

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE UMAR ATA BANDIAL, HACJ  
MR. JUSTICE SYED MANSOOR ALI SHAH  
MR. JUSTICE MUHAMMAD ALI MAZHAR

**CIVIL PETITION NO.3645 OF 2015 AND**  
**C.M.A.NO.8716 OF 2015.**

(Against the Judgment of Peshawar High Court,  
Peshawar dated 26.10.2015 passed in Civil  
Revision 1666/2011)

Mst. Zarsheda

... Petitioner

**Versus**

Nobat Khan

... Respondent

For the Petitioner : Mr. Zia-ur-Rehman, ASC  
(Via video link from Peshawar)

For the Respondent : Mr. Ghulam Mohy-ud-Din Malik, ASC  
(via video link from Peshawar)

Date of Hearing : 14.09.2021

**JUDGMENT**

**MUHAMMAD ALI MAZHAR, J:-** This Civil Petition for leave to appeal has been brought to challenge the judgment dated 26.10.2015 passed by learned Peshawar High Court whereby, the Civil Revision Application No.1666/2011 was dismissed.

2. The short-lived facts of the case are as under:-

The respondent had instituted a Civil suit for possession through right of pre-emption against the petitioner/defendant before the Civil Judge-II, Swabi on the premise that the Suit property has been transferred through an unregistered sale deed in lieu of Rs.88,000/- by Muhammad Ali to his sister. This sale transaction was recorded vide mutation No.1511, dated 24.08.2007. He came to know about the unregistered sale deed on 02.09.2007 at his house through Niaz Muhammad S/o Haji Mohabat Khan, thereafter in presence of Bashir Ahmed, his son, the plaintiff declared his intention to lodge right of pre-emption. On 11.9.2007, he sent notice of "Talab-i-Ishhad" for claiming his right of pre-emption. The defendant was approached to accept the right and deliver possession in lieu of sale consideration but defendant paid no heed hence the plaintiff filed a suit which was contested by the defendant/petitioner. The trial court decreed the suit which was affirmed in the appeal and against that judgment, the petitioner filed aforesaid Revision Application.

3. The learned counsel for the petitioner argued that impugned judgment is based on misreading of evidence. It was further contended that the suit property was owned and possessed by the petitioner by virtue of gift and not through sale hence no right of pre-emption could arise. The learned High Court as well as both the courts below failed to consider this crucial aspect which resulted into grave miscarriage of justice. In fact the mutation was entered and attested as a gift between the brother and sister, however, the price of the land was fixed as Rs.88,000/- for the purpose of taxes. The concerned Patwari with the connivance of the plaintiff/respondent created doubt in the mutation entry. He concluded that the respondent had no superior right of pre-emption who failed to fulfill requisite formalities in accordance with law.

4. The learned counsel for the respondent fully supported the judgment rendered by the learned high court in civil revision as well as the judgment of the courts below. He argued that the trial court decreed the suit on the basis of evidence and the learned appellate court after due consideration of evidence led by the parties rightly dismissed the appeal. There is no case of misreading or non-reading of evidence rather it is case of concurrent finding of the two courts below which was also affirmed in the civil revision by the learned high court. The respondent while claiming right of pre-emption completed all formalities religiously and also produced the evidence but on the contrary, the petitioner miserably failed to lead any evidence to prove that the transaction was in fact a gift and not sale.

5. Heard the arguments. The right of pre-emption is a right to acquire by purchase an immovable property in preference to other persons by reasons of such right. Compliant with clause (d) of Section 2 (Definitions Clause) of Khyber Pakhtunkhwa Pre-emption Act, 1987, 'sale' means permanent transfer of the ownership of an immovable property in exchange for a valuable consideration and includes transfer of an immovable property by way of hiba-bil-iwaz or hiba-bi-shart al-iwaz but in line with one of the exceptions

provided therein, it does not include a transfer of an immovable property through inheritance or will or gift, other than hiba-bil-iwaz or hiba-bi-shart al-iwaz. It is well settled exposition of law that the right of pre-emption arises in case of sale and when such sale is completed but does not arise in case of transfer of immovable property without consideration such as gift. The sale is completed when the price is paid by the purchaser to the vendor and possession of the property is delivered by the vendor to the vendee. If the suit for pre-emption is decreed by court of law, the pre-emptor stands in the shoes of the vendee and takes the property subject to all existing equities. The doctrine of Pre-emption or right of "shufaa" is originated by Muslim Law. The foundation of this right is in fact based on human desire to avoid inconvenience and disturbance which is likely to be caused by the introduction of a stranger into the land.

6. The persons in whom the right of pre-emption vest are put on view under Section 6 of Khyber Pakhtunkhwa Pre-emption Act, 1987 i.e. Shafi-Sharik (*person who is a co-owner in the corpus of the undivided immovable property sold with other person or persons*); Shafi-Khalit (*participator in the special rights attached to the immovable property sold, such as right of passage, right of passage of water or right of irrigation*) and Shafi-Jar (*person who has a right of pre-emption because of owning an immovable property adjacent to the immovable property sold*). The record exhibits that the plaintiff/respondent had put forward his demand of pre-emption in accordance with the prerequisites or preconditions laid down under Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987 in the order of "Talb-i-Muwathibat" (*immediate demand by a preemptor in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of pre-emption*); "Talb-i-Ishhad" (*demand by evidence establishing evidence*); "Talab-e-Khusumat" (*demand by filing a suit*).

7. The language used under Section 115 of C.P.C. unambiguously envisages that the revisional court has to examine the allegations of jurisdictional error such as exercise of jurisdiction not vested in

the court below or a jurisdiction vested in it by law was failed to exercise and or the court has acted in exercise of its jurisdiction illegally or with material irregularity or committed some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. Though the High Court exercises the jurisdiction to correct the error in the case decided by its subordinate courts but while exercising the revisional jurisdiction under Section 115, C.P.C., the powers of the court are limited and narrow. In the trial court Issue No.6 was settled whether plaintiff performed necessary Talbs in accordance with the law or not. After scrutinizing the evidence produced by the plaintiff to prove his right of pre-emption and the fulfillment of requirements as envisaged under Section 13, the trial court decided this issue in favour of the plaintiff.

8. The controversy and discord in its entirety was roaming around of an issue whether the defendant was gifted the property by her brother Muhammad Ali and the transfer was effected through gift. According to Section 5 of the Khyber Pakhtunkhwa Pre-emption Act, 1987, it is clearly provided that the right of pre-emption shall arise in the case of sale whereas Sub-section (2) further expounds that nothing contained in Sub-section (1) shall prevent a court from holding that an alienation purporting to be other than sale is in fact a sale. In paragraph 2 of the written statement, the defendant took the plea that there was no sale transaction. It is clearly reflecting from the judgment of the trial court that after filing the written statement by the defendant, the learned trial court settled the issues after scrutinizing and delved into the pleadings of the parties. The Issue No.5 unswervingly hinged on whether the transaction in question was a gift or sale but the trial court reached to the conclusion that defendant miserably failed to establish that the transaction was not sale but a gift. The gist of evidence shows that defendant failed to establish the factum of gift. The attorney of the defendant appeared as DW-I, who deposed that the property was gifted by Muhammad Ali to the defendant, however, during his cross examination, he deposed that Muhammad Ali was present in his village but he cannot produce any witness of the gift. Neither the alleged donor was produced or

called in the court for evidence nor was the witnesses of the alleged mutation of gift were called for evidence. Waseem Bari, Stamp vendor, PW-3 appeared and verified that stamp paper in question was sold by him to Muhammad Ali for agreement to sell in favour of Mst. Zarsheda, daughter of Hayat Khan.

9. At this juncture Article 129 of the Qanun-e-Shahadat Order 1984 is quite relevant under which court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. According to the illustrations highlighted for resonating the presumption, Illustration (g) is quite relevant which illuminates *“that evidence which could be and is not produced would, if produced, be un-favourable to the person who withholds it”*. Adverse inference for non-production of evidence is one of the strongest presumptions known to law and the law allows it against the party who withholds the evidence. Regardless of the presence of important witnesses (the alleged donor) and the alleged witness of the mutation, the defendant failed to produce them despite framing of specific issue whether there was no transaction of sale but a gift.

10. In the case of Shahbaz Gul and others vs. Muhammad Younas Khan and others (2020 SCMR 867), this court held that where two different interpretations were possible of the evidence brought on record, then appraisal of facts of lower courts should not be overturned by the High Court in its revisional jurisdiction under S.115, C.P.C. Between two possible interpretations, the one adopted by the trial and appellate courts should have been maintained, keeping in mind the limited scope of revisional jurisdiction. Whereas in the case of Ahmad Nawaz Khan Vs. Muhammad Jaffar Khan and others (2010 SCMR 984), this court expressed that that High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 115, C.P.C. In the case of Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi. Vs. Ikhtlaq Ahmed and others. (2014 SCMR 161), the court held that the provisions of Section 115, C.P.C under which a

High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities. The revisional jurisdiction of the High Court cannot be invoked against conclusion of law or fact, which do not, in any way, affect the jurisdiction of the court. In the case of Atiq-ur-Rehman Vs. Muhammad Amin (PLD 2006 SC 309), this court held that the scope of revisional jurisdiction is confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law but the interference for the mere fact that the appraisal of evidence may suggest another view of the matter, is not possible in revisional jurisdiction. There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This court in the case of Sultan Muhammad and another. Vs. Muhammad Qasim and others. (2010 SCMR 1630 ) held that the concurrent findings of three courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.

11. The learned counsel for the petitioner relied on the case of Elahi Bakhsh and others. Vs. Muhammad Iqbal and another (2014 SCMR 1217). This case was related to the exchange of land through registered exchange deed. The court also referred to Article 103 Qanun-e-Shahadat 1984 and held that oral evidence challenging the registered document cannot dislodge the presumption of truth attached to a registered deed. In the case in hand there was no question of challenging any registered document hence the above precedent is found distinguishable.

12. The first appellate court re-evaluated the evidence on record and affirmed the findings recorded by the trial court and the learned high court also after reappraisal of the evidence affirmed the concurrent conclusion arrived at by the courts below. We are of the firm view that findings recorded by the all the courts below are in consonance with the evidence on record, hence we do not find any infirmity in the impugned judgment which could warrant interference by this court. The petition is dismissed with listed application and leave to appeal is refused.

Acting Chief Justice

Judge

Judge

Islamabad,  
14.09.2021  
Approved for reporting.