SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Sajjad Ali Shah
Mr. Justice Amin-Ud-Din Khan

AFR
Civil Appeal No.1683 of 2014

(Against the judgment dated 21.11.2014 passed by the Peshawar High Court, Abbottabad Bench in CR No.181-A of 2008)

Mst. Bibi Fatima ...*Appellant*

Versus

Muhammad Sarwar ...*Respondent*

For the Appellant(s): Mr. Muhammad Munir Paracha, ASC
Syed Rifaqat Hussain Shah, AOR.

For the Respondent(s): Mr. Muhammad Wajid Khan, ASC
Ch. Akhtar Ali, AOR

Date of Hearing: 07.02.2022

JUDGMENT

Amin-ud-Din Khan, J: Through this appeal filed under Article 185(2)(d)(e) of the Constitution of Islamic Republic of Pakistan, 1973 appellant has challenged the judgment and decree dated 21.11.2014 whereby the learned Single Judge of the Peshawar High Court accepted the Civil Revision No. 181-A of 2008 filed by the respondent-plaintiff/pre-emptor.

2. Brief facts are that respondent/plaintiff opted to pre-empt the sale of land measuring 46 kanals and 7 marlas, fully described in the head-note of the plaint, through registered sale deed No. 1141 dated 8.11.2005 and pleaded that the sale was actually for a consideration of Rs. 93000/- whereas in the sale deed it was mentioned as Rs. 6,00,000/-. Respondent/Plaintiff pleaded that he has a superior right, he is a co-sharer in khata having easement rights, and is owner of adjacent property.

Further pleaded that after performance of Talabs in accordance with law he filed the suit. Written statement was filed, suit was contested. Preliminary objections were raised. Performance of Talabs was denied and it was stated that the plaintiff has waived his rights if any. The learned trial court framed the issues, invited the parties to produce their respective oral as well as documentary evidence. Both the parties produced their oral as well as documentary evidence. Learned trial court dismissed the suit vide judgment and decree dated 19.3.2007. Respondent/Plaintiff preferred an appeal which too was dismissed vide judgment and decree dated 12.6.2008. Revision petition filed by the plaintiff was allowed through the impugned judgment and decree, the suit was decreed. Hence, this appeal by the vendee/defendant.

3. Learned counsel for the appellant/defendant states that there are two pivotal questions to be decided by this Court as it is a direct appeal before this Court; one is that respondent/plaintiff was required to prove his right of pre-emption on the sale of land at the time of sale of land, but he failed to prove right of pre-emption at the time of sale and further respondent/plaintiff has not proved the service or refusal to accept the notice of Talab-e-Ishhad allegedly sent by him. States that mutation No. 1096 of inheritance of father of plaintiff, on the basis of which plaintiff claims to be the co-owner in the suit khata was attested on 22.11.2005, does not show the date of death of his father. Nothing is in the evidence or in the pleadings of the respondent/plaintiff regarding the date of death of his father. The respondent/plaintiff has not produced the postman to prove the service of notice of Talab-e-Ishhad or refusal thereof by producing acknowledgement due in the Court. Neither the postman nor the acknowledgement due has been produced which was a sine qua non for proving Talab-e-Ishhad when vendee-defendant has denied receipt of any such notice. Learned counsel for the appellant prays for acceptance of the appeal.

4. In response learned counsel for the respondent/plaintiff argues that in the High Court a photostat

copy of the death certificate of father of the plaintiff was produced. The death of father of the respondent/plaintiff is prior to attestation of the impugned mutation, therefore, respondent/plaintiff became co-owner in the suit property, hence, was having a right to pre-empt the sale in question. In response to the second point states that when learned trial court has decided the issue of Talab-e-Ishhad in favour of plaintiff-respondent and finally the suit was dismissed on the basis of findings on other issues, the respondent/plaintiff filed an appeal. The appellant/defendant was also required to file cross-appeal or cross-objection to challenge the findings of the learned trial court with regard to Talab-e-Ishhad and further the said findings were affirmed by the learned first appellate court, therefore, argues that the same cannot be scrutinized by this Court.

5. Heard, perused the record with the able assistance of learned counsel for the parties. First we take matter of performance of Talab-e-Ishhad. Plaintiff/respondent claims that he sent the notice of Talab-e-Ishhad through registered post with acknowledgment due. The appellant/defendant denied this fact in his written statement. There is no cavil with the proposition that in terms of Article 129 of the Qanun-e-Shahadat Order read with section 27 of the General Clauses Act, a presumption of service does arise if a notice sent through registered post with acknowledgement due is received back with the endorsement of "refused" by the postal authorities but if the addressee appears in Court and makes a statement on oath disowning receipt of notice, the presumption under the afore-referred provision shall stand rebutted and the onus is on the party which is relying on such an endorsement to prove the same by producing the postman who made the endorsement. Reference may be made to "*Muhammad Bashir v. Abbas Ali Shah*" **(2007 SCMR 1105)**, "*Bashir Ahmed V. Ghulam Rasool*" **(2011 SCMR 762)**, "*Allah Ditta V. Muhammad Anar*" **(2013 SCMR 866)**, "*Dayam Khan V. Muslim Khan*" **(2015 SCMR 222)**, "Basharat Ali Khan V. Muhammad Akbar" **(2017 SCMR 309)**, "*Sultan V. Noor Asghar*" **(2020 SCMR 682)**. In these circumstances, it was the duty of the plaintiff/respondent to prove not only the issuance of notice

of Talab-e-Ishhad in accordance with law and sending of notice to the vendee/defendant through registered post, acknowledgment due but also the service of notice upon vendee/defendant or refusal thereof by producing the Postman and acknowledgment receipt. Admittedly the plaintiff/respondent has not produced the original postal envelope if returned to him on refusal to receive the same by vendee/defendant neither the receipt of acknowledgment of delivery of notice produced nor the postman. In this way the plaintiff miserably failed to prove the performance of Talab-e-Ishhad in accordance with law.

6. Now adverting to the fact of non-filling of cross-objection or cross-appeal by the appellant/defendant against the finding of learned Trial Court (recorded in favour of the respondent/plaintiff while dismissing his suit) qua performance of Talab-e-Ishhad. It is a matter of record that the Trial Court, while dismissing the suit of the respondent/plaintiff, found him successful in proving the mandatory Talab-e-Ishhad under the law. The appellant/defendant contested the appeal before the first appellate court; however, did not file any cross-objection or cross-appeal against the above finding of the Trial Court. Now question for determination by us is whether in every case when some findings are recorded against a defendant and ultimately the suit is dismissed by the trial court the defendant is required to file cross-appeal or cross-objection or he can argue against the findings recorded against him without filing cross-appeal or cross-objection before the appellate court. In our view when no part of decree is against the defendant the defendant can argue against the said findings before the appellate court in the appeal filed by the plaintiff without filing cross-appeal or cross-objections and in case a partial decree is passed against the defendant and rest of the suit is dismissed if the plaintiff files appeal against the portion of dismissal of suit then it is incumbent upon the defendant to file cross-appeal or cross-objections to challenge the part of grant of decree against him. Now we discuss the principle.

7. The appellate Court is empowered, in the interest of justice, to allow appropriate relief to non-appealing parties where the appeal is with regard to whole of the decree in terms of Order XLI Rule 33, C.P.C. The Court has also inherent powers under section 151, C.P.C., to make such orders, as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. These are all enabling provisions; the powers thereunder can be exercised by the Court to cover ostensibly impossible situations, for complete dispensation of justice, for which C.P.C. has been designed, but despite the best efforts of the draftsman, to cater for all possible situations, if it is found lacking in meeting some eventualities, the Court can act ex delicto justiciae, supply the omission in the procedure, adopt methodology, for effectually carrying out the purpose. Reliance can be made to "*North-West Frontier Province V. Abdul Ghafoor Khan*" **(PLD 1993 Supreme Court 418)** and "*Muhammad Nawaz V. Mst. Ahmad Bibi*" **(1995 SCMR 266)**. In case where no part of a decree was against the vendee-defendant he was not bound to file cross-appeal or cross-objection. He was having a right to argue against the findings recorded against him on issue of Talab-e-Ishhad, therefore, we can see into the legality of the findings recorded by the learned trial court and affirmed by the learned courts below. Thus, we have gone through the findings recorded by the learned trial court who erred in law while holding that the plaintiff was able to prove Talab-e-Ishhad by noting that he produced the alleged witness of notice of Talab-e-Ishhad and producing the receipt of sending registered post to the vendee-defendant. These findings are absolutely wrong, erroneous and against the settled law on the subject as well as our observation in preceding paras. As it is a sine qua non for establishing service of notice or refusal thereof when the receipt of notice is denied by the vendee-defendant to produce the postman who got the said notice served upon vendee-defendant or in case of refusal to prove his report of refusal while appearing in the witness-box and producing the original envelope of the registered acknowledgement due. When plaintiff/pre-emptor failed to produce the postman and the acknowledgement due, he

failed to prove the performance of Talab-e-Ishhad, therefore, findings recorded on issue of Talab-e-Ishhad by the learned courts below are absolutely wrong.

8. To establish a right of pre-emption claimed by the respondent/plaintiff, he has produced "Fard Intikhab az Register Haqdaran Zameen" for the year 2002-2003 Exh.PW-1/1. This document shows that Khalil-ur-Rehman father of the respondent, Muhammad Ashraf, vendor and the Provincial Government are owner in the Khata subject matter of the suit land and the said "Fard Intikhab" carries the endorsement of mutation No. 1096 of Khalil-ur-Rehman son of Samandar in favour of his legal heirs including Muhammad Sarwar respondent/plaintiff attested on 22.11.2005. Admittedly, "Fard Intikhab" of Register Haqdaran Zameen is not a substitute of the complete Register Haqdaran Zameen which carries the presumptions of correctness in the light of judgments of this Court. Admittedly, the respondent/plainitff is not recorded as co-owner in the disputed Khata and the sale is through registered Sale Deed dated 8.11.2005 whereas the mutation of inheritance of father of the plaintiff was attested on 22.11.2005 as per endorsement on this document. No other evidence is available on the file to show the date of death of father of the respondent/plaintiff. In a suit for pre-emption, plaintiff is required to prove his right of pre-emption at the time of sale of land, at the time of filing of suit and at the time of decree. The document Exh. PW-1/1 does not show the plaintiff as owner in the disputed khata as claimed by him in his suit that he is a co-sharer in the suit khata. Furthermore, this document is not of the year 2005 when the sale took place. No question to prove the right of pre-emption at the time of filing of the suit and passing of the decree by the plaintiff-respondent in these circumstances of this case. In this view of the matter, respondent/plaintiff failed to prove that he was having a right of pre-emption. No other document has been produced to prove or establish the right of pre-emption by the respondent/plaintiff.

9. In this view of the matter, the findings of the learned High Court with regard to superior right of pre-emption as well as Talab-e-Ishhad are absolutely wrong and not maintainable under the law, therefore, same are reversed. Plaintiff-respondent failed to prove the performance of Talab-e-Ishhad and establish right of pre-emption, therefore, this appeal is allowed. The impugned judgment and decree passed by the learned High Court is set aside.

Islamabad, the
07th of February, 2022
(Mazhar Javed Bhatti)

Approved for reporting