

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE AMIN UD DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR

(AFR)

CIVIL APPEAL NO.1798 of 2016

(Against the judgment dated
10.06.2016 passed by the
Lahore High Court, Rawalpindi
Bench in Civil Revision No. 174-
D of 2010.)

Ch. Riaz Ahmad

...Appellant

Versus

Munir Sultan Malik

...Respondent

For the Appellant:

Maulvi Anwar Ul Haq, ASC.

For the Respondent:

Sh. Zamir Hussain, ASC
Syed Rifaqat Hussain Shah, AOR.

Date of hearing:

12.11.2021

JUDGMENT

AMIN-UD-DIN KHAN, J. Through this appeal filed under Article 185(2)(d) of the Constitution of Islamic Republic of Pakistan, 1973 appellant has challenged the judgment dated 10.06.2016 passed by the learned Single Judge of the Lahore High Court whereby revision petition filed by the respondent/vendee/defendant was allowed and judgment and decree of both the fora below decreeing the pre-emption suit of the appellant and affirming the same by the learned appellate court were set aside.

2. We have heard the learned counsel for the parties at length. Appellant opted to pre-empt a sale of land through registered sale deed dated 02.04.2003 in favour of vendee/defendant through a pre-emption suit filed on 02.09.2003 stating that the time for filing of the suit was till 2nd of August, 2003 and civil courts were closed till 31.8.2003, therefore, the suit was filed on re-opening of the courts. Written statement was filed, suit was contested. The learned trial court framed the issues, invited the parties to produce their evidence. Both the parties produced their oral as well as documentary evidence. The learned trial court decreed the suit, same was affirmed by the learned first appellate court but the learned revisional court reversed the findings of both the courts below and dismissed the suit. The main cause for dismissal was that the plaintiff-appellant failed to prove performance of *Talb-e-Muwathibat* as well as *Talb-e-Ishhad* in accordance with law. To succeed in a suit for pre-emption the first and foremost condition is that plaintiff has to plead that before filing of suit he has fulfilled the requirements of Talabs and thereafter he has to prove the performance of *Talb-e-Muwathibat* and *Talb-e-Ishhad*. For proving *Talb-e-Muwathibat* needless to observe that there must be specific time, date and place of knowledge pleaded in the plaint as well as in the notice of *Talb-e-Ishhad* and thereafter plaintiff is required to prove the same by proving the gaining of knowledge at specific place, time and date and thereafter sending of notice attested by two truthful witnesses through registered post acknowledgement due

where the postal facilities are available and thereafter to prove the delivery of notice to the addressee-vendee-defendant or its refusal by producing a Postman in the Court while producing evidence to prove the above-mentioned pleadings.

3. In the instant case there are two defects; the date mentioned in the pleadings for gaining knowledge is 02-04-2003 but plaintiff himself when appeared as PW-1 as his own witness stated the said date as 02-08-2003 while PW-2 (son of the plaintiff) narrated it as 02-03-2003. Moreover, the Postman has also not been produced to prove the delivery of notice of *Talb-e-Ishhad* or its refusal by the addressee. There are contradictions in date of *Talb-e-Muwathibat* pleaded in the plaint and in the statement of the plaintiff and the witnesses which fact has been rightly noted and considered by the learned revisional court. The learned counsel for the appellant contended that it was due to a slip of tongue and the learned trial court as well as the learned appellate court have noted as such. When confronted to the learned counsel that what stopped the plaintiff-appellant from moving before the learned trial court for correction of the dates mentioned in his statement recorded as PW-1 and the statement of PW-2, learned counsel is unable to respond to this query. We entertain the thought that when a date was incorrectly noted as stated by a witness in the statement as PW-1 i.e. Riaz Ahmad and PW-2 i.e. Qasim Ali while appearing before the court in the witness box on 03.04.2006, whether

subsequently the court at the time of final adjudication of matter on 31.07.2007 was competent to observe that it was a slip of tongue. We are of the view that when during this period the plaintiff-appellant never moved before the court that the dates uttered by himself when he appeared as PW-1 and his witness Qasim Ali PW-2 were wrongly recorded or it was a slip of tongue, the court was not competent to declare such mentioning of the dates as slip of tongue.

4. The court in order to declare any fact deposed by a witness as a slip of tongue is required to look into the material available on record. When evidence of a witness is taken down in appealable cases, the procedure is provided under Order XVIII Rule 5 of the CPC, which is reproduced:-

“How evidence shall be taken in appealable cases.—In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.”

It is apparent from the said provision that after recording statement it is read over to a witness and that was the time when the witness could tell that the recorded date was a slip of tongue or it was wrongly recorded. No such objection of the witness is available on the file, therefore, there was no material available before the learned trial court to declare the said date as a slip of tongue. It is only a presumption of the

court, that too without any material, which has no value in the eyes of law.

5. Further the findings of the learned appellate court especially in Paragraph No. 9 of the judgment are relevant which are reproduced:-

"Minor discrepancies do not effect the merits of case. Oftenly it happens during recording of evidence that sometime in statement may be outcome of either slip of tongue or wrongly recorded, similarly it happened in this case."

It was the case of nobody that discrepancy vis-à-vis narration of date of knowledge was a slip of tongue or the date was recorded wrongly. The learned court of its own, declared that either it was a slip of tongue or the date was taken down wrongly during the course of evidence. In case a date or any portion of statement is recorded wrongly, the party has a right to move for correction of the same before the completion of the proceedings of the said date. When a statement is recorded, at the end it is read over to the witness and a witness has a right to move for correction if any part of the statement is wrongly recorded. Nothing on record is shown that any effort was made by the appellant before the learned trial court or even before the learned first appellate court but the interpretation by the learned first appellate court that it was either a slip of tongue or wrongly recorded testimony is based on self-destructive findings not permissible under the law. It was not within the jurisdiction of the learned appellate court to record such like findings when there was no material for declaring so before the learned first appellate

court as discussed supra. In this view of the matter, findings of learned trial court and first appellate court that plaintiff has proved the performance of *Talabs* were absolutely against the law which have rightly been set aside by the revisional court. There was a further defect in the decree granted by the two fora below as the Postman was not produced. In view of the law laid down by this Court reported as "Pervaiz Hussain and another versus Arabian Sea Enterprises Limited" (2007 SCMR 1105) and "Bashir Ahmad Versus Ghulam Rasool" (2011 SCMR 762), failure of the plaintiff-appellant to produce the Postman proves that he failed to prove *Talb-e-Ishhad* in these circumstances of this case. In this view of the matter, the findings recorded by the learned High Court are in accordance with law and no case for interference by this Court is made out. Resultantly, this appeal stands dismissed.

Islamabad.
12.11.2021
Mazhar Javed Bhatti.

"Approved for reporting"