

FORM No. HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

W.P. No.9656 of 2023

Shabana Kousar **Versus** Addl. District Judge and others

Sr.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
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13.6.2023 Mr. Saghir Ahmad Bhatti, Advocate for petitioner.

Through the instant constitutional petition orders dated 22.12.2022 and 06.4.2023 of the courts below have been called into question.

2. Heard.
3. The petitioner instituted a suit for possession through preemption wherein the stance taken was petitioner shared common khewat, passages and watercourses and that as such being *shafi sharik* and *shafi khalit* was entitled to a superior right of preemption and that by sale deed No.3935/1 dated 13.9.2022 the property was secretly sold; that she had no information or notice thereof which was subsequently gifted orally to the sons of the respondent vendee and mutation of oral gift No.5057 dated 14.9.2022 was also entered and that on coming to know she immediately made the necessary *talbs* and, thereafter, filed suit in a timely manner. It was also alleged that the transaction had actually been conducted for a total consideration of Rs.1,65,00,000/- which was exaggeratedly recorded as Rs.2,00,00,000/- in the sale deed to repel the claim of the petitioner to preemption and that under the circumstances the suit was liable to be decreed in her favour. The claim was resisted through the written statement filed by the other side.

Along with the suit the petitioner also filed an application under Order XXXIX, Rules 1 and 2, C.P.C. for grant of temporary injunction to restrain alienation and change to the nature and condition of property pending decision of suit, which after hearing both sides was dismissed by the trial court vide order dated 22.12.2022. The petitioner preferred an appeal thereagainst which too was turned down by the learned Addl. District Judge vide order dated 06.4.2023. Both these orders declining temporary injunction and dismissal of appeal have now been assailed in the Constitutional jurisdiction.

4. Main stance of the learned counsel is that petitioner being *shafi sharik* and *shafi khalit* having performed the requisite *talbs* has a prima facie case for the grant of temporary injunction and that the court below incorrectly ignored this aspect of the matter and that the balance of convenience is also in favour of the petitioner and that any change in the nature and condition of the property would result in irreparable loss to the petitioner.

5. Perusal of the application under Order XXXIX, Rules 1 and 2, C.P.C. shows that the application is based on vague assertions and assumptions. The only plea raised in paragraph “3” of the application under Order XXXIX, Rules 1 and 2, C.P.C. is that the respondent with mala fide intended to change the nature and condition of the suit property and was threatening to raise construction and making further alienation. The response given by the respondent to the application is material inasmuch as it is asserted therein that the facts asserted by the petitioner were false; that the respondents were not in breach of any law; that they were peacefully living and law-abiding individuals and

that for the purpose of getting benefit out of their property the boundary walls were raised, a gate was installed, a room with other constructions comprising an office and cattle-shed were constructed, water-pump and solar-energy plant were installed at the premises and that they were running their business therein which was not causing any damage to the petitioner. The petitioner did not either specifically controvert these facts nor placed on record any material to controvert the existence of construction at site or the facts as narrated in the reply to the application by the respondent. In view of these facts, the entire stance of the petitioner for seeking injunction was misplaced and was rightly repelled by the courts below.

6. Even otherwise the factual position at the moment is that the respondents are owners of the property and being bona fide purchaser they had every right to use the property for beneficial purposes while the petitioner at present has no title in the property. The petitioner's claim is based on preemptory right which was dependent on the proof of requisite *talbs* and other facts to establish superior right of preemption. At present the plea regarding the alleged *talbs* is just an assertion which is yet to be proved by evidence. As against the petitioner, the respondents are bona fide transferee for consideration who possibly could not be deprived of their rights of uninterrupted use of their property. In Zahid Shah v. Shanzab (2015 YLR 1505) it was observed to the effect that in a suit for preemption temporary injunction could not be granted against bona fide purchaser nor he could be restrained from raising construction at his own risk and cost as it would not cause any inconvenience to the plaintiff if he ultimately succeed in the suit inasmuch as the bona fide purchaser

had every right to utilize his property until and unless decree was passed against him and that to prohibit the lawful owner of the constitutional guarantee provided under the fundamental rights. In Muhammad Sham and others v. Kaneez Zohra Bibi (1983 CLC 2541) it was observed to the effect that the vendee being the absolute owner has the right to enjoy the possession of the area subject matter of suit so long a decree for preemption is not passed against him and it is executed. In Hameedullah Khan v. Mst. Shah Jehan Begum and others (1989 MLD 1603) it was observed to the effect that the construction on a portion of property duly allotted under partition decree was not against law and that mere fact the plaintiff could succeed in establishing his right of preemption in respect of portion in possession of the opposite side could not debar the defendant in the suit from carrying out construction or improvement in the property unless it was against any specific provision of law. In Muhammad Zahid Pervaiz v. Muhammad Shafqat Iqbal (PLD 2007 Lah. 377) it was observed to the effect that injunctive order could not be lightly granted regarding the construction of the property by the vendee nor could making of improvement in the property could be restrained till the final decision of the case. Even if the preemptor has the prima facie case has established its right of preemption on record still the owner of property cannot be put under restraint to use his property which may tantamount to the breach of his fundamental right as enshrined by Article 23 of the Constitution of Islamic Republic Of Pakistan, 1973. In Muhammad Ashraf v. Naseer Ahmad and and others (2010 YLR 22) it was observed to the effect that the plaintiff in a suit for preemption, at best, is claimant of right of preemption

and has yet to prove his case who cannot be allowed to hold a bona fide purchaser hostage by the reason of such claim and deprive such purchaser of the lawful right to use and enjoy the property purchased by him. In Muhammad Zaman v. Azmat Ullah and another (2014 MLD 1585) it was observed that the right of preemption would not be affected in the case of transfer of property or any change in the nature of the same after institution of suit and that at best the plaintiff could be directed to move an application for spot inspection if any construction was made in order to assess whether the improvement was made or otherwise qua the time of such improvement. In Professor Syed Khurshid Alam v. Ch. Muhammad Aslam (2014 CLC 188) it was observed that in a suit for preemption if an application under Order XXXIX, Rules 1 and 2, C.P.C. is filed by the preemptor to restrain the vendee from alienating the suit property or changing the character thereof during the pendency of suit, the balance of convenience could not be said to allow in favour of the plaintiff before proving the superior right and performance of *talbs* on the basis of evidence and that question of prima facie case in favour of the plaintiff will be determined after scanning of evidence of parties and that the principle of *lis pendens* would take care of the alienation of the suit land by the vendee during the pendency of the suit and that any injunctive order would deprive the vendee of his vested right to use the land as its owner according to his own choice.

7. It is clear from the above that the consistent view of the court has been that at the instance of preemptor who is yet to succeed after proving *talbs* and qualifying of superior rights, a bona fide purchaser/owner of the property could not be restrained from constructing

thereupon or be prevented from using the property for own purpose as they choose and that any restraint would be violative of the fundamental rights that have been guaranteed by the Constitution Of Islamic Republic Of Pakistan, 1973. In the present case the respondents have specifically stated in the reply to application under Order XXXIX, Rules 1 and 2, C.P.C. that they had already raised the construction detailed therein and were using it for commercial purpose while the petitioner was unable to show or prove anything otherwise. Being so, the application was based on frivolous assertions, the petitioner therefore had no prima facie case for the grant of injunctive relief while the balance of convenience and irreparable loss operated in favour of respondents. The courts below for valid reasons and on sound premises exercised their discretion against the petitioner which does not suffer any legal infirmity, jurisdictional error or arbitrariness and, therefore, does not call for any interference. Resultantly, instant petition is without any substance is hereby **dismissed**.

(RASAAL HASAN SYED)
JUDGE

Approved for reporting

JUDGE