in the application u/s 12 (2) C.P.C is in attendance. During the course of arguments, learned counsel for the respondent/ plaintiff produced attested copy of the application submitted before the learned trial Court during pending adjudication of the suit by Habib Ahmad, Sher Ahmad, Ghulam Ahmad and Siraj Ahmad sons of Hazrat Muhamad who were seeking their

impleadment in the suit on the ground that they are owners in possession of the property, wherein they have constructed their houses and are residing therein since its purchase, as such, their valuable rights are attached with subject matter and hence they may be impleaded as a party. This application was moved on 06.03.2018 and was dismissed by the learned trial Court on 11.04.2018, against which, they filed a revision petition but the present applicant was not the party in the said revision petition. The revision petition was dismissed by the learned Additional District Judge-I, Dir Upper on 11.09.2018. It is pertinent to mention here that on previous date, learned counsel for the applicant submitted at the bar that the application u/s 12 (2) C.P.C was filed before the learned trial Court but after submission of the instant application on getting knowledge about the pendency of the instant petition, proceedings in said applications were adjourned *sine die*. Without going into the merits of the application, which is still pending adjudication and was adjourned *sine die* on the request of the applicant, for its competency before the learned trial Court on the basis of the principle of merger, neither any document pertaining to the title of the property or its purchase has been annexed with the instant application and despite directions, the applicant and his learned counsel could not document the application properly qua the application of the applicant was dismissed by the learned trial Court during pendency of the suit, against which, the revision of the brothers of the applicant was also been dismissed by the learned revisional Court and in addition to the above, the applicant has already approached to the learned trial Court

on the ground that the decree is the result of fraud and misrepresentation of facts, the instant application, has got no merits and without any substance, is hereby dismissed.

4. Learned counsel for the petitioner submitted at the bar that the suit of the respondent/ plaintiff was barred by time as deed, on which, the respondent/ plaintiff based his claim was allegedly scribed on 23.06.2008 while suit for declaration was filed on 11.08.2014 and that too without impleading the vendors, from whom, the respondent/ plaintiff alleged himself to be the owner of the property, thus, his suit was incompetent rather not maintainable because on the strength of sale agreement declaration could not be sought. He added that the petitioner Khadim Ahmad was the vendee from the predecessor in interest of the vendors of the respondent/ plaintiff, as such, the suit for declaration was incompetent against him. He further added that on the strength of deed dated 02.01.1992, he is owner in possession and has constructed houses in the property. He also added that Khadim Ahmad had purchased a piece of land measuring 128 X 128 square feet whereas rest of the portion of the disputed property has been purchased by Habib Ahmad, who through his application, was seeking impleadment in the suit. He maintained that the petitioner has produced marginal witnesses of the deed dated 02.01.1992 and has proved his stance, thus, on 23.06.2008 the vendors of the respondents/ plaintiffs were not the owners of the property and through alleged deed in favour of the respondent/ plaintiff, no proprietorship could be transferred but the learned Courts below have misread the evidence and record as well,

therefore, the impugned judgments and decrees are not sustainable in the eye of law. In support of his contentions, he placed reliance on the cases of "Muhammad Ijaz Ahmad Chaudhry Vs. Mumtaz Ahmad Tarar and others" (2016 SCMR 1), "Rao Abdul Rehman (deceased) through legal heirs Vs. Muhammad Afzal (deceased) through legal heirs and others" (2023 SCMR 815), "Ainuddin Vs. Abdullah and another" (2019 SCMR 880), "Haji Muhammad Nawaz and others Vs. Aminullah (deceased) through L.Rs and others" (2019 SCMR 974), "Muhammad Shoaib Vs. Muhammad Ayub and 09 others" (2019 MLD 195) and "Gohar Rehman Vs. Riaz Muhammad" (2011 YLR 888, Peshawar).

5. Conversely, learned counsel for the respondent/ plaintiff submitted at the bar that though the vendors have not been impleaded as party in the suit as no relief was sought against them for the reason that they have never denied the right of ownership of the respondent/ plaintiff and more-so, one Sahibzada Tahir Islam appeared before the Court as a witness for the plaintiff and admitted the execution of the deed in favour of the respondent/ plaintiff and in such an eventuality, when the document has been proved by producing its marginal witnesses the suit was rightly decreed by the learned Courts below. He added that Amir ur Rahman and Sher Muhammad were the marginal witnesses of the deed and they have deposed in favour of the respondent/ plaintiff; that their statements are consistent besides payment of sale consideration, transfer of proprietorship, possession of the respondent/ plaintiff and construction made by the respondent/

plaintiff in the property have also been proved, as such, the instant petition requires dismissal, being without merits.

6. Having heard the arguments and perusal of record, the first question requiring determination through instant petition is maintainability of the suit against the petitioner/ defendant Khadim Ahmad. No doubt, in terms of section 42 of the Specific Relief Act, 1877 when the status, right or title of a person is denied then in such an eventuality, suit for declaration could be filed before the civil Court but since the respondent/ plaintiff was deriving his title from sons of Sahibzada Syed Ahmad Jan on the strength of sale deed dated 23.06.2008 then irrespective of the fact that they have not denied the status and the ownership of the respondent/ plaintiff, were proper party, if not necessary, for determination of the *lis*. Correct that Sahibzada Tahir Islam, one of the vendors, appeared before the Court as a witness for the respondent/ plaintiff then to the extent of alienation of his share by Sahibzada Tahir Islam through deed dated 23.06.2008 in juxtaposition with his statement in favour of the respondent/ plaintiff, the suit could be held maintainable. It is an axiomatic principle of law that no one can transfer better title than his own and admittedly Sahibzada Tahir Islam was neither the special or general attorney for rest of his brothers (vendors of the respondent/ plaintiff) nor they themselves appeared before the Court and when learned counsel for the respondent / plaintiff (Muhammad Nabi and Mr. Akbar Khan Kohistani, Advocates) were asked about the competency of the alienation on the strength of the statement of Sahibzada Tahir Islam on behalf of his brothers when neither they

appeared before the Court nor they were party to the suit, they could not wriggle out of this legal aspect. Reliance may be placed on the cases of "Itbar Shah and others vs. Ahmad Shah and others" (2001 CLC 1021), "Abdul Hameed through legal heirs and others Vs. Shamssuddin and others" (PLD 2008 SC 140). This Court in case titled "Syed Azhar Hussain shah Vs. Member Board of Revenue Khyber Pakhtunkhwa and others" (2016 YLR 1849), has observed that:

"6. It is by now established that vendor cannot transfer a better title than that he possesses at the time of transfer. Mere fact that mutation has been attested in favour of some of co-sharers would not extinguish title of other co-sharers. Section 42 of the Land Revenue Act, 1967 provides the mechanism for transfer of rights in periodical records. The word "purchase" used in subsection (1) of section 42 would oust the attestation of mutation in exclusive Hissadari mutation in possession. Ownership has been defined by "Salmond on jurisprudence" that it is relationship between a person and any right that may be vested in him. According to Austin "ownership" is a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration. Holland defines ownership "as a plenary control over an object." According to him ownership is exercise in its primacy and fullest sense over physical objects only."

Reference may be made to the case law reported as 2016 CLC Note 35, 2016 CLC Note 22, 2015 CLC 1004, 2009 CLC 1022, and 2006 CLC 482. The alienation of the property by Sahibzada Tahir Islam, being the son of Sahibzada Syed Ahmad Jan in favour of the respondent/ plaintiff especially when Sahibzada Syed Ahmad Jan has not transferred his entire ownership in his favour, was under no legal obstacle to transfer the property in favour of the respondent/ plaintiff but to the extent of his own share.

7. Moreover, Amin-ur-Rahman appeared before the learned trial Court as PW-5 while Sahibzada Tahir Islam as PW-4, who in their cross examination have deposed that the amount of sale

consideration was paid in their presence but the statements to the extent of payment of sale consideration to the vendors are not sufficient to rely upon when the vendors of the respondent/ plaintiffs were not arrayed as party in order to defend their rights or to submit the cognovit in his favour and to admit his claim. Stamp vendor and notary public have also not been produced by the plaintiff. Similarly, the scribe of the deed was also not produced. It is reflected from the statement of PW-2 that the meeting, in which, the deed was scribed, Mr. Hanif Ullah, Advocate, Said Afzal, Naeem Ullah and other shopkeepers were also in attendance but none of them has been produced before the Court to substantiate the contention of the plaintiff/ respondent. Record also transpires that the sale consideration was paid to Sahibzada Khurshid Islam and not to Sahibzada Tahir Islam, who appeared before the Court as PW-4. In view of the above, the respondent/ plaintiff could not prove his case for declaration on the strength of deed dated 23.06.2008 but this aspect of the suit is connected with the stance of the petitioner/ defendant, who has made reliance on the deed dated 02.01.1992 and contended that Sahibzada Syed Ahmad Jan had sold the property in his favour. He in order to prove his contention produced Habib Sarwar and Umara Khan as DW-4 & DW-5, whose statements are of worth perusal. Habib Sarwar (DW-4) in his cross examination deposed that:

مذکورہ سید احمد جان نے کہا کہ مدعا علیہ مجھے 33 ہزار روپے دیگا۔ از خود کہا کہ مذکورہ نے یہ بھی کہا تھا کہ دیگر اراضیات جو کہ مدعی نے خریدی ہیں، میں 1/4 حصہ خادم احمد کو بلا معاوضہ دیگا۔ اور تین حصوں کا رقم خادم احمد مجھے ادا کریگا۔

Umara Khan entered into the witness box as DW-5, who in his cross examination, admitted that the sale consideration has not changed hands in his presence. In such an eventuality, when the payment of sale consideration to the vendor Sahibzada Syed Ahmad Jan has not been proved by the petitioner/ defendant then Sahibzada Syed Ahmad Jan was the owner of the property, on whose death his property was devolved upon his three sons Sahibzada Khurshid Islam, Sahibzada Tahir Islam and Sahibzada Irshad Ullah, thus, Tahir Islam was the owner to the extent of his legal and *shari* share, who has deposed in favour of the respondent/ plaintiff, therefore, to that extent his statement could be considered as an admission in favour of the respondent/ plaintiff and the respondent/ plaintiff is held entitled to the extent of legal and *shari* share of Sahibzada Tahir Islam in the disputed property whereas the suit to the extent of his brothers namely Sahibzada Khurshid Islam and Sahibzada Irshad Ullah could not be decreed in favour of the respondent/ plaintiff.

8. Adverting to the submission of the petitioner being based upon the deed dated 02.01.1992. Though, the petitioner/ defendant alleged to have purchased the property from Sahibzada Syed Ahmad Jan but has not been able to prove the payment of sale consideration by him to his vendor. The maintainability of the suit of the respondent/ plaintiff to the extent of denial from the status or proprietorship has provided a cause of action to the respondent/ plaintiff, thus, suit u/s 42 of the Specific Relief Act, 1877 could not be held to be incompetent.

9. Both the learned Courts below in their findings have not taken into consideration the entire factual and legal aspects rather misread the evidence/ record especially while decreeing the suit against Sahibzada Khurshid Islam and Sahibzada Irshad Ullah as neither they were party to the suit nor Sahibzada Tahir Islam was their attorney to depose on their behalf. Had the power of attorney been placed on record in favour of Sahibzada Tahir Islam on behalf of his brothers, even then it could not be held that his brothers had received the sale consideration and alienated their shares in favour of the respondents/ plaintiff unless it was specifically pleaded/ mentioned in the power of attorney and statement to that effect recorded before the learned trial Court. Needless to say that when the learned Courts below have fallen into an error and exercised the jurisdiction in excess of their powers then this Court is not barred or lacking the powers to rectify the legal errors or illegalities by correcting the same by exercising the powers u/s 115 C.P.C, thus, keeping in view the facts and circumstances above, the evidence on record in juxtaposition with the legal aspect, this petition is decided/ disposed of in the following terms:

- i. Suit of the respondent/ plaintiff could not be decreed to the extent of the shares of Sahibzada Khurshid Islam and Sahibzada Irshad Ullah, the brothers of Sahibzada Tahir Islam;
- ii. On the basis of statement of Sahibzada Tahir Islam by considering it as an admission in favour of the respondent/ plaintiff in accordance with the provisions of order XII rule 6 C.P.C, the suit of the plaintiff is decreed in his favour but only to the extent of legal/*shari* share of Sahibzada Tahir Islam in the disputed property;
- iii. The petitioner/ defendant has not been able to prove the sale in his favour by Sahibzada Syed Ahmad Jan;

- iv. The maintainability of the suit of the respondent/ plaintiff, on the strength of deed dated 01.02.1992, could not be questioned when he is asserting his right of ownership as against the respondent/ plaintiff;
- v. Suit of the respondent/ plaintiff in view of the declaration is within time under Article 120 of the Limitation Act, 1908;
- vi. The excess possession of the respondent/ plaintiff or the petitioner/ defendant shall be dealt with by the learned executing Court in accordance with law; and
- vii. No order as to cost.

Announced.
12.02.2024.


JUDGE

office
17/2/2024

Sabz Ali/* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR