

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

CIVIL APPEAL NO. 1409 OF 2013

(On appeal from the judgment dated 14.10.2013 of the Peshawar High Court, Abbottabad Bench passed in C.R.No.485-A/06)

Mst. Zohra Khatoon.

... Appellant

Versus

Ghulam Farid.

... Respondent

For the Appellant:

Mr. Ashfaq Qayyum Cheema, ASC with
Ch. Mushtaq Ahmed Khan, Sr. ASC.
Syed Rifaqat Hussain Shah, AOR.

For the Respondent:

Sardar Muhammad Aslam, ASC.
Chaudhry Akhtar Ali, AOR.

Date of Hearing:

08.01.2020.

J U D G M E N T

Qazi Faez Isa, J. This appeal as of right assails the impugned judgment dated 14th October 2013 of the learned Single Judge of the Peshawar High Court, Abbottabad Bench, who allowed the civil revision filed by the respondent and set aside the two concurrent judgments of the Subordinate Courts.

2. The respondent had filed a suit seeking pre-emption of agricultural land situated in Mouza Mankarai, District Haripur, which land the appellant had purchased through sale deed dated 25th January 2003 for a sale consideration of two hundred thousand rupees. In the plaint the pre-emptor plaintiff (the respondent herein) alleged that the actual sale consideration was thirty one thousand rupees. The pre-emptor stated that he learnt of the said sale on 6th March 2003 from Zafar Iqbal (PW-7) and immediately made *Talb-i-Muwathibat* and thereafter issued notice of *Talb-i-Ishhad* on 17th March 2003 which was received by the appellant.

3. Mr. Ashfaq Qayyum Cheema, the learned counsel representing the purchaser of the land (the appellant herein, who was the defendant in the

suit), did not dispute that the respondent had the right of pre-emption but stated that the *Talb-i-Muwathibat* was either not made or was not made immediately and that *Talb-i-Ishhad* notice was not issued within two weeks thereof in terms of section 13 of the Khyber Pakhtunkhwa Pre-Emption Act, 1987 ("**the Act**"). He further stated that the notice of *Talb-i-Ishhad* was not received by the appellant as she was in France when Muhammad Aslam, the postman (PW-3), came to deliver it and that the delivery of the notice to Ghulam Akbar (DW-1) cannot be deemed to be receipt by the appellant of the notice; reliance in this regard was placed upon the cases of *Bashir Ahmed v Ghulam Rasool* (2011 SCMR 762), *Khan Afsar v Afsar Khan* (2015 SCMR 311) and *Basharat Ali Khan v Muhammad Akbar* (2017 SCMR 309). The learned counsel further stated that the purported informant Zafar Iqbal (PW-7) had testified that he had informed the respondent about the sale outside the door of the respondent's residence whereas the respondent said that he had received the said information from the informant in his courtyard, which discrepancy, according to the learned counsel, is fatal and he relied on the case of *Allah Ditta v Muhammad Anar* (2013 SCMR 866). He further stated that the respondent was not interested to purchase the said land at the price paid for it by the appellant as he, without any basis, alleged that the land was bought for thirty one thousand rupees instead of two hundred thousand rupees. Concluding his submissions the learned counsel stated that the pre-emption suit had been dismissed and the appeal filed by the respondent was also dismissed and there was no justification to set aside the two concurrent judgments of the Subordinate Courts in exercise of the High Court's revisional jurisdiction as there was no illegality or material irregularity in the judgments impugned before the High Court in terms of Section 115 of the Code of Civil Procedure.

4. Sardar Muhammad Aslam, the learned counsel representing the pre-emptor respondent, stated that the learned counsel for the appellant has argued the matter beyond the point noted in order dated 15th May 2018 of this Court, which was limited to the point with regard to the service of notice of *Talb-i-Ishhad* which he cannot do. With regard to service of *Talb-i-Ishhad* notice on Ghulam Akbar (DW-1) the learned counsel stated that Ghulam Akbar was the authorized attorney of the appellant and had received the notice on her behalf, therefore, the notice had been properly served on the appellant. The learned counsel further stated that if Ghulam

Akbar was not authorized to receive notice he should not have received it. The said land was also bought by the appellant through her attorney Ghulam Akbar, therefore, according to the learned counsel service of the said notice on Ghulam Akbar was proper even on this score; reliance was also placed on the case of *Pervaiz v Muhammad Nawaz* (2006 SCMR 4). In respect of the evidence referred to by the appellant's counsel with regard to when the respondent gained knowledge of the sale the learned counsel stated that a particular sentence or two from the testimony of the respondent and Zafar Iqbal should not be read in isolation and that the same should be read in context with their entire testimonies and in this regard relied upon the case of *Muhammad Amir v Khan Bahadur* (PLD 1996 Supreme Court 267).

5. We have heard the learned counsel for the parties and with their able assistance also examined the documents on record. With regard to the objection taken by the respondent's learned counsel, that the appellant's counsel cannot argue the matter beyond the scope of the order dated 15th May 2018, which had only referred to the matter of service of the notice of *Talb-i-Ishhad* we regrettably cannot bring ourselves to agree with the learned counsel since this appeal has been filed as of right, as two concurrent judgments were set aside in revision, and the appeal has not arisen out of a petition for leave to appeal.

6. The referred to section 13 of the Act commences by stating that, "*the right of pre-emption of a person shall be extinguished unless such person makes demands of pre-emption in the following order, namely: (a) Talb-i-Muwathibat; (b) Talb-i-Ishhad; and (c) Talb-i-Khusumat*" and goes on to explain, that, "*Talb-i-Muwathibat means immediate demand by a pre-emptor 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*". And, subsection (2) of section 13 of the Act states that, "*when the fact of sale comes within the knowledge of a pre-emptor through any source, he shall make Talb-i-Muwathibat*" whereafter the pre-emptor has to issue notice of *Talb-i-Ishhad* within two weeks (subsection (3) of section 13 of the Act). In this case the notice of *Talb-i-Ishhad* was issued on 17th March 2003. The two weeks' time within which the notice of *Talb-i-Ishhad* had to be issued will start to run from the time when the pre-emptor got knowledge of the sale. The pre-

emptor respondent (PW-6) stated that his real nephew Zafar Iqbal (PW-7) learnt of the sale on the day of the execution of the sale deed, which was 25th January 2003, however, Zafar Iqbal stated that respondent was informed by him on 6th March 2003. In his cross-examination Zafar Iqbal stated that he did not know the name of the purchaser and also did not know the particulars of the land which had been purchased. It is thus clear that the respondent had not learnt of the said sale on 6th March 2003 as was stated by him in the plaint. The respondent in his cross-examination admitted that his nephew learnt of the sale on the date of execution of sale deed, which was 25th January 2003, therefore, it can reasonably be presumed that Zafar Iqbal must have informed his uncle then or soon thereafter instead of waiting for forty-one days. The respondent pleaded and testified that *Talb-i-Muwathibat* was made on 6th March 2003 which is not believable, particularly, when Zafar Iqbal testified that the only reason for him to go and see to his uncle on 6th March 2003 was to inform him about the sale, thereby suggesting that he had considered the communication of information of sale as important. In the plaint it was disclosed that Zafar Iqbal had learnt of the sale on 25th January 2003. It thus appears that the respondent had knowledge of the sale on 25th January 2003 but to bring the notice of *Talb-i-Ishhad* within the statutory period of two weeks had alleged in the plaint that he learnt of it on 6th March 2003. In a pre-emption suit the pre-emptor must *immediately* upon learning of the sale make *Talb-i-Muwathibat* and thereafter as per the Act, within fourteen days, send notice of *Talb-i-Ishhad*. Since the knowledge of sale was obtained by the respondent on 25th January 2003, or soon thereafter, the notice of *Talb-i-Ishhad* was sent beyond the statutory period of two weeks.

7. Since in our opinion the respondent did not make *Talb-i-Muwathibat* immediately and also did not send the notice of *Talb-i-Ishhad* within the prescribed period of two weeks the respondent's pre-emption suit would fail on these grounds. It is therefore not necessary to determine the matter of whether service on the appellant's attorney was proper service of the notice of *Talb-i-Ishhad*.

8. There is however another matter which in our opinion needs to be commented upon. The respondent in his plaint had stated that the land was bought for thirty one thousand rupees however he did not substantiate his

assertion with regard to its alleged sale price. Section 33 of the Act stipulates as under:

"33. Matters ancillary or akin to the provisions of this Act. Matters ancillary or akin to the provisions of this Act which have not been specifically covered under any provision thereof shall be decided according to *Shariah*."

In the case of *Subhanuddin v Pir Ghulam* (PLD 2015 Supreme Court 69) it was held, that:

"Shari'ah requires honesty and truthfulness in one's dealing and false statements made to obtain an advantage is an anathema to Almighty Allah: "O, you who believe! Be afraid of Allah, and be with those who are true" (Surah 9, At-Taubah, verse 119); "And be not like her who undoes the thread which she has spun after it has become strong, by taking your oaths a means of deception amongst yourselves" (Surah 16, An-Nahl, verse 92); "And make not your oaths, a means of deception among yourselves, lest a foot may slip after being firmly planted, and you may have to taste the evil of having hindered from the Path of Allah and yours will be a great torment" (Surah 16, An-Nahl, verse 94). Therefore, when an undue advantage is sought to be gained on the basis of a completely unsubstantiated statement it would disentitle a shafee to claim pre-emption. This was not a case where the plaintiff had been unable to establish the price that he contended was paid for the said land, but instead a case where a plea which had no basis in fact was taken to gain an advantage."

9. Therefore, for the reasons mentioned above, we allow this appeal, set aside the impugned judgment of the High Court and consequently dismiss the pre-emption suit filed by the respondent, but with no order as to costs.

Judge

Judge

Announced in open Court at Islamabad on 14th January, 2020.

Judge

Bench-IV
Approved for Reporting
(M. Tauseef)