

**SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Bench-III**

Mr. Justice Amin ud Din Khan  
Mr. Justice Shahid Waheed

**CA No.493 & 494 of 2023**

(Against judgment dated 04.07.2023 of the Peshawar High Court, Mingora Bench (Dar ul Qaza), Swat, passed in Civil Revision No.304-M of 2012).

Khurshid Ali & others ...Appellant(s)

**Versus**

Miangul Adnan Aurangzeb (decd.) ...Respondent(s)  
through LRs and others

For the Appellant(s) : Mr. Zia ur Rehman Khan, ASC  
via video link from Peshawar in in  
CA No.493/23  
Mr. Tariq Aziz, ASC/AOR in CA  
No.494/23

For the Respondent(s) Mr. Tariq Aziz, ASC/AOR in CA  
No.493/23  
Mr. Zia ur Rehman Khan, ASC  
via video link from Peshawar in  
CA No.494/23

Date of Hearing : 17.10.2024

**ORDER**

**Shahid Waheed, J:** These two direct appeals come before us from the decree issued under the judgment dated 4<sup>th</sup> of July, 2023, by the Mingora Bench (Dar-UI-Qaza), Sawat of the Peshawar High Court. This judgment was made in exercising the jurisdiction granted under Section 115 of the Code of Civil Procedure, 1908.

2. The parties involved in these appeals will be referred to in this judgment by the title they had in the suit.

3. The suit giving rise to these two appeals was for possession of immovable property and recovery of *mesne*

profit. The suit was dismissed by the Trial Court by its decree dated 11<sup>th</sup> of June, 2011, holding that the plaintiffs had failed to prove their title over the property. The plaintiffs appealed, and on the case coming before the Additional District Judge, Swat, he arrived at the conclusion that the plaintiffs had proved their ownership of the property by tendering a gift deed, and the evidence brought on record demonstrated that the defendants had no legal claim to the property, and as such, granted a decree to the plaintiffs as prayed for. Accordingly, on 1<sup>st</sup> of February, 2012 a decree was drawn. The defendants then sought revision of the appellate decree. The High Court, by its judgment dated 12<sup>th</sup> of June, 2023, partially revised the decree by which the decree to the extent of recovery of possession was maintained, and the decree to the extent of *mesne* profit was set aside. Now, the defendants have brought their appeal (CA No.493 of 2023) to challenge the decree for possession, while the plaintiffs have also preferred their appeal (CA No.494 of 2023) before us to assail the refusal to grant a decree to recover *mesne* profit. The point arising for decision is common to both appeals; consequently, they will be disposed of by this single judgment.

4. The arguments presented to us suggest that the fate of these appeals hinges on the decision of the question of whether, on the state of facts, the plaintiffs who brought a suit for possession of immovable property by ejectment of the defendants, based on their own title, but failed to prove that title, would nevertheless be entitled to a decree for

possession of the property as the Court found that the defendants were in possession without any valid title.

5. The facts of the case are to be considered with reference to the pleadings of the parties, and we shall, therefore, begin with those pleadings because without fully appreciating them, it is scarcely possible to appreciate the point of law stated above to which the circumstances of this case have given birth. The property in suit is two shops situated in the revenue estate of Saidu Sharif, Tehsil Babuzai, District Swat. Upon the two shops thus in suit, it was claimed that these were originally owned and occupied by Badshah Sahib, the former ruler of the State of Swat. Following the integration of Swat into Pakistan, in 1972, the Government of Pakistan established a Land Inquiry Commission tasked with identifying and determining properties belonging to Badshah Sahib. This Commission conducted a thorough investigation across various villages in Swat and issued a notification detailing the properties associated with Badshah Sahib, including the two disputed shops. Upon Badshah Sahib's passing, his estate was inherited by his two sons, Miangul Jahanzeb and Miangul Sultan. The two brothers amicably divided their father's assets, with Miangul Jahanzeb acquiring both of the shops in question. Miangul Jahanzeb then gifted these shops to Miangul Aurangzeb, who subsequently gifted them to the plaintiffs. This transfer of ownership established the plaintiffs as the rightful owners of the shops. However, the plaintiff asserted that the defendants initially took possession

of the shops as licensees, with the plaintiffs' consent. When the plaintiffs approached the defendants to reclaim possession of the shops, citing their personal needs, they refused. This refusal led to a dispute over the possession of the shops. Upon these assertions, a two-fold relief was sought: first, a decree for possession of the shops by ejectment of the defendants be granted, and second, a decree for recovery of *mesne* profit at Rs.10,000 per month.

6. It is now essential to delineate the defences raised against the claims put forth. The defendants asserted that on the 12<sup>th</sup> of November, 1973, Miangul Jahanzeb, the son of Badshah Sahib, entered into a formal, written agreement in which he sold the shops to their father, Rehmani Gul. Following this transaction, he duly delivered possession of the shops to him. On the death of Rehmani Gul, the ownership of the shops was devolved upon the defendants. Therefore, they contended that the alleged gift claimed by the plaintiffs was nothing more than a sham — without any legal validity or merit.

7. On the pleadings, as already stated by us, it is clear that the suit was brought under Section 8 of the Specific Relief Act, 1877, and, as such, it rested upon the plaintiffs who sued to oust the defendants to prove their title for seeking such ouster<sup>1</sup>. It laid upon them to establish the reason why the defendants should be ousted and why the *mesne* profit claimed should be awarded. The plaintiffs

---

<sup>1</sup> Taj Wali Shah v. Bakhti Zaman (2019 SCMR 84)

desired to disturb the state of things as it existed on the 28<sup>th</sup> of November, 2005, when this suit was instituted, and of the defendants that it should remain undisturbed. The suit must be defeated unless the plaintiffs show such a cause, which would require a Court at the date of the suit to disturb the state of things as they were on that date. We have spoken too abstractly in enunciation of this doctrine of jurisprudence because it will be easier for us to explain the application of that doctrine to the circumstances of this case by referring to concrete facts as they have been found in the case itself.

8. To begin addressing the matter before us, it is crucial first to investigate whether the plaintiffs had a title to the shops of which they claimed possession and recovering *mesne* profit which they sought in the plaint. A thorough title investigation will provide the essential groundwork for any subsequent legal deliberations. This process will not only clarify the legitimacy of their ownership but also shape the direction of the case moving forward. The question then is, what is their title? The title they asserted is a gift. This led the Trial Court to frame the issue on it; to be precise, it was issue No.8, burdening the plaintiffs to prove it by adducing evidence. The plaintiffs called upon two witnesses to testify to discharge their burden of proof. Through their testimonies, they presented a total of five documents as evidence to support their case. Nisar Ahmad was the plaintiffs' attorney and appeared before the Trial Court as P.W.2. In his examination-in-chief, he deposed that Badshah

Sahib originally owned the shops in the suit. After the death of Badshah Sahib, all his assets, including two shops, were devolved on his two sons, Miangul Sultan and Miangul Jahanzeb. The two brothers amicably divided the assets, and as a result, shops came in the share of Miangul Jahanzeb. He then gifted the shops to Miangul Aurangzeb, who subsequently gifted them to the plaintiffs. This deposition was in line with the contents of the plaint. This witness, in his statement, tendered four documents. The first was his power of attorney deed (Ex.P.W.2/1). The second was the copy of the Notification No.10/16-SOTA-II/HD/72-1525 dated 28<sup>th</sup> of September, 1972 (Ex.PW.2/2). This document established the details of Badshah Sahib's assets. The third document was the list, dated 8<sup>th</sup> of June, 1984, showing the details of the houses belonging to Miangul Aurangzeb (Ex.P.W.2/R-1). The fourth document was the list, dated 1<sup>st</sup> of September, 1982, of shops allegedly owned by Miangul Aurangzeb (Ex.P.W.2/R-2). The last two documents were written on plain paper, and no witness was produced to prove them. It is essential to mention here that the gift deed by which allegedly Miangul Jahanzeb transferred the shops to Miangul Aurangzeb was not tendered in evidence. The omission to produce this vital link in the transaction was fatal. Needless to say, in the absence of this document, the ownership of Miangul Aurangzeb over the properties mentioned in Ex.P.W.2/R-1 and Ex.PW.2/R-2 could not be held to be proved. Given the circumstances, when ownership

of Miangul Aurangzeb over the shops was not proved, further gift transactions with the plaintiffs also failed.

9. There is yet another aspect of the matter, and an appraisal of it will help determine the plaintiffs' ownership claim. The second witness produced by the plaintiffs was Muhammad Nazir, P.W.1. He was a Senior Clerk in the office of the Sub-Registrar, Babuzai. He tendered gift deed No.151 dated 6<sup>th</sup> of May, 2000, (Ex.P.W.1/1) executed in favour of the plaintiffs. However, during his cross-examination, this witness admitted that the disputed shops were not explicitly mentioned in the gift deed (Ex.P.W.1/1). The plaintiffs' attorney, P.W.2, also admitted in his cross-examination that disputed shops were not mentioned in the gift deed (Ex. P.W.1/1). So, the broad effect of the evidence is that the plaintiffs had no title, that those under whom they claimed had no title, and that the very gift of disputed shops never existed. In light of the above-stated circumstances that surround this case, it is clear that the plaintiffs failed to establish their ownership or title to the property in question. As a result, the plaintiffs could not call upon the defendants to establish the legitimacy of their property title, nor could they seek a decree for possession based on claims that the defendants either lacked a title or possessed a flawed one. Its underlying rationale is quite straightforward: the plaintiffs must succeed based solely on the strength and validity of their own title rather than capitalising on any potential shortcomings of the defendants' situation. Along the line of this legal doctrine, the court was also precluded from

examining the validity of the defendants' title, particularly since the plaintiffs did not formally challenge it. We are therefore poised to affirm that the trial court's method of addressing the issue at hand, along with its findings that were unfavourable to the plaintiffs, was indeed correct. In stark contrast, both the first Appellate Court and the Revision Court veered off course, misinterpreting the plaintiffs' claims and erroneously overturning the Trial Court's decree due to flawed application of the law.

10. There is another essential aspect to consider regarding the frame and competency of the suit. The defendants asserted that their father purchased the shops from Miangul Jahanzeb through registered agreement No.76, dated 12<sup>th</sup> of November, 1973, (Ex.D.W.1/1). They provided evidence of this document by presenting its marginal witness, Bakhat Jahan (D.W.2), and retrieving the record from the Tehsil Office via Rehmat Ali, Junior Clerk (D.W.3). This sale occurred before the alleged transaction in which Miangul Jahanzeb gifted the shops to the plaintiffs' transferor. The sale agreement (Ex.D.W.1/1) created uncertainty regarding not only Miangul Aurangzeb's title but also that of the plaintiffs. The general principle governing situations where a mere suit for possession will lie is well established. In brief, if the plaintiff is in possession but his title to the property is disputed or clouded, or if the defendant claims title and poses a threat of dispossession, the plaintiff must sue for a declaration of title and seek injunctive relief. Likewise, if the plaintiff's title is clouded or



disputed, and he is not in possession or not able to establish possession, he must file suit for a declaration, possession, and injunction. In this case, the plaintiffs sued for possession based on their title. However, an intervening sale regarding the property in question cast doubt on their title; therefore, they should have sought a declaration of their rights before claiming relief for possession. Their simple suit for possession was not maintainable.<sup>2</sup> Despite the defendants' assertions in their written statement, the plaintiffs did not take any step to seek a declaration of title. This oversight went unaddressed by the High Court, so its judgment cannot be affirmed.

11. A thorough review of the case records shows that the plaintiffs did not demonstrate the necessary diligence in pursuing their suit. They failed to call any witnesses to substantiate the alleged gift transaction, which significantly weakened their position. The solitary statement provided by their attorney was insufficient to support their claims, particularly since it did not effectively demonstrate that the defendants, as licensees, had possession of the shops in question. Furthermore, the rationale behind their demand for *mesne* profits of Rs.10,000 per month was not adequately established, and there was a lack of tangible evidence to justify this figure. Additionally, the plaintiffs did not provide a credible basis for seeking the eviction of the defendants from the shops. Consequently, the suit brought by the plaintiffs was liable to be dismissed in its entirety.

---

<sup>2</sup> Sultan Mahmood Shah through LRs and others v. Muhammad Din and two others (2005 SCMR 1872)

12. We accordingly accept the defendants' appeal, CA No.493 of 2023. Consequently, we dismiss the plaintiffs' appeal, CA No.494 of 2023. In doing so, we set aside the decrees issued by both the High Court and the first Appellate Court, and we restore the Trial Court's decree that dismissed the plaintiffs' suit in toto. We will not impose any costs related to this matter.

**Judge**

**Judge**

Islamabad  
17.10.2024  
APPROVED FOR REPORTING  
*Rashid\**