

59/21

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Ijaz-ul-Ahsan
Mr. Justice Qazi Muhammad Amin Ahmed
Mr. Justice Amin-Ud-Din Khan

(A/R)
Civil Appeal Nos.471-L & 472-L of 2012

(On appeal from the orders dated 28.05.2009
passed by the Lahore High Court, Lahore in Civil
Revision Nos. 1372 and 1373 of 1996.)

Muhammad Rafiq

(in C.A.No.471-L of 2012)

Muhammad Rafiq and others

(in C.A.No.472-L of 2012)

...Appellants

Versus

Abdul Aziz

(in both cases)

...Respondent

For the Appellants:

Mr. Zulfiqar Khalid Maluka, ASC

For the Respondents:

Mr. Faiz A. Sanghera, ASC.

Date of Hearing:

18.05.2021

J U D G M E N T

AMIN-UD-DIN KHAN, J.- Through this single judgment,
we intend to decide the instant civil appeals arising out of CPLA. Nos.
1656-L & 1657-L of 2009.

2. Brief facts of the case are that through mutation No. 327
attested on 29.5.1973 agricultural land measuring 26 kanals 18
marlas, whereas, through mutation No. 328 attested on 25.7.1973
agricultural land measuring 58 kanals 3 marlas was sold by the
father of the respondent/plaintiff in favour of the
appellant/vendee/defendant. The respondent opted to pre-empt the
sale of land on two grounds i.e. on the basis of relationship/Yak-

Jaddi being son of the vendor and on the ground that he was the tenant over the suit land, by filing two pre-emption suits on 12.2.1974 before the learned Civil Judge.

3. After insertion of new sub-para (5)¹ in Para 25 of the Land Reforms Regulations, 1972 (MLR 115) (hereinafter to be referred as "MLR"), which is reproduced:-

"All suits for enforcing the right of pre-emption in respect of land comprised in a tenancy shall be exclusively entertained, heard and decided by the Collector within whose jurisdiction the land in respect of which the right of pre-emption has been claimed is situated, and all such suits which may be pending in any Court immediately before the commencement of the Law Reforms (Amendment) Ordinance, 1976, shall, on such commencement, stand transferred to the Collector concerned."

the learned Civil Judge, as per the learned counsel for the parties, transmitted the files of the suits to the concerned Collector on 27.7.1976. The Assistant Commissioner/Collector dismissed the suits vide judgment dated 2.5.1979. As per the learned counsel for the appellant, time barred appeals were filed on 11.8.1979 before the Additional Commissioner as the period provided for filing an appeal was thirty days in accordance with sub-para (6) of Para 25 of the MLR. The Additional Commissioner vide order dated 17.2.1980 remanded the matter to the Collector on the ground that the decree sheet (*parcha* decree) had not been prepared and the Collector should prepare the decree sheet along with the impugned judgment. It was further observed that the issue of tenancy can be decided by the Collector, however, the matter with regard to right of pre-emption on the basis of relationship with the vendor is not within the jurisdiction

¹ Para 25(5) of the Land Reforms Regulations, 1972 (MLR-15) [added through Act No. XLVIII of 1976].

of Collector, therefore, either the Collector should dismiss the suit or the pre-emptor should seek his relief from the Civil Court. Last part of order is re-produced:-

"The issue of tenancy can be decided by the Collector while the issue of relationship was beyond his jurisdiction. Therefore, it shall be open for the court either to dismiss the suit or after preparing the decree to direct him to seek relief from the civil court as a relative. The appeal is accepted to the above extent. Parties are directed to appear before the Collector on 17.3.1980."

4. Learned counsel for the appellant argues that the order passed by a Collector in suits is deemed to be a decree of the Civil Court and is executable as such in accordance with sub-para (8) of Para 25 of the MLR. Sub-para (8) is reproduced:-

"For the purposes of this paragraph a Collector, a Commissioner and the Board of Revenue shall be deemed to be a Civil Court and shall have all powers of a Civil Court under any law for the time being in force and the final order passed in such suits shall be deemed to be a decree of a Civil Court and shall be executed as such."

Thereafter, when the matter was pending before the Collector after the remand, the pre-emptor/respondent moved an application on 15.4.1980 before the AC/Collector to the effect that he abandoned his claim of pre-emption on the basis of tenancy and requested the Collector to send the files of pre-emption suits to the learned District Judge for further adjudication, as the Collector had no power to adjudicate upon the right of pre-emption claimed on the basis of relationship of pre-emptor being Yak-Jaddi of the vendor. The Collector on the same day i.e. 15.4.1980 returned the plaints to the plaintiff for presentation to the Civil Court. Plaints were when presented before the Civil Court, after return from the Collector vide order dated 15.4.1980 is not on the record; the suits were decreed by

the learned Civil Judge vide judgment and decree dated 8.7.1984. The appeals against this judgment and decree were accepted and the cases were remanded to the learned Civil Judge vide remand order dated 26.6.1986 directing the trial court to record independent evidence and then to decide the matter in accordance with the law. After remand, the learned trial court dismissed the suits vide judgment and decree dated 31.7.1988. Appeals against this judgment and decree too were dismissed on 10.7.1990. Subsequently, the dismissal of the appeals was challenged through Civil Revisions before the learned Lahore High Court which were allowed and once again the matter was remanded to the learned trial court vide remand order dated 22.5.1992. Subsequently, the learned trial court decreed the suits vide judgment and decree dated 11.12.1993. The appeals filed there-against by the vendee-defendant were dismissed by the learned Additional District Judge vide judgment dated 7.2.1996. Thereafter, the Civil Revisions filed by the vendee-defendant against the dismissal of the appeals were also dismissed by the learned High Court vide judgments dated 28.5.2009. Hence, the vendee-defendant filed CPLAs against the judgments of the learned High Court resulting in the instant appeals after being granted leave vide order dated 2.7.2012 which is reproduced:-

"Inter alia contends that the three Courts below have not appreciated that there were two pre-emption suits to challenge two sale deeds of even date (29.5.1973); that one suit was filed within time (Suit No. 134 of 1974) while the other suit (Suit No. 23 of 1976) was hopelessly time barred; that the preempted sale was made by father of respondent-plaintiff whereas the preemption suit was filed by the son; that the collusive arrangement was evident from the fact that from the sale price, the vendor purchased agricultural land in Sahiwal in his name and in the name of respondent-plaintiff and that the findings reflect non-reading and non-consideration of material evidence on record.

2. Having heard petitioner's learned counsel at some length, leave is granted in both the petitions, inter alia, to consider the issue raised."

5. The Learned counsel for the respondent admits that the Collector was having no jurisdiction to adjudicate upon the right of pre-emption claimed on the basis of relationship of the pre-emptor being Yak-Jaddi of the vendor. It was further admitted that even after the insertion of new sub-para (5) in Para 25 of the MLR, full suits, which were pending before the civil court, should not have been sent for proceeding before the Collector and that at that time, the transmission of full suits to the Collector was not agitated by the plaintiff-respondent before the learned trial court or before any forum.

6. We have gone through the order passed by the Additional Commissioner, while remanding the matter to the Collector vide order dated 17.2.1980, he has not set aside the judgment of Collector dismissing suits dated 2.5.1979 but the matter was remanded just for preparation of the decree sheet. It was found by the Additional Commissioner that so far as the right of pre-emption on the basis of relationship is concerned that is not within the jurisdiction of the Collector; therefore, either the Collector shall dismiss the suit to this extent or direct the pre-emptor to seek his relief from the civil court. Even at that point of time, the pre-emptor ignored such finding that his claim for pressing his right of pre-emption on the basis of relationship with the vendor being Yak-Jaddi was in the exclusive jurisdiction of the learned Civil Court to adjudicate upon and he opted not to resort to the Civil Court for adjudication of his right of pre-emption on the basis of Yak Jaddi. Whereas, after about two months of the remand order, he filed an application before the

Collector on 15.4.1980 to state that he does not press his right of pre-emption claimed on the basis of tenancy and prayed for sending the matter to the learned District Judge for sending the same to the court of competent jurisdiction for adjudication. This application was allowed on 15.4.1980 and the plaints were returned to the plaintiff for presenting the same before the learned Civil Judge. At the same time it is also noteworthy that the Collector, despite an express direction by the Additional Commissioner, did not pass an order to the effect of dismissal or directing the pre-emptor a recourse to Civil Court.

7. Admittedly, full suits of the plaintiff were not to be transmitted to the Collector by the learned Civil Judge after insertion of the new provision of sub-para (5) of Para 25 of the MLR. Even if such order was passed, the plaintiff was required to challenge that order or resist that his suits on the basis of being Yak-Jaddi were exclusively triable in the jurisdiction of the Civil Court to adjudicate upon. Furthermore, the orders of remand were otherwise not in accordance with law in the light of sub-para (8) of para 25 of the MLR and therefore, there was no need for preparation of the decree sheets. The judgment of the Collector was self-executory as a decree. The initial judgments of dismissal of suits by the Collector dated 2.5.1979 remained in the field throughout. They were never set aside and even the appeals filed against the said judgments were not competent as the said judgments were decrees in the light of sub-para (8) of Para 25 of the MLR. Even the remand orders passed by the Additional Commissioner dated 17.02.1980 were against the law and no direction was required to be given to the Collector for preparation of decree-sheets.

8. Be that as it may, the order passed by the Civil Court, Collector or the Additional Commissioners as to the exercise of jurisdiction were never challenged by any of the parties. If we accept the argument that Civil Court's first order of sending the case to the Collector was without jurisdiction, then it stands equally true that Collector wrongly assumed the jurisdiction as to the claim of Yak Jaddi and the Additional Commissioner's observations as to "dismissal" were misconceived. However, finally the Civil Court assumed the jurisdiction and that too was not objected to by the either party. It may be deemed as if the Civil Court withdrew/recalled its first order of sending the matter to the Collector. The principle of law, "actus curiae neminem gravabit" comes into play that no one be prejudiced by the act of the Court. In this regard the reference may be made to *Habib Bank Ltd. Vs Bashir Ahmad* (2019 SCMR 362) and *Malik TARIQ MAHMOOD Vs. GHULAM AHMED* (PLD 2017 SC 674). Moreover, a five-member Bench of this Court in the case of *KHUSHI MUHAMMAD through L.Rs. and others Vs. Mst. FAZAL BIBI and others* (PLD 2016 SC 872) observed as under: -

"[---]In fact the respondent had rightly filed the appeal before the High Court in the first instance and the earlier order of the High Court dated 8.10.2013 returning the appeal was/is bad in law. In this manner the respondent has been compelled to file his appeal before the District Court which had no jurisdiction on account of the increase in the sale price of the property by the trial court. Therefore for the purposes of doing complete justice we set aside the judgment of the High Court dated 8.10.2013 and hold that the original RFA No.53/2011 of the

respondent be deemed to be pending before the High Court and be decided on merits"

It may be assumed that initially Civil Court abdicated to exercise of lawful jurisdiction vested with it but later on, by the return of the case from the Collector, rectified its previous order. The said assumption of jurisdiction was not challenged. In this backdrop, when the matter has been hanging over for the last 40 years, we consider it inappropriate to decide the matter on hyper-technical grounds. Though the order of transmission of full suit to the District Collector was to be challenged by the plaintiff-respondent but the same was not challenged. Late filing of appeal against the order of dismissal of suit by the Collector before the Additional Commissioner by the plaintiff-respondent and after observation of the Additional Commissioner that to adjudicate the claim of the plaintiff on the basis of Yak Jaddi is not within the jurisdiction of Collector, was not adverted to by the plaintiff-respondent and after about four months of the said observation he applied for transfer of the suit to the Court of District Judge. All these factors remain in the baggage of the plaintiff-respondent, therefore, we think that on the basis of this baggage with the plaintiff-respondent only on the basis of limitation this case should not be decided, therefore, we proceed to decide the case on merits.

9. Now come to the question of waiver and collusive arrangements, the established and undeniable facts on record are that the plaintiff is the real son of the vendor. They live in the same house which consists upon 8/9 marlas. Just after the sale of the suit lands in favour of the appellant other land was

purchased in District Sahiwal in the name of the plaintiff/pre-emptor and his brother. The case of the appellant is that said land in the District Sahiwal was purchased from the consideration amount of the suit land which was paid by the appellant-vendee/defendant. With this regard when plaintiff/pre-emptor appeared as his own witness as PW-1 in pre-remand proceedings on 29.1.1981, in the cross-examination he stated that nothing was paid from his own pocket for the purchase of said land. Money was sent by his brother from England. He showed his ignorance whether his father added the money received from the vendee-defendant in the said amount for purchase of the land in Sahiwal. This statement was confronted when he again appeared as his own witness as PW-1 and previous statement was marked as Exh.D.1. In post-remand statement he stated that the property in the Sahiwal was purchased from the money his brother sent from England. The pre-emptor purchased the property in Sahiwal with his own money. Further stated that a car was sent by his brother from England and after sale of said car the money was paid but showed ignorance regarding make and model of the car. He admitted that his suit for pre-emption remained pending for a period of three years before the Assistant Commissioner but he never pursued his matter before the Assistant Commissioner. Meaning thereby his father who is vendor was pursuing the matter after filing the pre-emption suit before the forum where the suit was pending. Further it is the case of the

vendee/defendant-appellant from the day first that actually the bargain was struck and completed with the owner with the assistance of the plaintiff/pre-emptor. The statement of DW-1 Sarbrah Lumberdar that suit property was sold with the consultation of the plaintiff/pre-emptor by his father and the statement of DW-2 Atta Ullah that the bargain was struck with the owner and the plaintiff and the money was paid to the vendor and plaintiff. These important portions of statement of DW-1 and DW-2 were not cross-examined. It is settled that a material point of statement of a witness which is not cross-examined is deemed to have been admitted by the other side. In the written statement it was the case pleaded by the appellant/vendee/defendant that the plaintiff was instrumental to bargain of impugned sale and further the plaintiff/pre-emptor using the consideration amount of the impugned sale purchased the land in District Sahiwal. The law laid down by this Court on the points noted supra is to be reviewed before finalizing the view by this Court. Paragraph No. 7 of the judgment reported as "Naseer Ahmad versus Arshad Ahmad" (PLD 1984 Supreme Court 403) is reproduced:-

"It is universally accepted that pre-emption is a piratory right, where a person plugs in his claim to purchase a certain piece of land or property after another person has purchased it. There is no dearth of cases, in actual practice, where the pre-emptors are close relatives of the vendors themselves? and knew all about the transaction while it took place, but did not come forward to purchase it at that time. They allow another person to purchase it; wait for the whole year and then, on the last date of the period of limitation,

they suddenly spring a surprise on him by filing a suit for pre-emption with the object (as appears to be the intention in the present case) to obtain the property in question at a nominal price, because it is expected that the case shall be decided after many years, by which time price of the land shall have been enhanced manifold and the price that he would be required to pay shall be the one prevailing at the time of the transaction. As a matter of fact, we have come across cases where the father sells land and his son files a suit for pre-emption, which cannot but lead one to assume that there was collusion between the two. We feel that such suits are very often mala fides because if the pre-emptor is genuinely so keen to purchase the land or property in question, he would gladly pay the price which is being offered to the vendor by another person or come forward and tender the highest bid at an auction rather than wait till the transaction is complete and thereafter spend 20 years of his life in litigation and incur huge expenditure which was in many cases even more than the actual price of the land or the property at the time of the sale or auction. Apparently the motive behind it is to create a hurdle in the way of the vendee for his own benefit, because the vendee is compelled in many cases to dish out large sums of money as a price for the withdrawal of the suit by the plaintiff. The latter does not, therefore, deserve relief through Courts of law."

In another judgment of this Court reported as "Baqri and 4 others versus Salmon and 3 others" (PLD 1972 SC 133) it was observed as under:-

"Right of pre-emption, however, can be waived before the actual sale either by express refusal to purchase the property or by a clear conduct on the part of the plaintiff, showing that he is not interested in the purchase of the property."

10. The conduct of the plaintiff is very relevant and important in this case, he being the son of the vendor living in

the same house measuring 8/9 marlas. The admission of the plaintiff that when the suit was pending for a period of three years in the Court of Assistant Commissioner he never pursued the matter, the one who was pursuing was his father and further the material point showing that the plaintiff was instrumental to the struck of bargain between the vendor who was his father and the vendee appellant/defendant. Non-cross-examination of these points leads us to conclude in the light of law laid down by this Court mentioned supra that it is a clear cut case of waiver when it is not denied even by the plaintiff that the money received from the sale of the impugned transaction was used in purchase of the land in the name of the plaintiff in District Sahiwal soon after the sale of the impugned land. The conduct of the plaintiff that he has disputed the sale consideration amount of both the mutations and subsequently when appeared in post remand proceedings as PW-1 admitted the sale consideration amount. The claim of the pre-emptor that the suit land was sold at a much lower price as compared to the price mentioned at the time of mutation and thereafter pre-emptor failed to disclose the source of such information. He has pleaded wrong amount in his plaint and pressed the same till his first statement recorded in the Civil Court as PW-1 when admitted the amount of sale mentioned in the mutation as correct, thereafter, when he appeared after remand again as PW-1 his own witness admitted the sale price as mentioned in the sale mutation to be correct, which shows that he is not

truthful. Further he is not in Court with clean hands. Law laid down by this Court in "Subhanuddin and others versus Pir Ghulam" (PLD 2015 Supreme Court 69) is relevant.

11. There was a further hurdle in the way of the plaintiff/pre-emptor/respondent that he has not uttered when appeared as his own witness as PW-1 that he is having a superior right of pre-emption qua the vendee/defendant. In our view not only pleading that the plaintiff is having superior right of pre-emption but it is to be proved through evidence as the pleading cannot be considered or equated with the evidence of the parties. We are further clear in our mind that in accordance with the facts of this case the witness of the plaintiff can only support the case pleaded by the plaintiff and proved through his statement. When plaintiff has not stated that he is having superior right of pre-emption when appeared as PW-1 it is fatal for the plaintiff and he cannot get a decree without saying in the court that he is having a superior right of pre-emption against the vendee-defendant under the Punjab Pre-emption Act, 1913.

12. In the above circumstances, the judgments and decrees passed by all the three courts below are not sustainable under the law. We allow the appeals, set aside the judgments and decrees passed by the three fora below. Result would be that the suit filed by the plaintiff-respondent stands dismissed with cost throughout. The plaintiff will be entitled to receive.

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back 1/5th amount as well as the remaining consideration
amount if deposited in the learned trial/ executing court.

sd/- J
sd/- J
sd/- J

Lahore, the
18th of May, 2021
(Mazhar Javed Bhatti)

APPROVED FOR REPORTING