

Stereo HCJDA-38
JUDGMENT SHEET
LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.43399/2021

Muhammad Saleem

Versus

Additional District Judge, etc.

JUDGMENT

Date of Hearing:	18.05.2023
Petitioner by:	Mr. Imran Muhammad Sarwar, Advocate.
Respondent No.3 by:	Mr. Asad Ali Bajwa, Advocate.

Anwaar Hussain, J:- Through this single judgment, this Court intends to decide the present as well as connected constitutional petitions bearing W.P. No.43383/2021, W.P. No.43392/2021 and W.P. No.43406/2021 filed by different petitioners, who happen to be the members of the same family and vendees of one and the same person, namely, Surraya Jahan Khanam (**‘the vendor’**) and the properties purchased by them have been pre-empted by one Mst. Tahira Shahid (**‘the pre-emptor’**), who is respondent No.3 in the present case and also the contesting respondent, in the connected matters. The identical legal question that boils down for determination by this Court is to examine the manner and the stage at which the application, under Section 24(1) of the Punjab Pre-emption Act, 1991 (**‘the Act’**) is to be decided by the learned Trial Court.

2. The factual matrix of the case is not disputed. Four suits were instituted by the pre-emptor. The sale price recorded in the sale deeds in present petition as well as connected petitions bearing W.P. No.43383/2021 and W.P. No.43392/2021 is Rs.30,000,000/-, whereas

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the sale price recorded in sale deed forming subject matter of petition bearing W.P. No.43406/2021 is Rs.60,000,000/-. In the suits, the pre-emptor asserted that the price recorded in the sale deeds is inflated just to defeat her right of pre-emption and prevailing market rate per marla is Rs. 12,500/- and hence, the actual sale price of the properties in present petition as well as connected petitions bearing W.P. No.43383/2021 and W.P. No.43392/2021 is Rs. 4,000,000/- and not Rs.30,000,000/-, whereas the actual sale price of the property forming subject matter of petition bearing W.P. No.43406/2021 is Rs.8,000,000/- and not Rs.60,000,000/-. The pre-emptor also filed an application under Section 24 of the Act for the determination of probable value of the properties pre-empted in each suit. Thereafter, on 21.10.2014, the learned Trial Court directed the pre-emptor to deposit 1/3rd of the amount recorded in the sale deeds and kept the said applications in the suits pending. The order of the learned Trial Court, to deposit *zar-e-soem* on the basis of the price recorded in the sale deeds was complied with, and the amount was accordingly deposited. The pre-emptor then filed an application, in each suit, for investing the amount of *zar-e-soem* in government securities. Admittedly, the same has been done. Later on, separate application in all four suits was filed by the pre-emptor for decision of the applications under Section 24 that was contested and, *vide* orders of even date 28.01.2019, the applications were dismissed. Order dated 28.01.2019 was assailed in separate revision petitions by the pre-emptor and, *vide* orders of even date 05.12.2019, the revision petitions were accepted, with consent of the parties and the matter was remanded to the learned Trial Court for decision afresh on the pending applications, of the petitioner, under Section 24. In post remand proceedings, another application, in each suit, under Order XIV Rule 2 was filed, by the pre-emptor with the prayer that issues No.3 and 4 already framed and settled regarding the determination of the sale price be treated as preliminary issues and the petitioners be directed to lead the evidence. This application was

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accepted, *vide* order dated 12.11.2020, which was assailed by the petitioners by filing separate revision petitions that were also dismissed *vide* orders of even date 04.05.2021. Hence, present as well as connected constitutional petitions.

3. Learned counsel for the petitioners contends that the impugned orders have been passed in a mechanical manner without appreciating the factual and legal position in its true perspective. Adds that the consent recorded by the petitioners was only to the extent of decision of the applications under Section 24 and not to treat issues No.3 and 4 as preliminary inasmuch as the said issues are factual in nature whereas only issues that relate to legal aspects of the matter can be treated as preliminary issues and decided in the first instance and places reliance upon case reported as “Shehzad Iqbal Malik v. Addl. District Judge and 2 others” (2019 CLC 1320). Concludes that the petitioners still have no objection if the pending applications, under Section 24 are decided on the basis of any material/record, from the office of Sub Registrar concerned, etc., related to similar properties to ascertain the sale price provided issues No.3 and 4 are decided along with remaining issues through the final judgment.

4. Conversely, learned counsel for the pre-emptor submits that the present as well as connected petitions are not maintainable on the ground that once the revisional jurisdiction is exercised by the learned Courts below based on the consent of the parties, constitutional jurisdiction by this Court is barred. Places reliance upon case reported as “Amer Khan v. Judge, Family Court” (2009 MLD 1011) and “Muhammad Yousaf v. Manzoor Ahmed and another” (PLD 2006 Lah 738). Adds that inadvertently in the applications Order XIV Rule 2 of the CPC has been referred whereas the applications, in fact, were filed under Order XVIII, Rules 1 & 2 of the CPC which pertains to leading the evidence and in the case in hand, the onus as far as issues No. 3 and 4 are concerned in the first instance is on the petitioners to discharge

and hence, the petitioners are obligated to prove that the price recorded in their respective sale deeds is not inflated. Adds that order dated 05.12.2019 in the matter has attained finality and the petitioners cannot back out from the same. Further contends that it is *sine qua non* in a pre-emption suit to decide the application under Section 24 before proceeding further and therefore, the learned Courts below have rightly treated issues No.3 and 4 as preliminary issues. Places reliance upon the cases reported as Amer Khan supra and “Muhammad Yousaf and 3 others v. Mst. Zubeda Begum and another” (1993 MLD 2138).

5. Arguments heard. Record perused.

6. Before examining the merits of the case and answering the legal questions involved, it is imperative to address the objection of learned counsel for the pre-emptor regarding the maintainability of the constitutional petitions. In this regard, emphasis has been laid on the point that once the jurisdiction is exercised by the Revisional Court below, recourse to the constitutional jurisdiction is not permissible. The argument is misconceived inasmuch as every case has its own peculiar facts and where the Revisional Court errs in appreciating the controversy in its proper perspective or otherwise decides the matter erroneously that can lead to defeating the object of the law on the subject, this Court has power in its supervisory and/or constitutional jurisdiction to rectify such an error. Hence, this Court is of the opinion that the petitions are maintainable. The case law referred by learned counsel for the petitioners has been considered but is not of any help to the respondent, on account of distinguishable facts of the present cases.

7. Adverting to the legal question involved in the present as well as the connected petitions that requires opinion of this Court as to whether in the given facts and circumstances of the case, ascertainment of price of the pre-empted property (ies) is to be taken up as a preliminary issue,

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in terms of proviso to Section 24(1) of the Act read with Order XIV Rule 2 of the CPC or whether such an issue is to be decided alongwith other issues already framed in the case, it is advantageous to reproduce Section 24 of the Act that reads as under:

“24. Plaintiff to deposit sale price of the property-(1) In every suit for pre-emption the Court shall require the plaintiff to deposit in such Court one-third of the sale price of the property in cash within such period as the Court may fix:

Provided that such period shall not extent beyond thirty days of the filing of the suit:

Provided further that if no sale price is mentioned in the sale-deed or in the mutation, or the price so mentioned appears to be inflated, the Court shall require deposit of one-third of the probable value of the property.

(2) Where the plaintiff fails to make a deposit under subsection (1) within the period fixed by the Court or withdraws the sum so deposited by him, his suit shall be dismissed.

(3) Every sum deposited under subsection (1) shall be available for the discharge of costs.

(4) The probable value fixed under subsection (1) shall not affect the final determination of the price payable by the pre-emptor.”

It is mandate of the law that once a suit for pre-emption is instituted and an application is also filed for determining the tentative price for the purpose of depositing *zar-e-soem*, an inquiry/probe is to be made which in the present cases, the learned Trial Court decided not to conduct and passed a direction to deposit *zar-e-some* on the basis of the amount recorded in the sale deeds that are registered documents having presumption of truth attached to them unless the same are cancelled by the competent authority.

8. It is admitted feature of the case that in the suits for pre-emption, followed by filing of applications for ascertaining the price for the

purpose of depositing *zar-e-soem*, the pre-emptor was directed to deposit *zar-e-soem* in terms of the amounts recorded in the sale deeds while the applications remained pending and the said order to deposit *zar-e-soem* was complied with and the amount so deposited was invested in various investment schemes at the specific request of the pre-emptor. The order having been acted upon, if allowed to be reopened, it will not put an end to the litigation, which is not the object of law. It is settled principle of law that procedural rules should be so interpreted and applied that justice may be handy and quickly available. It is also admitted feature of the case that the issues have already been framed, which, *inter alia*, include issues regarding the ascertainment of the price. The issues settled in present petition, that are identical to issues framed in connected cases except to extent of price and particulars of sale deeds, are reproduced hereunder:

- “1. Whether plaintiff has right of pre-emption regarding suit property against the defendants? OPP
2. Whether plaintiff has fulfilled the requisite Talabs in accordance with law? OPP
3. Whether sale price Rs.3,00,00,000/- mentioned in the sale deed No.7327 dated 23.06.2014 was actually fixed and paid by the defendants as consideration of suit property? OPD
4. If issue No.3 is proved in negative then what is the market value of suit property? OP Parties
5. Whether plaintiff has filed this suit just to harass the defendants and defendants are entitled to recover special costs, if so, to what extent? OPD
6. Whether suit is incorrectly valued for purpose of court fee and jurisdiction, if so, what is its correct valuation? OPD
7. Whether suit in hand has been got instituted through plaintiff by her father for his own interest, so, its effect? OPD
8. Relief.”

Once the pre-emptor complied with the order dated 21.10.2014 and deposited *zar-e-soem*, decision on the application of the pre-emptor becomes meaningless. Perusal of the record reveals that comprehensive issues, as per divergent pleadings of the parties, were settled about eight years ago. The pre-emptor instead of pursuing that the litigation should be decided on its merits, after recording of evidence of the parties, for the reasons best known to her, has prayed for decision of issues No.3 and 4 in the first instance by treating them as preliminary. Certainly, issues No.3 and 4, if treated as preliminary with a direction to the petitioners/defendants to lead the evidence while postponing the trial of the pre-emption suits on the other material issues pertaining to *talbs*, the burden of proof whereof is upon the pre-emptor/ plaintiff, the trial will not only be lingered on but the same is not permissible under the law.

9. The matter can be examined from another angle. Admittedly, issues No.3 and 4 are factual in nature and at this juncture, needless to mention that as per mandate of the applicable law, as envisaged under Rule 2 of Order XIV, CPC, where issues, both of law and fact, arise and the Court is of the opinion that it should dispose of the issues of law only, it is obligatory for it to try the same first and for that purpose, the Court may, if it deems appropriate, postpone the settlement of issues of fact until the issues of law have been determined, however, if the decision is required on issues of law and the Court is called upon to record evidence of the parties, even in such eventuality, such legal issues should be decided alongwith the remaining issues on facts. Having above legal position in sight, it is observed that in the cases in hand, soon after the settlement of the issues, the pre-emptor did not make any such request rather acted upon the direction of the Court to deposit the amount of *zar-e-soem* as per the amount recorded in the sale deeds executed in favour of the petitioners, rendering his pending applications filed prior to framing of issues infructuous, and hence, estopped to agitate the same. Needless to mention that being factual in

nature, issues No. 3 and 4 cannot be decided in isolation with the remaining issues which are even more pertinent and goes to the root of the *lis* as the same relate to the *talbs* purportedly exercised by the pre-emptor, in accordance with law. It is only once the said burden is discharged by the pre-emptor/plaintiff and the Court reaches the conclusion that a case of pre-emption has been setup, then the Court is required to proceed and determine the sale price in terms of Section 24(4) of the Act. Decision regarding the ascertainment of the price at this stage by way of decisions on issues No.3 and 4 will make exercise of power/duty of the Court under Section 24(4) redundant.

10. On a pointed question as to the scope of Section 24(4), which becomes redundant if the decision on issues No.3 and 4 is rendered in the first instance, learned counsel for the pre-emptor could not offer any plausible argument to refute the same. It is pertinent to observe that determination of probable value under proviso to Section 24(1) of the Act is only tentative in nature that is to be made on the basis of available record or any preliminary probe without recording of evidence and before direction is passed to deposit *zar-e-soem* and cannot be equated with the determination, which is to be made after framing of issues and recording of evidence that falls under the purview of Section 24(4) of the Act. Suffice to observe that the former determination can be made even though the right of the pre-emptor is yet to be established whereas the latter determination is to follow the establishment of right of pre-emption and if a pre-emptor/plaintiff fails to establish his right, the determination under Section 24(4) of the Act is not required to be made. Therefore, this Court is of the opinion that in the instant case, stage of determination of probable value under proviso to Section 24(1) of the Act has gone by and acted upon and even the consent of the petitioners/defendants cannot rewind the clock and any determination while deciding issues No.3 & 4 prior to establishment of right of the pre-emption amounts to putting a cart before the horse.

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11. In view of the above discussion, the present as well as connected constitutional petitions are **allowed** and the applications of the pre-emptor filed under Order XIV, Rule 2 read with Order XVIII, Rules 1 & 2 of the CPC are dismissed.

(Anwaar Hussain)
Judge

Approved for reporting

Judge

S. Zahid