IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI
MR. JUSTICE MUHAMMAD ALI MAZHAR

(AFR) D J
CIVIL APPEAL NO.232-P OF 2014
(On appeal against judgment dated 03.05.2010 of the Peshawar High Court, Peshawar in Civil Revision No.353 of 2010.)

Syed Asad Hussain & others. ... Appellants

vs

Syed Ghulam Khitab ... Respondent

For the Appellants : Mr. Altaf Ahmed, ASC
Haji Muhammad Zahir Shah, AOR

For the Respondent : Mr. Muhammad Faheem Wali, ASC

Date of Hearing : 24.11.2021

Judgment

Munib Akhtar, J.: This appeal was dismissed by means of a short order on 24.11.2021. The matter arose out of a suit for pre-emption, which was filed by the respondent. The property in question had been purchased by the appellants. The suit was contested but decreed in favor of the respondent. The appellants' appeal before the Additional District Judge failed. (We may note that the respondent also filed an appeal which was partially allowed, but that issue is no longer alive.) The appellants took the matter further to the High Court, but their revision (decided by the impugned judgment) met the same fate. Leave to appeal was sought, and granted vide order dated 23.10.2014 in the following terms:

> "In this pre-emption *lis* between the parties, the suit filed by the respondent on 22.12.2003 against the petitioners has been decreed by the trial court on 11.6.2009, holding that the respondent has a superior right of pre-emption; *talabs* have been proved and that the suit is not barred by time as was pleaded by the petitioners. The appeal of the petitioners and thereafter the civil revision has failed. It is urged that

> the sale deed in this case (*the sale which has been pre-empted*) was executed in favour of the petitioners on 12.8.2003 and the document was presented for registration to the sub-Registrar promptly, when the respondent/ pre-emptor on 3.7.2003 filed a suit for injunction seeking restraint against Gulzar, the vendor of the property, that he should be prohibited from alienating the same to the petitioners. An injunction order was passed in this case, however, on 5.9.2003 Gulzar in his written statement has brought on record the fact that the sale has already been accomplished; thus the respondent was obliged under the law to make *Talb-i-Muwathbat* there and then, which was not so done, resultantly the view set out by the learned courts below that as sale deed was registered on 4.11.2003 and therefore, *Talb-i-Muwathibat* made on 9.11.2003 by the respondent is valid in law, is founded upon misconception; against the facts on the record and also violative of the letter and spirit of the provisions of Section 13 of the N.W.F.P. Pre-emption Act, 1987. Leave is granted to consider the above."

2. Before us, learned counsel for the appellants took up the point on which leave to appeal was granted, to argue that the first *talb* was not made timely and in the manner required by law, but belatedly. It was contended that the law was well settled that even a slight deviation or delay in the making of the *talbs* was sufficient to disentitle the pre-emptor (here the respondent) from the right claimed. It was submitted that all the courts in the hierarchy had failed to properly appreciate the evidence and the appeal ought to be allowed. Learned counsel for the respondent submitted that the impugned judgment was correct and ought to be upheld.

3. The first point to note is that the appellants have come to this Court against three concurrent findings, in judgments where the evidence and the law has been considered and treated with thoroughness. The burden therefore lay heavily on them to satisfy the Court that such a clear error had been made that it required interference here. We now come to the specific point on which the matter was argued, namely, that the respondent had knowledge of the sale prior to the registration of the sale deed (in terms as stated in the leave granting order) and, for the first *talb*, it was the former that was relevant and not the latter. Reference in this regard was made to s. 13 of the KPK Pre-Emption Act, 1987 ("Act"), which in material part provides as follows:

> "**13. Demand of pre-emption.** (1) 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; ...

Explanations. I. 'Talb-i-Muwathibat' means immediate demand by a pre-emptor in the sitting or meeting (Majlis) in which he had come to know of the sale declaring his intention to exercise the right of pre-emption.

Note. Any words indicative of intention to exercise the right of pre-emption are sufficient....

(2) When the fact of sale comes within the knowledge of a pre-emptor through any source, he shall make Talb-i-Muwathibat...."

Sale is defined in s. 2(d) of the Act as meaning (to the extent presently relevant) a "permanent transfer of the ownership of an immovable property in exchange for a valuable consideration". In the impugned judgment the learned High Court also referred to s. 31 of the Act, which inter alia provides that the "period of limitation for a suit to enforce a right of pre-emption under this Act shall be one hundred and twenty days from the date- (a) of the registration of the sale-deed..."

4. Before us, strong reliance was placed on a judgment of a learned two member Bench of this Court, reported as *Muhammad Nafeez Khan v Gulbat Khan and others* 2012 SCMR 235. It was held therein that the word "sale" as used in s. 13 had a meaning different from that as given in the definition in s. 2(d). It was observed that while ordinarily it was to be presumed that the same meaning had to be given to a word, term or phrase throughout the statute, it was also well settled that the same word, term etc. could have different meanings in different parts thereof, or even in the same section (see para 6). It was then held in para 7 as follows (emphasis in original):

"7. For the purpose of exercise of the right of pre-emption, sale must be complete in all respect in accordance with its definition given in section 2(d) of the Act, namely, permanent transfer of the property and payment of valuable consideration. The right, therefore, cannot be exercised until the two conditions exist. The said definition of "**Sale**" becomes relevant when controversy arises as to whether or not the property in question was sold, conferring right of preemption on the pre-emptor/plaintiff. The fulfilment or otherwise of the two conditions mentioned in section 2(d) of the Act, however, may not be relevant in the context in which the word "**Sale**" in subsection (3) of section 13 of the Act has been used. The latter provision mandates the pre-emptor to make immediate demand in the same sitting or meeting in

> which he acquires knowledge of the sale. This stringent provision does not allow the preemptor to postpone the making of Talb-e-Muwasibat in order to make further inquiry or probe as to whether or not the sale was complete in all respects. The Talb is to be made regardless of the credibility of the information. The pre-emptor may never be able to find out about the completion of the sale until the commencement of the proceedings in the suit for pre-emption or, at times, upon its conclusion when the Court finally determines the question, if the same was in issue. This possibility is aptly demonstrated by the facts of the present case when it was disclosed for the first time during the recording of evidence of the vendee/defendant that the sale consideration was paid by the vendee at the time of attestation of mutation. A pre-emptor may never know when, if at all, sale consideration was paid to the vendor. If the word **"Sale"** in section 13 is given the same meaning as its definition in section 2(d) it would negate the very essence of the mandatory nature of the former provision requiring the pre-emptor to make immediate Talb-e- Muwasibat upon learning of the sale. The expression 'Sale' in the two statutory provisions is used in entirely different context. The definition of sale in section 2(d) cannot be applied to the same expression used in section 13 of the Act and the pre-emptor is obliged to make the talb regardless of whether the conditions laid down for completion of sale have been fulfilled. As the appellant had delayed the making of talb till attestation of the sale mutation, his suit was rightly dismissed."

5. We have carefully considered the cited case. With utmost respect, we would express certain reservations as to the observations made therein including, in particular, as extracted above. However, it is not necessary for us to consider the correctness or otherwise of the cited case. For, the question of knowledge of the sale is ultimately a question of fact. It has to be determined on the basis of the evidence as led by the parties. Three courts have already taken the same view of the evidence. The crucial point which formed the crux of the appellants' case, as set out in the leave granting order, was the claim that as the sale stood disclosed in the written statement of the vendor of the property (one Gulzar) in the earlier suit, the first *talb* had to be reckoned from the date thereof, which was 05.09.2003. But this is ultimately a question of fact. Merely because the written statement filed by Gulzar was of a certain date cannot mean that the knowledge of the respondent must automatically, or even necessarily, be reckoned from that date or that the law raises a presumption, conclusive or otherwise, in this regard. It had to be specifically pleaded (or least proved by leading evidence on the

point) that the respondent's knowledge dated to the date of the written statement or was on the basis, or in terms, thereof. This would have then rebutted the case as put forward by the respondent as regards the date of his knowledge of the sale and the evidence that he led thereon (which was otherwise accepted throughout). However, an examination of the judgments of the three courts shows that the matter was not pleaded by the appellants in terms as set out in the leave granting order, nor was evidence led in respect thereof in those terms. Thus, the crucial finding of fact which the appellants now urge the Court to make would, in effect, have to be a new finding. Indeed, the nature of this new finding would be such that it would be based (in at least important part) on surmises and conjectures. It would not be a non-reading or misreading of evidence, which can, in appropriate cases, give rise to a question of law. This is not permissible at this stage and certainly not before a Court of final appeal. Ultimately therefore the appellants could not succeed in terms of the case sought to be made out here. Accordingly, the appeal failed and stood dismissed.

Islamabad, the
24th November, 2021
Naveed/*
Not approved for reporting