

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
(JUDICIAL DEPARTMENT)

C.R. No.132/2019

Muhammad Abbasi v. Mujeeb-ur-Rehman, etc.

Petitioner by: Mr. Muhammad Ishtiaq Ahmed Raja, Advocate.

Respondents: Ex-parte.

Date of Hearing: 09.09.2020.

MOHSIN AKHTAR KAYANI, J: Through the captioned civil revision petition, the petitioner has called in question concurrent findings of the learned Civil Judge (East), Islamabad as well as of the learned Additional District Judge (East), Islamabad, dated 08.03.2018 and 04.09.2018, respectively, whereby suit filed by the petitioner has concurrently been dismissed.

2. Succinctly, petitioner is owner of land falling in Khasra No.1194, 1195 & 937, adjacent to which respondents have purchased immovable property from Khasra No.1191 & 1192 through two registered sale deeds No.12527 & 15264 and kept the matter of purchase undisclosed. On 18.05.2006, when respondents arrived at the site for the purpose of taking over possession, the petitioner learnt about selling of the land in favour of respondents. On 05.06.2006, the petitioner issued notices to the respondents requiring them to receive the sale price and get the land transferred in favour of petitioner, but to no avail. Resultantly, the petitioner filed suit for possession through pre-emption of land measuring 9 Kanals & 18 Marlas, comprising in Khasra No.1191 & 1192, Mouza Mohra Noor, Islamabad, however same was dismissed by learned Civil Judge vide impugned judgment dated 08.03.2018, whereas appeal thereto was also dismissed by learned Additional District Judge vide impugned judgment dated 04.09.2018. Hence, instant civil revision petition.

3. Learned counsel for petitioner contends that impugned judgments of both the Courts below are against the law and facts available on record, rather learned

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trial Court as well as learned first Appellate Court had rendered the judgments on Issues No.6 against the evidence produced by the petitioner, as such, impugned judgments suffer from misreading and non-reading of evidence, therefore, same are liable to be set-aside and suit filed by the petitioner may be decreed as prayed for.

4. At the time of admission of instant civil revision petition, this Court, vide order dated 28.05.2019, directed to issue notices to respondents for 02.12.2019, however none appeared on the date fixed despite service of notices. Hence, respondents have been proceeded against ex-parte.

5. Arguments heard, record perused.

6. Perusal of record reveals that petitioner is aggrieved with the concurrent findings of the learned Trial Court as well as of the learned first Appellate Court, whereby the suit filed by the petitioner for possession through preemption has been dismissed concurrently. The petitioner has sought the preemption of land purchased by respondents through two sale deeds registered at Serial No.12527, dated 22.09.2005 (measuring 06-Kanal & 04-Marla) and No.15264, dated 02.12.2005 (measuring 03-Kanal & 11-Marla), Khasra No.1191 & 1192, Mouza Mohra Noor, Tehsil and District, Islamabad. Whereas, the petitioner claims to be owner of adjacent land in Khasra No.1194, 1195 & 937, Moza Mohra Noor, Islamabad. The petitioner emphasizes that both the courts below have non-suited him mainly on the ground that he has failed to prove the *Talbs* required in suit for preemption, although he has allegedly notified his right of preemption on 18.05.2006 when the respondents along with revenue officials were available on suit property for the purpose of demarcation, presence of whom was purportedly witnessed by PW-3 Syed Azhar Hussain Shah and PW-4 Mazhar Hussain Abbasi, even the petitioner has notified his claim on the basis of written notice i.e. Exh.P3 and Exh.P4, dated 05.06.2006, which were dispatched to

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respondents through registered post (Exh.P5 & Exh.P6), but all these facts have not been considered by the Courts below.

7. Perusal of evidence reveals that the issuance of notices to the respondents for the purpose of claim of preemption has not been proved independently as PW-1 Ashraf Hussain/Post Master recorded his statement that as per Pakistan Post Office Rules, referred in Vol. 6, Para-25, they only maintain the official record for 18 months. This aspect clearly establishes that service of notice has not been proved by way of calling the postman as to whether written notice has ever been served upon the respondents, hence the responsibility and onus in terms of Article 117 of the Qanun-e-Shahadat Order, 1984 have not been discharged in a valid manner.

8. The petitioner though claims that he performed *Talb-e-Muwathibat* on the day demarcation was being carried out by the respondents and later on, *Talb-e-Ishhad* has also been made in written form, therefore, petitioner is under legal obligation to discharge the onus to prove the said *Talbs*. It is trite law that *Talb-e-Muwathibat* and *Talb-e-Ishhad* are not merely formalities and cannot be inferred from circumstances of the case, as such, under the Muslim laws, formalities are strongly observed and there should be clear proof of its observance as held in case reported as PLD 1984 Peshawar 12 (Samandar Khan vs. Ali Zaman).

9. I have also considered the evidence of PW-3 Syed Azhar Hussain Shah and PW-4 Mazhar Hussain Abbasi, but surprisingly the latter has not uttered a single word regarding the respondents nor recognized those persons who claim to be purchaser of suit property. Similarly, he has stated in his evidence that:

"عباسی صاحب کی گاڑی رکی تو دیکھا کہ وہاں 6، 7 بندے زمین ناپ رہے تھے۔"

This aspect is silent qua the identity of person to whom the *Talbs* have been made by the preemptor i.e. the petitioner. Whereas, law of evidence clearly stipulates that if any notice or transaction regarding *Talbs* has been made, the minimum

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requirement i.e. production of two adult males or two adult females and one adult male in presence of *Talbs* shall be complied with in order to ascertain the identity of respondents and the mode and manner in which *Talbs* have been made, which is not the case in hand. The witnesses of *Talb-e-Ishhad* were also under obligation to state those words for demand being made. Even the property has to be identified in a proper manner, but both the witnesses of petitioner side are not aware about the description of the property or the amount on which property was sold.

10. Similarly, notices (Exh.P3 & Exh.P4) though claimed to be signed by PW-3 Syed Azhar Hussain Shah and PW-4 Mazhar Hussain Abbasi, but they have not been confronted with their signatures and as such, the notices have not been proved independently.

11. The other defect which persuaded the learned first Appellate Court is the filing of suit for declaration and permanent injunction, titled "*Mehmood Hussain Abbasi vs. Mujeeb ur Rehman*", which was filed by the petitioner prior to suit for preemption, whereby he has sought an injunctive relief against the respondents to avoid the encroachment upon his own land, but at the time of filing of said suit, he was well aware that property in question was already purchased by respondents, but he had not filed a suit for preemption, though he has referred his intention in Para-7 i.e. seeking remedy of preemption. But it is not the case of respondents or justified on record that the respondents ever interfered with the land for which the petitioner has filed a suit, as such, such conduct of the petitioner expressively shows his malafide in order to restrain the respondents from their lawful rights, hence, the application of Order II Rule 2 CPC has rightly been considered by the learned first Appellate Court with the observation that the petitioner despite having knowledge that he has two remedies, he opted for suit of declaration and permanent injunction at first instance and later on, filed another suit for preemption. Such practice creates a bar for relinquishment of

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claim in terms of Order II Rule 2 CPC, therefore, in such eventuality, suit is not maintainable. Reliance is placed upon 1990 CLC 1132 Karachi (Khursheed Jehan vs. Aziz Ahmed Naqvi).

12. Similarly, the initial cause of action, as referred in Para-9 of earlier plaint, claims to be accrued on 18.05.2006, whereby the petitioner claimed that "*the defendant are trying to encroach upon plaintiff's land*", but in the second suit i.e. suit for pre-emption, petitioner also refers in Para-9 that cause of action accrued to him on 18.05.2006 when fact of sale came into his knowledge. If both these claims regarding cause of action are placed in juxtaposition with the evidence of petitioner produced as PW-2, it appears that he has made two different statements with two different intentions to initiate litigation against the respondents and maneuvered the facts for his gain.

13. Keeping in view the referred position, it is the obligation and onus of petitioner to prove that he has made the *Talbs* in presence of truthful witnesses and he himself is an honest person and as such, *Talb-e-Ishhad* is based on the execution of document, which has not been proved by the two attesting witnesses, who are required to justify the contents and execution of documents in terms of Article 79 of the Qanun-e-Shahadat Order, 1984, which otherwise render the performance of *Talb-e-Ishhad* as not proved. Reliance is placed upon 2015 SCMR 394 (Muhammad Abdullah vs. Ijaz Ahmad).

14. I have gone through the concurrent findings of both the Courts below and observed that same are in accordance with law and as such, suffer from no illegality, therefore, revision petition against concurrent findings of facts by the Courts below is not justified as ordinarily the revisional court would not interfere with concurrent findings of facts, except where misreading or non-reading of evidence is conspicuous or where there is an error in exercise of jurisdiction. Reliance is placed upon 2016 SCMR 24 (Nazim-ud-Din vs. Sheikh Zial-ul-Qamar) and 2014 SCMR 1469 (Mst. Zaitoon Begum vs. Nazar Hussain).

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