Stereo.HCJDA 38.

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

....

Civil Revision No.3252 of 2016

(Syed Shehanshah Raza Hussain Rizvi **Versus** Tariq Nawaz Khan, etc.)

J U D G M E N T

Date of hearing:	**02.10.2024**
Petitioner by:	Mr. Abid Hussain Khichi, Advocate (*proxy counsel for the petitioner's counsel*).
	Syed Iqbal Hussain Shah Gillani, Advocate.
Respondents #2,3&4 by:	Mr. Muhammad Usman Gondal, Advocate.

AHMAD NADEEM ARSHAD, J. This civil revision is directed against the judgment and decree dated 24.05.2016 passed by the learned Appellate Court whereby while accepting the appeal of respondents No.2 to 4 set aside the judgment and decree dated 10.04.2014 of learned trial court and resultantly, dismissed the petitioner's suit for possession through pre-emption.

2. Facts in brevity are that the petitioner (plaintiff) instituted a suit for possession through pre-emption on 07.10.2003 against respondent No.1 (defendant No.1) and pre-empted the sale effected through sale deed No.7034 dated 3.7.2003 whereby one Akhtar Hussain Rizvi sold out a piece of land measuring 01 Kanal (hereinafter referred to as suit property) for a consideration of Rs.9,00,000/- to respondent No.1 by maintaining that being Shafi Shrik, Shafi Khaleet and Shafi Jar he has a superior right of pre-emption over respondent No.1; that respondent No.1 kept the sale transaction secret from him in order to defeat his right of pre-emption; that he came to know about this transaction on 30.09.2003 at about 10.00 a.m. through Muhammad Naseem Khan at his residence while sitting with Shafat Hussain Rizvi and Mehdi Hassan; that he on receiving the said information then and there

announced to exercise his right of pre-emption with regard to the suit property and in this way he performed Talb-i-Muwathibat; that thereafter he sent a notice of Talb-i-Ishhad duly attested by the witnesses, namely, Muhammad Naseem Khan and Mehdi Hassan on 01.10.2003 through a registered post AD to respondent No.1 and in this way he performed Talb-i-Ishhad; that despite receipt of notice of Talb-i-Ishhad respondent No.1 is not ready to transfer the suit property which constrained him to institute the suit and in this way performing Talb-i-Khusumat and prayed for decree of his suit; that despite issuance of notice no one appeared on behalf of the respondent No.1; that on 13.12.2003 the petitioner moved an application under Order 1 Rule 10 CPC with the contention that respondent No.1 (vendor) further alienated the suit property to respondents No.2 to 4 through registered sale deed No.11378 dated 08.09.2003, therefore, they are proper and necessary party and prayed for their impleadment; that the learned trial court allowed the said application vide order dated 8.1.2004 and directed the petitioner to implead said subsequent vendees in the array of defendants, therefore, the petitioner impleaded said subsequent vendees as defendants No.2 to 4 (respondents No.2 to 4); that said respondents filed their contesting written statement on 23.4.2012 by raising certain preliminary objections to the effect that the suit is not maintainable in its present form; that the suit is hopelessly barred by time; that the plaintiff has no cause of action against them; that the plaintiff has no locus standi to file the suit against them; that the plaintiff is estopped from his own conduct to file the suit; that the plaintiff did not make any demand of pre-emption to the answering defendants so he has no cause of action against them; that no right of pre-emption is vested to the plaintiff; that plaint is liable to be rejected under Order VI Rule 11 CPC; that the plaintiff has not come to the court with clean hands and he misstated and mis-represented the facts to the court; that the suit is absolutely false, frivolous and liable to be dismissed with special costs. While replying on facts admitted that Akhtar Hussain Rizvi sold the suit

property to respondent No.1 through sale deed No.7034 dated 03.07.2003, however, maintained that said respondent further alienated the suit property to them and they are bona fide purchasers of the suit property on 26.09.2003 from respondent No.1 without any notice and prayed for dismissal of the suit. The learned trial court while keeping in view the divergent pleadings of the parties framed necessary issues and invited them to produce their respective evidence. After recording evidence of the parties pro and contra, oral as well as documentary decreed the suit vide judgment and decree dated 11.03.2014. Feeling aggrieved respondents No.2 to 4 preferred an appeal which was allowed by the learned appellate court vide judgment and decree dated 24.05.2016 and while setting aside the judgment and decree of the learned trial court dismissed the petitioner's suit for possession through pre-emption. Being dis-satisfied the petitioner has approached this Court through the instant civil revision.

3. The revision petition was fixed before this Court on 24.9.2024. On the said date learned counsel for the petitioner has sent a written request for adjournment. On his request case was adjourned to 01.10.2024 with a warning that no further adjournment shall be granted. On 01.10.2024 again no one appeared on behalf of the petitioner and adjournment was sought on his behalf. Therefore, case was adjourned to 02.10.2024. The same was the position on 2.10.2024, therefore, no option left with the Court to hear the arguments of the respondent No.2 to 4.

4. The arguments of learned counsel for respondents No.2 to 4 were heard and case was reserved for announcement of the judgment with a direction to the petitioner to file written arguments, if he desired. Learned counsel for the petitioner submitted written arguments on behalf of the petitioner which are made part of the file. I have carefully examined the written arguments submitted on behalf of the petitioner, the arguments advanced by learned counsel for respondents No.2 to 4, perused the record and the case laws cited at bar.

5. From careful examination of the record, it appears that the petitioner pre-empted the sale executed through registered sale deed No.7034 dated 03.07.2003 in favour of respondent No.1. No one appeared on behalf of respondent No.1 to rebut the claim of the petitioner. However, it is a matter of record that before announcement with regard to exercise of the right of pre-emption on 30.09.2003 (Talb-i-Muwathibat), sending notice of Talb-i-Ishhad on 01.10.2003 and institution of the suit on 07.10.2003 the suit property had already been alienated through registered sale deed No.11378 by respondent No.1 to respondents No.2 to 4 which was executed on 26.09.2003, presented for registration on 27.09.2003, referred to the local commission for recording of the statement on the same date the statements of the parties recorded on 27.09.2003 and registered on 08.10.2003.

6. Respondents No.2 to 4 took a stance that the petitioner failed to pre-empt the sale executed in their favour whereas the petitioner claimed that he pre-empted the first sale executed in favour of respondent No.1, therefore, he was not required to pre-empt the sale executed after institution of his suit, as it was hit by principle of *lis pendence*.

7. Before deciding the said crucial point of determination whether the petitioner was required to pre-empt the sale executed in favour of respondents No.2 to 4 or not it is better to see whether he had successfully proved his right of pre-emption against respondent No.1 or not. In this regard first two issues are relevant which are reproduced as under:-

1. *Whether plaintiff has fulfilled requirements of Talbs as per law? OPP.*

2. *Whether the plaintiff has superior right of pre-emption qua the defendant? OPP.*

8. The onus of proof of the said issues were placed upon the petitioner. In order to discharge the said onus the petitioner appeared in the witnesses box as PW-1 and produced Muhammad Naseem Khan, Informer and attesting witness of the notice of Talb-

i-Ishhad as PW-2, Mehdi Hassan the witness of Majlis and attesting witness of notice of Talb-i-Ishhad as PW-3 and Naeem Yameen, Postman as PW-4. The petitioner also produced order dated 4.7.1988 passed by this Court in Civil Original No.22 of 1983 titled as *Syed Akbar Hussain Rizvi, etc. Vs Shah Noor Studio Limited, etc*. as Exh.P-1, copy of plan whereby shares of the parties with meats and bound were mentioned as Exh.P-2, copy of notice of Talb-i-Ishhad as Exh.P-3, copy of registered sale deed executed in favour of respondent No.1 as Exh.P-4 and receipt of registry as Exh.P-5 and closed his oral as well as documentary evidence.

9. Section 6 of the Punjab Pre-emption Act, 1991 (*hereinafter referred to as* '**Act**') provides a list of person in whom the right of pre-emption vest. For better understanding the said section is reproduced as under:-

> *"**6. Persons in whom the right of pre-emption vests**---(1) The right of pre-emption shall vest—*
>
> *(a) firstly, in Shafi Sharik;*
> *(b) secondly, in Shafi Khaleet, and*
> *(c) thirdly, in Shafi Jar*
> *Explanation---(i) "Shafi Shrik" means a person who is a co-owner in the corupus of the undivided immovable property sold.*
> *(ii) "Shafi Khaleet" means a participator in the special rights attached to the immovable property sold, such as right of passage, right of passage of water or right of irrigation.*
> *(iii) "Shafi Jar" means a person who has a right of pre-emption because of owning an immovable property adjacent to the immovable property sold.*
> *(2) Notwithstanding anything in subsection (1) the right of pre-emption shall be exercisable only in case of 'Zarooat' or to avoid 'Zarar'.*

Perusal of said section appears that it recognizes that the right of pre-emption vest '***firstly***', in Shafi Sharik i.e a co-owner in the undivided immoveable property sold, '***secondly***', in Shafi Khaleet i.e participator in the special rights attached to the immoveable property sold; and '***thirdly***', in Shafi Jar i.e an owner of immoveable property adjacent to the immoveable property sold.

10. The above quoted provisions of section 6 of the Act serially and separately categorized the superior claims to the right of pre-emption of a pre-emptor as Shafi Sharik, Shafi Khaleet and Shafi Jar. Each definition sets out the scope, the qualifications and the condition of each of these rights. A pre-emptor may have a claim to the right of pre-emption on the basis of any one or more of the prescribed qualifications. The pre-emptor in order to succeed must successfully established such right on the day of sale, on the day of filing of suit and its continued subsistence till the date of decree. The underline principle of law of pre-emption is that the preemptor has to own property before he can exercise such right. For reference reliance is placed on the case titled *Mushtaq Hussain Vs Fateh Khan and others* (**PLD 2015 SC 27**) wherein it was held as under:-

> *"The facts would reveal that pre-emption was allowed when the pre-emptor own property either adjacent to the preempted one or the parties shared a water channel or common thoroughfare adjacent to their respective properties but not in the present case when it has not been demonstrated at all by the appellant that he own any property adjacent to the common passage i.e he could be termed as Shafi Jar. In so far as his right of pre-emption based upon being Shafi Khaleet is concerned again as observed above no special rights are attached to the pre-empted property as the passage is a common one of which appellant only owns one marla."*

11. In order to prove his superior right of pre-emption the petitioner produced copy of order dated 04.07.1988 passed by this Court in Civil Original No.22 of 1983 titled as *Syed Akbar Hussain Rizvi, etc. Vs Shah Noor Studio Limited, etc*. as Exh.P-1 and site plan of the property as Exh.P-2. Perusal of order dated 04.07.1988 (Exh.P-1) it appears that name of the petitioner does not figure anywhere. No doubt in the site plan of Shah Noor Studio (Exh.P-2) the name of the petitioner is mentioned and described that the area shown in red belonged to the petitioner alongwith other shareholder. But said plan is not substitute of title document. Neither any inheritance mutation was placed on record nor copy of record of rights was produced to establish that he is a co-sharer or co-owner in the suit khata from where the pre-empted property was sold.

Mere admission on behalf of the DWs that suit property situated in Shah Noor Studio and belongs to father of the petitioner and petitioner's house was situated in the Shah Noor Studio does not discharge the petitioner to establish independently that he is owner of the property from where pre-empted property was sold and he enjoyed the status of Shafi Sharik, Shafi Khaleet and Shafi Jar. In view of said discussion the petitioner failed to prove his superior right of pre-emption.

12. The petitioner claimed that he got the information with regard to the sale of the suit property on 30.09.2003 at about 10.00 a.m when he was sitting in his house. However, the informer PW-2 Muhammad Naseem Khan did not depose in his examination-in-chief that he passed on said information to the petitioner at 10 a.m. In this way, he failed to point out time of Talb-i-Muwathibat whereas PW-3 in his examination in chief maintained that about 9.00 or 9.30 a.m. the petitioner's Manager Muhammad Naseem Khan came there and maintained that on a plot situated in front of Floor No.4 and Music Hall some labourers were working and the said labourers informed that a person namely Tariq Nawaz purchased the plot, then, the petitioner promptly announced that he will institute the pre-emption suit. The said witness also failed to give exact time as to when the informer informed and the petitioner announced to exercise his right of pre-emption. In this way the petitioner failed to prove Talb-i-Muwathibat.

13. The petitioner claimed that he sent the notice of Talb-i-Ishhad through registered AD. Although receipt of the registered post was produced as Exh.P-5 and Postman was got examined but failed to bring on record the acknowledgment due.

The non-production of the "acknowledgment due" card in the evidence, which is a mandatory obligation under the law, crumbles down the structure of Talbs. The august Supreme Court of Pakistan in a case titled "*BASHIR AHMED Versus GHULAM RASOOL*" (**2011 SCMR 762**) held as under:-

> *"This Court in the judgment reported as "Muhammad Bashir v. Abbas Ali Shah (2007 SCMR 1105)" inter alia held that notice of Talb-i- Ishhad must be served on the vendee and the service of the addressee as prescribed in law is imperative and if the acknowledgment due carries an endorsement of 'refusal' or 'not accepted' a presumption of service would arise unless rebutted and if the addressee makes a statement on oath denying the service, then the onus to prove would be on the party relying upon such notice. It has further been held that if service of notice was denied by the vendee, then it was for the pre- emptor to prove service of notice by producing Postman, who allegedly made the endorsement. In the present case neither the service of the petitioner was effected as required under the law, nor any acknowledgment due carrying an endorsement of 'refusal' or 'not accepted' was produced in evidence. The present case is on better footing as in this case the plaintiff failed to produce any evidence to show that the defendant was 'served with a notice of Talb-i-Ishhad or that he refused to accept the notice, in as much as, acknowledgment due was not placed on record. Under the circumstances, to our mind, it was imperative for the plaintiff, in order to succeed in the suit for pre-emption, to produce evidence, including the Postman, to prove that in fact notice was served upon the petitioner or that he refused to accept the notice, which was sent at his correct address. We find that the learned High Court dismissed petitioner's revision petition primarily on the ground that, "a plaintiff is not required to produce the acknowledgment due receipt as the only requirement is that the sending of notice through registered post acknowledgment due. The plaintiff is not required to establish on record that the said notice has been received by the vendee and its acknowledgment receipt was also received by the plaintiff after its service on the vendee." The said findings are not in consonance with the law on subject, inasmuch as, those were rendered contrary to the law laid down by this Court in the case of Muhammad Bashir (ibid)" (*emphasis supplied*)*

In this way he failed to establish the valid performance of notice of Talb-i-Ishhad.

14. The next question for determination is that whether the petitioner was required to pre-empt the sale effected through sale deed executed in favour of respondents No.2 to 4 or the said sale deed is hit by the principle of *lis pendence*.

15. Respondents No.2 to 4 produced registered sale deed No.11378 as Exh.P-1. Perusal of the said sale deed it appears that respondent No.1 sold the suit property to respondents No.2 to 4.

Said sale deed was executed on 26.09.2003 and was presented for registration to the Sub-Registrar on 27.09.2003 and forwarded to local commission for recording the statements. The local commission summoned the vendor (respondent No.1) on 27.09.2003 (Saturday) at 4/5.00 p.m and recorded the statements of the parties on the same day. Said sale deed was subsequently registered on 08.10.2003.

16. No doubt the petitioner allegedly performed the requisite Talbs i.e Talb-i-Muwathibat, Talb-i-Ishhad and Talb-i-Khusumat before the registration of sale deed executed in favour of respondents No.2 to 4 but admittedly said Talbs were performed after execution of the said sale deed.

17. In order to appreciate the point involved in the instant case whether the sale deed was operative on the date of execution or from the date of registration it is necessary to see section 47 of the Registration Act, 1908 which is reproduced as under:-

> *47. **Time from which registered document operates**.---A registered documents shall operate from the time from which it would have commenced to operate if no registration threof had been required or made, and not from the time of its registration.*

The Hon'ble Supreme Court of Pakistan in the case titled *Naseer Ahmed and another Vs Asghar Ali* (**1992 SCMR 2300**) held as under:-

> *"The High Court however, excluded from consideration the purchase of 4 Kanals land by the appellants for different reasons. There is no controversy that the sale deed in respect of this land was executed in appellants' favour on 8.9.1974 i.e. a day before the institution of the suit. It was presented for registration on 9.9.1974 but registered on 10.9.1974. In the opinion of the High Court as the document was registered after the institution of the suit, the transaction was of no avail to the appellants. The view taken by the High Court is untenable. Section 47 of the Registration Act seemingly escaped notice of the learned Judges of the High Court which provides that a document registered on a date subsequent to the date of its execution operates from the date of the execution. Obviously, therefore, the title to the land had passed on to the appellants on 8.9.1974 and could justifiably bank on it to oppose the suit filed by the respondents."*

For further reference the Hon'ble Supreme Court of Pakistan in a case titled *Ghulam Rasool and others Vs Akbar Ali and others* (**2011 SCMR 794**) observed as under:-

> *"A bare perusal of the said provision of law manifests that a registered document shall operate from the time, day, when it was written and signed and it will create, right, title and interest in favour of the transferee from the date of execution and not from the date of registration."*

18. Section 47 of the Registration Act, 1908 postulates that a registered document would take effect from the date of its execution and not from the date of registration. Admittedly, the subsequent transfer deed was executed on 26.09.2003 and was registered on 08.10.2003. So, in view of the ratio of the referred cases, the subsequent transfer was made prior to making of talbs and institution of pre-emption suit. Thus, the principal of *lis pendence* is not applicable to this case on this ground, as well.

19. No doubt once a pre-emption suit stands instituted, a vendee is prohibited from entering into sale or re-sale of the pre-empted property. It is obvious because the *lis* is pending adjudication. Even otherwise, it is a matter of common sense that the provision of section 52 of the Transfer of Property Act, 1882 would get attract only and only when the *lis* is pending. However, in the instant case further sale made by the vendee prior to the institution of pre-emption suit, could not be brought within the four corners of *lis pendence* and such further sale would be a new transaction altogether of the pre-emptor, if interested in preempting the said sale, would have instituted a suit against the latest sale but not against the previous one. For reference reliance has been placed on the cases titled *Abdul Yameen Khan Vs Ashrat Ali Khan and others* (**2004 SCMR 1270**) and *Muhammad Rafique and 7 others Vs Noor Ahmed* (**2007 MLD 1557**).

20. Although the sale deed is incomplete till the formality of registration has been gone through, but once that requirement is fulfilled the sale takes effect from the date of its execution. In view of section 47 of the Registration Act, 1908 its application cannot be

confined only to the parties to the document; it equally applies to a third person or for that matter to a pre-emptor. For reference reliance has been placed on case titled *Raja Muhammad Azan Vs Asghar Hussain* (**1999 YLR 2480**).

21. It is undisputed fact of the case that the petitioner did not perform Talb-i-Muwathibat or Talb-i-Ishhad qua the subsequent sale nor he alleged any such Talbs in his plaint. Likewise, he did not adduce any evidence in this regard which was sine qua non for successful exercise of right of pre-emption. Whereas the subsequent sale was an independent transaction, which was required to be pre-empted in accordance with law of pre-emption.

22. Though there is divergence of views in the courts below and conclusions are contrary to each other but this Court, while exercising its revisional jurisdiction in terms of section 115 of CPC supposed to make comparative analysis of both judgments in order to determine their validity on the touch stone of said provision. It is, cardinal principle of law that in the matter of giving preference to the judgments of learned lower courts, while analyzing the same in exercise of revisional jurisdiction, the preference and regard is always given to the findings of the learned Appellate Court, unless those are suffering with any legal infirmity or material irregularity. The Hon'ble Supreme Court of Pakistan in case titled *Muhammad Nawaz through LRs Vs Haji Muhammad Baran Khan through LRs and others* (**2013 SCMR 1300**) observed as under:-

> "12…..We have also taken into consideration the judgments of the appellate court which is based on proper appraisal of evidence on record and the findings of the appellate court are to be preferred as it has been held by this Court in the case of *Madan Gopal and others V. Maran Bepari and others* (PLD 1969 SC 617) that in the findings of fact reached by the first appellate court is at variance with that of the trial court, the former will ordinarily prevail, although it would not possess the same value or sanctity as a concurrent findings. This view also finds support from the cases of *Muhammad Shafi and others v. Sultan Mehmood and others* (2010 SCMR 827)……."

The above view also finds support from the cases of *Amjad Ikram v. Mst. Asiya Kausar and two others* (**2015 SCMR 01**) and *Muhammad Hafeez and another v. District Judge, Karachi East and another* (**2008 SCMR 398**).

23. For the foregoing reasons learned Appellate Court has rightly set-aside the judgment & decree of learned trial Court and dismissed the suit of the petitioner/plaintiff. Learned counsel for the petitioner failed to point out any illegality, mis-reading and non-reading of evidence in the findings of learned appellate Court. I have minutely gone through the record available on the file as well as the impugned judgment and decree passed by the learned Appellate Courts. I have seen no illegality, irregularity, mis-reading or non-reading of evidence and jurisdiction defect on the part of learned appellate Court while passing the impugned judgment and decree.

24. As an inevitable corollary of above discussion, instant civil revision having no force is hereby ***dismissed*** with no order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE.

Announced in open Court on _____

JUDGE.

***Approved for reporting*:**

JUDGE.

*M.Saeed **