

HIGH COURT OF AZAD JAMMU & KASHMIR

Civil Appeal No.63/2008;
Date of institution 26.04.2008;
Date of decision 30.10.2013.

Syed Nazir Hussain Shah S/o Nigah Ali Shah caste Syed R/o village Raywand Tehsil & District Hattian Bala through Syed Manzoor Hussain Shah Attorney Tehsil & District Hattian Bala.

Appellant.

VERSUS

1. Mir Hussain S/o Umar Din caste Gakhar;
2. Syed Hussain Shah;
3. Syed Mukhtar Hussain Shah;
4. Syed Akthar Hussain Shah;
5. Syed Munir Hussain Shah, sons;
6. Mst. Mir Fatima D/o Yasin Shah residents of Safaida Tehsil & District Hattian Bala.

Respondents.

CIVIL APPEAL

Before:- **Justice M. Tabassum Aftab Alvi, J**

PRESENT:

Syed Riaz Hussain Naqvi, Advocate for Appellant.
Chaudhry Ghulam Nabi, Advocate for Respondent No.1.
Nemo for Respondents No. 2 to 5

JUDGMENT:

The captioned appeal has been filed against the impugned judgment and decree dated 29.01.2008 passed by learned Additional District Judge, Hattian Bala, whereby judgment and decree dated 30.07.2007 of learned Civil Judge, Hattian Bala, pertaining to dismissal of appellant-plaintiff's suit for prior purchase and perpetual injunction, were upheld.

2. Precise facts forming background of the instant appeal are that appellant-plaintiff filed a suit for prior purchase-cum perpetual-injunction pertaining to land comprising survey No.869/201, measuring 01 kanal 05 marlas, situated in village Raywand, Tehsil and District Hattian Bala, on the grounds of co-owner and co-sharer, before Civil Judge, Hattian Bala, on 12.03.2003. It was claimed that appellant-plaintiff besides co-owner and co-sharer was also enjoying possession of suit land, however, without consent and serving notice upon him the land in dispute was transferred by the vendor to respondent-defendant No. 1 vide registered sale deed dated 13.01.2003. The appellant-plaintiff accordingly solicited decree for right of prior purchase and perpetual injunction. The suit was resisted by the respondent-defendant through written statement dated 03.03.2004. It was averred that plaintiff was having no cause of action, hence, suit was not maintainable. It was further alleged that suit was filed for mala fide reasons only to harass the defendant. It was also stated that suit was liable to be dismissed as plaintiff refused to purchase the land in dispute and sale deed was executed with the consent of plaintiff and prayed for dismissal of suit. The learned trial Court on the basis of pleadings of parties framed 06 issues, on 20.09.2004. After obtaining evidence from both the parties and hearing, 04 basic

issues were decided in favour of appellant-plaintiff, however, suit was dismissed by the learned trial Court on the sole ground that possession of suit land was not solicited, vide judgment and decree dated 30.07.2007. Against the above mentioned judgment and decree an appeal was filed by the appellant which too was dismissed by the learned Additional District Judge, Hattian Bala, vide impugned judgment and decree dated 29.01.2008, hence, the instant second regular appeal.

3. Syed Riaz Hussain Naqvi, the learned counsel for appellant submitted that all the vital issues pertaining to right of prior purchase were decided by the trial Court in favour of appellant-plaintiff, however, solicited relief was unlawfully declined on technical ground that he did not seek possession of suit land. He further argued that at the time of addressing final arguments an application was moved for seeking amendment inserting words "recovery of possession" in title and prayer clause of the plaint which was not considered by the trial Court and first appellate Court illegally concurred with the judgment of trial Court and craved for acceptance of appeal.

4. Ch. Ghulam Nabi, the learned counsel for contesting respondent while controverting arguments of the learned counsel for appellant submitted that there

are concurrent findings of the Courts below which cannot be disturbed at the stage of second regular appeal. The learned counsel pressed into service that suit filed by the appellant-plaintiff without seeking consequential relief of possession was bad in law which was rightly dismissed by the trial Court and the same was upheld by the first appellate Court in accordance with law, hence, submitted for dismissal of appeal.

5. After hearing the learned counsel for parties, I have perused the contents of appeal and examined the appended record.

6. A contemplate perusal of record reveals that appellant-plaintiff filed a suit for prior purchase-cum-perpetual injunction regarding land in dispute on the grounds of co-owner and co-sharer before the learned Civil Judge, Hattian Bala, on 12.03.2003. Both the courts below concurrently decided all the vital issues and held that on the basis of revenue record the grounds pertaining to co-owner and co-sharer were proved by the appellant-plaintiff. Against the decisions regarding the above mentioned 04 vital issues no appeal was filed by the contesting respondent-defendant, hence, the same got finality under law. The suit was, however, dismissed on solitary ground that possession of land in question was lying with vendee respondent-defendant, and appellant-plaintiff failed to solicit possession of the

disputed land. It appears that during pendency of suit the plaintiff was dispossessed from the land in question. The learned trial Court framed 06 issues, which were duly signed by the learned counsel for contesting respondent-defendant, on 20.09.2004. However, no any issue was framed on the point of possession which is an admitted fact. It reflects from evidence of the parties that major portion of suit land is in possession of appellant-plaintiff while a small portion is also under the possession of vendee, respondent-defendant Mir Hussain. As per Order XX rule 5 of Civil Procedure Code, the Court shall state its findings with reasons, therefor, on each issue, which is reproduced as under:-

“5. Court to state its decision on each issue.-- In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.”

As there was no issue on the point of possession, therefore, the judgments and decrees of the Courts below are against codal provisions, hence, not sustainable under law.

7. A perusal of record also reveals that appellant-plaintiff before announcement of judgment preferred an application for adding words “recovery of possession” in

title and prayer clause of the plaint on 30.07.2007. The other side also filed objections on the same day. The application was turned down by the learned trial Court before announcing judgment through separate telegraphic order dated 30.07.2007. No reasons were advanced for dismissal of the application supra. The facts were not in dispute, hence, according to my considered view, even the formal amendment of plaint was unnecessary, as the Court was bound to administer law for ends of justice to protect statutory right of the plaintiff-pre-emptor. A discretion is vested in this behalf in a Court of law to be judicially exercised in the proper cases in order to avoid multiplicity of proceedings to shorten litigation and to do complete justice and mould the relief according to the altered circumstances in the larger interest of justice. A Court of law is competent to grant a relief though not specifically prayed for or it may grant relief on the ground other than the one relied upon in the plaint, provided it was not inconsistent with plaintiff's case and there was no element of surprise to his adversary. In this connection the general law on the point is well summarized on page 1148 of the commentary under rule 7 of Order VII of the Code of Civil Procedure, by D.F. Mulla (13th Edn.) and I cannot do better than to reproduce here from the learned author as under:-

“Ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made.”

As per order VII rule 7 of Civil Procedure Code, relief can be mould by the court of law and subsequent events can be taken into consideration at the time of decision. An identical point was arisen in (AIR 1960 Patna 452), wherein at page 456 of the report it was held as under:-

“(53) Lastly, it was argued that admittedly defendant No. 4, the appellant, is in possession of all the properties of Bhagelu minus the two properties gifted to defendants 1 and 3, under Exts. A-1 and A-2, and, as such, unless the plaintiff asks for possession, her relief for partition cannot be allowed. It appears from the record of the case, however, that the plaintiff paid ad valorem court-fee on the valuation of the suit as demanded by the Court below. After the payment of the ad valorem court-fee, it is obvious that the only thing which the plaintiff had to do was to ask for joint possession, and, then for partition and, thereafter separate possession. The fact, therefore, that the plaintiff has not done so does not entail a dismissal of her suit.

Rule 7 of Order 7 of the Code of Civil Procedure, while providing that every plaint shall state specially the relief which the plaintiff claims either simply or in the

alternative, further provides in express terms that it shall not be necessary for the plaintiff to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. In the instant case, however, the plaintiff, in paragraph 14 of her plaint, besides claiming specific relief's, also claimed in cl. (e) of paragraph 14, that a decree be passed in her favour against the defendants for any other further relief to which she may be found entitled. Although such a general or further relief was not necessary."

It was further held at page 457 of the report as follows:-

"For the reasons given above, therefore, in my opinion, this Court is not precluded from granting such further relief which it thinks proper to the plaintiff. It is, therefore, declared that the plaintiff is entitled, not only to get 1/4th share in all the properties left by Bhagelu which passed on to the hand of Ganesh and then to sheobarat, which are all mentioned in schedule A of the plaint, as held by the Court below, but also to joint possession with her three sisters defendants 1 to 3, and, thereafter, to partition and separate possession. There will be, therefore, a decree for possession in favour of the plaintiff in respect of her 1/4th share in schedule A properties as against the defendants, who claimed to be in possession as against the plaintiff. The preliminary decree for partition is, accordingly confirmed."

The same view was expressed in case titled Mst. Salma Abbasi & others V. Ahmed Suleman & 2 others 1981 CLC 462 (Karachi), wherein at page 471 of the precedent case it was observed as follows:-

“In my view it is a well-established principle of law that a relief which is admissible to the plaintiff, should not be denied on the ground that the suit has been wrongly framed. A relief though not specifically prayed for in the plaint may be granted if not inconsistent with the case of the party, and that where a relief is claimed upon a specific ground, the court may grant relief upon a different ground from that on which it is claimed in the plaint.”

It was further held at page 473 of the report as under:-

“However, the question which remains to be considered is, as to whether in the absence of a valid partition between the co-owners the plaintiffs’ prayer for possession can be granted with out ordering the partition of the land. While discussing issue No. 10 I have already held that in a fit case the Court is competent to grant the relief for partition in spite of the absence of an express prayer in this regard.”

The aforesaid view was reiterated by the Karachi High Court in case titled Mehrab Khan Vrs. Province of Sindh and 5 others 2005 CLC 441 (Karachi), wherein at page 445 of the report it was observed as follows:-

“The objection of Mr. Jhamat Jethanand, that relief granted to the petitioner was different than the one prayed for. It is an established law that the Court can mould the relief in favour of the petitioner even if it is not prayed for. Therefore, the petitioner was entitled to the relief granted by this Court in order to meet the ends of justice as the petitioner appears to be was without supply of water.”

The same view was expressed by the Karachi High Court in case titled Capt. S.M. Aslam and others Vrs. Karachi Building Control Authority and others 2005 CLC 759 (Karachi). At page 763 of the report it was held as under:-

“Mr. Manzoor Ahmed, learned counsel for the City District Government, Karachi has argued that the petitioner only has disputed the quantum of rate and therefore, the scope of the petition cannot be enlarged to cover the issue of amendment in the Zonal Plan Scheme and the relief in these proceedings could only be confined to the quantum of rates of commercialization. This submission of the learned counsel ex-facie is misconceived inasmuch as this Court has ample power to alter and or mould the relief in favour of a petitioner, even if it is not prayed for in order to meet the ends of justice if the facts pleaded in the petition so warrant.”

8. The plaintiff in the instant case solicited decree for right of prior purchase on the enlisted grounds which were admittedly proved who also prayed for any other further relief to which he may be found entitled to in the interest of justice. The relief for possession was not inconsistent with the case set up by the plaintiff and facts were also not disputed. Therefore, it was paramount duty of the learned courts below to attend altered circumstances and to mould the decree to do complete justice which could not be done in the given case, hence, according to my considered view, even formal amendment was un-necessary.

9. The crux of above discussion is that by accepting the appeal both the judgments and decrees dated 29.01.2008 and 30.07.2007 respectively of the Courts below are hereby set-aside and consequently suit of the appellant-plaintiff for right of prior purchase, with possession is decreed, subject to depositing amount of sale consideration along with its expenses within two months, failing which the suit shall be treated as dismissed. The costs shall follow the eventualities.

Muzaffarabad,
30.10.2013(I)

JUDGE