2012 Y L R 1386 [Lahore]

Before Muhammad Ameer Bhatti, J

LIAQAT HUSSAIN MALIK---Appellant

versus

Malik MUHAMMAD ASLAM---Respondent

R.S.A. No.18 of 2004, decided on 27th September, 2011.

(a) Qanun-e-Shahadat (10 of 1984)---

----Arts.49 & 85(1)(iii), (3), 87 & 88---Criminal Procedure Code (V of 1898), Ss.154 & 513---Certified copies of First Information Report and surety bond pro-cured from accused---Evidentiary value---Such documents for being public documents and relevant would be admissible in evidence without any further proof---Principles.

Haji Abdul Razzaque v. Pakistan through Secretary, Ministry of Deence and 2 others 1994 CLC 613 ref.

Irshad Ahmad and 6 others v. Abdul Hamid and 4 others 1985 CLC 1513; Mst. Noor Khatun v. Noor Khan PLD 1956 Lah. 293; Ratanchand Radhakisondas v. State AIR 1960 Bombay 146 and Emperor v. Khawaja Nazir Ahmed AIR 1945 PC 18 rel.

(b) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Pre-emption suit---Talb-e-Muwathibat, performance of---Knowledge of others about suit sale---Effect---Mere such knowledge could not be considered knowledge of pre-emptor.

Islamuddin and others v. Ghulam Muhammad and others PLD 2004 SC 633; Mst. Noor Jahan

Begum through Legal Representative v. Syed Mujtaba Ali Naqvi 1991 SCMR 2300; 2007 SCMR 518 and Muhammad Hafeez and another v. District Judge Karachi East and another 2008 SCMR 398 ref.

Sardar Khan v. Bashir Ahmed 2010 CLC 124 rel.

(c) Pleadings---

----No body can go beyond his pleadings.

Muhammad Ameen v. Sardar Ali PLD 2006 SC 318 and Louise Anne Fairley v. Sajjad Ahmed Rana PLD 2007 Lah. 300 rel.

(d) Punjab Pre-emption Act (IX of 1991)---

----S. 13---Pre-emption suit---Talb-e-Muwathibat and Talb-e-Ishhad, per-formance of---Proof---Positive proof about date and specific time of gaining knowledge of suit sale by pre-emptor and place of his making jumping demand being sine qua non for succeeding in such suit---Foundation of such suit rested on Talb-e-Muwathibat, thus, in case of failure of pre-emptor to prove the same, Talb-e-Ishhad, even if proved, could not be considered.

Taki Ahmed Khan for Petitioner.

Naveed Shahryar Sheikh and Fayyaz Ahmed Kaleem for Respondent.

Dates of hearing: 26th and 27th September, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---Through this second appeal, the appellant has challenged the judgment and decree of learned First Appellate Court whereby while reversing the findings of the learned trial Court, the suit of the present appellant was dismissed.

2. The brief facts necessary for the just decision of this appeal are that the appellant filed a suit by exercising the right of Talb-e-Khusumat for possession through pre-emption against the respondent after fulfilling the first two Talbs against sale of land described in the plaint for ostensible consideration of Rs.5,00,000 vide Iqrar Nama dated 3-4-2001, whereas he has actually paid Rs.2,00,000 as a consideration. Appellant claimed that he had a superior right of pre-emption.

3. The suit was contested by the respondent by filing written statement. 14-issues were framed out of the divergent pleadings of the parties.

4. Both the parties led their evidence to discharge respective onus on issues. The plaintiff produced as many as six witnesses including himself as P.W.1 and also produced seven documents as Exh.P.1 to Exh.P.7. Respondents produced four witnesses and himself appeared as D.W.1 to support his case and also produced twelve documents in support of his version. The learned trial Court vide judgment dated 18-11-2003 decreed the suit which was assailed by the respondent by way of filing an appeal which was accepted by the learned Additional District Judge vide his judgment and decree dated 6-1-2004 by reversing the findings of the learned trial Court and consequently dismissed the suit of the present appellant.

5. Learned counsel for the appellant contends that the judgment of learned First Appellate Court is based on misreading and non-reading of evidence of the appellant. First of all, learned counsel while referring to the evidence of the P.Ws contends that appellant has succeeded in proving on record by producing P.W.1 to P.W.3, Talb-e-Mawathibat, as he gained the knowledge of the transaction on 18-6-2001 at his own house from the mouth of P.W.2 and at the same time, he made a declaration about exercising his right of pre-emption. Since the respondent has failed to cross-examine on this particular point, the facts which have not been cross-examined shall be deemed to be admitted. Reliance is placed on Islamuddin and others v. Ghulam Muhammad and others, (PLD 2004 SC 633):--

"----Art. 133---Cross-examina-tion----Failure of defendant to challenge statement of plaintiff on material point i.e. relating to controversy between parties---Effect---Presumption would be that statement of witness to such extent was proved against defendant"

A similar view has also been constantly taken by the Hon'ble Supreme Court of Pakistan judgment reported as Mst. Noor Jahan Begum through Legal Representative v. Syed Mujtaba Ali Naqvi (1991 SCMR 2300) and (2007 SCMR 518). Learned counsel for the appellant further contends that as compared to the positive evidence produced by the appellant, the respondent has failed to produce any positive evidence about the gaining of the knowledge of transaction by the appellant before 18-6-2001. Learned counsel for the appellant further contends that the learned First Appellate Court has failed to consider not only the above mentioned contention of the learned counsel, but also misread the evidence of P.W.2 and P.W.3 by mentioning that the P.W.1, the appellant was aware of the transaction on 15-6-2001. Although, P.W.2 and P.W.3 admittedly made the statement about their knowledge not about the knowledge of the appellant. By referring to the excerpts of the evidence of P.W.1, contends that the appellant while appearing as P.W.1 specifically stated about the gaining of knowledge on 18-6-2001 but there is neither any cross-examination nor any suggestion was put to him about the knowledge of transaction before 18-6-2001. Learned counsel for the appellant further contends that the learned First Appellate Court has also misconstrued the evidence of P.W.2 and P.W.3, where they have admitted about the gaining of knowledge themselves but the inference cannot be drawn from the evidence of P.W.2 and P.W.3 that the appellant was in the knowledge of the transaction. He further contends that the admission made in the evidence by P.W.1 about the transaction which has been used by the learned First Appellate Court against the appellant is not reflected from the evidence of appellant. The extract of evidence from the P.Ws mentioned in the order of the learned First Appellate Court has been misinterpreted and misconstrued. He further contends that Exh.D.7 and Exh.D.8 cannot be read in evidence, as these documents are inadmissible in the eye of law, as the F.I.Rs. are not admissible. Reliance is placed on Haji Abdul Razzaque v. Pakistan through Secretary, Ministry of Defence and 2 others (1994 CLC 613) to elaborate his arguments. Learned counsel for the appellant contends that the surety bond and contents of the F.I.R. cannot be considered and read in evidence, as neither any person in support of these documents has been produced to prove their contents nor these documents have been put to the appellant at the time of cross-examination, hence no benefit can be drawn from these documents. While relying on Article 140 of the Qanun-e-Shahadat, contends that the document which has not been confronted to the witness, cannot be used against that person. Learned counsel for the appellant contends that testimony of P.W.5 and postal receipt and the photo copy of the notice which have been exhibited as Exh.P.2 and Exh.P.4, available on record are sufficient to prove the Talb-e-Ishhad and the respondents have failed to shake the testimony of P.W.5, who was a disinterested witness. In this view of the matter, the judgment of the learned First Appellate Court cannot stand on its legs and liable to be set aside.

6. Conversely, the learned counsel for the respondent vehemently opposed the contentions of the learned counsel for the appellant and in support of the judgment of the learned First Appellate

Court contends that the learned First Appellate Court has taken the entire evidence of the parties into consideration and while referring to the excerpts of the evidence of the parties, passed a reasonable judgment and the appellant has failed to point out any misreading or non-reading and jurisdictional defect in the judgment of the learned First Appellate Court. In support of the judgment of the learned First Appellate Court, learned counsel for the respondent contends that the judgment of the learned trial Court was passed without making any specific reference to the evidence of parties and it does not reflect the examination of any evidence of the parties, hence being no judgment in the eye of law, has been rightly reversed by the First Appellate Court after referring to the available evidence on the record produced by the plaintiff as well as the defendant. While relying on the memo of parties and Para 2 of the plaint where the address of the appellant has been shown as Moaza Lathian Tehsil and District Gujrat, the appellant categorically stated that he came to his house at Moaza Lathian at 9-00 p.m. on 18-6-2001 (Monday) and contends that the appellant claimed himself to be the resident of Moaza Lathian and there is no stand of the appellant that he temporarily shifted from Moaza Lathian to City Gujrat where he has been residing for the last four years. While referring to this para and the address mentioned in the memo of the parties, contends that the appellant cannot go beyond his pleadings. He has no right to deviate from whatever has been mentioned in his plaint and any evidence produced by him beyond that pleadings cannot be considered as part of the evidence, hence improvements made in the case of the petitioner by adding that he was residing in the city temporarily for the last four years and on the said day and date 18-6-2001 (Monday), he came to Moaza Lathian on a casual visit, cannot be considered as part of evidence. He further contends that from the evidence of the plaintiff it can be established that the appellant is a resident of Moaza Lathian and from the evidence it is also clear that from the day of possession, he was aware of the sale in dispute and the story as mentioned in the plaint and evidence brought on record is concocted and false. He further contends while relying on Muhammad Hafeez and another v. District Judge Karachi East and another (2008 SCMR 398):---

"----Ss 96, 100, 115 & O. XLI, R.33----Conflicting judgments of Trial Court and Appellate Court---Effect---Findings of Appellate court would be preferred and respected in such event---Exceptions stated.

In the event of conflict of judgments, findings of Appellate Court are to be preferred and respected, unless it is shown from the conclusions drawn are against the material on record; that the judgment of Appellate Court suffers from misreading or non-reading of evidence or that the reasons recorded for reversal of judgment are arbitrary, fanciful and perverse."

that the judgment of First Appellate Court must have been given preference as compare to the judgment of learned Trial Court. While referring to the admission of P.W.2 about the sale and the possession, he further made a reference to the evidence of P.W.2 from where it is clear that the P.W has informed the plaintiff/appellant at the time he came to know about the sale and this

fact from the evidence of the P.W.2 and P.W.3 are very much clear. He further contends that only P.W.1/plaintiff himself asserted in his evidence about his residence in the city Gujrat but nothing has come out from the mouth of the P.Ws. Further contends that the plaintiff himself admitted in his evidence that all the villagers gained the knowledge of sale after the possession had been taken over in response to the transaction. Learned counsel for the respondent contends that the arguments of the learned counsel for the appellant are against the record that Exh.D.1 (written statement) was put to him. The written statement (Exh.D.1) filed in a suit for permanent injunction filed by the present respondent against the appellant and his brothers and this written statement was put to him at the time of cross-examination wherein they have admitted about the possession of respondent on 15-6-2001. So, at least he was aware of this transaction and possession from 15th June 2011. He while relying on Ruqiya Bibi v. Samiullah 2004 YLR 2007 contends that the possession has been admitted by all the P.Ws which was from the date of the transaction. Learned counsel for the respondent contends that since registration of the F.I.R., has been admitted by P.W.1/appellant himself in cross-examination, hence the registration of the F.I.R. and its existence stood proved, hence the judgment referred to by the learned counsel for the appellant is not applicable. Even otherwise, the appellant himself suggested the registration of the case to the D.W.1/respondent and the surety bonds also admitted document apart from that these are judicial record of the criminal Court. He also contended that the informer/P.W.2, who stood surety of the accused of the F.I.R., became the interested person and had lost his credibility as a witness. While referring to the excerpts of evidence of P.W.1 to P.W.4 about the suggestion put to them about Talbs, the respondent has succeeded in shaking the testimony of the P.Ws. Moreover, the plaintiffs as well as their P.Ws have failed to prove the case of making the Talb-e-Muwathibat and Talb-e-Ishhad in a positive sense, hence this second appeal having no merits, liable to be dismissed.

7. I have anxiously considered the respective arguments of the learned counsel for the parties and have meticulously examined the record.

8. It is appropriate to first determine the performance of Talb-e-Muwathibat as envisage in the Punjab Pre-emption Act, 1991.

9. A good deal of oral and documentary evidence was led by the parties on this point. The appellant in order to discharge onus of performance of Talb-e-Muwathibat has produced three witnesses including himself as P.W.1. and P.W.2 is the informer and P.W.3 witness of Majlis. From the evidence produced by the appellant, apparently the appellant has succeeded to prove this fact that he came to know about sale on 18-6-2001 and he made the Talb-e-Muwathibat (jumping demand) but for adjudging whether he succeeded in proving the Talb-e-Muwathibat as envisaged in law of pre-emption is a question mark. The case of the respondent is that the appellant has concocted this drama of Talb-e-Muwathibat, otherwise he was aware of the sale and the possession of the disputed house before the stage was set for this so-called Talb-e-

Muwathibat. This assertion of the learned counsel for the respondent is a question before this Court for determination. For that matter, the learned counsel for the respondent while demonstrating the evidence of the appellant, referred to many excerpts of evidence of appellant. The appellant through his evidence brought on record that he came to know about the sale on 18-6-2001, whereas the respondent's case is that the appellant was well aware with regard to the sale which happened to be on 3-4-2001 and the possession was also taken over on the same day. Now from the evidence of the appellant and the respondent, the moot point is whether the appellant had the knowledge of sale and the possession of the disputed property before 18-6-2001. In this context, the evidence of the appellant referred to by the learned counsel for the respondent in conjunction with the evidence produced by the respondent, if put in juxtaposition, transpires that the appellant gained the knowledge before 18-6-2001 but before I jump to this conclusion, it would be expedient to consider the objection raised by the learned counsel for the appellant about the misreading or mis-construing the evidence of the appellant as well as inadmissible evidence produced by the respondent has to be taken into consideration. The pieces of evidence referred to by the learned First Appellate Court have been examined with the assistance of the learned counsel for the parties. It is evident from the evidence of the appellant that from the day of sale, the respondent/vendee took over possession of the disputed property and the possession and sale came to the notice of every person of the Village. This fact has been admitted by all the P.Ws and P.W.2, who also admitted that he came to know about the sale and possession three days earlier i.e. from 18-6-2001. At one stage, to answer of some questions, P.W.2 had admitted that he informed the day he came to know about the sale. Now, the emphasis of the learned counsel for the respondent on this sentence is that P.W.2 came to know about the sale of the disputed house 2/3 days from 12-6-2001 as he admitted in his cross-examination which was the date of sale. So, he acquired the knowledge of sale probably on 15-6-2001 and if this sentence is read with the earlier part of this statement, then there remains no doubt that he informed P.W1/pre-emptor about the sale on 15-6-2001 but on the other hand, the learned counsel for the appellant contends that this sentence does not connote as to whom he informed about the sale. He further elaborated his arguments by citing to another sentence in answer to the question, wherein he clarified about the day of information i.e. Monday and Monday fell on 18-6-2001. Now, his statement is self-contradictory, hence whatever benefit can be drawn from his evidence, will go to the defendant, as this witness is of plaintiff and so far as to whom he informed, he is a plaintiff's witness corroborating the evidence of the plaintiff. It is obvious that he talked about the plaintiff because none else was under reference, hence the objection of the learned counsel for the appellant is devoid of force. The evidence produced by the respondent is worth mentioning. He has produced the suit filed by the brother of the present appellant against the respondent for permanent injunction on 3-4-2001 for obtaining the stay from the court in order to frustrate the possession of the respondent. Nevertheless, the possession was taken over by the respondent. For that purpose, to get possession by force, they took the law in their hands and stormed the house of respondent. In this regard, F.I.R. No.21 under sections 452, 448, 148, 149 P.P.C. dated 3-4-2001 was also got registered by the wife of the present respondent against two nephews and others who obtained the bail from the Court of law and surety bonds were submitted on 19-5-2001. One of the surety, who stood for one of the accused namely Muhammad Kashif was the appellant. It is available on record as Exh.D.2. The other surety bond submitted by Manzoor Hussain P.W.2 for Zaka Ullah is also available as Exh.D.3. The F.I.Rs. are also available on record as Exh.D.7 and Exh.D.8. Learned counsel for the appellant has tried to wriggle out from this situation and contends that these documents neither have been put to him

nor these are the judicial documents which could be considered as an admissible under the provisions of the Qanun-e-Shahadat but I find support from law enunciated by this Court reported as Irshad Ahmad and 6 others v. Abdul Hamid and 4 others (1985 CLC 1513). The F.I.Rs. are public documents and admissible in evidence without further proof.

Mst. Noor Khatun v. Noor Khan (PLD 1956 Lahore 293).

Another point argued on behalf of the appellant is that a report which was made by the defendant at the police station, about the abduction of the plaintiff has been illegally received in evidence. It is urged by the learned counsel in the first place that that report is not a public document and could not have been proved by a certified copy. Here, the learned counsel is clearly wrong. It is a report entered in a register kept in the police station under section 155 of the Criminal Procedure Code in which report of non-cognizable offences are recorded. It is a public document because it is an act of a public officer of the executive branch of the Government. The document is relevant under section 35 of the Evidence Act, and it is a public document within the meaning of section 74. Another objection taken is that the production of the certified copy does not prove the identity of the person who made the report. There is however evidence aliunde to prove that fact.

Ratanchand Racihakisondas v. State (AIR 1960 Bombay 146), The admissibility of a first information report depends not on the fact that it is signed by the person making it, but on the fact that a first information report given in writing or taken down by a police officer would be a part of the official record as the substance of such information is to be entered in a book kept by the station officer in the form prescribed and that may attract the operation of the provisions of S.35, Evidence Act.

Emperor v. Khawaja Nazir Ahmed (AIR 1945 PC 18) and I am of the opinion that the F.I.Rs. as well as the surety bonds are the public document, hence admissible in evidence without any further proof. To elaborate about the surety bonds, it is appropriate to refer the relevant provision. Section 513 Criminal Procedure Code.

Deposit instead of recognizance. When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or Officer may, except in the case of bond for good behavior, permit him to deposit a sum of money or Government promissory comments to such amount as the Court or officer may fix, in lieu of executing such bond.

10. Since the surety bonds procured and accepted under provision of law and certified copy can also be issued after obtaining the permission from the Court of competent jurisdiction and it is also matter of fact that the charge having been created over the property by pledging said documents before the competent Court and charge over the property remained in the field unless it had been redeemed by the Court. So the surety bond is a part of judicial record and the same is relevant under Art. 49 of the Qanun-e-Shahadat and being a public document, needs not to be proved as envisaged in the Qanun-e-Shahadat Order, 1984 under Article 85(3). It is also appropriate to reproduce the relevant provision of law:--

Article 85 PUBLIC DOCUMENTS. The following documents are public documents:

(1) ----------

(2) ----------

3. Documents forming part of the records of judicial proceedings.

So from the above discussion, it is clear that F.I.Rs. and surety bonds are public documents and admissible in evidence without further proof. Learned counsel for the appellant further contends that the knowledge of others cannot be considered knowledge of the appellant Sardar Khan v. Bashir Ahmed (2010 CLC 124):--

"The presumption drawn by the learned Additional District Judge that since other people of village had got knowledge, it does not mean that the petitioner had also knowledge of the sale. Knowledge of other persons cannot be presumed to be a knowledge of the suitor."

There is no deviation from this proposition that the mere knowledge of others cannot be considered knowledge of the suitor. But the situation which has been created and proved by the respondent by producing his evidence to establish this fact that the appellant had the knowledge of the sale as well as the change of possession, hence the law laid down by this Court referred to by the learned counsel for the appellant is of no help in this case. From these documents coupled with the litigation pending between the parties which are available on the record as placed by the

defendant in his evidence, persuaded this Court to come to this conclusion that the appellant/plaintiff was aware of the sale before 18-6-2001. It is important to refer to another document in support of this conclusion that Exh.D.1, the written statement submitted by Liaquat/ plaintiff along with his brothers in suit filed by Muhammad Aslam, the vendee/ defendant for permanent injunction. In that written statement in para 4, which was signed by the present appellant, in which he admitted that:--

"The plaintiff Muhammad Aslam (respondent in this suit) took over the possession of the disputed property on 15-6-2001 from Malik Fazal Mehmood (original owner). In other words, Malik Fazal Mehmood transferred the possession on 15-6-2001 to the plaintiff No.1 because he was a bona fide purchaser of this suit land, hence he was in possession of the suit property as an owner. "

Although, the learned counsel for the appellant to justify the statement made in this written statement came up with the explanation that this written statement was submitted on 27-11-2001 and it was the duty of all the defendants to spell out the correct position at that time because this has subsequently come to the knowledge of plaintiff, the present appellant. So, whatever he submitted in this written statement that was a subsequent knowledge gained by him after 18-6-2001, hence this statement has no material effect on his case. I have considered this contention of the learned counsel but it was not the contention of the appellant at that time because the other co-defendants were aware of the sale as well as the possession of the respondent/vendee, hence this common statement cannot be bifurcated and at this stage it cannot be assumed as to what was the intention of the executant of this document at that time.

11. Even otherwise, the plaintiff has not mentioned in his plaint about his temporary residence in city Gujrat. He has just averred in the plaint that he came from Gujrat to his own house and in the plaint he has also mentioned one address, which relates to Moaza Lathia except his own statement where he tried to prove his case by asserting that in fact he was temporarily residing in city Gujrat and from Gujrat he came over there on 18-6-2001. Hence whatever happened in the Village, he was not aware but this was not the case of the plaintiff at the time of filing of this suit. There is very critical deficiency in the pleadings of the plaintiff. The obvious legal consequence of such lapse is, that though the plaintiff has structured his case on the foundation of his non-availability in Moaza Lathian but without proving the same, there is no evidence except his own assertion at the time of recording of his statement. It is settled law that nobody can go beyond his pleadings. Reliance in this behalf can be placed upon the judgment reported as Muhammad Ameen v. Sardar Ali PLD 2006 SC 318.

"It is settled principle of law that parties are bound by their pleadings as law laid down by this

Court in Mst. Murat Begum's case (PLD 1974 SC 322)."

and Louise Anne Fairley v. Sajjad Ahmed Rana (PLD 2007 Lahore 300):

"that no one can plead his case, beyond the scope of his pleadings."

12. In the light of aforementioned exhaustive discussion, I am of considered opinion that the appellant was well aware about the sale before 18-6-2001, the whole stance of the appellant/plaintiff stands falsified. The appellant failed to perform the Talb-e-Mawathibat as envisage in law of Pre-emption and as enunciated by the Hon'ble Supreme Court of Pakistan. It is the requirement of law that unless the pre-emptor proved through positive evidence the specific time and date of knowledge of sale and in Majlis in which declaration was made for exercising his right of pre-emption, the performance of Talb-e-Muwathibat cannot be considered to have been proved which is a sine qua non for succeeding in a suit for possession through pre-emption.

13. I deem it unnecessary to consider the other point of Talb-e-Ishhad as the appellant has failed to perform his first Talb-e-Muwathibat on which the foundation of the pre-emption suit rests. Unless the pre-emptor succeeded to prove this Talb-e-Muwathibat, Talb-e-Ishhad cannot be considered even if it has been proved, for that reason, I am disinclined to advert to the other (immaterial) points involved in this case.

14. For what has been discussed above, this appeal merits rejection and dismissed accordingly.

S.A.K./L-4/L Appeal dismissed.