

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

CIVIL PETITION NO. 611-L 2018

(Against the order dated 05.03.2018 of the Lahore High Court, Bahawalpur Bench passed in Writ Petition No. 1737/18)

Badl (deceased) through his L.Rs and others. ... Petitioners

Versus

Lashkari (deceased) through his L.Rs and others. ... Respondents

For the Petitioners: Raja M. Ibrahim Satti, Sr. ASC.
Mr. Rizwan Ibrahim Satti, ASC.
Syed Rifaqat Hussain Shah, AOR.

For Respondents No.1-3: Mr. Aftab Alam Yasir, ASC.
Mr. Ahmed Nawaz Ch., AOR.

For other Respondents: Abdul Sattar, Naib Tehsildar.
Mulazim Hussain, Patwari.

Date of Hearing: 14.02.2020.

ORDER

Qazi Faez Isa, J. The predecessors of the petitioners, namely, Badl son of Allah Bakhsh, Imam Bakhsh son of Ali Murad and Wahdoo son of Razi ("**the Plaintiffs**") filed a suit claiming pre-emption rights under paragraph 25 of the Land Reforms Regulation, 1972 (Martial Law Regulation No. 115, enacted on 11th March 1972) (hereinafter referred to as "**the Regulation**"). Paragraph 25(3)(d) of the Regulation granted pre-emption rights to tenants and is reproduced hereunder:

"25. Rights of tenants.

(3) As from Kharif 1972 -

(d) subject to the other provisions of this Regulation, a tenant shall have the first right of pre-emption in respect of the land comprised in tenancy."

2. The Plaintiffs filed their pre-emption suit on 29th May 1983 and in it challenged sale mutation No. 642, sanctioned on 30th March 1983, in respect of the sale of land measuring 47 *kanals* and 8 *marlas* ("**the Land**"), by its owner Ahmed Khan to Lashkari, Ibrahim and Faiz Ahmed, respectively respondents No. 1, 2 and 3 ("**the contesting Respondents**"). The Land was sold for eighty two thousand nine hundred and fifty rupees (Rs.82,950/-) as per the sale mutation. In the suit the sale price was disputed and it was alleged that the price had been enhanced to deprive the Plaintiffs from pre-empting the sale and the price actually paid, by the contesting Respondents to the Land owner Ahmed Khan, was seventy-seven thousand three hundred and fifty rupees (Rs.77,350/-). The Plaintiffs alleged that as they were tenants of the Land they were entitled to pre-empt its sale under paragraph 25(3)(d) of the Regulation at the price of Rs.77,350/-. The contesting Respondents denied that they had only paid Rs.77,350/- and not Rs.82,950/- as the sale consideration to Ahmed Khan and also denied that the Plaintiffs were tenants of Ahmed Khan.

3. The Assistant Commissioner cum Collector, Sadiqabad, District Rahim Yar Khan ("**the AC**"), *vide* order dated 10th October 1984, without recording of evidence, and on the purported statement made by the counsel for the contesting Respondents decided that the Plaintiffs were the tenants of Ahmed Khan but disbelieved that the sale consideration paid to him was Rs.77,350/-. His two page order concluded by holding that, "*the plaintiffs shall be at liberty to exercise their right of pre-emption at the quoted rate*", that is Rs.82,950. The order of the AC was challenged by both sides and was set aside by the Additional Commissioner (Revenue), Bahawalpur, and the case was remanded to the AC to decide it afresh after recording evidence, *vide* order dated 29th October 1986. As directed, the AC recorded evidence and then dismissed the suit, *vide* order dated 2nd April 1987. The Plaintiffs challenged the AC's decision before the Commissioner, Bahawalpur, and once again the case was remanded to the AC, *vide* order dated 8th October 1987, and the AC again, *vide* order dated 29th January 1991, dismissed the suit. This decision was again challenged by the Plaintiffs before the Additional Commissioner (Revenue), Bahawalpur, who upheld the order of the AC and dismissed the appeal, *vide* order dated 9th March 1994. Thereafter, the Plaintiffs challenged the two concurrent decisions before the Member (Judicial-II), Board of Revenue, Punjab ("**BoR**"),

who, *vide* order dated 11th September 1999, remanded the case to the Executive District Officer, Revenue (the nomenclature of the Commissioner was changed to Executive District Officer, Revenue). The Executive District Officer, *vide* order dated 10th July 2004, partially decreed the suit. Both the sides then filed revision petitions before the BoR, which were disposed of by a common order dated 30th June 2008 and the revision petition filed by the contesting Respondents was dismissed and the one filed by the Plaintiff was allowed and the suit was decreed as prayed, that is, the Plaintiffs were granted a decree in respect of 47 *kanals* and 8 *marlas*, that is of the entire Land. Writ Petition No. 2496/08/BWP was filed by the contesting Respondents before the Lahore High Court, Bahawalpur Bench, which was allowed by remanding the case to the BoR, *vide* order dated 27th May 2013, and the BoR, *vide* order dated 19th March 2015 in turn remanded the case to the Additional Commissioner (the nomenclature of the Executive District Officer, Revenue had reverted to Additional Commissioner). The Additional Commissioner, *vide* order dated 3rd March 2016, dismissed the suit. The Plaintiffs preferred a revision petition before the BoR, which, *vide* order dated 12th February 2018, dismissed it. Thereafter, the Plaintiffs filed Writ Petition No. 1737 of 2018 before the Lahore High Court, Bahawalpur Bench and the learned Judge of the High Court upheld the decisions of the Additional Commissioner and of the BoR dismissing the suit of the Plaintiffs', *vide* impugned judgment dated 5th March 2018.

4. Mr. Muhammad Ibrahim Satti, the learned senior counsel representing the petitioners, the legal heirs of the Plaintiffs, states that though the pre-emption suit was concurrently dismissed however all of them had misread the evidence and had also disregarded the fact that the Plaintiffs were tenants. He next submits that since the AC had decided the suit in favour of the Plaintiffs on 10th October 1984 therefore the judgment in the case of *Government of N.W.F.P. v Said Kamal Shah* (PLD 1986 Supreme Court 360) would not come in their way as the AC's decision pre-dates the effective date mentioned in the said judgment of the Supreme Court, that is, 31st July 1986. The learned counsel relied on the AC's decision dated 10th October 1984 and the Executive District Officer, Revenue's order dated 10th July 2004, which, according to him, had correctly and conclusively decided the matter in favour of the Plaintiffs. Concluding his submissions the learned counsel states that in the year

2007 the contesting Respondents initiated ejectment proceeding against the petitioners wherein they had shown them to be their tenants.

5. Mr. Aftab Alam Yasir, the learned counsel who represents the contesting Respondents, states that all the *fora* below decided the case, both on facts and on law, against the Plaintiffs by dismissing their suit and no case is made out for grant of leave. He further states that Imam Bakhsh (petitioners at No. 2 are his legal heirs) was a *mustajir* (lessee) and thus not entitled to invoke the provisions of paragraph 25(3)(d) of the Regulation since he was not a tenant and in this regard relies on the case of *Mohd. Ashraf v Member (Rev.), Board of Revenue* (1984 CLC 2950, 2954B). He further states that paragraph 25(3)(d) of the Regulation uses the phrase, "*comprised in tenancy*", which was explained by this Court in the case of *Ghulam Sarwar v Chanan Din* (PLD 2006 Supreme Court 347) to mean exclusive tenancy and not a co-shared tenancy, however, the Plaintiffs' own case was that they were co-tenants of the Land. The learned counsel next submits that Imam Bakhsh showed himself to be a *mazaray-taab-e-marzi*, which was not correct since he was a *mustajir* and his co-Plaintiff Wahdoo was a tenant of Imam Bakhsh, and thus not a tenant of Ahmed Khan. The learned Mr. Yasir also refers to the doctrine of *sinker* and contends that when a person, who may otherwise be entitled under the Regulation to pre-empt land, joins others who are not tenants in preferring a pre-emption claim his own claim, which was otherwise valid, would also sink with them; Imam Bakhsh was arrayed as a Plaintiff but as a *mustajir* was not a tenant, reliance in this regard is placed on the case of *Malik Sher v Rab Nawaz* (1993 SCMR 2035). He further states that the Plaintiffs, even if they were tenants, stopped being tenants, as admittedly, they were not paying rent to Ahmed Khan and therefore were not entitled to rights of pre-emption as tenants under the Regulation and in this regard relies on the cases of *Abaad Ali v Muhammad Din* (1981 SCMR 742) and *Rasool Bakhsh v Member (Judicial-II), Board of Revenue* (2002 CLC 1557). The case of *Muhammad Sharif v Member (Judicial-II), Board of Revenue* (1998 SCMR 408), the learned counsel submits, held that under the Regulation the pre-emptor must establish right of pre-emption at each of three crucial stages: at the time of sale of property, at the time of institution of the suit and at the time of decree, however, in this case the Plaintiffs had failed to establish their rights at any one of the said three stages. Responding to the submission

about ejectment proceedings said to have been filed by the contesting Respondents the learned counsel states that the referred document is not part of the record and also is shown to relate to the year 2007, which is long after the suit was filed, and therefore it has no bearing on the merits of the pre-emption suit filed by the Plaintiffs twenty-four years earlier.

6. The learned Mr. Yasir further contends that Press Note No. 57 dated 7th June 1973 was issued by the Land Commission, the authority under the Regulation, which received judicial sanction in the case of Mohd. Ashraf (above), had clarified that a lessee was not a tenant. The said Press Note is reproduced hereunder:

"A question has been raised by some interested persons whether the word "tenant" as used in paragraph 25 of Martial Law Regulation 115 also includes a "lessee". The Land Commission of the Punjab is pleased to clarify that the word "tenant" as used in paragraph 25 of Martial Law Regulation 115 does not include a lessee who is covered by the definition of "landlord" as given in sub-section (12) of Section 4 of the West Pakistan Land Revenue Act, 1967 (West Pakistan Act XVII of 1967)."

7. We have heard the learned counsel for the parties and with their able assistance examined the record, the provisions of the Regulation and the cited precedents. The learned counsel for the petitioners primarily relies on the order of the AC dated 10th October 1984, therefore, we enquired from him whether the Plaintiffs had exercised their right of pre-emption pursuant to such order and paid the sale consideration (Rs.82,950) and if so when did they do so. The learned counsel states that the Plaintiffs had assailed the AC's order because the order did not grant a decree in respect of the entire pre-empted land and because the sale consideration mentioned by the Plaintiffs (Rs.77,350) was disbelieved by the Plaintiffs. Responding to our query about when payment was made, the learned counsel states that payment was made on 22nd July 2004; the learned counsel for the contesting Respondents however disputes this and states that payment has not been made till date. Without entering into the controversy of whether payment was made, if we accept the Plaintiffs' version that payment, of the sale consideration amount, was deposited it was done twenty years after the AC's order. The Plaintiffs therefore did not abide by the order of the AC the benefit of which they claim. They did not exercise their right of pre-emption

nor paid/deposited the determined sale consideration within a reasonable time of the AC's order dated 10th October 1984. This in itself was a sufficient ground for dismissal of the suit, however, this aspect of the case was not considered by the *fora* below, which had dismissed the suit of the Plaintiffs on other grounds.

8. The findings with regard to Imam Bakhsh being a *mustajir* (lessee) are borne out from the exhibits which we have seen, therefore, Imam Bakhsh was not a 'tenant' under paragraph 25(3)(d) of the Regulation. The Press Note had clarified in unequivocal terms that "*the word "tenant" as used in paragraph 25 of the Martial Law Regulation 115 does not include a lessee who is covered by the definition of "landlord"*". The exhibits on record further show that another Plaintiff, Wahdoo, was a tenant of Imam Bakhsh, therefore, Imam Bakhsh was the landlord of Wahdoo and as such Wahdoo could not be a tenant of Ahmed Khan, the seller of the Land. Therefore, neither Imam Bakhsh nor Wahdoo could have initiated right of pre-emption in the Land. Badl had joined two others (Imam Bakhsh and Wahdoo) in the suit which would attract doctrine of *sinker*. Badl having joined those who did not have the right to pre-emption the land Badl's right of pre-emption would sink, as was held in the case of *Malik Sher* (above). The other aspects of the case ably elaborated by the learned Mr. Yasir are also borne out from the record.

9. Therefore, for the reasons mentioned above, the Plaintiffs' suit for pre-emption was rightly dismissed, therefore, leave to appeal is declined and the consequently this petition is dismissed.

Judge

Judge

Bench-II
Islamabad:
14.02.2020

Approved for Reporting
(M. Tauseef)