

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

1. Civil Revision No. 166/2017
Muhammad Saleem Khan
VERSUS
Habib Ahmed Abbasi
2. Civil Revision No. 167/2017
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VERSUS
Habib Ahmed Abbasi

Petitioner by: Raja Abdul Ghafoor and Raja Muhammad
Irshad, learned ASCs.
Respondent by: Ch. Asif Irfan, Advocate.
Date of Hearing: 07.07.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- Through the instant civil revision petitions (C.R. Nos.166 & 167 of 2017), the petitioner impugns the judgments and decrees dated 14.03.2016 and 26.01.2017, passed by the learned Civil Judge 1st Class and learned Additional District Judge Islamabad-East respectively, whereby suit for possession through pre-emption, filed by the respondent was decreed subject to deposit of sale consideration of Rs.60,00,000/- within three weeks failing which the suit would be deemed to have been dismissed and the appeal filed by the petitioner was dismissed while that of the respondent was allowed and the sale consideration was fixed as Rs.400,000/-.

2. Precisely, facts relevant for the disposal of the instant civil revision petitions are that respondent filed a suit for possession through pre-emption against the petitioner regarding land measuring 08 Kanal 10 Marlas bearing Khasra No.2069, 2073, 2082, 2074, 2081, 2076, 2077, 2080, 2075, 1887, 1828 & 1829, situated in revenue estate of Mouza Mohra Noor, Tehsil and District Islamabad on the basis of superior preferential right as against the vendee/ petitioner. The suit was contested by the petitioner by filing written statement. On 08.04.2015, learned trial Court framed following issues:-

1. Whether the plaintiff is entitled for decree for pre-emption as prayed for? OPP
2. Whether the plaintiff has prior right of pre-emption, being co-owner of the suit property? OPP
3. Whether the plaintiff has performed all the three talbs in accordance with law? OPP
4. Whether the suit of the plaintiff is barred by law? OPD
5. Whether the suit of the plaintiff is false, frivolous, as such the defendant is entitled for special cost? OPD
6. Relief.

3. Both the parties produced evidence in support of their respective contentions. The respondent appeared as PW-1 and examined Ulfat Zaman as PW-2, Nisar Ahmad Abbasi as PW-3, Muhammad Siharam as PW-4 and Javed Iqbal as PW-5. In documentary evidence, notice of *talb-i-ishhad* was tendered as Ex.P1, copy of mutation No.200663 as Ex.P2, copy of Jamabandi for the year 2000-2001 as Ex.P3 and registered acknowledgment as Ex.P4. While, from petitioner's side, special attorney Haq Nawaz appeared as DW-1 and tendered copy of pay order as Mark-A, copy of mutation as Mark-B and power of attorney as Ex.D1. The learned trial Court after hearing the contesting parties decreed the suit as prayed for vide judgment and decree dated 14.03.2016 subject to deposit of sale consideration to the tune of Rs.60,00,000/- within three weeks or else, the suit would be deemed as dismissed. The petitioner as well as respondent filed separate appeals. The petitioner prayed for outright dismissal of suit filed by the respondent, while the latter assailed the direction regarding payment of sale consideration of Rs.60,00,000/- being contrary to one stipulated in the sale mutation. The appeal of the petitioner failed while that of the respondent was allowed and pursuant thereto the amount of sale consideration was reduced to the tune of Rs.400,000/-. The petitioner, being dissatisfied with the decision (*surpa*) filed the instant civil revision petitions.

4. Learned counsel for the petitioner questioned the impugned judgments and decrees on the sole ground that when the petitioner in written statement had specifically taken a preliminary objection that the suit land had been transferred in the name of Bahria town, the Court in order to do complete justice, was under an obligation to frame issue and record evidence to that effect, even in absence of any application for arraying the said intervener as party in terms of Order I Rule 10 of the Code of Civil Procedure, 1908 ("CPC"). The learned counsel has placed reliance upon case of *Mst. Rasheeda Bibi and others V. Mukhtar Ahmad and others (2008 SCMR 1384)*.

5. On the other hand, learned counsel for the respondent contends that the petitioner has not produced any evidence to prove the creation of third party right by transfer of the subject matter in the name of Bahria Town; that the document Mark-B, copy of mutation, tendered to show the alleged transaction, being photocopy was inadmissible and retains no sanctity in the eye of law; that even otherwise, the entries in the said document depict only a procedure to be observed for approval while it did not contain any such approval besides the absence of any date of its sanction or initiation. According to the learned counsel, the principle of *lis pendens* is applicable in a case of pre-emption and even if the land is transferred to third party or many others during the pendency of the proceedings, it will have no consequence as the final adjudication of the suit would have prevalence.

6. Heard the learned counsel for the parties and perused the record with their able assistance.

7. It is now a well settled principle of law that in pre-emption suits, the vendee is precluded from transferring/creating third party right regarding the subject land in favour of any other party. In this respect, the ultimate

court of the land has held in case reported as “***Abdul Yamin Khan V. Ashtar Ali Khan and others (2004 SCMR 1270)*** that:-

“12. From the case law on the subject in general and from that cited at the Bar in particular one feels, no difficulty in arriving at the conclusion that, once a pre-emption suit stands instituted, a vendee is prohibited from entering into sale or resale of the' disputed property. It is obvious because the lis is pending adjudication. Even otherwise, it is a matter of common sense that the provisions of section 52 of the Transfer of Property Act would get attracted only and only when the lis is pending. Contrary to that, in the instant case, the pre emptor had not then instituted the pre-emption suit on 5 10 2000 when the vendee Abdul Subhan had already sold, the property to Ashraf Ali Khan on 29 9 2000 vide Mutation No.639. How by any stretch of imagination or interpretation this further sale can be brought within the four corners of the principle of lis pendens. The learned High Court has, therefore, rightly held that it was a new transaction altogether and the pre emptor if at all interested in pre emptying the sale, should have filed a suit against the latest sale and not against the previous one. If the principle of lis pendens is wrongly applied to the sales taking place prior to the institution of suit then every purchaser shall be made bound to wait for a pre emptor suit and refrain from exercising his proprietary rights over the property purchased. The right of pre emptor, by such interpretation cannot be so over stretched and so blown out of proportions.” [Emphasis added]

8. From the above case law it is very much obvious that in a pre-emption suit when the plaintiff has preempted the sale transaction by way of filing of suit i.e. *talb-i-khusumat* , if any sale subsequent to institution of suit is made, has to sink or swim together with the ultimate outcome of the pre-emption suit. Therefore, in the light of above, if there was any transaction, regarding which there is no proof on the record, after the institution of the suit for pre-emption, that too, is of no significance and the decree of the court has to prevail. Reliance is also placed upon “***Mian Tahir Shah and another V. Additional District Judge, Swabi and others***” (1998 SCMR 858).

9. The inspection of the record also reveals that although the petitioner had taken a preliminary objection to the effect that suit land has been transferred in favour of Bahria Town, yet his sole witness/special attorney Haq Nawaz DW-1 in his

statement has not dittoed the preliminary objection rather stated in following terms:

"مجھے یاد نہ ہے کہ کس انتقال نمبر کے تحت زمین بحریہ ٹاؤن کو منتقل کی ہے۔ ایسے کسی انتقال کی کاپی بھی جواب دعویٰ کیساتھ نہ لگائی ہے۔ مجھے علم نہ ہے کہ بحریہ ٹاؤن کیساتھ کب انتقال درج ہوا و تصدیق ہوا۔ مجھے علم نہ ہے کہ مدعی نے اپنے دعویٰ میں طلب مواثبت کی تاریخ کیا لکھی ہے۔ مجھے علم نہ ہے کہ کہ بحریہ ٹاؤن کیساتھ ہونے والا انتقال طلب مواثبت سے پہلے ہوا یا بعد میں۔ علم نہ ہے اس بابت اگر مدعا علیہم پیش ہو تو وہ بتا سکتا ہے۔"

10. From the above statement, it is clear that the witness had no knowledge when the suit land was transferred to Bahria Town and under which mutation number the said transfer was sanctioned. It is, thus, clear that there is no material which can be made basis to substantiate the oral assertion regarding transfer of the suit land to third party, as asserted. Moreover, from the above referred portion of the statement/evidence of PW-1, the star witness of the petitioner, it reveals that the said statement is totally in vacuum regarding the alleged sale transaction in favour of the third party. Needless to mention that any assertion in the pleadings is required to be proved by way of recording of evidence which is lacking in the present case. In this regard, the reliance is placed upon case of Hakim ud Din through L.Rs and others Vs Faiz Bakhsh and others (2007 SCMR 870), wherein it is held in the following way:

"5. We have considered the submissions made by the learned counsel for the parties and perused the record. It is an admitted fact that respondent did not appear before the trial Court to prove the contents of the plaint. It is a settled law that pleadings of the parties are not substitute of evidence and it being not a substantive evidence, the averments made in the pleadings would carry no weight unless proved from the evidence in Court or admitted by the other party." [Emphasis added]

The same principle was endorsed in another judgment of the Hon'ble Apex Court reported as Muhammad Akram and another V. Mst. Fareeda bibi and others (2007 SCMR 1719)."

11. Now, coming to the objection of the learned counsel regarding framing of issue on the point of said transfer of land in favour of the third party, the record is evident of the fact that the petitioner had fully participated in the proceedings and never raised this objection at any stage before the two learned courts below. The sole witness in his statement also did not utter a single assertion in this respect. The Hon'ble Apex Court in case "*Mehr Din (Lrs) V. Dr. Bashir Khan and 2 others*" (1985 SCMR 1) has graciously held as under:-

"Nonetheless, we find that throughout the trial the parties were fully cognizant of this issue which really arose out of the pleadings of the parties and they had also adduced their evidence in respect thereof. So, that in our considered opinion, no prejudice was done to any of the parties in the failure of the Court to frame a proper issue in the suit arising out of the pleadings of parties."

By seeking guidance from the above referred judgment, it is safe to hold that the petitioner was not much interested to have an issue framed by the courts at the two forums below. At present, the petitioner is in revisional jurisdiction which is not substitute of appellate jurisdiction and the remedy of appeal has already been exhausted by him, therefore, cannot agitate the ground at this stage. The issues must be agitated before proper stage and not at the level of Apex Court. Although framing of issues is the duty of the Court yet at the same time, it was an obligation of a party to litigation to point out to the Court at the earliest available opportunity regarding that error, where such deficiency was not covered, it means that the party would be deemed to have waived its right. In this respect guidance is sought from case of "*Water and Power Development Authority through Chairman and another V. Bilal Ahmad and another*" (2006 SCMR 929) and "*Punjab Bricks Company through Abdul Rasheed and another V. M/s Pervez Coal Agency and another through its sole proprietor*" (2001 YLR 1373).

12. The documentary evidence produced by the petitioner i.e. special power of attorney, sworn in favour of DW-1 for recording of statement, copy of pay order Mark-A and copy of mutation Mark-B did not lend support to the said preliminary objection. The document Mark-B, available at Page-72 did not contain any date of entry or its sanction/attestation. It also did not contain that any mass meeting was convened for approval of the process initiated by the concerned Halqa Patwari. When this document is compared with the document i.e. Ex.P2, mutation sanctioned in favour of the petitioner, the latter carries all particulars including the proceedings and its sanctioning. It also bears the date and complete description while all such entries are missing in Mark-B. The said substance even could not qualify the test of a validly executed document, keeping in view the legal position on the subject under discussion.

13. It is thus clear that Mark-B is just a photocopy and that too, of an incomplete document, therefore, it can be safely concluded that the preliminary objection regarding transfer of suit land to Bahria Town was without any substance and lacks documentary support. There is no cavil with the proposition that for safe administration of justice, it is the duty of the court to frame issue and record evidence but in case, as mentioned above, when there is mere an assertion without any material backing, the said departure cannot be termed as illegality on the part of the two learned courts below.

14. There is another important aspect of the case and that is regarding principle of *lis pendens*. The law is also settled by the Hon'ble Apex Court of the country that Section 52 of the Transfer of Property Act, 1882 envisages that new purchaser stepped into the shoes of the vendee/defendant and, therefore, will fall or rise with the vendee/defendant. In this respect due reliance can be made to the judgment

reported as **Muhammad Muneeb Qureshi V. Abdul Qadir Shah and 3 others (2015 CLC 1751)** wherein it is held in the following manner:-

"6. The petitioner got registered sale-deed No.720 in his favour during pendency of suit. In view of section 52 of the Transfer of Property Act, 1882 the petitioner has stepped into the shoes of vendee/defendant, therefore, will fall or rise with vendee/defendant. Reliance can be placed on "Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others" (PLD 2011 Supreme Court 905), wherein it has been held:---

"The proposition, in our view, in the present case is germane to the scope and application of section 52 of the Transfer of Property Act, 1882, which reads as under:

"During the pendency in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

Explanation:--- For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

The aforesaid section manifestly embodies the rule of lis pendens, which is available both in equity and at the common law. The rule and the section is founded upon the maxim "pendente lite nihil innoovetur", which means that pending litigation, nothing should be changed or introduced. The virtual and true object of lis pendens is to protect

and safeguard the parties to the suit and their rights and interest in the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person. The rule unambiguously prescribes that the rights of the party to the suit, who ultimately succeed in the matter are not affected in any manner whatsoever on account of the alienation, and the transferee of the property shall acquire the title to the property subject to the final outcome of the lis."

The two courts below have rightly decided and rejected the application for impleadment in accordance with law, thus no circumstances exist to interfere with the judgments of the two courts below by this Court."

15. The case law relied upon by the learned counsel do not extend any help to the petitioner due to having distinct facts and circumstances.

16. In view of the above, it is concluded that both the learned Courts below committed no illegality or material irregularity while passing the impugned judgments. The concurrent findings arrived at by the two learned courts do not call for any interference. Consequently, the instant revision petitions being devoid of merits are accordingly dismissed with no orders as to costs.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

Suhail

ANNOUNCED IN OPEN COURT ON 30-07-2020

JUDGE