

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE JAMAL KHAN MANDOKHAIL

Civil Appeal No.1018/2016

(On appeal from the judgment dated
22.01.2016 passed by the Peshawar
High Court, Peshawar in C.R.
No.235/08)

Shan Muhammad alias Shany

...Appellant

Versus

Said Mashal

..Respondent

For the appellant: Mr. Abdul Rehman Qadar, ASC
Syed Rifaqat Hussain Shah, AOR

For the respondent: Mr. Amjad Ali, ASC

Date of hearing: 12.05.2022

ORDER

MAZHAR ALAM KHAN MIANKHEL, J.-. The respondent herein had filed a pre-emption suit against the present appellant with regard to a sale effected through mutation No.1310 attested on 23.12.2004. The suit was contested by the present appellant by filing his written statement wherein he through a general/evasive denial alleged that *Talabs* were not performed in accordance with law and not within the stipulated time besides other legal and factual objections. After a full-fledged trial, the suit was decreed by the Civil Judge-VII, Swabi vide his judgment and decree dated 29.06.2007 but in appeal of the present appellant, the appellate court while accepting the appeal vide its judgment and decree dated 27.2.2008, set aside the judgment and decree dated 29.06.2007 of the trial court and dismissed the suit of

the present respondent. The respondent/pre-emptor, feeling aggrieved, approached the High Court by way of civil revision and the learned *Judge-in-Chambers* vide impugned judgment and decree dated 22.01.2016 accepted the same by restoring the judgment and decree of the trial Court. The vendee-appellant, being dissatisfied, has questioned the same through the instant appeal.

2. We have heard the learned counsel for the parties and have gone through the available record with their able assistance. The only point urged and argued by the learned counsel for the appellant was with regard to non-mentioning of the date of issuance of notice of *Talb-i-Ishhad* (the '**Notice**') in the plaint and delivery of physical possession of the suit property prior to attestation of mutation which makes the plaint of respondent as barred by time.

The learned counsel by placing reliance on the cases of Mst. Saleem Akhtar Vs. Chaudhry Shauk Ahmed (2009 SCMR 673), Mst. Bashiran Begum Vs. Nazar Hussain and another (PLD 2008 SC 559) and Mian Pir Muhammad and another Vs. Faqir Muhammad through L.Rs. and others (PLD 2007 SC 302) submitted that the pre-emptor has failed to mention the date of Notice in his plaint which in view of the law laid down by this Court in the above referred judgments is *sine qua non* and in absence of such date the suit of the respondent is liable to dismissal. On the other hand, the learned counsel for the respondent supported the judgments rendered by the trial Court as well as the High Court in favour of the respondent.

3. In light of the arguments of learned counsel for the appellant, we have noted that though the date of Notice is not mentioned in the plaint but the appellant has never alleged such

deficiency in his written statement and has simply denied the performance of *Talabs* in accordance with law within the stipulated time; no further details whatsoever were given in his written statement. The appellant, while appearing as a witness as DW-1, has repeated the same stance and was not specific with regard to the argument advanced by the learned counsel for the appellant. The evidence led by the respondent clearly establishes the fact that the Notice (Ex.PW-4/1), which bears the date of its issuance/execution, was tendered in evidence without any objection by the present appellant. The postman in this regard, who appeared as PW.1, has stated in categorical terms that the said Notice through a registered cover was delivered to the defendant. Besides the above, there is nothing in rebuttal by the present appellant. When confronted as to whether objection with regard to non-mentioning of date of issuance of Notice was raised in his written statement or in his grounds of appeals before the fora below or before this Court, his answer to such query was in negative. The appellant has never ever raised this ground during the trial or in both of his appeals. Learned counsel for the appellant has tried to make out a case which was never pleaded by him earlier and the law does not allow him to make out a new case by raising such a factual plea. We have gone through the entire evidence regarding the performance of *Talabs* and have found that the entire evidence establishes the fact that both the *Talabs* were performed by the respondent in accordance with law. It appears that substantial compliance of the statutory provisions has been made by the respondent and no prejudice has been caused to the appellant which is also in accordance with the law laid down by this court in the above referred judgments, and many other judgments on the point. In view of the ample evidence on the record which goes un-

rebutted, the respondent cannot be non-suited for a *bonafide* omission of non-mentioning of the date of notice in the plaint. Notice was available on the file along with plaint from day one. So, simply non-mentioning the date of issuance of notice cannot be held to non-suit the respondent in the peculiar circumstances of the case. Though in the above judgments it has been held that mentioning the date of issuance of notice in the plaint is must but the same has not been elaborated as to why and what for the mentioning date in the plaint is must. Had in the said cases/judgments, this aspect was clarified then one could have considered the same in the light of peculiar circumstances of the case. As explained above in detail, in presence of entire evidence on the point, mere non-mentioning of date of issuance of notice would not be fatal for preemptor. The above judgments in the circumstances are distinguishable and have no bearing on the merits of the case in hand.

4. As far as the second argument regarding delivery of possession of the suit property prior to attestation of mutation is concerned, there is no evidence on the record in this regard except a single sentence by the appellant and his vendor in their respective statements that after the sale transaction, physical possession of the property was delivered to the appellant on the second day but neither any entry in the daily diary of *Patwari Halqa* was tendered in evidence nor any *Khasra Girdawari* reflecting change of possession in favour of the appellant was available on the file in support of the argument of the learned counsel for the appellant. Mere alleging such an important matter in their statements, even if not cross-examined, cannot be termed as a sufficient evidence to hold the suit of the respondent as barred by time. For such an important aspect of the

case, there should have been a detailed evidence reflecting the mode and manner of change of possession with specific date and time and the persons witnessing such change of possession. In absence of such evidence, it cannot be held that possession of the property was handed over to the appellant prior to attestation of mutation.

5. The judgments and decrees rendered by the trial Court as well as the learned *Judge-in-Chambers* of the High Court would reflect that the same are based on proper appraisal of the entire evidence and we do not see any infirmity, misreading or non-reading of any material evidence on the record which could suggest a different opinion by this court. Hence this appeal, being meritless, is dismissed as such.

C.M.A. No.2781/2016: In view of our above findings, this application has lost its fate and is accordingly disposed of.

Judge

Judge

Islamabad,
15th May, 2022
Nasir Khan /-
'Approved for reporting'