IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE MAQBOOL BAQAR

CIVIL APPEALS NO.833 TO 835/2006 AND CIVIL REVIEW PETITION NO.117/2006 IN CIVIL PETITION NO.2535/2001
(Against the judgment dated 4.7.2001 of the Lahore High Court, Bahawalpur Bench, Bahawalpur passed in RSA Nos.123, 102 and 122/1971 – On review of this Court's order dated 18.5.2006 passed in C.P.No.2535/2001)

1.	Jan Muhammad etc. **Vs.** Mst. Sakina Bibi etc.	In CA 833/2006
2.	Jan Muhammad etc. **Vs.** Mst. Sughran Begum etc.	In CA 834/2006
3.	Mst. Jiwani etc. **Vs.** Riazul Hassan etc.	In CA 835/2006
4.	Malang Khan (decd) through LRs **Vs.** Mst. Sughran Begum (decd) through LRs	In CRP 117/2016

For the appellant(s): Ch. Mushtaq Ahmed Khan, Sr. ASC
Mr. M. S. Khattak, AOR
(In CAs 833 to 835/2006)
Nemo
(In CRP 117/2006)

For the respondent(s): Ex-parte
(In CA 833/2006)
Nemo
(For respondent No.1 in CA 834/2006)
Nemo
(For respondents 33, 34, 36, 43, in CA 835/2006)
Ex-parte
(For other respondents in CAs 834 & 835/2006)
Not represented
(In CRP 117/2006)

Date of hearing: 03.01.2017

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ORDER

MIAN SAQIB NISAR, CJ.- These appeals, with the leave of the Court, entail common facts and question of law. The matter has its genesis in pre-emption suits initiated by the predecessors-in-

interest of the respondents against the predecessor-in-interest of the appellants pre-empting the sale concluded *vide* sale deed executed on 23.7.1966 and registered by the registering authority on 27.6.1968. The suits were filed on 25.4.1968 and 30.7.1968 *(note:- as mentioned in the consolidated judgment of the learned Trial Court)*. The appellants as vendees resisted the suit on the point of limitation claiming that the period of limitation would commence from the date of execution of the sale deed and not from its registration, thereby rendering the suits time-barred; they also challenged the superior right of pre-emption of the respondents-plaintiffs. After framing issues and recording evidence the learned Trial Court *vide* consolidated judgment and decree dated 17.7.1969 was pleased to decree both the suits. It held that they were within time for the starting point of limitation was the date of registration of the sale deed and not the date of its execution; the respondents'-plaintiffs' superior right of pre-emption was categorically recognized. On appeal, this judgment and decree was reversed and the suits were dismissed on the ground that the two rival pre-emptors did not possess a superior right of pre-emption in respect of the suit property as against the appellants. Revision petitions by the respondents were accepted and the learned High Court *vide* impugned judgment categorically held that the period of limitation would start from the date of registration of the sale deeds rather than execution thereof; and that the plaintiffs had a superior right of pre-emption. Leave in these cases was granted *vide* order dated 18.5.2006 in the following terms:-

> *"With a view to examining the contention as to whether sale of right to cultivate amounts to sale of land*

amenable to pre-emption leave to appeal is granted. Meanwhile status quo as to possession be maintained."

2. Learned counsel for the appellants argued that according to the provisions of Section 47 of the Registration Act, 1908 a sale deed would operate from the date of its execution and not registration. This point has already been determined in the judgment of this Court rendered in Civil Appeal No.540-L of 2009 titled **Meraj Din and another Vs. Muhammad Sharif and anotaher** in which it was held that the starting point of limitation shall be the date of registration of the sale deed and not the date of execution. The relevant part of the judgment reads as under:-

"In those cases where possession has not been delivered and/or the sale deed has been executed but not registered as yet, obviously a pre-emptor would have no notice that sale had taken place, thereby enabling him to exercise his right. In those cases the first part of Article 10 of the Limitation Act would have no application, rather the case(s) would fall within the second part thereof beginning from the word ***OR*** *"where the subject of the sale does not admit of physical possession, when the instrument of sale is registered." It is instructive to remember that a document required to be registered can be presented to the registrar within four months from the date of its execution as per Section 23 of the Registration Act. Thus for example, if a document is executed on 1.1.2000 and is presented for registration on the last date of the four months allowed for the presentation thereof and it takes a further one month to be registered according to the law, in this manner about five months may be lost and yet the pre-emptor would have no notice of the sale; the right of the prospective pre-emptor to file a suit within a period of one year*

> *cannot thus be curtailed by excluding this whole period from the calculation which is what would happen if we took the date of execution of the sale deed to be the starting point for purposes of limitation; further the provisions of Section 47 of the Registration Act cannot be read into the clear language of Article 10 of the Limitation Act which specifically mandates "when the instrument of sale is registered" meaning thereby that limitation begins to run from the date of the registration."*

Be that as it may, this was not a point on which leave was granted. Learned counsel has not pressed the point on which leave was granted, rather he has conceded that cultivation rights can be sold and are therefore/thereafter pre-emptible.

3. Learned counsel for the appellants has instead raised an absolutely new point today, stating that, according to the notification No.196-B dated 28.2.1944 issued by the Government of Punjab *(the notification)* no right of pre-emption shall exist in any local area to which the Colonization of Government Lands (Punjab) Act, 1912 *(the Colonization Act)* has been or may thereafter be made applicable, therefore, the land in question, falling within the colonization area being a part of the Bahawalpur District, the right of pre-emption cannot be exercised by the respondents as per the provisions of Section 8(2) of the Pre-emption Act, 1913 *(the Pre-emption Act)*. He relied upon the judgments reported as **Muhammahd Siddique and others Vs. Muhammad[28] Sharif and others (2012 SCMR 1387)** and **Abdul Majeed through L.Rs. and others Vs. Sher Din through L.Rs. (2015 SCMR 620)**. When confronted with the fact that leave was never granted on this point, learned counsel argued that this being a pure question of law, the Court could always decide the matter on the

basis thereof regardless of whether or not leave had been granted on that point. This question lies at the root of the case the Court confronts today. To decide whether a new point can be raised by the appellants' counsel today which was neither agitated at any stage of the proceedings nor a ground set out in the memo of appeal and for which leave was not granted we feel it is expedient to evaluate the law on the subject. In this context Order XIX Rule 5 of the Supreme Court Rules, 1980 *(the Rules)* prescribes *"The appellant shall not, without the leave of the Court, rely at the hearing on any grounds not specified in his petition or appeal and the concise statement"*. In the judgment reported as **Abdul Hameed and others Vs. Muzamil Haq and others (2005 SCMR 895)** this Court held:-

> *"18. Coming to the objection of respondent's learned counsel that since question of waiver was not raised before the High Court and it has not been specifically urged in the memo. of appeal before this Court, therefore, the appellants' learned counsel is estopped to raise this point we feel that this objection in the facts and circumstances of this case has no force firstly because before the High Court it was the respondent No.1 who had filed the appeal and there was no occasion for the appellants to raise this issue and since the suit had been dismissed by the first Court of appeal only on Issue No.1. The High Court were touched this issue and reversed the finding on Issue No.4. Secondly, in terms of Order XIX, rule 5 of the Supreme Court Rules, 1980 this Court has discretion to allow an appellant to raise any ground not specified in the memo. of appeal. The said Rule reads as under:--*
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> *"(5) The appellant shall not without the leave of the Court, rely at the hearing on any grounds not*

> *specified in his petition of appeal and the concise statement."*

The same question *(whether a new point may be raised before the Apex Court)* was considered in the case reported as **Mst. Shamim Akhtar Vs. Syed Alam Hussain and others (1975 SCMR 16)** and this Court after noting the practice of the Privy Council and of this Court *(note:- the Rules were not in vogue at that time)* came to the following conclusion:-

> *"It is no doubt true that the general practice of this Court following the Privy Council practice, has been as suggested by the learned counsel; but this is not an inflexible rule, and there may well be cases in which this Court, in the interest of justice, may be constrained to depart from this practice, although such cases will, no doubt, be extremely rare. This Court has undoubtedly the power, under the Constitution itself, to do complete justice and, therefore, it has never tied itself down in such a manner as to deprive itself of this power… It would thus appear that it is not correct that this Court has never departed from this rule of practice. It cannot, therefore, be maintained that any and every departure from this rule no doubt a salutory rule-would result in the exercise of a jurisdiction not possessed by the Court and thereby constitute an error apparent on the face of the record. The jurisdiction is there; but whether, and in what circumstances, the Court will exercise it, is an entirely different matter."*
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> *(Emphasis supplied)*

In **Dr. Zulfiqar Haider Vs. Riaz Mahmud (PLD 1992 SC 238)** this Court came to the following conclusion:-

> *"It is true that a pure question of law which does not involve an inquiry into facts, even if it is raised for the first time, can be considered by this Court. But this concession is subject to the condition that leave to raise and argue such a point must be granted by this Court. In other words, even a pure question of law, which was not raised earlier, can be canvassed only by the leave of this Court."*
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> *(Emphasis supplied)*

In **Gatron (Industries) Limited Vs. Government of Pakistan and others (1999 SCMR 1072)** and **Caltex Oil (Pakistan) Ltd. Vs. Collector, Central Excise and Sales Tax and others (2006 SCMR 1519)**, the same principle has been reaffirmed adding that it is the duty of the Court to apply the correct law to meet the ends of justice. Furthermore, in **The State through Advocate-General, Sindh High Court of Karachi Vs. Raja Abdul Rehman (2005 SCMR 1544)**, this Court held that:-

> *"10. After going through the aforesaid cited cases, the conclusion or the inference which is to be drawn is that the arguments at the appellate stage would in normal and in ordinary course governed by the leave granting order and any question or point not referred to in the leave granting order for consideration would not be permitted to be agitated and considered at the stage of final arguments of the appeal. However, this Court in the case of Khushdil and 3 others v. The State PLD 1981 SC 582 pronounced that this Court in exercise of its power to do complete justice would be competent to examine points other than those on which leave was granted. In view of the pronouncement of this Court it is to be noted that there is no rigid on the established rule relating to the power of this Court to allow raising of a question or point on which leave to appeal was not*

> *granted and normally or in ordinary course it would not permit raising of point/question not mentioned in the leave granting order but in exceptional cases for doing complete justice, it would permit or allow the appellant to agitate a point/question not mentioned in the leave granting order."*

We are clear in our minds that the appellants do not have a right to raise an absolutely new plea before this Court and seek a decision on the basis thereof. Nor can such plea be allowed to be raised and the case decided accordingly as a matter of course or right on the pretext of doing complete justice. The leave of this Court in this context is mandatory but the considerations for the purposes of granting leave to raise a new point depend upon the facts and circumstances of each case. This Court has the discretion to grant leave at the time of hearing an appeal in which leave has been granted on a different point(s) and to consider such point of law, including for instance the question of inherent jurisdiction, undoubtedly being a pure question of law; even if not earlier taken up in any proceedings including those before the Supreme Court. This could very well apply to the point of limitation too where such plea was not dependent upon any factual determination. However, those cases which require a factual foundation and adjudication for the purposes of settling a legal issue cannot be said to be pure questions of law and the same cannot be allowed to be raised before this Court for the first time. In the context of the rule *supra* we have examined the point raised by the learned counsel and the notification and the judgments upon which reliance has been placed; suffice it to say that in order to attract the said notification the foundational question is whether the property in issue is situated in a colony area or not. This foundational fact was

required to be pleaded and determined if the appellants wanted to defeat the pre-emption right of the respondents on this ground, but from the present record it is clear that nothing of the sort was ever done or attempted to be done. From the learned Trial Court up till this Court no opportunity was availed, nor any exercise carried out to seek any amendment in the written statement to join an issue in this context, nor was this point raised in the memo of appeal etc. Therefore, the argument that the plea now sought to be raised is a pure question of law is absolutely unfounded and misconceived. As regards the reliance placed upon **Abdul Majeed**'s case *(supra)*, it may be mentioned that the defendants of that case *(the vendees)* in their written statement took up the plea that the property in question was situate in a colony area and, therefore, the plaintiffs did not have the right of pre-emption. Accordingly an issue was framed in this regard as is clear from the judgment of this Court when it mentions "*The said suit was resisted. On the divergent pleadings of the parties, issues were framed, including Issue No.1 as to whether the land in dispute was not pre-emptable (sic)…*" Furthermore, this Court gave a factual finding in that case based upon the consideration of evidence, particularly the statement of DW-1, the *Patwari* that "*…Chak No.21-A/NP was carved out from three existing basties and is within "the Colony Area", In the Revenue Record, the owner was identified as "Sarkar Dault Madar" as is evident from Exh.D-10*". However, in the instant cases, this factual aspect was never addressed in the defence of the appellants and therefore the notification and Section 8(2) of the Pre-emption Act are of no avail to them. The point now raised is not a pure question of law and, therefore, we decline to grant leave to the appellants to raise this plea at this stage of the proceedings before this Court for the first time. These appeals are

dismissed. As regards Civil Review Petition No.117/2006, we do not find that a case for review has been made out and it is accordingly dismissed.

CHIEF JUSTICE

JUDGE

Announced in open Court

on **14.2.2017** at **Islamabad**
Approved For Reporting
Waqas Naseer/*

CHIEF JUSTICE