Form No.HCJD/C-121

ORDER SHEET

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

Civil Revision No.1068-D of 2014

Muhammad Saleem (deceased) Through his Legal Heirs

Versus

Habib-ur-Rehman

S.No. of order/ Proceeding	Date of order/ proceeding	Order with signature of Judge and that of parties or counsel, where necessary
	21.11.2024	Sardar Abdul Raziq Khan, Advocate for the petitioners. Sardar Bilal Firdous, Advocate for the respondent.

Through instant petition under Section 115 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "**C.P.C.**") the petitioners assail the *vires* of judgment and decree dated 14th October, 2014, whereby learned Additional District Judge, Pindigheb, while dismissing appeal preferred by their predecessor-in-interest namely Muhammad Saleem (hereinafter referred to as "**pre-emptor**") affirmed the judgment and decree dated 12th March, 2014 passed by the learned Civil Judge Class-I, Pindigheb District Attock.

2. Briefly the facts necessary for adjudication of instant petition are that the **pre-emptor** instituted a suit for possession through pre-emption averring therein that suit land was purchased by the respondent through mutation No.507 dated 31st January, 2011 in lieu of sale consideration of Rs.15,000/-, however, in order to defeat the right of pre-emption of the **pre-emptor**, sale consideration was mentioned as Rs.30,000/-. As per averments contained in the plaint, **pre-emptor** attained the knowledge of sale on 17th February, 2011 at 10:00 am when he was present in his house and the information was disclosed by Saeed Akhtar in presence of Abdul Aziz. It is the case of the **pre-emptor** that

immediately on attaining the knowledge, he performed necessary Talbs in furtherance of his superior right of pre-emption. Suit was contested by the respondent by filing written statement, wherein the assertions contained in the plaint were controverted. The respective stances of the parties put forth in the pleadings resulted into framing of multiple issues. After framing of issues, evidence of both the sides was recorded and on completion of the same, suit was dismissed vide judgment and decree dated 12th March, 2014. The **pre-emptor**, being dissatisfied with the above said judgment and decree though preferred an appeal before the learned Additional District Judge, Pindigheb, but the same was also dismissed vide impugned judgment and decree dated 14th October, 2014.

3. Learned counsel for the petitioners submitted that the **pre-emptor** was possessed with a superior right of pre-emption and as such he exercised his right by performance of necessary Talbs. It is contended that though overwhelming evidence was produced to this effect but suit was dismissed without due appreciation of the same. Learned counsel maintained that findings of courts below qua performance of Talbs are not tenable. It is contended that concurrent findings are thus not tenable at all.

4. Conversely, learned counsel appearing on behalf of the respondent, while defending the judgments under challenge, submitted that there are concurrent findings of facts recorded by both the courts below, which are in consonance with the material available on the record. Learned counsel submitted that the respondent after purchase of the suit land obtained the possession of the same, which fact was well in the knowledge of the **pre-emptor** right from the first day. He maintained that the **pre-emptor** failed to prove his superior right of pre-emption as well as performance of necessary Talbs.

5. Heard. Record perused.

6. Before adverting to the merits of the case it would be apposite to observe that the **pre-emptor** died during the pendency of this petition and after his death the petitioners have joined the proceedings being his legal heirs. Section 16 of the Punjab Pre-emption Act, 1991 (hereinafter referred to as "**Act, 1991**") provides that where a pre-emptor dies after making any of the demand under Section 13 of the Act *ibid*, the right of pre-emption shall transfer to his legal heirs.

7. From the perusal of record it reveals that the **pre-emptor** while canvassing his superior right instituted the suit in order to pre-empt the suit land. It is time and again held by the superior courts that existence and enforcement of pre-emption right are two distinct and different phenomena and mere having a superior right of pre-emption by itself is not sufficient to succeed in a suit for pre-emption. The pre-emptor has to establish the performance of necessary Talbs as required under Section 13 of the **Act, 1991** in order to succeed in a suit for pre-emption.

8. Talb-i-Muwathibat is the basic foundation of the right of pre-emption which is to be performed immediately on attaining the knowledge about the sale. Even wastage of a single moment in performance of Talb-i-Muwathibat is sufficient to damage the right of pre-emption. For the purpose of determining the fate of Talb-i-Muwathibat time, date and place always play a significant role. The pre-emptor(s) is/are always obliged to lead cogent and unimpeachable evidence to establish his/their right through performance of necessary Talbs. While going through the evidence, it is observed that the evidence of the **pre-emptor** is highly discrepant qua the above aspects. As per plaint, the information was received by the **pre-emptor** through Saeed Akhtar (PW2) on 17th February, 2011 at 10:00 am when he was present in his house in presence of Abdul Aziz (PW3), however, while appearing

as PW1 he did not mention the time on which information was received from Saeed Akhtar (PW2). Even otherwise Abdul Aziz (PW3) also did not make clear statement about the place of Talb-i-Muwathibat. This omission is fatal for a suit for pre-emption. There is no cavil that time and date were mentioned in the plaint but it is well settled principle of law by now that pleadings cannot be a substitute of evidence. Unless a material fact which is asserted in the pleadings has been deposed in evidence by the witness that cannot be considered or treated as valid piece of evidence. This sole aspect is sufficient to shatter the case of the **pre-emptor** because time and place always plays a pivotal role for the purpose of analyzing the validity of Talb-i-Muwathibat. Reliance in this respect can be placed on *ALLAH DITTA through L.Rs. and others vs MUHAMMAD ANAR* **(2013 SCMR 866)** and *Mian PIR MUHAMMAD and another vs FAQIR MUHAMMAD through L.Rs. and others* **(PLD 2007 Supreme Court 302)**.

9. It would not be out of context to mention here that Abdul Aziz (PW3) only deposed the date of Talb-i-Muwathibat and did not state about the month and year regarding this material fact. He also deposed that one year earlier Saeed Akhtar (PW2) had informed about the impugned sale. If such statement of said witness is to be admitted correct then it evinces from the record that statement of Abdul Aziz (PW3) was recorded on 30th May, 2012 then the date of making of Talb-i-Muwathibat becomes 30th May, 2011 whereas the **pre-emptor** purportedly received the information on 17th February, 2011. In such situation, story relating to Talb-i-Muwathibat is not appealable at all to prudent mind.

10. It is noticed that as per stance of the **pre-emptor** in his plaint he attained the knowledge about the sale of suit land, while sitting in his house but plaint is silent about the exact portion of the house. House is a vast place and non-mentioning of exact portion by itself is fatal to right of pre-

emption. Guidance in this respect can be sought from *ALLAH DITTA through L.Rs. and others versus MUHAMMAD ANAR* **(2013 SCMR 866)** wherein the Supreme Court of Pakistan held as under :-

> **"**2. We have heard learned counsel for the parties and find vital discrepancy in the statements of P.W.1, P.W.2 and P.W.3 particularly, P.W.1 and P.W.2. P.W.2 stated that the disclosure of the sale of suit land was made to them while the plaintiff was sitting inside the shop of Aziz, whereas the informer who is the son of the pre-emptor, P.W.3 Muhammad Rafique, has contradicted the above and in unequivocal, clear and unambiguous terms stated that they were sitting outside the shop. This was a material discrepancy but the learned Appellate Court had failed to notice the same and it has also been overlooked by the learned Revisional Court…….**"**

Reference in this respect can also be made to the cases of *NOOR MUHAMMAD SULTAN versus Hafiz ALLAH BAKHSH* **(2014 YLR 1381)** and *MUHAMMAD AFZAL versus ALI MUHAMMAD* **(2014 YLR 87)**.

11. There is yet another important aspect; claim of pre-emption always set to motion on the basis of information received by the pre-emptor from the informer. As per claim of the **pre-emptor**, he attained the knowledge about the sale transaction on 17th February, 2011 from Saeed Akhtar (PW2). As per statement of informer, he became acquainted with the sale transaction from one Muhammad Ayub but said person was never produced in evidence in order to prove the source of information. Needless to observe that onus to prove the basic source of information through which the pre-emptor attained the knowledge of sale always rests upon him. The **pre-emptor** was though obliged to establish whole chain of information but it is clearly missing in the present case, which even otherwise is very essential element to prove Talb-e-Muwathibat. Guidance in this respect can be sought from *FARID ULLAH KHAN versus IRFAN ULLAH KHAN* **(2022 SCMR 1231)**. The relevant extract from the same is reproduced below :-

> **"*Source of information of sale - hearsay evidence***

8.2 Secondly, no person who could have testified that he had direct knowledge of the sale of the suit land, has been examined by the respondent. All the evidence produced on the source of information, as to the sale of the suit land, is hearsay. The brother of the respondent, Farman Ullah **(PW-4)**, who had informed him about the sale of the suit land, could not tell the names of the persons, who were talking about sale of the suit land in the Chok of the village, except the one who had died. Thus, no one was produced by the respondent to substantiate the version of Farman Ullah **(PW-4)** of how he had come to know of the sale.

8.3 In *Subhanuddin v. Pir Ghulam*, a case of similar facts, where the person who had conveyed the information of the sale to the brother of the pre-emptor, who in turn passed it onto the pre-emptor, as is in the present case, was not produced as a witness. Based on the said facts, this Court held that the elements of Talb-i-Muwathibat had not been proved, with the following observation:

> "7. It was the respondent's case that upon his return from Punjab he was informed about the sale by his brother (Taj Ali). Taj Ali, lives in the same house as the respondent, but did not know whether the respondent was in the village when the sale took place, nor when the respondent returned from the Punjab and that he was informed about the sale by his nephew Nazir. The initial burden of proof with regard to these facts (the conveying of the information of sale and price) lay upon the respondent, and to establish the same Nazir could have been called to give evidence, as the evidence in this regard (which was oral) was required to be direct and of the witness who saw, heard or perceived it himself (Article 71 of the Qanun-e-Shahadat Order, 1984), but Nazir was not produced as a witness. Consequently, an important and relevant fact was not proved by the respondent and on this ground alone the suit merited dismissal as *Talb-i-Muwathibat* is required to be made immediately upon learning of the sale".
>
> (Emphasis added)

In essence, this Court in the above case came to the conclusion in view of the provisions of Article 71 of the Qanun-e-Shahadat 1984, which mandates that oral evidence must be direct, that is to say, if it refers to a fact, which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact, which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact, which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; and if it refers to an opinion or to the grounds on which that opinion is held, it must be, subject to the proviso, the evidence of the person who holds that opinion on those grounds.

8.4 The fact of a sale of land is a fact that can be seen, such as, by observing or taking part in the sale-transaction or by seeing the sale deed or sale mutation. The person who conveys the information of the fact of sale must be a person who has seen the fact of sale and it is he who can then pass on the said fact to another person(s). Thus, the chain of the source of information, as to the fact of sale, from the very

> first person, who has the direct knowledge thereof and passes on the same to the person who lastly informs the pre-emptor, must be complete. Only the complete chain of the source of information of the sale can establish the essential elements of *Talb-i-Muwathibat*, which are: (i) the time, date and place when the pre-emptor obtained the first information of the sale, and; (ii) the immediate declaration of his intention by the pre-emptor to exercise his right of pre-emption, then and there, on obtaining such information. In the present case, such chain of the source of passing on the information, as to the fact of sale of the suit land has not been proved, and the entire case as to making of *Talb-i-Muwathibat* is built on the hearsay evidence of the respondent's brother, Farman Ullah (PW-4). This omission raises doubts on the veracity and truthfulness of the witnesses produced by pre-emptor.**"**

Reference to the above effect can also be made to *MUHAMMAD RIAZ versus MUHAMMAD AKRAM and others* **(2024 SCMR 692)** and *SUBHANUDDIN and others versus PIR GHULAM* **(PLD 2015 Supreme Court 69)**.

12. Needless to mention that the respondent specifically denied the performance of Talbs in his written statement, so it was incumbent upon the **pre-emptor** to lead tangible evidence in order to substantiate the performance of Talbs. When once the **pre-emptor** failed to prove first Talb i.e. Talb-i-Muwathibat, which is the basic foundation for the whole edifice of pre-emption right, there remains no need to advert to the second Talb because if first Talb is not proved then the entire structure would crumble down.

13. There are concurrent findings of facts recorded by both the courts below. After having scrutinized the record, I am of the considered view that concurrent findings arrived at by both the courts below are based on proper appraisal of evidence and there is no misreading or non-reading of evidence on part of any of the court below. The revisional jurisdiction is to be exercised, while keeping in view the principles enshrined in Section 115 of the **C.P.C.** The superior courts are always reluctant to interfere with the concurrent findings, unless some patent illegality or material irregularity crept up on the record or pointed out by the petitioner(s). The exercise of revisional powers is always

guided by the necessary pre-conditions laid down in the above referred provision of law. The scanning of evidence and the perusal of impugned judgments does not reflect any illegality or material irregularity, justifying interference by this Court. Reference in this respect can be made to *Mst. ZARSHEDA versus NOBAT KHAN* **(PLD 2022 Supreme Court 21),** *MUHAMMAD SARWAR and others versus HASHMAL KHAN and others* **(PLD 2022 Supreme Court 13)** and *GHULAM QADIR and others versus Sh. ABDUL WADOOD and others* **(PLD 2016 Supreme Court 712)**.

14. In view of above discussion, instant petition being devoid of any merits is **dismissed in *limine***.

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE

Shahbaz Ali*