

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.129/2019
Rab Nawaz and others
Versus
Rusmat Ali

Date of Hearing:	12.11.2019
Petitioners by:	M/s Ch. Asif Irfan, Shahid Munir and Umar Hayat, Advocates
Respondent by:	Mr. Sajid Mehmood Chaudhary, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioners impugn the judgment dated 06.03.2019 passed by the Court of the learned Additional District Judge, Islamabad, whereby the respondent's appeal against the order and decree dated 29.09.2018 passed by the Court of the learned Civil Judge, Islamabad was allowed and the matter was remanded to the learned Civil Court with the direction to proceed with the suit on merits. Vide the said order and decree dated 29.09.2018, the learned Civil Court dismissed the suit for pre-emption and permanent injunction instituted by the respondent primarily on the ground that he had not deposited the *zar-e-soem* (one third of the sale consideration) within a period of thirty days.

2. The facts essential for the disposal of the instant petition are that on 16.06.2017, the respondent (Rusmat Ali) filed a suit for pre-emption and permanent injunction against the petitioners before the Court of the learned Civil Judge, Islamabad. The petitioners had purchased land measuring 7 *kanals* 2 *marlas* in different *khasra* numbers in revenue estate Tumair, District Islamabad for a sale consideration of Rs.2,00,000/- from Astafeer Ahmed through registered sale deed No.9919 dated 18.05.2017. The respondent based his claim for pre-emption on account of being a co-owner in the *khasra* numbers where the land purchased by the petitioners was situated.

3. Vide order dated 16.06.2017, the learned Civil Court directed the respondent to deposit *zar-e-some* , i.e. one third of the sale

consideration, amounting to Rs.66,667/- with the Nazir of the Court *“till the next date of hearing”* which was fixed for 29.06.2017.

4. It is an admitted position that the respondent did not deposit the *zar-e-soem* by 29.06.2017. However, on 17.07.2017, he submitted an application for the deposit of Rs.66,667/-. On the respondent's said application, the learned Presiding Officer ordered *“allowed to deposit zar-e-soem”*. It is also an admitted position that on 17.07.2017, the *zar-e-soem* was deposited by the respondent in compliance with the said order.

5. Vide order and decree dated 29.09.2018, the learned Civil Court dismissed the respondent's suit on the ground that he had filed the application for the deposit of *zar-e-soem* two days after the expiry of thirty days prescribed by law for the deposit of *zar-e-soem*.

6. The respondent's appeal against the said order and decree passed by the learned Civil Court was allowed by the Court of the learned Additional District Judge, Islamabad vide judgment dated 06.03.2019. The learned Appellate Court set-aside the order and decree dated 29.09.2018 and remanded the matter to the learned Civil Court with the direction to decide the case on merits after the framing of issues and recording of evidence.

7. The learned Appellate Court held that since the requirement to deposit *zar-e-soem* within thirty days of the filing of the suit was set out in Section 24 of the Punjab Pre-emption Act, 1991 (*“the 1991 Act”*) and since the provisions of the said 1991 Act were not applicable to the Islamabad Capital Territory (*“I.C.T.”*), the learned Civil Court could not have dismissed the respondent's suit for failure to deposit the *zar-e-soem* within thirty days of the filing of the suit. Furthermore, it was held that the *zar-e-soem* had been deposited by the respondent. The said judgment dated 06.03.2019 has been assailed by the petitioners in the instant revision petition.

8. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that as a matter of practice, the provisions of the 1991 Act were being applied by Courts in Islamabad; that Islamic Law did not require a pre-emptor to deposit *zar-e-soem*; that since the order for the

deposit of the *zar-e-soem* was made under Section 24 of the 1991 Act, the consequences provided in the 1991 Act for not depositing the *zar-e-soem* within thirty days of the filing of the suit would ensue; that none of the provisions of the 1991 Act are repugnant to the injunctions of Islam; that the 1991 Act was enacted by the Provincial Legislature of the Punjab bearing in mind the law laid down by the Hon'ble Shariat Appellate Bench of the Supreme Court, in the case of Government of N.-W.F.P. Vs. Said Kamal Shah (PLD 1986 S.C. 360), wherein Sections 15, 5(a) and (b) and 30 of the Punjab Pre-emption Act, 1913 (“the 1913 Act”) were declared as repugnant to the injunctions of Islam; that the preamble to the 1991 Act explicitly provides that the law relating to pre-emption was being re-enacted so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and *Sunnah*; and that since none of the provisions of the 1991 Act have till date been held as un-Islamic, the learned Civil Court did not commit any illegality by requiring the respondent to deposit the *zar-e-soem* and by dismissing the respondent's suit for non-deposit of the *zar-e-soem* within thirty days of the filing of the suit. Learned counsel for the petitioners prayed for the judgment dated 06.03.2019 passed by the learned Appellate Court to be set-aside and for the order and decree dated 29.09.2018 passed by the learned Civil Court to be restored. In making his submissions, learned counsel for the petitioners placed reliance in the cases of Ahmed Bakhsh Vs. Nasir Khan (PLD 2017 S.C. 674) and Malik Tariq Mehmood Vs. Ghulam Ahmed (2002 CLC 119).

9. On the other hand, learned counsel for the respondent submitted that the impugned judgment dated 06.03.2019 does not suffer from any jurisdictional infirmity so as to warrant interference in the revisional jurisdiction of this Court; that under paragraph 231 of the Muhammadan Law by D.F. Mulla, a co-sharer in the property (*shafi-i-sharik*) is included amongst the classes of persons who is entitled to claim pre-emption; that since the respondent was a co-sharer in the *khasras* where the land purchased by the petitioners was situated, his claim for pre-emption was in accordance with the law; that since the learned

Civil Court had permitted the respondent to deposit the *zar-e-soem* on 17.07.2017, and since the *zar-e-soem* was deposited by the respondent on 17.07.2017, the learned Civil Court could not have dismissed the respondent's suit on the ground that the *zar-e-soem* had been deposited on a date two days beyond the lapse of thirty days from the date of the filing of the suit; that the learned Civil Court duly recorded in the order sheet that the *zar-e-soem* had been deposited by the respondent on 17.07.2017; that pre-emption suits in Islamabad are governed by Islamic law; and that since there is no provision in the Islamic law for the *zar-e-soem* to be deposited within thirty days, the learned Civil Court could not have dismissed the respondent's suit for non-deposit of the *zar-e-soem* within a period of thirty days of the filing of the suit. Learned counsel for the respondent prayed for the instant revision petition to be dismissed.

10. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 7 above and need not be recapitulated.

11. Section 24(1) of the 1991 Act provides *inter alia* that 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 extend beyond thirty days of the filing of the suit. Section 24(2) of the 1991 Act provides that where the plaintiff fails to make a deposit under sub-section (1) within the period fixed by the Court, or withdraws the sum so deposited by him, his suit shall be dismissed.

12. Learned counsel for the petitioners very fairly submitted that the provisions of the 1991 Act were not applicable to the I.C.T. but they were being enforced as a matter of practice. In view of the fact that the 1991 Act did not apply to the I.C.T., could the learned Civil Court have dismissed the respondent's suit for non-deposit of the *zar-e-soem*?

13. An attempt was made in 1997 to make pre-emption laws for the I.C.T. The Islamabad Capital Territory Pre-emption Ordinance 1997 (“the 1997 Ordinance”) was promulgated on 15.02.1997 and it extended to the I.C.T. This Ordinance lapsed by efflux of four months in terms of Article 89 of the Constitution. Section 34 of the 1997 Ordinance repealed the 1913 Act. For the purposes of clarity, Section 34 of the 1997 Ordinance is reproduced herein below:-

“34...Repeal. The Punjab Pre-emption Act, 1913 (Punjab Act I of 1913) in its application to the Islamabad Capital Territory, is hereby repealed.”

14. The mere fact that the 1997 Ordinance repealed the 1913 Act implies that the 1913 Act was in force in the I.C.T. prior to its repeal by the 1997 Ordinance. Since the 1997 Ordinance lapsed upon the expiry of ninety days from the date of its promulgation, the 1913 Act to the extent of it being applicable to the I.C.T. revived. It is well settled that when an Ordinance amends or repeals a statute and thereafter the Ordinance expires, the original statute re-emerges. Reference in this regard may be made to the law laid down in the cases of Federation of Pakistan Vs. M. Nawaz Khokhar (PLD 2000 SC 26) and Sarghoda Bhera Bus Service Limited Vs. Province of West Pakistan (PLD 1959 SC 127). Additionally, in the case of Umar Mujeeb Shami Vs. District Magistrate/Deputy Commissioner, Islamabad (2003 CLC 430), it was held that repeal effected by temporary legislation is only a temporary repeal and a permanent enactment revived only after expiry of the repealing Ordinance. Recently, in the case of Pakistan Medical and Dental Council Vs. Muhammad Fahad Malik (2018 SCMR 1956), it was held that any amendment/insertion/substitution made by the Pakistan Medical and Dental Council (Amendment) Ordinance, 2014 in the Pakistan Medical and Dental Council Ordinance, 1962 did not survive after the former lapsed or was repealed, and the latter Ordinance stood revived.

15. In the case of Sabir Shah Vs. Shad Muhammad Khan (PLD 1995 SC 66), the Hon'ble Supreme Court interpreted Article 89 of

the Constitution (as it stood when the 1997 Ordinance was promulgated) in the following terms:-

“From a careful examination of Article 89 (ibid), it is quite clear that the legislative power conferred by this Article on the President to promulgate Ordinance is circumscribed by these conditions. Firstly, at the time the Ordinance is promulgated by the President, the National Assembly must not be in session and circumstances exist which render it necessary to take immediate action for promulgation of the Ordinance. The Ordinance so promulgated by the President is only a stop-gap arrangement and a temporary measure, as this Ordinance has to be placed before the National Assembly if it pertains to matters specified in Article 73(2) of the Constitution and in all other cases before the Parliament, within 4 months of the date of its promulgation, unless it is earlier withdrawn by the President or disapproved by the National Assembly or Parliament as the case may be. It is, therefore, quite clear that the power to promulgate an Ordinance by the President under Article 89 of the Constitution of 1973 is designed to meet a situation when the legislation is required urgently and the Assembly is either not in session or is unable to function for reasons of having been dissolved in accordance with the provisions of the Constitution of 1973. But the Ordinance so promulgated by the President does not acquire the status of a permanent Act of Parliament as it loses its validity on expiry of 4 months period from the date of its promulgation if the National Assembly or Parliament as the case may be, does not approve the legislative measure within that period.”

16. An Ordinance which expires upon the lapse of four months from the date of its promulgation without having been approved by Parliament is considered to have been repealed. The consequences of such repeal are provided in Article 264 of the Constitution. Since the 1997 Ordinance repealed the 1913 Act, and upon the lapse of four months, the 1997 Ordinance itself stood repealed by operation of Article 89(2)(a) of the Constitution, it is safe to hold that upon the expiration of four months from the date of the promulgation of the 1997 Ordinance, the 1913 Act stood revived.

17. In the case of Islamabad Club Vs. Punjab Labour Court-II (PLD 1981 S.C. 81), it has been well explained that by the President's Order No.1 of 1970, called the Province of West Pakistan (Dissolution) Order, 1970, the Province of West Pakistan was dissolved and the four Provinces of Balochistan, the North-West Frontier Province, the Punjab, and Sindh were constituted in addition to two Centrally Administered Areas, namely, the Islamabad Capital Territory and the Centrally Administered Tribal

Area. Under Article 6 of the said Order, the President was given exclusive power to legislate in relation to the I.C.T. Article 19 of the said Order provides that all existing laws shall continue in force so far as applicable and with necessary adaptations until altered, repealed or amended by the appropriate Legislature or other competent authority.

18. It is not disputed that the 1913 Act was in force in the I.C.T. prior to the passing of the President's Order No.1 of 1970. By virtue of Article 19 of the President's Order of 1970, the 1913 Act continued to apply to the I.C.T. The President, in exercise of powers under Article 6 of the President's Order No.1 of 1970, could have amended the 1913 Act to the extent that it applied to the I.C.T. or could have passed an Order with respect to the laws of pre-emption. This, the President did not do. However, in exercise of the powers conferred under Article 89 of the Constitution, the President promulgated the 1997 Ordinance dealing with the laws of pre-emption applicable to the I.C.T. Therefore, upon the repeal of the 1997 Ordinance by efflux of time, the 1913 Act stood revived to the extent of its application to the I.C.T. Until the 1913 Act is not repealed or amended by the competent legislature, its provisions (other than the ones that were declared unIslamic in the case of Government of N.-W.F.P. Vs. Said Kamal Shah (*supra*)) would continue to apply in the I.C.T. Even though the 1991 Act had repealed the Punjab Pre-emption Ordinance, 1991 and other Ordinances which in turn had repealed the 1913 Act, the application of the 1991 Act would be confined to the Province of the Punjab and cannot by implication be extended to the I.C.T. The enactment of the 1991 Act would not operate as a repeal of the 1913 Act to the extent of its application to the I.C.T. This is because the provisions of the 1913 Act continued to apply to the I.C.T. by virtue of Article 19 of the President's Order No.1 of 1970.

19. After holding that the provisions of the 1913 Act applied to the I.C.T., I would not proceed to examine the legality of the impugned judgment dated 06.03.2019 passed by the learned Appellate Court on the touchstone of the said law. Section 22(1) of

the 1913 Act provides that in every suit for pre-emption, the Court shall at or at any time before the settlement of issues require the plaintiff to deposit in Court such sum as does not, in the opinion of the Court, exceed one-fifth of the probable value of the land or property, or require the plaintiff to give security to the satisfaction of the Court for the payment if required, of a sum not exceeding such probable value within such time as the Court may fix in such order. Additionally, Section 22(4) provides *inter alia* that if the plaintiff fails within the time fixed by the Court or within such time as the Court may allow to make the deposit or furnish the security, his plaint shall be rejected.

20. In the case at hand, the learned Civil Court had not required the respondent to deposit one-fifth of the sale consideration but one-third of the sale consideration amounting to Rs.66,667/- by the next date of hearing, i.e. 29.06.2017. At no material stage did the respondent apply for the time fixed by the Court for the deposit of the *zar-e-soem* to be extended. There is no order of the Court passed prior to 29.06.2017 extending the time for the deposit of the *zar-e-soem*. Since the respondent did not deposit the *zar-e-soem* “within the time fixed by the Court” the learned Civil Court did not commit any illegality by dismissing the respondent’s suit. The deposit of the *zar-e-soem* on 17.07.2017 cannot be said to have been made “within such further time as the Court may allow.”

21. True, the 1913 Act does not require the pre-emptor/plaintiff to deposit the *zar-e-soem* but it requires the deposit of *zar-e-panjum* (one-fifth of the sale consideration). Since the respondent did not even deposit the *zar-e-panjum* by 29.06.2017, he could not make any grouse against the dismissal of his suit.

22. The order sheet of the learned Civil Court reveals that on 29.06.2017, the respondent had not deposited either *zar-e-soem* or *zar-e-panjum*. On the said date, the proceedings were adjourned to 14.07.2017, on which date the learned Presiding Officer was on leave. On 14.07.2017, the proceedings were adjourned to 25.07.2017. The learned Civil Court had allowed the respondent to deposit the *zar-e-soem* on 17.07.2017, which was not a date of hearing fixed by the Court. This *ex parte* order was not recorded

on the order sheet but on the respondent's application for the deposit of the *zar-e-soem*. The deposit of the *zar-e-soem* on 17.07.2017 would not excuse the respondent from the penal consequences envisaged by Section 22(4) of the 1913 Act. The respondent had to be judged not on whether he had deposited the *zar-e-soem* within thirty days of the filing of the suit but whether he had deposited the *zar-e-panjum* within the time fixed by the Court. Since the *zar-e-panjum* was not deposited by 29.06.2017, i.e. the time fixed by the Court, the learned Civil Court was correct in dismissing the respondent's suit.

23. As mentioned above, by virtue of Article 6 of the President's Order No.1 of 1970, the President was given the exclusive power to legislate in relation to the I.C.T. This power of the President continued until the enactment of the Constitution (Eighteenth Amendment) Act, 2010. Presently, under Article 142(b) of the Constitution (as amended by the Constitution (Eighteenth Amendment) Act, 2010), the Parliament has the exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.

24. Since certain provisions of the 1913 Act have been held to be unIslamic by the Shariat Appellate Bench of the Hon'ble Supreme Court in the case of Government of N.-W.F.P. Vs. Malik Said Kamal Shah (*supra*), wherein it was observed that the striking down of the provisions the *vires* whereof were challenged did not imply that the remaining provisions of the 1913 Act would *ipso facto* be in accordance with the injunctions of Islam. In this view of the matter, the legislature ought to consider enacting a statute on the law of pre-emption just as has been done by the provincial legislatures of the Punjab and of *Khyber Pakhtunkhwa* by enacting Punjab Pre-emption Act, 1991 and *Khyber Pakhtunkhwa* Pre-emption Act, 1987, respectively.

25. In view of the above, the instant revision petition is allowed; the impugned judgment dated 06.03.2019 passed by the learned Appellate Court is set-aside; and the order and decree dated 29.09.2018 passed by the learned Civil Court is restored. There shall be no order as to costs. Office is directed to transmit a copy

of this judgment to the Law and Justice Division, Government of Pakistan.

26. Before parting with this judgment, I must record my appreciation for the invaluable research for this case carried out by Mr. Umar Farooq, Research Officer attached with this Court.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

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