

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Munib Akhtar
Mr. Justice Shahid Waheed
Ms. Justice Musarrat Hilali

C.A.271/2015

(Against the judgment dated 11.09.2014
passed by the Peshawar High Court,
Bannu Bench in WP No.326-B of 2013)

Amir Waheed Shah & others ...Appellant(s)

Versus

Ajmal Khan & others ...Respondent(s)

For the Appellant(s) : Mr. Shah Nawaz Khan, ASC

Respondent No.1 : Syed Mastan Ali Shah Zaidi, ASC
Sh. Mahmood Ahmad, AOR

Respondents No.2-3 : *Ex-parte*

Date of Hearing : 20.11.2023

ORDER

Shahid Waheed, J. The defendants are the appellants in this appeal.

2. The suit by respondent No.1 (plaintiff) was one for possession under the Khyber Pakhtunkhwa Pre-emption Act, 1987 (**Act**). The subject matter of the suit was land measuring 1-Kanal, 9-Marlas, and 4½ sarsahi, which was sold to Mst. Gul Zahira Bibi (now represented by her legal heirs), respondent No. 2 herein, vide mutation No.1809 dated 28th of November, 2012. A perusal of the record suggests that immediately upon sanctioning of sale mutation, Mst. Gul Zahira Bibi gifted the land to her sons (appellants herein) by mutation No.1810.

3. The respondent No.1 (plaintiff), on the ground of his superior right, sought to pre-empt the sale made in favour of Mst. Gul Zahida Bibi and asserted that the subsequent transaction of gift in the form of mutation No.1810 was illegal. He also issued a notice of *Talb-i-ishhad* to Mst. Gul Zahira Bibi.

4. During the trial, application under Order VII Rule 11 of the CPC was filed to reject the plaint on the ground that respondent No.1 (plaintiff) had not made any *Talb* to pre-empt the transaction recorded in mutation No.1810. This application was dismissed by the Trial Court by order dated 8th of June, 2013. The appellants-defendants then filed an application under Section 115 of the CPC before the Additional District Judge-II, Bannu and sought revision of the order made by the Trial Court. This revision was allowed, and the plaint was rejected vide order dated 20th of September, 2013. The respondent No.1 (plaintiff), thereupon, filed a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, before the High Court. This petition was allowed by the impugned judgment dated 11th of September, 2014, and the case was remanded to the Trial Court with the direction to decide the suit afresh after providing opportunities to the parties to produce their evidence. Hence, this appeal.

5. We have heard both sides. It is now well settled that the right of pre-emption arises when the sale of land occurs. The sale, per the definition provided in Section 2(d) of the Act, does

not include a gift. In the present case, the land was first sold to Mst. Gul Zahira Bibi vide mutation No.1809, and before this sale could be pre-empted, it was further transferred to the present appellants by way of gift mutation No.1810. According to respondent No. 1 (plaintiff), the second transaction was sham and illegal. It is to be noted that in a suit for pre-emption, the validity of the transaction is not examined; however, the nature of the transaction may be determined. It also needs to be clarified here that a marked distinction exists between a devise and disguise. Devise is permitted but not disguise. When transaction has been given a false colour to evade third party rights, it is not only the function but also duty of the Court to remove veil, see through disguise and then to determine real and true character of transaction. A person is also equally entitled to evade law of pre-emption by all lawful and legitimate devices, like gift, exchange etc. So, in the given circumstances of the case, respondent No. 1 (plaintiff) could not ignore the gift mutation while making his demand. The appropriate course for him was to say, firstly, that the second transaction was a sale, but to defeat his right of pre-emption, it had been dubbed as a gift; and secondly, that he had made all the requirements of *Talbs* regarding the second transaction. On the contrary, a perusal of the contents of the plaint shows that neither any *Talb* was made to pre-empt the second transaction nor any notice of *Talb-i-ishhad* was sent to the present appellants. This was fatal. Still, there was another flaw: the last transaction was in the

nature of a gift; and this could not be pre-empted under the provision of the Act. All these facts escaped the consideration of the High Court, and thus, its judgment cannot be sustained.

6. In the result, this appeal is accepted, the judgment dated 11th of September, 2014, made by the High Court is set aside, and consequently, the order dated 20th of September, 2013, passed by the Additional District Judge-II, Bannu, is restored.

Judge

Judge

Judge

Islamabad
20.11.2023
APPROVED FOR REPORTING
Rashid* /

Announced in Court on _____.____.2023 at Islamabad

Judge