IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Present:

Mr. Justice Umar Ata Bandial
Mr. Justice Qazi Faez Isa

CIVIL REVIEW PETITION NO.147 OF 2016

(For review of the judgment of this Court dated 01.12.2015 in CP.247/2011)

Basharat Ali Khan ... ... Petitioner.

versus

Muhammad Akbar ... ... Respondent.

For the petitioner : Sh. Zamir Hussain, ASC.
S. Rifaqat Hussain Shah, AOR
(Absent)

For the respondent : Agha Muhammad Ali Khan, ASC.
Ch. Akhtar Ali, AOR.

Date of hearing : 03.10.2016.

O R D E R

UMAR ATA BANDIAL, J. – The petitioner seeks review of the judgment of this Court dated 01.12.2015 **("Judgment")** whereby Civil Appeal No.247 of 2011 filed by the respondent was allowed and his suit for pre-emption was decreed.

2. Review of our Judgment is pressed on the ground that an important aspect of the controversy escaped our consideration while writing the same. Our Judgment reversed the judgment of the learned High Court dated 11.01.2011 passed in revisional jurisdiction whereby the pre-emption suit filed by the respondent had been dismissed. The learned counsel for the petitioner has referred to the principles of review summarized in **Abdul Ghaffar-Abdul Rehman vs. Asghar Ali** (PLD 1998 SC 363) for elucidating the ground of review urged by him, namely: our omission to consider an important

matter in controversy. It is contended that the respondent/pre-emptor did not in terms of Section 12(3) of the Punjab Pre-emption Act, 1991 **("Act, 1991")** plead in his plaint the issuance of notice of *Talb-i-Ishhad* "by registered post acknowledgment due." Nor did the respondent bring any evidence on record regarding the service of the registered notice of *Talb-i-Ishhad* by the production of the acknowledgment due card or through the statement of the postman who may have delivered such notice. This was necessary on account of the contest raised by the petitioner/vendee in his written statement that *Talbs* were not performed by the respondent/pre-emptor in accordance with the provisions of the Act, 1991. The law laid down by this Court in the case of **Muhammad Bashir vs. Abbas Ali Shah** (2007 SCMR 1105) and **Allah Ditta vs. Muhammad Anar** (2013 SCMR 866) affirm that requirement of service of notice of *Talb-i-Ishhad* through registered post acknowledgment due is mandatory. Failure by a pre-emptor to satisfy the said condition is fatal to the maintainability of his pre-emption suit. The omission by the respondent/pre-emptor to plead and prove service of notice of *Talb-i-Ishhad* upon the petitioner/vendee in the prescribed mode defeated his suit. Conversely, our Judgment under review had decreed that suit.

3. By a candid admission made during his arguments, the learned counsel for the petitioner accepted that the above objection is not formulated in precise terms in the petitioner/vendee's pleadings, namely, his written statement or his civil revision petition filed before the learned High Court. Although Issue No.4: "*whether the plaintiff has completed talabs under the provisions of law? OPP"* was framed yet learned counsel for the petitioner concedes that the point about the absence of "acknowledgment due" post was never urged or otherwise

argued before any Court including this Court during hearing of the respondent's appeal by us. However, since the condition for a plaintiff/pre-emptor to prove service of notice of *Talb-i-Ishhad* goes to the root of the claim because the mode of service of *Talb-i-Ishhad* has been specifically prescribed by the Act, 1991 therefore, it is contended that this matter ought to have been examined, determined and established by the Court in its Judgment before dealing with the case on its merits. He submits that the Court has, accordingly, erred in fulfilling its duty to establish the maintainability of the respondent's suit.

4. Section 13(3) of the Act, 1991 provides as follows:

> "**13. Demand of pre-emption. –**
>
> **(1)** ...
> **(2)** ...
>
> **(3)** Where a pre-emptor has made Talb-i-Muwathibat under subsection (2), he shall as soon thereafter as possible but not later than two weeks from the date of knowledge make Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgment due, to the vendee, confirming his intention to exercise the right of pre-emption.
> Provides that in areas where owing to lack of post office facilities it is not possible for the pre-emptor to give registered notice, he may make Talb-i-Ishhad in the presence of two truthful witnesses.

This Court in its reported judgment in **Muhammad Bashir**'s case (2007 SCMR 1105) has observed:

> "11. The requirement of, "sending a notice in writing" is followed by a rider i.e. "under registered cover acknowledgment due". This signifies that the intention of law is not merely a formal notice on the part of the pre-emptor conveying his intention to pre-empt but a notice served on the addressee to apprise him about his intention to pre-empt. To say that mere "sending of notice" is enough would make the expression "acknowledgment due" redundant. The service of the addressee, as prescribed in law therefore, is imperative. ..."

The view expressed in the above referred precedent case has been followed consistently by this Court. More recently in **Allah Ditta**'s case (2013 SCMR 866), the Court has further explained that the plaintiff in a pre-emption suit bears the affirmative onus to prove *Talb-i-Ishhad* in a case where the respondent/vendee contests the same.

5. Learned counsel for the respondent/pre-emptor relied upon the case of **Raees Khan vs. Naseeb Khatoon** (2006 SCMR 1836) to claim that the petitioner/vendee had waived his objection of non-service of notice of *Talb-i-Ishhad* by not agitating the same before the learned High Court and also this Court. Therefore, the said objection cannot now be raised by the petitioner/vendee before us at the stage of review.

6. We have carefully considered the respective submissions made by the learned counsel. There are two aspects of the point under discussion; firstly, whether the "acknowledgment due" part of the notice of *Talb-i-Ishhad* under registered cover constitutes an imperative element of the prescribed mode of service affecting the maintainability of a pre-emption suit; and if so, whether a vendee can waive service of notice of *Talb-e-Ishhad* upon him by such a prescribed mode. Section 13(3) of the Act, 1991 specifies unequivocally that *Talb-i-Ishhad* shall be made by *(i)*written notice *(ii)*attested by two truthful witnesses *(iii)*under registered cover *(iv)*acknowledgment due. The only situation in which the Act, 1991 does not require the sending of notice by registered cover acknowledgment due is when the post office facility is not available to a pre-emptor *[S.13(3) proviso of the Act, 1991]*. Secondly, according to case law, the prescribed condition of service of notice by registered cover acknowledgement due may be relaxed

where the defendant/vendee admits that he has received notice of *Talb-i-Ishhad*. In all other cases, service of notice of *Talb-i-Ishhad* upon a vendee must be established by the proof of each of the afore-noted four prescribed elements of the notice of such *Talb*. These prescribed elements of the service of a *Talb-i-Ishhad* notice are specific statutory requirements for the proof of service of notice of such *Talb* which demand has been construed to be a mandatory obligation of a preemptor-plaintiff. This means that if any of the afore-mentioned four elements of the prescribed mode of service of *Talb-i-Ishhad* is not proven by a plaintiff, he dishonours his mandatory obligation and consequently, his pre-emption suit must fail. That deals with the first aspect of the matter noted above.

7. In the present case, the issuance of notice of *Talb-i-Ishhad* is controverted by the petitioner/vendee which dispute forms the subject matter of Issue No.4 framed for resolution by the learned Trial Court. It is important to recall that the respondent pre-emptor has failed to even aver in his plaint that such notice under registered cover was sent along with an acknowledgment due request. Therefore, unless permitted by the learned Trial Court, he could not have produced any evidence on the point of notice under registered cover being posted with acknowledgment due. Indeed, the acknowledgment due card was not produced on record by the respondent/preemptor nor was the postman, who may have delivered the notice, called to the witness box. Consequently, according to the pleadings and also the evidence on record, the respondent/pre-emptor has not discharged his burden to prove the service of notice of *Talb-i-Ishhad* as required under Section 13(3) of the Act, 1991. The respondent/pre-emptor thereby failed to satisfy his

mandatory obligation under the law. Such default is fatal for his pre-emption suit.

8. Turning to the next question, it is to be seen whether the omission by the petitioner/vendee to specify before the competent Courts the exact nature of the respondent/preemptor's default to comply the requirements of Section 13(3) of the Act, 1991 estops the former from claiming a right to be served with a notice of *Talb-i-Ishhad* in accordance with the requirements of the said provision. In other words, has the petitioner/vendee by his failure to object the default committed by the respondent/preemptor in the service of notice of *Talb-i-Ishhad* waived his right to claim its service in accordance with Section 13(3) of the Act, 1991. In this context, a significant principle of law having some relevance was noticed during the Court proceedings. In the case of **E.A.Evans vs. Muhammad Ashraf** (PLD 1964 SC 536), this Court laid down the principle that a law requiring service of notice by a party has mandatory effect if such legal requirement aims at protecting a large class of persons as a matter of public policy. On the other hand, where the requirement of law is meant to protect an individual or a private interest, then such requirement may be waived by its intended recipient. In the facts of the precedent case, the notice in issue was held to be mandatory and not capable of being waived. On the other hand, in the case of **Zehra Begum vs. Pakistan Burmah Shell Ltd.** (PLD 1984 SC 38), it was held that by entering into an agreement for a period of 30 years, the landlord had bartered away his right to seek ejectment of his tenant on the ground of his personal need notwithstanding the fact that such a ground for ejectment had

been granted by the law. This view is based on the premise that the statutory right of seeking ejectment of a tenant on the ground of personal need of a landlord grants the lessor/landlord a private or personal right. The statutory provision does not purport as a matter of public policy to safeguard landlords as a class of persons.

9. In the instant case, the requirement of *Talbs* as prescribed in the Act, 1991 enforces the substantive principles of Islamic Law on the subject of pre-emption. Specified features of the *Talbs* envisaged by the Act, 1991, as noticed above, have been held in the precedents referred above to be mandatory because of their statutory intent and as requirements of Islamic Law codified by the Act, 1991. The mode and measures for service of notice of *Talbi-i-Ishhad* prescribed in Section 13(3) of the Act 1991 extend protection to vendees of immovable property against claims of pre-emption assailing the purchases made by such vendees. To our minds, the various steps prescribed in Section 13(3) in the Act, 1991 for the performance of *Talbs* implement the public policy of the law to exclude delay and vexatious claims for the benefit of defendant/ vendees as a class in pre-emption suits. In this sense, the statutorily prescribed mode of service cannot be waived by a party. Consequently, the failure by the petitioner/vendee to highlight an obvious deficiency in the performance of *Talb-i-Ishhad* by the respondent pre-emptor does not debar the former from pointing out the same at any stage of the proceedings to the Court. This is because the said defect strikes the maintainability of the respondent's pre-emption suit.

10. In the circumstances discussed above, we find that the suit filed by the respondent / pre-emptor was deficient for lacking both the assertion and the proof of facts establishing a mandatory condition for the maintainability of his suit, namely, service of written notice of *Talb-i-Ishhad* under registered cover "acknowledgment due." The said deficiency is apparent by the absence of affirmative and supporting material on record. Had the said omission been noticed and considered by the Courts adjudicating the matter, it is patent that the ultimate result of the proceedings would have been different. Notwithstanding the default by the petitioner / vendee to highlight or articulate such objection before any forum, the Courts' record contained material that demonstrated the said defect. A deficiency that was obvious from the pleadings, issue No.4 as framed, the evidence led by the plaintiff-pre-emptor and the terms of the applicable law, was over-looked by the Courts thereby arriving at an anomalous result in the proceedings. We consider that the failure by the respondent / pre-emptor to prove the service of *Talb-i-Ishhad* in the prescribed mode has defeated the maintainability of his pre-emption suit. A material aspect of the controversy had thus escaped our notice in our Judgment. An omission whereby the Court has over-looked important material that would alter the decision in the case constitutes a fit ground for the grant of review under Article 188 of the Constitution of Islamic Republic of Pakistan. Reliance is placed on **Muhammad Zubair vs. Muhammad Zia** (2004 SCMR 1077), **Suba vs. Fatima Bibi** (1996 SCMR 158) and **Fida Hussain vs. The Secretary, Kashmir Affairs** (PLD 1995 SC 701).

For the foregoing discussion of the facts and the law, we allow this review petition and dismiss the appeal filed by the respondent/pre-emptor. No order as to costs.

Judge

Judge

Islamabad,
03.10.2016.
Irshad Hussain /*

APPROVED FOR REPORTING.