

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Mushir Alam
Mr. Justice Qazi Muhammad Amin Ahmed

Civil Appeal No.1664 of 2014

*(Against judgment dated 22.09.2014 passed by the
Peshawar High Court Abbottabad Bench in C.R.
No.225 of 2008)*

Mst. Kalsoom Begum

...Appellant(s)

Versus

Rizwan Shah & others

....Respondent(s)

For the Appellant(s): Barrister Umar Aslam, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondent(s): Mr. Manzoor Hussain, ASC

Date of hearing: 10.09.2020.

ORDER

Qazi Muhammad Amin Ahmed, J.-Appellant/plaintiff, claiming to be a co-sharer in contiguity with concomitant rights, successfully pre-empted sale of land measuring 1-Kanal 3-Marla bearing Khasra No.2459/6027 in Khata No.3568/6997, situating within the revenue estate of Mansehra, effected through mutation No.53825 dated 27.1.2003, vide judgment/decreed dated 30-11-2006, upheld by the learned Appellate Court vide judgment/decreed dated 16.10.2008. The respondent/ vendee-defendant filed Civil Revision No.225 of 2008, a learned Judge-in-Chamber issued pre-admission notice on 1.12.2008 to examine improvements on the suit land, claimed by the vendee-defendant while affirming appellant's superior right as well as performance of *Talab-e-Muwathibat* being in accordance with law. Dissatisfied with the finding of the learned Judge on the aforesaid issues, the vendee-defendants, during the pendency of their civil revision assailed the order *ibid* through Civil Petition No.93 of 2009, however, it was dismissed as withdrawn on 6.8.2008 with a direction to the High Court to afford opportunity of hearing to the both sides. It was in this backdrop that the learned High Court set aside the judgments and decrees of the Courts below vide judgment dated 2.4.2012

and remanded the case to the trial Court for decision afresh, assailed this time by the appellant through Civil Petition No.1247 of 2012 wherein leave was granted on 13.11.2012 in consequence whereof vide order dated 23.01.2013 the High Court was directed to decide the revision petition on merit by itself, pursuant whereto, the High Court allowed the revision petition and dismissed the suit vide judgment dated 22.09.2014, *vires* whereof, are being assailed through this direct appeal, *inter alia*, on the grounds that the High Court ran into error to non-suit the appellant by holding that she lacked superior right of being a co-sharer in the estate as well as her failure to satisfactorily perform *Talabs* in accordance with law. Contrarily, the learned counsel for the respondents has defended the impugned judgment by arguing that after a long drawn legal battle the learned High Court had drawn conclusions just and fair duly supported by evidence brought on the record. The learned counsel, emphatically, pointed out appellant's failure to produce the postman who had statedly delivered the notices to argue that the omission by itself was fatal to the suit; he has also highlighted "*discrepancies*" in the statements of witnesses to prove the *Talabs* with a particular reference to absence of their names in the plaint. The appellant was not a co-sharer in the estate at the relevant time, concluded the learned counsel.

2. Heard. Record perused.

3. Appellant's superior right as a co-sharer in the estate is the foundation stone of her claim; factum of contiguity and easement are inseparably consequent thereupon; she has constructed her plea on the strength of a court decree dated 4.5.1976, holding field till date, a common ground, on the basis whereof, mutation was sanctioned as late as on 15.1.2004, almost one year after the impugned sale as confirmed by Ghulam Raza, Patwari Halqa (PW-2) as well as mutation (Ex.PW-2/R-I); belated mutation weighed with the High Court to exclude the appellant from the estate. It is by now well settled that a mutation by itself does not create or destroy an existing right; it is merely reflection of revenue record, authenticity/validity whereof is to be essentially ascertained in the underlying transaction, a view held by this Court throughout in cases reported as Muhammad Lehrasab Khan Vs. Mst. Ageel-un-Nisa and 5 others (2001 SCMR 338), Saadat Pervaz Sayan Vs. Chief Secretary, Government of Punjab, Lahore and 3 others (2003 PLC (C.S.) 1277), Muhammad Munir Vs.

Muhammad Saleem and others (2004 SCMR 1530), Arshad Khan Vs. Mst. Resham Jan and others (2005 SCMR 1859), Mst. Janntan and others Vs. Mst. Taggi through LR's and others (PLD 2006 S.C. 322), Muhammad Ishaq Vs. Muhammad Shafiq and 9 others (2007 SCMR 1773), Haji Muhammad Anwar Vs. Muhammad Ahmed and others (2007 SCMR 1961), Abdul Rasheed through LR's and others Vs. Manzoor Ahmad and others (PLD 2007 SC 287), Mst. Suban Vs. Allah Ditta and others (2007 SCMR 635) and Muhammad Yaqoob Vs. Mst. Sardaran Bibi and others (PLD 2020 S.C. 338). The Court decree though incorporated after inordinate delay, nonetheless, had conferred the status of a co-sharer upon the appellant way back in the year 1976, additionally establishing contiguity with the suit land as well as easement rights appertaining thereto. Absence of the postman from witness-box who had actually delivered notices (Ex.PW-3/3-5) along with relevant receipts (Ex.PW-1/1-3) does not violate the law declared by this Court requiring official attendance to establish dispatch of notice of *Talab-i-Ishhad* as Muhammad Yousaf, Clerk GPO Mansehra appeared as PW-1 to bring on record the relevant details and thereby successfully established dispatch of the required notice to the respondents. It has been held in the case of Liaqat Ali and others Vs. Safdar Khan (2020 SCMR 863) that “we are also not impressed by the argument that the postman who had actually delivered the notice ought to have appeared in person instead of Fazal Majeed , Registration Clerk GPO and Zahid Ahmed, Postman, who respectively appeared as PW-2 and PW-3. Plaintiff by producing these official witnesses along with relevant receipts and acknowledgement due aptly discharged the onus to establish dispatch of notice. There is perpetual continuity in State business, sustained by officials in succession”. The appellant discharged the onus to prove dispatch of notice by producing official witnesses from the concerned post office as the mode adopted by her is in accord with the provisions of section 26 of the West Pakistan General Clauses Act, (Act VI), 1956, reproduced below:

“26. Meaning of service by post.—Where any Provincial Act, authorizes or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the documents, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

Adverting to the statements of the witnesses produced by the appellant to establish *Talab-i-Muwathibat and Talab-i-Ishhad*, held by the learned High Court as discrepant, upon our analysis, we have not been able to persuade ourselves to subscribe to the view taken by the learned High Court as the alleged contradiction in their depositions may not be viewed as major or significant. The appellant acquired knowledge of the impugned sale soon after her return to Pakistan after performance of *Hajj*. Some variations in the statements of witnesses, blown out of proportion, are merely narrative variations that inevitably occur in honest human discourse after flux of time; these do not destroy the contextual integrity of the declarations so as to defeat a valuable statutory right, vesting in the appellant. The appeal is allowed; impugned judgment of the High Court is set aside and the judgments and decrees of the trial Court and that of the Appellate Court are restored. No order as to costs.

Judge

Judge

Islamabad, the
10th September, 2020
Not approved for reporting
Azmat/-