

JUDGMENT SHEET

IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT
JUDGMENT

C.R.No.550-D/2016

Zahid Khan etc. **VS.** Muhammad Ahsan etc.

Date of hearing	27.09.2023
Petitioners by	Malik Muhammad Asif and Waqas Sher Afzal, Advocates
Respondents by	Sh. Ahsan-ud-Din and Sh. Zulfiqar Ali, Advocates

Ch. Muhammad Iqbal, J:- Through this civil revision the petitioners have challenged the validity of the judgment & decree dated 06.12.2012 passed by the learned Civil Judge, Attock who decreed the suit for possession through pre-emption filed by the respondent No.1 and also assailed the judgment & decree dated 16.03.2016 passed by the learned Additional District Judge, Attock who dismissed the appeal of petitioners.

2. Brief facts of the case are that Muhammad Ahsan, respondent No.1/plaintiff filed a suit for possession through pre-emption against Safdar Khan etc/petitioners/defendants in respect of land measuring 03 Kanal 08 Marla fully described in the headnote of the plaint and contended that the petitioners/defendants purchased the suit land from Aslam son of Ghulam Sarwar through mutation No.1282 dated 16.04.2008. On 23.04.2008 at about 12:00 noon when the respondent/plaintiff was present on his shop situated at Malik Market, Hazro Road Gondal and Muhammad Iqbal s/o Fazal Dad as well as Mansoor Abbas s/o Malik Akhtar r/o Awan Abad were present there. At

that time Muhammad Asif came there and informed him about the sale mutation and the respondent/plaintiff promptly announced to pre-empt the said sale. That on 24.04.2008 the respondent/ plaintiff sent notice of Talb-i-Ishhad and thereafter instituted suit on 07.05.2008. The petitioners/defendants sold back the suit property to Muhammad Aslam, ex-owner of the suit land through mutation No.1290 entered on 29.04.2008 and sanctioned on 07.05.2008 and mutation Nos.1402 & 1403 dated 20.06.2008. The petitioners/ defendants filed contested written statement and contended that the land subject matter of sale mutation No.1403 dated 20.06.2009 is although a different property against which the plaintiff's suit was not pending. That the preempted sale mutation has been rescinded as the vendee returned/resold the land to the vendor and cause of action stood extinguished, thus the suit is not maintainable. As per divergent pleading of the parties, the trial Court framed issues as under:-

1. Whether the plaintiff has got preferential right of pre-emption qua the defendant No.1 to 4? OPP
2. Whether the plaintiff has performed the required Talabs as per law? OPP
3. Whether the price of suit property value Rs.3,50,000/- is ostensible if so what it is real price? OPP
4. Whether the suit in hand is not maintainable as the suit property has been returned to the original vendor? OPD
5. Whether the suit property has not been properly valued for the purpose of Court fee? OPD
6. Relief.

And recorded evidence of the parties and decreed the suit on 06.12.2012. Zahid Khan, petitioner No.1, filed appeal which was dismissed by the appellate Court on 16.03.2016. Hence, this Civil Revision.

3. I have heard the arguments of learned counsels for the parties and have gone through the record.
4. As regard maintainability of the suit, the trial Court framed Issue No.4. Admittedly, respondent/plaintiff challenged

mutation No.1282 dated 16.04.2008 in respect of the suit land. Thereafter, the suit land was sold back and entry of the transaction was incorporated on 29.04.2008 by the defendants to ex-owner Muhammad Aslam and official fee of the mutation was paid through challan Form No.4 dated 06.05.2008 and Mutation No.1290 (Ex.D-3) was sanctioned on 07.05.2008 and the suit was also filed on same day i.e. 07.05.2008. Thus the sanctioning of resale mutation and filing of the pre-emption suit was on the one and the same date i.e. 07.05.2008. As the right of pre-emption emanates from Section 5 of the Punjab Pre-emption Act, 1991 which is stipulated with the sale of immovable property with permanent transfer of the title as well as the performance of the mandatory Talab as per law. The word “sale” has been defined in Section 2(d) of the Act ibid as under:

“(d) “sale” means permanent transfer of the ownership of an immovable property in exchange for a valuable consideration and includes transfer of an immovable property by way of ‘hiba bil-iwaz’ or ‘hiba ba-shart-ul-iwaz’, but does not include—

(i) transfer of an immovable property through inheritance or will or gift, other than ‘hiba bil-iwaz’ or ‘hiba ba-shart-ul-iwaz’;

(ii) a sale in execution of a decree for money or of any order of a civil, criminal, revenue or any other court or a Revenue Officer or any local authority;

(iii) exchange of agricultural land; and

(iv) transfer of an immovable property for a consideration other than valuable consideration, such as the transfer of an immovable property by way of dower or composition in a murder or hurt case.”

Similarly, Under Section 54 of the Transfer of Property Act, 1882, the Sale has been defined as under:-

“54. Sale defined. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

Sale how made. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs in possession of the property.

Contract for sale - A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

Meaning of the word “Sale” in Black’s Law Dictionary is as under:-

“1. The transfer of property or title for a price. 2. The agreement by which such a transfer takes place. The four elements are (1) parties competent to contract (2) mutual assent (3) a thing capable of being transferred, and (4) a price in money paid or promised.”

Thus the conjoint reading of the above provision of law as well as the pari materia, it can be said that the sale means transaction of any land with permanent transfer of title / ownership against payment of price in the shape of money, thus a “sale” is transfer of ownership of immovable property in exchange for a price paid or promised or partly paid or partly promised and for such transaction, payment of price must be contemplated; same must be followed by the delivery of possession, whereas mere registration of the document of sale deed and attestation of mutation in favour of the vendee is amounted to mature title of the vendee which is mere a subsequent event for the fiscal purpose or to update the official record. Reliance is placed on a case cited as Muhammad Khuibaib Vs. Ghulam Mustafa (deceased) through LRs (2020 CLC 1039). In this case, all the ingredients of resale were completed prior to filing of the suit on 07.05.2008 and sanction of mutation is mere a formality even then it was sanctioned on 07.05.2008 when the suit was filed, whereas the schedule for sanctioning of mutation normally takes a few days before sanctioning of it, thus the resale

of preempted land had taken place much before filing of the suit. Reliance in this regard is placed on a case cited as *Muhammad Nazeef Khan Vs. Gulbat Khan and others (2012 SCMR 235)*.

5. It is further observed that admittedly the suit land was sold back to the ex-vendor Muhammad Aslam through mutation dated 29.04.2008 which was sanctioned on 07.05.2008 and this transaction was not preempted and even the sale transaction affected through mutation No.1290 dated 20.06.2008 was also not pre-empted by the respondent, thus his suit is not maintainable. Reliance in this regard is placed on case titled as *Muhammad Hashim versus Sona Khan and 5 others (2015 CLC 223)* wherein it is held as under:

“11. The amended plaint filed by the petitioner/plaintiff reveals that the legal heirs of Lashkar Ali Khan were arrayed as party to the suit in the panel of the defendants with addition in the same prayer of possession through pre-emption that subsequent sale-deed No.1102 attested on 1-5-2001 in the name of Lashkar Ali Khan by defendant No.1 was wrong, illegal and ineffective upon the rights of the plaintiff. However, no suit for pre-emption was filed against the subsequent sale and the petitioners having maintained their stance to question the previous sale effected through registered deed No.635 attested on 12-3-2001 through exercise of right of pre-emption. The subsequent transaction remained unchallenged, so far as the exercise of right of pre-emption is concerned, while the previous sale for all practical purposes has been ended and is no more in existence. Needless to mention that talbs allegedly made against the previous transaction and plaintiff has made no talb against the subsequent transaction, as no suit for pre-emption has been filed against it. This state of affairs leads one to the conclusion that the defendants/vendees were not restrained from the transfer of property in the name of vendor or anyone else prior to the institution of suit and in the instant case, the same transfer took place even prior to the alleged Talb-e-Muwathibat and notice of Talb-e-Ishhad on behalf of the plaintiff. The right of the plaintiff, if vendee entered into fresh transaction/sale during the pendency of suit, would not be affected but if prior to the institution of suit neither section 22 of the N.-W.F.P. Pre-emption Act, 1987 nor section 52 of the Transfer of Property Act, 1882 would be applicable and the applicant would have no right whatsoever to claim any embargo upon the resale in accordance with law.”

(emphasis supplied)

And in a case titled *Muhammad Mansha and another versus Muhammad Nawaz (2014 MLD 1346)* it is held as under:

“6. In the case in hand, the appellants purchased the suit land from Hamad Naseer through an oral sale which was entered in the revenue record vide Mutation No. 966 dated 31-12-2009 (Annex-H). It was the case of the respondent that he came to know about the above said sale on 11-2-2010 through Maqsood Ahmad son of Muhammad Abdullah in presence of Zaka Ullah Bhindar and Muhammad Asim while he was sitting in his Dera situated in village Sheikhupura Baidad; and, that after getting the knowledge of above said sale he declared his intention to exercise his right of pre-emption in respect of the above said sale. The respondent on 6-3-2010 instituted a suit for possession of the suit property through pre-emption. During pendency of suit, Mutation No.966 stood cancelled by the Revenue Officer vide order dated 15-3-2010. This fact has not been denied by the respondent. Now, a question arises as to whether after cancellation of sale Mutation No. 966 the cause of action to file a suit ceased to exist. Answer to the above said question is in affirmative for the simple reason that as per section 5 of the Punjab Pre-emption Act, 1991 the right of pre-emption arises in case of sale of immovable property. It means that when there is no sale of immovable property; there is no right of pre-emption. The right of pre-emption is not a right of re-purchase, either from the vendor or from the vendee, involving any new contract of sale but it is simply a right of substitution, entitling the pre-emptor, by reason of legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all rights and obligation arising from the sale under which he has derived his title. It is, in fact, as if in a sale deed the vendee's name is rubbed out and the pre-emptor's name is inserted in its place. Thus, when the sale or contract of sale ceases to exist then the right to pre-empt the sale also stands extinguished. The cancellation or revocation of sale, even during pendency of suit, terminates the right of pre-emption as it is an established principle of law that pre-emptor in order to succeed must successfully establish such right on the day of sale, on the day of filing a suit pre-empting the sale and its continued subsistence till the day of decree. In the instant case, the respondent claimed his right on the basis of sale made in favour of the appellant vide Mutation No. 966. Thus, when the above said mutation stood cancelled, the cause of action to file a suit for pre-emption also stood extinguished as the suit property stood reverted to the original owner. In these circumstances the learned Trial Court validly rejected the plaint under Order VII, Rule 11, C.P.C.”

(emphasis supplied)

As the suit land was resold by the petitioners/defendants to the original owner through mutation No.1290 as such the suit

filed by the respondent/plaintiff was not maintainable. As such, the findings of the Courts below on this issue are illegal and same deserve reversal and this issue is decided in favour of the petitioners/defendants and against the respondent/plaintiff.

6. As regard the performance of Talbs, in this regard, issue No.2 was framed and onus whereof was placed upon the plaintiff. To dislodge the onus of this issue, Muhammad Ahsan, plaintiff/P.W.1 deposed that on 23.04.2008 12'o clock on Wednesday, he was sitting at his shop of *Khal Chokar* situated in Malik Market and at that time Muhammad Iqbal and Mansoor Abbas were also sitting there, when Muhammad Asif came there at 12 noon and informed him regarding the impugned sale mutation upon which he at once announced to pre-empt the sale. Muhammad Iqbal (P.W.2) deposed that:

"بيان کیا کہ مورخہ 23 اپریل 2008 بروز بده وقت تقریباً پونے بارہ بجے دن ملک مارکیٹ واقع حضروں گوندل روڈ شریف ہسپتال میں میں مدعاً کی دکان کھل چوکر سے خریداری کرنے کے لیے گیا تھا۔۔۔ پھر دن 12 بجے محمد آصف وہاں آیا۔۔۔ مدی نے سنتے ہی فوراً اعلان شفعت کیا کہ میری جدی زمین ہے۔ میں وارث ہوں اور قبضہ بھی میرا ہے اور منتقلی بیچ سے مدعاً کو نقصان ہے۔"

(emphasis supplied)

Muhammad Asif (P.W.3/informer) deposed that:

"بيان کیا کہ مورخہ 23.04.2008 بروز بده تقریباً 12 بجے سب سے پہلے میں پٹواری کے پاس اپنی زمین چیک کرنے کی غرض سے گیا جہاں پر پٹواری سے مجھے پتہ چلا کہ انتقال نمبر 1282 کے ذریعے محمد اسلام ولد غلام سرور نے صدر خان، عبدالوحید، محمد جاوید اور جہانزیب پر خسرہ نمبر 1119 اور 1129 پر ان حصہ 3 کنال 8 مرلہ فروخت کر دیا ہے۔۔۔ پھر میں مدعاً کو اس بابت دن 12 بجے مدعاً کی دکان کھل چوکر گوندل حضروں ملک مارکیٹ میں واقع ہے پر جا کر بتائی۔"

(emphasis supplied)

In cross examination, he deposed that:

"میں جس وقت پٹواری کے پاس گیا اس وقت پونے دس بجے تھے۔ پٹواری کے پاس 3/12 افراد بیٹھے ہوئے تھے۔۔۔ میں تقریباً 1 گھنٹہ میں پٹواری سے گوندل پہنچ گیا تھا۔"

(emphasis supplied)

The P.W.3 is the alleged informer who stated that he was sitting with Patwari at about 09:45 a.m. and thereafter within an hour he

reached to the plaintiff. Be that as it may, the witness reached to the plaintiff at about 11 a.m. whereas the plaintiff deposed that informer (P.W.3) reached to his shop at 12 noon. Thus, the testimony of the informer with regard to time of imparting the information of sale is clearly at variance with the statement of the other PWs and it evinces from the above deposition of PWs as well as the story of receipt of information is a self-created and concocted one. Thus, these major contradictions in the testimonies of the witnesses regarding the time of receipt of the information of the impugned sale are considered grave in nature which badly affect the preemptory cause of the respondent. Reliance is placed on the case reported as Allah Ditta through LRs & Others Vs. Muhammad Anar (2013 SCMR 866), the relevant portion whereof is reproduced 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, PW.1 and PW.2, P.W.3 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, PW.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.....”

Further the respondent/plaintiff also did not produce witness Malik Mansoor Abbas who was allegedly present with him at the time of receipt of the information and no explanation has been furnished in this regard, as such he failed to prove the performance of Talb-i-Muwathibat as per law.

7. Next with regard to performance of Talb-e-Ishhad, The petitioner/vendee denied the receipt of any notice of Talb-i-Ishhad thus the respondent/plaintiff was under obligation to substantiate the postal service of notice upon the vendees. The respondent/plaintiff produced Mushtaq Ahmad (P.W.4) who allegedly served the notices of the Talb-i-Ishhad through

registered post A.D but he was not actual postman of the said post office. During cross examination he deposed that:

"میں ڈاکخانہ کا مستقل ملازم نہ ہوں۔۔۔ یہ درست ہے کہ شادی خان ڈاکخانہ میں مستقل ڈاکیہ موجود ہے۔۔۔ یہ درست ہے کہ ڈاکیہ مذکور شادی خان کی حد تک ڈاک تسمیہ کرتا ہے۔"

(emphasis supplied)

but the P.W.4 neither stated that he was handed over any notice/letter to affect service upon defendant Muhammad Javed nor served the same upon him. Thus the respondent/plaintiff failed to prove the service of notice of Talb-i-Ishhad as per law. Reliance is placed on cases titled as *Munawar Hussain & Others Vs Afaq Ahmed (2013 SCMR 721)* and *Muhammad Riaz Vs. Muhammad Ramzan (2023 SCMR 1305)*. Moreover, initially the suit was filed against four defendants whereas the registered A.D were produced in respect of three defendants out of which only one was allegedly served in person whereas two notices were not personally served upon the other vendees. Non-production of the acknowledgment receipt (A.D) amounts to withholding of material evidence, which flaw has grave adverse effect on the case of the respondent/plaintiff. Reliance is placed on the cases titled as *Bashir Ahmed Vs. Ghulam Rasool (2011 SCMR 762)* and *Muhammad Riaz Vs. Muhammad Ramzan (2023 SCMR 1305)*.

Further, the respondent/plaintiff has not produced Malik Mansoor Abbas the witness of notice of Talb-i-Ishhad nor any explanation has been furnished in this regard. Thus, it is amounted to withholding of the best evidence and it would be legally presumed that had the said witness produced in the evidence, he would have deposed unfavourable against the respondent/plaintiff and presumption under Article 129 (g) of Qanun-e-Shahadat Order, 1984 goes against him, as such the respondent/plaintiff failed to prove the service of notice of Talb-i-Ishhad as well. Reliance is placed on the case of *Sughran Bibi Vs. Mst. Aziz Begum & 4 Others (1996 SCMR 137)* and *Jehangir Vs*

Mst. Shams Sultana & Others (2022 SCMR 309). Moreover, the performance of mandatory Talb as envisaged under Section 13 of the Punjab Pre-emption Act, 1991 has much significance as it lays or dismantles the foundation of the very suit and skip off or non-performance of a single Talb demolishes the whole superstructure of the pre-emptory cause even though the remaining Talbs have been performed. Reliance is placed on a judgment of the Supreme Court of Pakistan titled as Sardar Muhammad (deceased) through LRs. Vs. Taj Muhammad (deceased) through LRs and others (2023 SCMR 1113).

In view of above, it can conveniently be held that the respondent/plaintiff failed to prove the performance of Talbs as per law, as such the findings of the learned Courts below on issue No.2 are hereby reversed and this issue is decided against the respondent/plaintiff and in favour of the petitioners/defendants.

8. As regard the objection raised by learned counsel for the respondent that instant revision petition is not maintainable on the ground that only petitioner No.1/Zahid Khan, one out of the three defendants before the trial Court has challenged the judgment & decree of the trial Court through an appeal whereas rest of the defendants have not assailed the same and to the extent of rest of the defendants, the judgment & decree of the learned trial Court has attained the status of finality. Suffice it to say in this regard that under Section 115 C.P.C this Court has jurisdiction to entertain and adjudicate the matter if it appears from decision of the subordinate Courts that the lower fora have exercised jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested, or have acted in the exercise of its jurisdiction illegally or with material irregularity. In this case petitioner No.1/Zahid Khan, one of the defendants, challenged the judgment & decree of the trial Court through this Revision Petition and record of the case is appended with it. As the respondent-plaintiff filed suit for possession through pre-emption

but as discussed above he has failed to prove the performance of mandatory Talbs as per law which factum has escaped from the consideration of the trial Court who by committing misreading and non-reading of the evidence and misapplication of law, decreed the suit for possession through pre-emption and similar blatant illegality was also committed by the appellate Court who upheld the decision of the trial Court, thus this Court under Section 115 C.P.C has suo motu jurisdiction to look into the available record or call for the record of its subordinate courts who have committed material illegalities & irregularities and may pass appropriate order as it deems fit. Reliance in this regard is placed on a case cited as Hafeez Ahmad and others Vs. Civil Judge, Lahore and others (PLD 2012 SC 400). The Supreme Court of Pakistan has settled an alike question in a case cited as Naseem Ahmad and another Vs. Air Botswana (Pty) Ltd. and 5 others (1993 SCMR 647) by holding that in appropriate cases under Section 115 C.P.C, a High Court has jurisdiction to interfere when the lower fora exercised their jurisdiction excessively or committed material illegalities and irregularities. For ready reference, relevant portion of the judgment (supra) is reproduced as under:

“However, the view taken above has to some extent been modified by this Court in subsequent judgments delivered by this Court and the view subsequently taken is that undoubtedly the Courts will ordinarily decline to exercise revisional jurisdiction wherein alternative remedy is available but this should not be regarded as an inflexible rule to be followed rigidly without exception because in special circumstances of a case, a departure from this rule could be justified. Thus, this Court in Manager, Jammu and Kashmir State Property in Pakistan and others v. Khuda Yar and another (PLD 1975 SC 678) inter alia observed:--

"As a general rule the principle to be followed in all such discretionary matters is that special and extraordinary powers ought not to be exercised in favour of an applicant who has been negligent in pursuing the normal remedies open to him. Thus where an appeal lay to some other Court and could have been filed if the applicant was diligent but he has not done so, then the High Court

should not ordinarily entertain a revision even if the order or decision complained of does not amount to a decree.....

This rule is not, however, an inflexible one and it will, no doubt, depend upon the special circumstances of each case whether it will be followed or not."

and recently in the case of Messrs United Bank Limited v. Yousuf Haji Noor Muhammad Dhadhi (1988 SCMR 82) after noticing the above-mentioned two decisions it was observed:--

"Learned counsel also contended, on the basis of Municipal Committee v. Sh. Aziz Elahi (PLD 1970 SC 506) and S. Azizul Hassan and another v. Malik Ghulam Muhammad (1971 SCMR 123), that no revision under section 115 was competent if no appeal was preferred from the order which was appealable. This point, however, is concluded and determined by a judgment of this Court in Manager, Jammu and Kashmir State Property in Pakistan v. Khuda Yar and another (PLD 1975 SC 678), in which it was held that although ordinarily Courts have declined to exercise revisional jurisdiction where an alternative remedy is available, yet this is not an inflexible rule to be rigidly followed and a departure could be justifiably made if required from circumstances of the case. Having regard to all the circumstances of this case we feel that in this case the High Court ought to have entertained the revision application and set aside the order impugned before it whereby the plaintiffs were non-suited for a trivial formality."

In our opinion, the present was a fit case justifying a departure from the normal rule and in which the High Court should have exercised jurisdiction. The case raised a serious question of law namely whether in the circumstances of the case, the learned Judge in the High Court was right in holding that the Courts at Karachi did not have the jurisdiction to entertain the suit when the offices of at least two defendants were located in Karachi, although the claim for damages and short delivery of the goods pertains to the carriage undertaken by the airlines outside Pakistan. An authoritative decision of the High Court was necessary in the light of section 20, C.P.C. and Article 28 of the first schedule to the Carriage by Air Act, 1934. The last mentioned Article states that an action for damages must be brought at the option of the plaintiff either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination. Four alternatives have been provided to give jurisdiction to a Court in a dispute coming under this Act. This being the first case of its kind required consideration in depth by the High

Court. Moreso for the reason that in the present case, six Air Companies were involved having their head offices in different countries, considering that the present day air travel has become so common that a passenger expects to receive redress of his grievance at a place which is more convenient to him if a branch office is also established at a place of suing."

Thus the objection / argument of learned counsel for the respondent is misconceived and same is hereby repelled.

9. The Courts below have committed blatant misreading and non-reading of the evidence and have also failed to apply the correct law which rendered the said dicta as not sustainable in the eyes of law. This Court, under Section 115 C.P.C, has jurisdiction to interfere in the perverse concurrent judgments & decrees of the learned lower *fora*. Reliance is placed on the case of Nazim-ud-Din & Others Vs. Sheikh Zia-Ul-Qamar & Others (2016 SCMR 24).

10. In view of above, this civil revision is allowed, the judgment & decree dated 06.02.2012 passed by the learned trial Court as well as the judgment & decree dated 16.03.2016 of the learned appellate Court are set aside and the suit for preemption of the respondent/plaintiff is hereby dismissed. No order as to costs.

**(Ch. Muhammad Iqbal)
Judge**

Announced in open Court on 13.10.2023.

Approved for reporting.

Judge

Abdul Hafeez