

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

C.R No.342-P/2010

Suhbat Khan and others Vs. Hazrat Gul and others.

Present: *Mr. Aimal Khan Barkandi, Advocate for petitioners No.2 to 5.*
Mr. Naeem-ud-Din, Advocate for LRs of Respondent No.1.
Muhammad Ikram Khan, Advocate for LRs of Mst. Wala Bibi
(Respondent No.5)
Syed Abdul Haq, Advocate for Respondents No.2 to 5.
M/S. Fayaaz Muhammad Oazi and Ziaul Islam, Advocates for
rest of the petitioners.

Date of hearing: **14.03.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This single judgment in the instant petition shall also decide **C.R No.1584-P/2010** titled "**Mst. Wala Bibi Vs. Said Hazrat Said and others**" and **C.R No.418-P/2020** titled "**Rehman-du-Din and others Vs. Hazrat Gul and others**" as an identical question of law and facts is involved therein. **Suit No.87/1** of 2003 was filed by respondent No.1 Hazrat Gul on 04.04.1995 seeking therein declaration to the effect that the property known as *Adai Patay of Deh Peeran Kalay Malakand*, as described in the headnote of the plaint, is his ownership in possession on the strength of deed No.624 dated 16.07.1985, whereby he has purchased the property from Amir Hatam, the predecessor in interest of Mst. Wala Bibi, thus, with this property, the defendants have got no connection, interest and concern, whatsoever, and that they could not deny his right of ownership and hence cannot interfere with his possession. In alternate, he has sought decree for cancellation of any document offending his right, being based upon the deed of 1988.

Decree for demolition, if any construction is found in the property to the extent of his purchased property was also sought. Perpetual injunction was also sought restraining the defendants from altering the nature of the suit property by making construction therein and denying his right of ownership. Decree for possession was also sought. Mst. Wala Bibi, defendant No.16 of this suit, being the daughter of Amir Hatam, has filed suit No.119/1 claiming therein her legal and *shari* share in the legacy of her predecessor in interest Amir Hatam. The petitioners of connected C.R No.418-P/2010 Rahman-ud-Din etc. are aggrieved from the findings of the learned trial Court on issue No.9, being respondents in the instant petition have called in question the judgments and decrees of both the learned Courts below to the extent of findings on issue No.9, hence, all these matters are connected inter-se within the purview of the subject matter and parties thereof.

2. The requisite background of both the suits and these petitions is that Said Hazrat Gul has based his claim on deed dated 16.07.1985 but was claiming his interest from Amir Hatam, the predecessor in interest of defendant No.16 Mst. Wala Bibi, from whom, he has become the owner of the property in lieu of sale consideration of Rs.85,000/- and possession of the property was transferred to him. It was averred that he was living abroad and during that period in the year 1987, Amir Hatam died issueless when he came to Pakistan, a suit was pending adjudication between Rahmanuddin and Amir Hatam, however, said suit was subsequently dismissed as withdrawn. The plaintiff alleged that with the collusion

of defendant No.5 to 15, 1 to 14 & 16, *inter se*, they have prepared forged and fabricated partition deed dated 22.09.1988 regarding the disputed property, which offends his right of ownership and possession, thus, said document is ineffective upon his rights. This suit was contested by the defendants on different legal and factual grounds through their written statement. The defendants No.1 to 3 have raised a preliminary objection that deed dated 17.06.1985 is forged/fictitious and that earlier Civil Suit No.189/1 of 1979 titled "*Bahadar and others Vs. Ghulam Hasan and others*" was decided on 30.09.1984 but it was brought on record that Amir Hatam had died during pending adjudication of said suit No.189/1, as such, he was not alive on the date of the alleged deed dated 16.07.1985, hence, suit No.87/1 of Said Hazrat Gul requires dismissal. They have also alleged that another suit No.22/1 of 1962 was pending adjudication between the predecessor in interest of defendants No.4 to 15 and Amir Hatam, wherein they could not prove their ownership, the findings of the learned trial Court remained intact till this Court; that they have made improvements in the property. Mst. Wala Bibi through her suit was claiming her *shari* and legal right in the property of Amir Hatam being his daughter and in such an eventuality, she has questioned the deed relied upon by the plaintiff of suit No.87/1. After completion of evidence, the learned trial Court vide its judgment and decree dated 29.04.2004 decreed suit No.87/1 while dismissed suit No.119/1, against which, three Civil Appeals No.123/13 126/13 & 128/13 of 2004 were filed, which were allowed by the learned District Judge Malakand at Batkhela on 10.07.2006

by setting aside the judgement & decree, framed additional issues and remanded the matter to the learned trial Court for decision afresh. After remand, certain evidence was recorded by the parties and thereafter the learned trial Court through its judgment and decree dated 31.10.2006 dismissed both the suits. The plaintiff of suit No.87/1 filed Civil Appeal No.52/13 whereas that of suit No.119/1 filed Civil Appeal No.3/13 of 2007, which were decided by the learned District Judge Malakand at *Batkhela* through its judgment and decree dated 19.11.2009, whereby appeal of Said Hazrat Gul was allowed, his suit No.No.87/1 was decreed while that of Mst. Wala Bibi against the dismissal of her suit, was dismissed. The petitioners of the instant petition have challenged the decree in favour of Hazrat Gul whereas Mst. Wala Bibi has filed connected C.R No.1584-P/2010 against dismissal of her suit. The findings of the learned Courts below on issue No.9 have been assailed by the petitioners of connected C.R No.418-P/2010.

3. C.Ms No. 32-M/2015 & No.963-M/2016: Through former application, the petitioners want to place on file award of jirga Ex.DW5/6, decision Ex.DW5/7, document Ex.DW5/8 etc. whereas through the latter application, the respondents No.2 to 4 request for placing on file the copy of written statement of defendants No.1 to 3 alongwith documents pertaining to suit No.77-A dated 24.04.1973, suit No.85 dated 29.05.1942 etc., on the ground that these documents are necessary for just and proper decision of the instant petition. As the contents of the applications have been verified through affidavits by the deponents besides the application have not been opposed by

the respective parties, therefore, both these applications are allowed and the documents annexed therewith are hereby read as part and parcel of the instant petition.

4. Arguments heard and record perused.

5. The plaintiff of suit No.87/1 was seeking declaration to the effect that on the strength of deed dated 16.07.1985, which was placed on record as Ex.PW1/1, he is purchased owner of the property from Amit Hatam. The suit was resisted by the defendants on the ground that Amir Hatam was not alive as his death was proved to have been caused during the pending adjudication of suit No.189/1 dated 11.06.1985 hence, Amir Hatam was not alive at the time of execution of the deed dated 16.07.1985 (Ex.PW1/1), for which, from the pleadings of the parties, issue No.13 was framed by the learned trial Court. This issue was decided in negative and it was held that he was alive but the petitioners/ defendants have not filed any appeal or cross objection against the findings on issue No.13 of the learned trial Court on this ground that suit of the plaintiff was dismissed by the learned trial Court. No doubt, that the suit was dismissed by the learned trial Court, against which, the appeal was filed by the respondent (plaintiff of suit No.87/1) but when the crucial aspect of the death of Amir Hatim was alleged by the petitioners/ defendants in their written statement and this issue was decided against them then they were legally required to challenge said findings of the learned trial Court through their cross objection in the appeal of the respondent/ plaintiff under order XLI rule 22 C.P.C but by not doing so, they cannot press into service the plea taken by them through their

pleadings (written statement). There is no cavil with the proposition that when the findings of the Courts below have not been assailed either through appeal or cross objection under order XLI rule 22 C.P.C, then in such eventuality the findings of the learned trial Court or Court of appeal attain finality. It is by now well settled that an issue decided against a party, if not challenged, shall attained the finality. Reliance in this regard is placed on the cases reported as “Muhammad Aslam and 2 others v. Sved Muhammad Azeem Shah” (1996 SCMR 1862) and “Kanwal Nain v. Fateh Khan” (PLD 1983 SC 53). In the case Muzaffar Khan vs. Sanchi Khan and another reported in (2007 SCMR 181), wherein it was held that: -

“7. We have carefully considered through the judgment of the trial Court and find that the submission made by the learned counsel is not without substance as the petitioner and respondent No.2 utterly failed to adduce any cogent evidence in support of their plea. Furthermore, these findings were neither assailed by way of appeal nor through cross objections with the result that such findings of fact attained finality in the eyes of law, casting heavy clouds on the right, interest and title of the petitioner to claim such right or interest through his brother. Learned counsel rightly contended that since the petitioner did not assail the findings of fact as regards his right, interest and possession of the property in his own rights, he could not legally maintain Civil Revision before the High Court. Mr. Abdul Qadir Khan has drawn our attention to the judgment of this Court in the case of Masta v. Sarang and another PLD 1969 SC 261. The precedent relied upon by learned counsel fully supports his view and there can be no cavil with the proposition of law laid down by this Court.” Reliance is placed on the case law as reported in case PLD 2011 SC 119.

6. More-so, issues No.10 & 11 were also crucial with respect to the alleged vendor of the plaintiff, Amir Hatam, which were framed by the learned trial Court as under:

10. کیا آراضی حد عویہ مسیان قدر حسن و بہادر نے بروئے دستار پر قلع نامہ مورخہ 1931/3/11 خرید کر قبضہ حاصل کیا اور اس میں امیر حاتم اور ارجمند کا کوئی حق نہیں ہے؟

11. کیا آراضی حد عویہ بروئے مقدمہ دیوانی نمبر 22 فیصلہ شدہ 1962/1/10 ملکیت قدر حسن و بہادر قرار دی گئی ہے اور ان کے حق میں قلع نامہ مورخہ 31/3/11 درست قرار دیا گیا ہے؟ اگر ایسا ہوا تو کیا امیر حاتم اس کے بعد آراضی حد عویہ کا مالک رہا؟

The defendants are deriving title on the strength of deed dated 11.03.1931, which was placed on record by them as **Ex.DW5/2**, the contents whereof reflect that Gul Pir, who was the owner of the property, had sold it as described therein in lieu of sale consideration of Rs.1,000/- in favour of Qadar Hussan and Bahadar s/o Hussain. It also appears that earlier, a dispute arose between Sabir Shah s/o Redi Gul and Amir Hatim s/o Hussin and Noor Hassan and the matter was referred to Jirga. The jirga has recommended that two documents/deeds dated 11.03.1929 were forged while the deed of 1931, which was produced by the son of Qadar Hassan, was correct. They have also recommended that the deed, through which, the property was sold in favour of Qadar Hassan and Bahadar, is correct and the property described therein is owned and possessed property of the vendees, with which, Arjumand and Amir Hatam had got no concern. The case was decided on 12.02.1968 by the then Political Agent / District Magistrate, Malakand by accepting the award of the *jirga* and dismissing the suit of Sabir Shah and Amir Hatim, the decision of Political Agent was assailed before the Commissioner FCR but the revision was dismissed. The *jirga* award was placed on record as **Ex.DW5/6**, the decision of Political Agent as **Ex.DW5/7**, the copy of decision of the revision petition by Commissioner FCR was placed on record as **Ex.DW5/8** and lastly, the matter was brought before the Deputy Secretary Home Department of NWFP,

who upheld the judgment of the Political Agent vide order dated 15.01.1974. The decision of the Deputy Secretary-III NWFP was placed on record as **Ex.DW5/9**. All these documents were produced in the statement of Wazir Hassan s/o Ghulam Hassan on 15.03.2004 before the learned trial Court. Though these documents were objected to by the respondent/ plaintiff but since the attested copies thereof were produced before the learned trial Court and being part of the judicial record, same could not be discarded. It is worth to mention here that another deed dated 11.03.1931 was also placed on record as **Ex.DW4/2** and another deed document dated 21.05.1943 as **Ex.DW4/3** but neither the original thereof nor the attested copies of the same were produced before the Court, thus, the validity of those documents could not be adjudged without any proof in favour of its beneficiaries.

7. It also appears from the record that Amir Hatim alongwith Bahadar and Arjumand had filed a suit No.198/1 of 1979 against Ghulam Hasan s/o Qadar Hassan alongwith Mst. Hanifa, wherein they were claiming declaration to the effect that they were owners in possession of 3/4 share in the property and the order passed by the Assistant Political Agent (APA) and Commissioner FCR are ineffective upon their rights. The said suit was contested by Ghulam Hasan and others and ultimately it was dismissed on 30.09.1984 by the learned Senior Civil Judge, Malakand at *Batkhela*. The disputed question before the learned civil Court was the validity of the order of the APA Malakand dated 31.10.1977. During pending adjudication of the said suit, the documents **Ex.DW5/6**, **Ex.DW5/7**

and **Ex.DW5/8** were also scrutinized. After dismissal of the said suit, another suit was filed by Amir Hatim alongwith others, on the basis of which, they were once again claiming their entitlement but their suit was dismissed on 11.06.1985. After remand, the plaintiff produced some evidence and recorded his statement as APW-1, wherein documents **Ex. APW/1/1** to **Ex. APW1/13** were placed on record. **Ex.APW1/1** was the suit between Rahmanuddin and Hazrat Gul for recovery of possession through pre-emption, **Ex.APW1/2** was the amended plaint, **Ex.APW1/3** is the copy of the order sheet dated 12.03.2000, **Ex.APW1/4** is the joint statement of the parties, **Ex. APW1/6** is the copy of application for placing on file the list of legal heirs of Amir Hatam, **Ex.APW1/7** is the copy of order sheet dated 05.10.1985 and copy of the judgment of the learned District Judge Malakand in Civil Appeal No.83/13 of 1985 is **Ex.APW1/8** while rest of the documents are the order sheets and *wakatnamas* etc. These documents were tendered in evidence and were relied upon by the plaintiff/ respondent but none of them is helpful to the him. The fate of the deed dated 11.03.1931 has been decided from all the *fora* below and later on it remained in discussion in other civil litigations. The learned trial Court, while taking into consideration the evidence produced by the parties in juxtaposition with the evidentiary value of the decision of Political Agent, revisional forum and Deputy Secretary-III (competent *fora* as they were), has rightly concluded that the property was sold in favour of Qadar Hassan and Bahadar by Gul Pir, the vendor, and in such an eventuality, when Amir Hakam was held to have no concern or interest with the property as reflected

therein alongwith his brother then he was not competent to make any transaction or to execute any document in favour of respondent/ plaintiff Hazrat Gul on the strength of proposition that no one can transfer the interest of the property of which he is not the owner. A Latin maxim says: '*Nemo dat quod non habet*' which means that no one can give what he doesn't have. Moreover, a right cannot be claimed in case of transfer of property through deceit or without knowledge of its owner. Reliance is placed on the cases of "*Muhammad Zafarullah through L.Rs. and others v. Muhammad Arif through L.Rs. and others*" [2007 SCMR 589] and "*The Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others*" [PLD 1975 S.C. 331], "*Lal Din and another v. Muhammad Ibrahim*" [1993 SCMR 710], "*Muhammad Younas Khan and 12 others v. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others*" [1993 SCMR 618], "*Government of Sindh through the Chief Secretary and others v. Khalil Ahmed and others*" [1994 SCMR 782]]. The learned Appellate Court has also relied upon the documents Ex.DW4/2 and Ex.DW5/4 dated 11.03.1931 but has held that the description therein was in respect of the other properties and Amir Hatim has transferred the disputed property in favour of the plaintiff, however, the findings of the learned appellate Court find no support from the evidence on the record rather the contents of the documents. It is worth to mention here that the plaintiff has also made a reliance on the deed of 1931 but the said deed has never been tendered in evidence and the

evidentiary value thereof has not been settled by the learned courts below.

8. Moreover, on 09.12.2021, this Court, after hearing the instant petition and keeping in view the issues No.10 & 11 in juxtaposition with the findings of the learned Appellate Court in first round of appeal, has needed the appointment of a local commission in order to determine the property description of the disputed property with reference to deed dated 11.03.1931 and the decision made on 12.02.1968, and thus appointed a local commission to submit his report on the following terms of reference (ToRs):


1. **Whether the property in disputed had been part of the property acquired by Qadar Hassan and Bahadar vide sale deed dated 11.03.1931, in respect of which decree in their favour had also been granted by the Political Agent on 12.02.1968 or it has been a property separate and distinct from the property acquired through the sale deed.**
2. **He shall also measure the property through the revenue staff and shall give measurement of the property. If the property consists of more than one chunk, then the measurement shall accordingly be separately given.**
3. **He Shall also prepare a site plan of the property showing its boundaries and other description found feasible and necessary by the learned local commission.**

Mr. Farid Ullah Khan, Advocate proceeded to the spot and submitted his report on 15.03.2022. On receipt of the report of the learned local commission, the parties were directed to submit their objections. His report was objected to by respondents No.2, 3, legal heirs of respondent No.4, respondent No.5 and legal heirs of Hazrat Gul, as such, the learned local commission was directed to appear

before the Court, his statement was recorded as CW-1 on 25.09.2023, who was cross examined by the objectors (respondents No.2, 3, legal heirs of respondent No.4, respondent No.5 and legal heirs of Hazrat Gul) but despite his lengthy cross examination, he remained consistent with his report (Ex.CW1/1), wherein he has reached to the conclusion that the property in dispute is part and parcel of the sale deed dated 11.03.1931 and the decree granted by the Political Agent on 12.02.1968. Keeping in view the consistent statement of the learned local commission in juxtaposition with the measurement of the property on the spot and the sketch prepared by him, the report-commission (Ex.CW1/1) is hereby confirmed and it is held that the disputed property is one which was the subject matter of the decision of 1968 and part of the deed dated 11.03.1931, as such, the plaintiff Hazrat Gul has got no concern with the disputed property because the predecessor in interest of Mst. Wala Bibi was not the owner of the property, hence, she has got no interest in the property and thus her suit was rightly dismissed by the learned courts below. The deed through which Hazrat Gul was claiming himself to be the owner of the property was of no legal effect because his vendor was not the owner of the property and he could not transfer the valid title in favour of Hazrat Gul.

9. It appears that the plaintiff /respondent of the instant petition and petitioners of connected C.R No.418-P/2010 are in league with each other. They are being represented by Syed Abdul Haq and Mr. Abdul Qayum, Advocates, respectively who have admitted at the bar that during pendency of the suit, the documents have not been placed

on record as they were required to be produced and at this juncture when learned counsel for the plaintiff was questioned that the documents relied upon by the plaintiff i.e., the deed of 1931 was the part of the suit of 1962, neither learned counsel for the respondent nor that of the petitioners of C.R No.418-P/2010 could prove the authenticity of the document as relied upon by them as to whether the said document was the part of the suit of 1962 and they have submitted that through C.M No.42-M/2017, they have submitted before this Court to allow them to produce additional evidence, however, their submission is in negation to the provision of order XLI rule 27 C.P.C wherein one of the condition precedent is that when a document was available or evidence was in existence during trial of the *lis* but the same has not been produced, in such an eventuality, the same could not be allowed to be brought on record within the purview of the additional evidence by invoking the provisions of order XLI rule 27 C.P.C. The parties and their predecessors are litigating against each other for more than four decades regarding a dispute, which has already been settled and Amir Hatam was not the owner of the property at the time of execution of the deed Ex.PW1/1 in favour of the plaintiff Hazrat Gul.

 10. Furthermore, the petitioner of C.R No.418-P/2010 has placed on file an attested copy of the order sheet pertaining to the complaint between Qadar Hasan and Noor Hassan dated 13.09.1943 but since these documents, which were annexed with the C.M were available to the plaintiff and for that mater, petitioners of C.R No.418-P/2010 but were not produced before the learned trial Court

even after the remand, thus, neither those documents could be taken into consideration nor could be relied upon for the purpose of determination of rights between the parties. At this juncture, learned counsel for the petitioners of C.R No.418-P/2010 have made a reference of W.P No.131-M/2016 titled "Fazal halim and others Vs. Hazrat Gul and others" decided by this Court on 18.05.2023 and submitted at the bar that since the matter has been remanded through that writ petition to the learned trial Court, thus, any findings in these petition would affect the proceedings before the learned trial Court in the said suit between Hazrat Gul and legal heirs of Fazal Halim. No doubt, this Court has allowed the writ petition and has remanded the matter to the learned trial Court because the plaint was rejected under order VII rule 11 C.P.C on the ground not falling within the ambit of non-disclosure of cause of action or bar of jurisdiction. The property as described in the deed Ex.DW4/2 and Ex.DW5/4 is the ownership of the petitioners, with which, the plaintiff Hazrat Gul and for that matter Rahmanuddin etc., the petitioners of C.R No.418-P/2010, have got no concern. Issue No.9 was in respect of the rights of the petitioners of C.R No.418-P/2010, which was framed by the learned trial Court that:

کیا آراضی حد عمومیہ کو چار برادران مسیان قدر حسن، امیر حاتم، شیر حسن عرف بہادر اور آرجند نے بروئے دستاویز بییمانہ عمرہ

1931/3/11 بمصر بر اربع قطعی خریدی تھی؟

This issue was required to be proved by the defendants No.1 to 3 and has been decided against them by the learned trial Court but they have not challenged the findings of the learned trial Court either through appeal or cross objection in the appeal of the

plaintiff/ respondent and after the decision of the learned Appellate Court, when the petitions were filed before this Court, they have come to this Court and filed the petition. The findings of the learned trial Court have attained finality, thus, the institution of C.R No.418-P/2010 was misconceived and against the provisions of order XLI rule 22 C.P.C. Their presence before this Court is only to support the plaintiff Hazrat Gul, who himself could not prove his case being based upon the suit of 1962, whereby Amir Hatam alongwith his brother has been excluded from the interest in the disputed property as mentioned in the deed, which was the controversy before the Political Agent and has been decided on the verdict of the jirga. The learned trial Court has rightly appreciated the evidence but the learned Appellate Court has not only overlooked the evidence on record but the judgment of the learned appellate Court was also the result of misreading and non-reading of the record.

11. Adverting to the fate of C.R No.1584-P/2010, it appears that through her suit Mst. Wala Bibi was claiming her share in the property of her father Amir Hatam, the fate of which, was based upon the deed relied upon by Hazrat Gul as it has been held in the preceding Paras that Amir Hatim has got no concern with the suit property on the strength of the decision of the APA and the deed relied upon by the predecessor in interest of the petitioners, then notwithstanding the fact that Mst. Wala Bibi was the daughter of Amir Hatam, and could be held entitled in the other properties of her predecessor in interest but her predecessor has got no concern with the suit property, therefore, she has got no *locus standi* to file the suit.

Her suit was rightly turned down by the learned Courts below and the learned counsel for petitioner (Mst. Wala Bibi) has not been able to point out any illegality, irregularity, jurisdictional defect or misreading and non-reading of evidence to the interest of Mst. Wala Bibi.

12. Thus, for the reasons discussed above, the instant petition is allowed, resultantly the judgment and decree of the learned appellate Court is hereby set aside while that of the learned trial Court is hereby restored. Both the connected C.R No.1584-P/2010 and C.R No.418-P/2010, being meritless, are dismissed. No order as to cost. The requisitioned record be sent back forthwith to the quarter concerned.

Announced
14.03.2024



JUDGE

office
21/3/2024
WR

Sabz Ali/* (S.B)

HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR