Stero.HCJDA 38.

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

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Civil Revision No.1415 of 2011.

Ahmed Yar & others

Versus

Chan Pir Shah & others

JUDGMENT

DATE OF HEARING:	05.09.2024.
PETITIONERS BY:	M/s Ch. M. Lehrasib Khan & Muhammad Zaman Mangat, Advocates.
RESPONDENTS BY:	Ex-parte (08.02.2021)

AHMAD NADEEM ARSHAD, J. This Civil Revision is directed against the judgment and decree dated 14.04.2011 of learned appellate court, whereby while allowing the appeal of the respondents suit for possession through pre-emption instituted by them was decreed.

2. Relevant facts forming background of this petition are that the plaintiffs (hereinafter referred to as "***the respondents***") instituted a suit for possession through pre-emption on 12.09.2005 against the defendants (hereinafter referred to as "***the petitioners***") by pre-empting the land measuring 21-Kanals 05-Marlas (hereinafter referred to as "***suit property***") sold out by one Muhammad Ashraf through oral sale mutation No.27 dated 08.08.2005 for consideration

of Rs.3,50,000/-, by claiming their superior rights of pre-emption being *shafi sharik, shafi khalit* and *shafi jaar* with the contention that the vendor (Muhammad Ashraf) sold the suit property through oral sale mutation in a secret manner without giving notice u/s 31 of the Punjab Pre-emption Act, 1991 (hereinafter referred to as "***the Act***") for a consideration of Rs.110,000/- but due to fear of pre-emption incorporated expository amount of Rs.350,000/-; that they came to know about the sale of the suit property on 13.08.2005 at 6:00 PM through Mulazim Hussain s/o Anayat Shah when they were sitting in the house of Muzaffar Shah s/ Fida Hussain along with Noor Din s/o Imam Din and Abid Hussain s/o Peer Khadim and they immediately announced their intention with regard to exercise of their right of pre-emption and in this way performed *Talb-i-Muwathibat*; that they asked the petitioners to alienate the suit property in their name after receipt of actual consideration amount of Rs.1,10,000/- by sending notices of *Talb-i-Ishhad* through registered post with acknowledgement due dated 15.08.2005 but they refused to do so, which constrained them to institute the suit by exercising their right of *Khusumat* and prayed for decree of their suit. The petitioners resisted the suit through filing contested written statement wherein they raised certain preliminary objections, denied the averments made in the plaint and maintained that the respondents neither fulfilled the requirement of Talbs nor sent notice of *Talb-i-Ishhad* and prayed for dismissal of the suit. The learned trial court keeping in view the divergent pleadings of the parties framed necessary issues and invited the parties to produce evidence in support of their versions. After

recording evidence of the parties pro and contra, oral as well as documentary, the learned trial court vide judgment and decree dated 24.11.2010 dismissed the suit. Feeling aggrieved, the respondents preferred an appeal which was allowed by the learned appellate court vide impugned judgment and decree dated 14.04.2011 and resultantly decreed the suit. Being dis-satisfied, the petitioners approached this Court through the instant civil revision.

3. No one is present on behalf of the respondents, as they have already been proceeded against ex-parte vide order dated 08.02.2021.

4. I have heard the learned counsel for the petitioners at full length and perused the record with his able assistance.

5. It is evident from the record that the respondents got examined six witnesses as PW-1 to PW-6 and produced 20 documents as Exh.P-1 to Exh.P-20. Whereas, in rebuttal the petitioners got examined one of the defendants, namely, Muhammad Anayat as DW-1 and Ghulam Qadir as DW-2, however, they did not produce any documentary evidence.

From scanning of said oral as well as documentary evidence it appears that the respondents got examined one of the plaintiffs namely Chan Peer as PW-1, who deposed that suit property measuring 21-kanal 05-marla was sold out by one Muhammad Ashraf to the petitioners for a consideration of Rs.110,000/- but in order to avoid pre-emption they incorporated Rs.350,000/- as consideration amount. He further deposed that on 13.08.2005 at about 6:00 PM evening when they, Muzaffar, Ghulam Rasool, Peer Chan, Peer

Ishfaq, Asif, Wasif, Noor Din and Abid were sitting in the house of Muzaffar Hussain, then Mulazim Hussain came there and informed that Ahmad Yar etc. purchased the suit property, then they said they will pre-empt it. He stated that they went to the office of Ghulam Rasool Advocate after getting copy of mutation and got prepared six notices of Talb-i-Ishhad bearing his thumb impression. He further deposed that said notices were in the names of Muhammad Anayat, Muhammad Walayat, Mehdi Khan, Muhammad Iqbal, Ahmad Yar and Mushtaq Ahmad and produced copies of said notices as Exh.P-1 to Exh.P-6. He further deposed that said notices were written by clerk of counsel and same were read over by the counsel to them. Thereafter they got registered said notices through post office in the name of the defendants. The post office delivered them the receipts of said registries, which they gave to their counsel. He further maintained that they are *Khata Shareek*. Thereafter they came to the house of defendants and asked them to receive actual paid amount and transfer the land but they refused.

The respondents got examined Abid Hussain as PW-2 and Noor Din as PW-3. The said witnesses are participants of the meeting where allegedly *Talb-i-Muwathibat* was performed and are attesting witnesses of notice of *Talb-i-Ishhad*. The said witnesses also deposed in the same line as PW-1 deposed in his statement. The respondents produced Muhammad Saleem Siddiqui Postmaster as PW-4, who maintained that receipts No.78 to No.83 were issued by him on 15.08.2005. He further stated that said receipts were handed over to the plaintiffs and registered envelopes with acknowledgement

due were sent to the addresses of the defendants. The respondents produced Muhammad Mazhar Iqbal clerk counsel of Ch. Ghulam Rasool Gondal as PW-5, who deposed that notices of *Talb-i-Ishhad* Exh.P-1 to Exh.P-6 are in his handwriting and he put his signature on the said notices as scriber and identified his signature. The respondents also produced Muhammad Azam postman as PW-6. The respondents' counsel produced copy of mutation No.27 dated 08.08.2005 as Exh.P-13, copy of record of rights for the years 2000-01 as Exh.P-14, three acknowledgement due as Exh.P-15 to Exh.P-17 and three registered envelopes with acknowledgement due as Exh.P-18 to Exh.P-20.

One of the petitioners namely Muhammad Anayat appeared as DW-1, who maintained that he purchased the suit property for a consideration of Rs.350,000/- from Muhammad Ashraf vendor. He further maintained that suit property is adjacent to their property. He further stated that thoroughfare which goes to suit property also leads to their property. Further states the watercourse also goes to the suit property from their property. He produced Ghulam Qadir in support of his version, who also deposed in the same lines as narrated by DW-1.

There are certain contradictions in the statements of PWs. PW-1 maintained that notices were written by clerk counsel and the counsel read over the same to them, but, PW-2 maintained that notices were scribed by the counsel which was written by Muhammad Akram Mangat Advocate. He did not state that said notices were read over to

them. PW-3 maintained that notices were written in his presence which were written by Muhammad Akram Advocate and clerk jointly.

PW-1 stated that they were sitting in the house of Muzaffar Hussain where at 6:00 PM Mulazim Hussain came there, at that time except plaintiffs and Mulazim Hussain no other person was present there. PW-2 during cross-examination maintained that at that time four ladies and nine males were present. Whereas PW-3 maintained that one or two ladies were present there. He also deposed that Peer Chan, Asif, Wasif, Pappu, Qasim, Abid, Zafar, Ghulam Rasool and one other person were present there, except them no other person was present there.

PW-1 stated that they came from the house at 8:00 AM morning and came to *Katchehry* from house through wagon. PW-2 maintained that they came to their counsel at 9:00 AM. He further deposed that they came through *Rickshaw*. Whereas PW-3 maintained that they reached at the office of their counsel at 11:00 A.M and they came to the office of their counsel on motorcycle and a *Rickshaw*.

PW-1 maintained that he paid Rs.30/- for sending notices through registered post. He also maintained that he purchased registered envelopes from the Post Office of Mandi. He also maintained that he alone came to the Post Office. PW-2 maintained that they all went to the post office at about 2:30 PM where they purchased six registered envelopes. He did not remember that how much money was paid. PW-3 maintained that 10 persons went to the Post Office. PW-4 Postmaster during cross-examination maintained that six persons came to him and he handed over separate receipts to

them. He further maintained that for each of them he charged Rs.20/- separately.

PW-5 scriber of the notices maintained that two plaintiffs were minors and their ages were near about 12 and 13 years. He further maintained that the plaintiffs came there at 10:00/11:00 AM and remained with them for about three hours. He also maintained that minors did not put their thumb impressions. He further deposed that the minors' thumb impressions were got through plaintiff No.1 Chan Peer.

PW-6 Postman maintained that he went to the defendants where Muhammad Anayat, Muhammad Walayat, Mehdi Khan received notices of *Talb-i-Ishhad*, whereas Ahmad Yar, Mushtaq Ahmad and Muhammad Iqbal were not present there, therefore said envelop was returned un-served. During cross-examination he maintained that he did not check I.D. cards of the persons who received registered envelopes.

PW-1 while recording his statement deposed that after sending notices of *Talb-i-Ishhad* they came to the house of defendants and asked them to return the land after receipt of original paid amount but they refused. The respondents did not mention in their plaint that they went to the house of defendants and asked them to return the suit property. The other PWs also did not state this fact in their statements.

The respondents pleaded in their plaint that the suit property was actually sold out for a consideration of Rs.1,10,000/- but the petitioners got sanctioned the oral sale mutation No.27 dated 08.08.2005 against an ostensible, fake and escalated consideration of

Rs.3,50,000/- in clandestine manner to prevent the right of pre-emption. The witnesses produced by the respondents also stated the same consideration amount. The respondents did not produce any documentary evidence which supported their stance that at the relevant time market value of the suit property was Rs.1,10,000/-. Neither any sale mutation or registered sale deed was produced nor any Government Notification was brought on record, which suggest that the value of suit property at that time was Rs.1,10,000/-. The learned trial court with regard to the said controversy framed issue No.3 and decided the said issue by holding that the defendants did not press this issue. The petitioners before the learned appellate court categorically denied of this fact that they did not press this issue before the learned trial court. Therefore, learned appellate court discussed the evidence of the parties and maintained that Rs.350,000/- was the actual price and decided this issue in affirmative in favour of the petitioners. The respondents did not assail said findings. Hence, it is established that the respondents intentionally mentioned a lower price of the suit property in order to obtain an un-due advantage and when an undue advantage is sought to be gained on the basis of a completely unsubstantiated statement, the same was not permissible as it could contravene the provisions of *Shari'ah* which have been made specifically applicable to pre-emption cases and it would disentitle a *Shafee* to claim pre-emption. Reliance in this regard is placed upon "*SUBHANUDDIN and others versus PIR GHULAM*" (**PLD 2015 Supreme Court 69**)**.** They had intentionally mentioned the wrong consideration amount in the plaint, notices of *Talb-i-Ishhad* as

well as in their statements got recorded before the Court, therefore, they are not truthful witnesses.

6. Perusal of the record it appears that seven plaintiffs including one of the minor plaintiff namely Wasif who was impleaded through his brother Peer Ishfaq instituted the suit for possession through pre-emption. However plaint is silent with regard to the fact that said Peer Ishfaq was ever appointed guardian by the court or not. Similarly it was not mentioned in the plaint that who made *Talb-i-Muwathibat* on behalf of the minor Wasif (plaintiff) and similarly notices of *Tabl-i-Ishhad* are also silent, who being his guardian sent the notices on his behalf.

7. The law permitted the guardian and agent to make demands on behalf of the person who is unable to make demands under Section 13 of the Act. In this regard Section 14 of the Act is relevant which is reproduced as under:-

> *"**14. Demand by guardian or agent**:- Where a person is unable to make demands under section 13, his guardian or agent may make the required demands on his behalf."*

No doubt the suit can be filed through next friend but the question is whether next friend can make demands in the special background of pre-emption right. The competency to act as next friend shall have to be assessed in the light of Injunctions of Islam, because of the conditions imposed by Section 3 of the Act which is reproduced below for ready reference:-

> *"**3. Interpretation**. In the interpretation and the application of the provisions of this Act, the Court shall seek guidance from the Holy Qur'an and Sunnah."*

The language of Section 3 is unequivocal on the point that all provisions of the Act shall be interpreted and for that matter all the words used in the Act shall be assigned meaning and applied, seeking guidance from the Holy Quran, Sunnah and Fiqah. Therefore, Section 14 of the Act shall apply keeping it within the parameters of Islamic Law.

The capacity of guardian has been discussed in Chapter XVIII Section 359 of the "Principals of Mohammdan Law" by D.F. Mulla wherein guardian of the property of minor defined as under:-

> *"**359. Legal guardian of property**.--- The following persons are entitled in the order mentioned below to be guardians of the property of a minor:-*
> *(1) the father;*
> *(2) the executor appointed by the father's will;*
> *(3) the father's father;*
> *(4) the executor appointed by the will of the father's father."*

The word "guardian" has been defined in Black's Law Dictionary (Eleventh Edition) in the following words:

> *"Someone who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability."*

The definition of "guardian ad litem" in Black's Law Dictionary (Eleventh Edition) is as follows:-

> *"A guardian, usu. A lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.---"*

Right of pre-emption is a property based right. So the legal guardian of the property of the minor can be the only person who can decide the exercise of this right and not the "next friend" as identified in Order XXXII of C.P.C.

This being the legal position it was the father of minor pre-emptor who being legal guardian was obliged by law to perform all the Talbs under section 13 of the Act. The suit is also to be instituted by the person who makes any demand. As discussed earlier, plaint as well as notice of *Talb-i-Ishhad* is silent with regard to performance of *Talb-i-Muwathibat* and *Talb-i-Ishhad* on behalf of the minor. Similarly no evidence was produced in this regard. Peer Ishfq has no authority to perform *Talb-i-Muwathibat*, *Talb-i-Ishhad* and *Talb-i-Khusumat* on behalf of his minor brother Wasif (one of the plaintiffs). It means that neither any Talbs were performed on behalf of the minor nor suit was instituted on his behalf. A demand made by father or a brother of the pre-emptor is not sufficient, even if he has a right to pre-empt, unless he has been previously authorized to make the demand.

8. It is evident from the record that out of seven plaintiffs, only one plaintiff namely Chan Peer appeared in the witness box as PW-1.

The plaintiffs in their plaint averred that they made *Talb-i-Muwathibat* and *Talb-i-Ishhad*, however, admittedly only Chan Peer (plaintiff) opted to face the music of cross-examination, whereas the rest of the respondents/plaintiffs did not opt to appear. Although there is no specific provision either in the Code of Civil Procedure, 1908 or Qanun-e-Shahadat Order, 1984 requiring such personal appearance of all the plaintiffs but at the same time, it is the settled law that where a "fact" is required to be proved through oral evidence, such evidence must be direct and of the primary source. Article 71 of the Qanun-e-

Shahadat Order, 1984 provides the instances of the direct oral evidence regarding the proof of a fact. The foundation of such direct evidence about the proof of the "fact" of Talb-i-Muwathibat, is the "person", who has made the Talb. It is he, who should appear enabling himself for the cross-examination of the other side.

The Article 129(g) of Qanun-e-Shahadat Order, 1984 enables the court to draw adverse inference in the eventuality of withholding the best evidence. The non-appearance of a party as his own witness, ordinarily discredit his case. Where the fact is in the personal knowledge of a person himself and he is the primary source to prove the "fact", if such person, without any sufficient cause, abstains from appearance in the court, the requisite inference shall be drawn.

The august Supreme Court of Pakistan while dealing with said proposition in a case "*ABDUL QAYYUM versus MUHAMMAD SADIQ*" (**2007 SCMR 957**) held as under:-

> *"The pre-emptor, no doubt could appoint an attorney to pursue the suit but Talb-i-Muwathibat being a personal act of the pre-emptor, is required to be proved by him through his own statement and an attorney may not be a substitute of the pre-emptor under the law, therefore, notwithstanding the provision of section 14 of Punjab Pre-emption Act, 1991 according to which if a person is unable to make demand under section 13 (ibid), his agent may make such demand on his behalf but the petitioner cannot get benefit of this exception firstly for the reason that he has claimed performance of Talb-i-Muwathibat in person and secondly, this exception appears to have been created to meet a situation in which either the pre-emptor is minor or is invalid or is not in a position in the ordinary circumstances to make Talb-i-Muwathibat himself and appear in Court in person. In the case in hand, it is an admitted fact that the pre-emptor himself made Talb-i-Muwathibat and was also available both at his ordinary place of residence and business and was not suffering from any disability to appear before the Court. It is also a fact that the attorney of pre-emptor had no direct knowledge of the performance of Talb-i-Muwathibat by the pre-emptor, therefore, his statement regarding performance of Talb-i-Ishhad was based on hearsay knowledge."*

The august Supreme Court of Pakistan in another case "*DILSHAD BEGUM versus Mst. NISAR AKHTAR*" (**PLJ 2012 SC 912**) held as under:-

> *"8. There is yet another aspect. The best evidence with regard to performance of Talb-e-Muwathibat is the person who makes such a talb. The effect of non-production of best evidence is provided in Section 129 of the Qanun-e-Shahadat Order, 1984, which reads as follows:-*
>
> > *"129. Court may presume existence of certain, facts.—Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
> > *Illustrations*
> > *The Court may presume—*
> >
> > *(a) that man who is in possession of stolen goods soon after the theft is either the if or has received the goods knowing them to be stolen, unless he can account for his possession;*
> > *(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;*
> > *(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;*
> > *(d) that a thing or state of things which has been shown for be in existence within a period shorter than that which such things or states of things usually cease to exist, is still to existence;*
> > *(e) the judicial and official acts have, been regularity performed;*
> > *(f) that the common course of business has been followed in particular cases;*
> > *(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. (Emphasis is supplied);*
> > *(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;*
> > *(i) that when a document creating an obligation is in the hands of the obliger, the obligation has been discharged."*
>
> *9. The case of the respondent/plaintiff would be squarely hit by Article 129(g) of the Qanun-e-Shahadat Order referred to above as without assigning any reason, the best evidence was withheld and not produced."*

9. The respondents claimed in their plaint and evidence that they came to know about the sale through Mulazim Hussain s/o Anayat Shah (informer) but they failed to produce the said alleged informer from whom they got information about the sale transaction. Production of informer in pre-emption cases was imperative for the

pre-emptor to prove the fulfillment of first demand of *Talb-i-Muwathibat* whose deposition being as a star witness was considered to be relevant having direct bearing qua the proof of said fact. He is the person who sets off the events leading to the institution of a suit for pre-emption. If he is not examined or he refused to enter in the witness box, the inescapable conclusion would be that he was not willing and ready to support the assertions made by the plaintiff.

The fate/effect of non-production of informer in a pre-emption case cropped up before the Honorable Supreme Court in case titled "*MUHAMMAD MAL KHAN versus ALLAH YAR KHAN*" (**2002 SCMR 235**), wherein it was held as under:-

> *"It was also not clarified/explained by the plaintiff in his statement as to why Tayyab Khan could not be produced as it was not stated that he was either won over by the other side or that he had turned hostile towards him for some other reasons or that out of fear of the defendant or for some other consideration the defendant was successful to prevent him to depose in favour of the plaintiff. Article 129(g) of Qanun-e-Shahadat reads:-*
>
> > *"That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."*
>
> *Therefore, in absence of any explanation by the plaintiff as to why he withheld Tayyab Khan from examining him as his witness the legal presumption would be that in case he had been produced then his deposition must have been against him."*

The evidence of an informer in a suit for pre-emption is of particular significance. It is evident from the observation of the Honorable Supreme Court of Pakistan made in the case of "*ABDUL REHMAN versus Haji GHAZAN KHAN*" (**2007 SCMR 1491**), the relevant portion wherefrom is reproduced for the ease of reference hereunder:-

> *"A pre-emptor claiming right of pre-emption, as a matter of prudence, ought to seek corroboration to satisfy reasonably the judicial mind of the Court that Talb-i-Mowasibat was made by him enabling him to make the other demand (Talb-i-Ishhad). In this case,*

> *failure to put the informer in witness-box, seen from that angle as well, raise a logical presumption that appellant feared that the witness, if examined, could not stand the test of cross-examination or that the witness would not support him or that his evidence would be against him."*

In *SUBHANUDDIN's* case referred supra the Honorable Supreme Court has held that non-production of informer in a pre-emption suit is a sufficient ground for dismissal of the pre-emptor's suit. For sake of convenience, the relevant part of the judgment is reproduced below:-

> *"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."*

10. 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*. The respondents failed to produce their star witness namely Mulazim Hussain who informed the sale of land to them and if the said witness was produced in evidence, then certainly he was cross-examined as to whether he has any direct knowledge with regard to the fact of sale or he heard it from anyone else and his information based upon hearsay evidence. For ready reference reliance is placed upon "*FARID ULLAH KHAN versus IRFAN ULLAH KHAN*" (**2022 SCMR 1231**) and "*MUHAMMAD RIAZ versus MUHAMMAD AKRAM and others*" (**2024 SCMR 692**).

11. From the scanning of evidence available on the record it is established that the respondents failed to prove the performance of requisite Talbs as prescribed under the law. The learned appellate court failed to appreciate the actual facts as well as evidence on record in its true perspective, hence committed grave illegality and material irregularity while passing the impugned judgment and decree, which is not sustained in the eye of law.

12. Epitome of above discussion is that this civil revision is **allowed**. The impugned judgment and decree of learned appellate court dated 14.04.2011 is hereby set aside. Consequently, the suit for

possession through pre-emption instituted by the respondents shall stand **dismissed**. No order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE

Approved for Reporting

JUDGE

Qurban*