

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, D.I.KHAN BENCH
(Judicial Department)

Civil Revision No.55-D of 2016 with
C.M.No.68-D of 2016

Nadir Khan and another

Versus

Atta Muhammad deceased through
his legal heirs Mst. Sahibzadai and others

JUDGMENT

For petitioners: Mr. Burhan Latif Khaisori, Advocate.

For respondents: Mr. Sajid Nawaz Saddozai, Advocate.

Date of hearing **19.10.2022**

MUHAMMAD FAHEEM WALLI, J.- Through the instant petition under section 115 C.P.C. the petitioners Nadir Khan and another have called in question the judgment and decree dated 01.02.2016 rendered by learned Additional District Judge-III, D.I.Khan, whereby their appeal against the judgment and decree dated 03.3.2011 of learned Civil Judge-X, D.I.Khan was dismissed.

2. The facts giving rise to the instant revision petition, in brief, are that the petitioners filed a suit against the respondents for declaration, perpetual injunction and possession to the effect that they are owners of the suit property, detailed in the heading of the plaint, on the basis of agreement dated 20.01.2002. They also sought cancellation of mutations No.12282 dated 22.3.2009 and 1240 dated 30.5.2009.

3. Despite publication in newspaper, the respondents did not appear before the Court and thus, were proceeded against ex-parte vide order dated 29.6.2010. The petitioners recorded and closed their evidence. The learned Civil Judge-X. D.I.Khan, after hearing ex-parte arguments, dismissed the suit vide judgment and decree dated 03.3.2011.

4. Aggrieved from the judgment and decree dated 03.3.2011, petitioners filed an appeal. The learned Additional District Judge-III, D.I.Khan, vide judgment and decree dated 22.8.2011, accepted the appeal on ex-parte basis and set a side the judgment and decree dated 03.3.2011, leaving the respondents at liberty to file an application for contesting the instant order, if so, advised.

5. The respondents filed an application under section 12(2) C.P.C before learned Additional District Judge-III, D.I.Khan for setting aside the judgment and decree dated 22.8.2011, which was dismissed vide judgment dated 18.02.2013.

6. The judgment dated 18.02.2013 was assailed by the respondents before this Court in revision petition which was accepted and application under section 12(2) C.P.C was remanded for decision in accordance with law. The learned Additional District Judge-V, D.I.Khan, vide



judgment dated 25.02.2015, disposed of the application under section 12(2) C.P.C in the manner that the decree dated 22.8.2011 in appeal was set aside and the appeal was revived to be heard and decided on merits. The appeal was revived and after hearing arguments. the learned Additional District Judge-III, D.I.Khan dismissed the appeal vide judgment and decree dated 01.02.2016, hence the instant revision petition by the petitioners.

7. I have heard the arguments of learned counsel for the parties and have gone through the record.

8. Perusal of record reveals that Atta Muhammad, predecessor of respondents No.1 to 9, had lodged FIR No.38 dated 03.02.2001 at police station Saddar, D.I.Khan against Nadir Khan, petitioner No.1. During trial, petitioner No.1 and predecessor of respondents No.1 to 9 entered into compromise and scribed an Iqrar Nama dated 20.01.2002, whereby it was agreed that in case the predecessor of respondents No.1 to 9 leaves the house measuring 07 kanals which is owned by him vide mutation No.12281 now. the same will be purchased by petitioner No.1 and petitioner No.2 in equal shares for sale consideration of Rs.3,20,000/- and they will pay Rs.1,60,000/- each to predecessor of respondents No.1 to 9. In short, the claim of petitioners is based on an agreement dated 20.01.2002 (Ex.P.W.1/2). It is by now settled law that agreement to sell does not create any right or title for which a declaration




could be sought. Declaratory decree could only be granted in respect of a legal right character. The only right arising out of an agreement to sell was to seek its specific performance alongwith any consequential relief, but the same has not been done. therefore, the suit of the petitioners to the extent of declaration is not maintainable. In this respect, reliance can be placed on the case of Abdur Razaq. Vs. Abdul Ghaffar and others (2020 SCMR 202) wherein it was held that:-

"We are clear in our mind that through the suit filed under section 42 of the Specific Relief Act, 1877 a declaration can be granted with regard to legal character or to right as to any property However, no new right can be created in favour of plaintiff, by grant of declaratory decree."

9. Perusal of agreement (Ex.P.W.1/2) reveals that it is not with the free consent of predecessor of respondents No.1 to 9 for the reason that the petitioners themselves admitted that before entering into agreement, the predecessor of respondents No.1 to 9 had lodged an FIR against them, where after compromise mentioned above was effected by Jirga members. The agreement was conditional that in case the predecessor of respondents No.1 to 9 leaves the house measuring 07 kanals now, the same will be purchased by petitioner No.1 and petitioner No.2 in equal shares for sale consideration of Rs.3,20,000/- and they will pay Rs.1.60,000/- each to predecessor of

respondents No.1 to 9. Through their evidence, the petitioners could not substantiate that predecessor of respondents No.1 to 9 left the house at that time. Neither there is any evidence regarding payment of sale consideration to predecessor of respondents No.1 to 9 nor in the Court at the time of its institution. In such view of the matter, the petitioners cannot enforce the said agreement. In the case of *Hamood Mehmood. Vs. Mst. Shabana Ishfaq and others (2017 SCMR 2022)* it was held that:-

"It is mandatory for a person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act, 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side."



10. There is yet another aspect of the case that the agreement was executed in the year 2002 whereas the suit has been filed by the petitioners in the year 2010. The main relief sought by the petitioners is that of declaration for which suit should have been filed within six years, but the same has been filed after about eight years. The petitioners have neither given any reason for delay in filing the suit nor moved any application for condonation of delay. Both the learned Courts below rightly appreciated the evidence produced by the petitioners and arrived at just and lawful

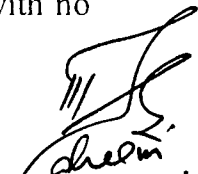
conclusions while non-suiting them. The impugned judgments do not suffer from any illegality or material irregularity warranting interference by this Court in exercise of its revisional jurisdiction.

11. Even otherwise, concurrent findings of facts arrived at by the Courts below cannot be disturbed by revisional Court when it is established that such findings are on the whole reasonable and are not arrived at by disregarding any provision of law or any accepted principle concerning appreciation of evidence. In this respect, reliance is placed on the case Moulvi Muhammad Azeem. Vs. Alhaj Mehmood Khan Bangish and another (2010 SCMR 817) it was held that:-

"It is also settled principle of law that findings on the question of fact or law, however, erroneous the same may be, recorded by any Court of competent jurisdiction, cannot be interfered with by the High Court, in exercise of its revisional jurisdiction under section 115, C.P.C unless such finding suffers from jurisdictional defect, illegality, or material irregularity."

12. For the reasons mentioned above, the instant petition being bereft of merits is hereby dismissed with no order as to costs.

Announced.
Dt: 19.10.2022.
Hubib:*


JUDGE



(SB)
Hon'ble Mr. Justice Muhammad Faheem Wali