IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Petition No. 287 of 2019
(Against the judgment dated 13.12.2018 of the Peshawar High Court, Bannu Bench, passed in Civil Revision No. 69-B of 2014)

Farid Ullah Khan

... Petitioner

Versus

Irfan Ullah Khan

... Respondent

For the Petitioner:	Mr. Sher Afzal Marwat, ASC Mr. Mehmood Ahmad Sheikh, AOR
For the Respondent:	Mr. Salahuddin Malik, ASC/AOR.
Date of Hearing:	15.04.2022

JUDGMENT

Yahya Afridi, J.- Farid Ullah Khan **("petitioner")** seeks leave to appeal against the judgment of the Peshawar High Court, dated 13.12.2018, whereby his revision petition filed against the concurrent judgments passed against him by the trial and appellate courts was dismissed.

2. It all started on 26.06.2009, when Irfan Ullah Khan **("respondent")** instituted a suit for possession of the suit land, seeking enforcement of his right of pre-emption against the petitioner, regarding sale mutation No. 500 dated 27.02.2009. The respondent claimed in the plaint that, he being a *Shafi Sharik* (co-owner in *khewat* of the suit land), *Shafi Khalit* (participator in the special rights attached to the suit land) and *Shafi Jar* (owner of land adjacent to the suit land), had a superior right of pre-emption against the petitioner, and had also made *Talb-i-Muwathibat*

(immediate demand) on 22.06.2009 and *Talb-i-Ishhad* (demand by establishing evidence) on 24.06.2009, as per the law. The petitioner denied both these assertions of the respondent in his written statement. On these disputed assertions of facts, the trial court framed issues, and the parties led their respective evidence. The trial court decreed the suit in favour of the respondent. The petitioner filed an appeal which failed, and so did the revision petition filed by him against the concurrent judgments of the trial and appellate courts. Hence, the present petition.

3. Disputed before us by the present petition are the findings of the courts below only on the issue of making of *Talb-i-Muwathibat* and *Talb-i-Ishhad*.

4. Learned counsel for the petitioner has pleaded that these findings are the result of gross misreading and non-reading of the evidence, while learned counsel for the respondent has submitted that these findings are based on correct reading and appreciation of the evidence. Learned counsel for the respondent has also contended that this Court does not interfere with the concurrent findings of facts of the courts below.

5. We have heard the valuable arguments of the learned counsel for the parties and with their able assistance have read the evidence of the parties led on the issue of making of *Talbs*.

Talb-i-Muwathibat

6. In order to prove making of the first and primary *Talb*, that is, *Talb-i-Muwathibat*, the respondent **(PW-3)** himself appeared in the witness box, and also produced as witnesses, his two real brothers, Farman Ullah **(PW-4)** and Arif Ullah **(PW-5).** The respondent

(PW-3) deposed that his said two brothers came to his house on 22.06.2009 and his brother, Farman Ullah **(PW-4)**, informed him about sale of the suit land, when he then and there, and that too in their presence, made a declaration to exercise his right of pre-emption. He further stated that his brother, Farman Ullah **(PW-4)**, had told him that he had come to know of the subject sale in the *Chok* (meeting place) of the village, but he (Farman Ullah) had not told him the name of the person, who had informed him about said sale. Farman Ullah **(PW-4)** stated that some people were talking about the sale of the suit land in the *Chok* of the village, but he did not remember their names except of the one, Akbar Ali Khan, who had since died.

7. To rebut the respondent's stance, the petitioner **(DW-5)** deposed that he obtained possession of the suit land after the sale agreement dated 11.05.2006 **(Exh-DW-1/1)** in presence of many persons of the locality, including the respondent and his father. On obtaining possession of the suit land, he got repaired the constructions existing on the suit land and also constructed a new room thereon. The respondent with the petitioner's permission excavated and took soil from the suit land for his brick kiln. The respondent was thus aware of the sale of the suit land, since then. Muhammad Safdar **(DW-1)**, the vendor, Muhammad Ayub Khan **(DW-2)** and Tariq Mehmood Khan **(DW-3)**, the attesting witnesses of the sale agreement **(Exh-DW-1/1)** and Ihsaan Ullah **(DW-4),** the brother-in-law of the petitioner, in whose favour the sale agreement **(Exh-DW-1/1)** and registered deed of general power of attorney dated 23.05.2008 **(Exh-DW-1/3)** were executed by the vendor, supported the petitioner's version.

8. Careful reading of the evidence led by the respondent to prove the essential fact of making of *Talb-i-Muwathibat* as well as the evidence produced by the petitioner to rebut the same, and the manner how the same was appraised by the three courts below, have disclosed certain serious legal lapses.

Delay in making Talb-i-Muwathibat

8.1. Firstly, Arif Ullah **(PW-5)** in his testimony deposed that Farman Ullah **(PW-4)** informed the respondent, the pre-emptor, on the date of the sanctioning of the sale mutation of the suit land. This assertion completely nullifies the stance of the respondent to have made *Talb-i-Muwathibat* on 22.06.2009, as admittedly the sale mutation was sanctioned on 27.02.2009. Thus, the respondent had knowledge of the sale of the suit land much before he made his *Talb-i-Muwathibat* in order to exercise his right of pre-emption. This crucial delay on his part to make *Talb-i-Muwathibat*, upon obtaining knowledge of the sale of the suit land, legally defeats his right of pre-emption.

Source of information of sale - hearsay evidence

8.2 Secondly, no person who could have testified that he had direct knowledge of the sale of the suit land, has been examined by the respondent. All the evidence produced on the source of information, as to the sale of the suit land, is hearsay. The brother of the respondent, Farman Ullah **(PW-4)**, who had informed him about the sale of the suit land, could not tell the names of the persons, who were talking about sale of the suit land in the *Chok* of the village, except the one who had died. Thus, no one was produced by the respondent to substantiate the version of Farman Ullah **(PW-4)** of how he had come to know of the sale.

8.3 In **Subhanuddin v. Pir Ghulam**,[1] a case of similar facts, where the person who had conveyed the information of the sale to the brother of the pre-emptor, who in turn passed it onto the pre-emptor, as is in the present case, was not produced as a witness. Based on the said facts, this Court held that the elements of *Talb-i-Muwathibat* had not been proved, with the following observation:

> "7. It was the respondent's case that upon his return from Punjab he was informed about the sale by his brother (Taj Ali). Taj Ali, lives in the same house as the respondent, but did not know whether the respondent was in the village when the sale took place, nor when the respondent returned from the Punjab and that he was informed about the sale by his nephew Nazir. The initial burden of proof with regard to these facts (the conveying of the information of sale and price) lay upon the respondent, and to establish the same Nazir could have been called to give evidence, as the evidence in this regard (which was oral) was required to be direct and of the witness who saw, heard or perceived it himself (Article 71 of the Qanun-e-Shahadat Order, 1984), but Nazir was not produced as a witness. Consequently, an important and relevant fact was not proved by the respondent and on this ground alone the suit merited dismissal as Talb-i-Muwathibat is required to be made immediately upon learning of the sale".
>
> (Emphasis added)

In essence, this Court in the above case came to the conclusion in view of the provisions of Article 71 of the Qanun-e-Shahadat 1984, which mandates that oral evidence must be direct, that is to say, if it refers to a fact, which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact, which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact, which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; and if it refers to an opinion or to the grounds on which that opinion is held, it must

[1] PLD 2015 SC 69.

be, subject to the *proviso*, the evidence of the person who holds that opinion on those grounds.

8.4 The fact of a sale of land is a fact that can be seen, such as, by observing or taking part in the sale-transaction or by seeing the sale deed or sale mutation. The person who conveys the information of the fact of sale must be a person who has seen the fact of sale and it is he who can then pass on the said fact to another person(s). Thus, the chain of the source of information, as to the fact of sale, from the very first person, who has the direct knowledge thereof and passes on the same to the person who lastly informs the pre-emptor, must be complete. Only the complete chain of the source of information of the sale can establish the essential elements of *Talb-i-Muwathibat,* which are: (i) the time, date and place when the pre-emptor obtained the first information of the sale, and; (ii) the immediate declaration of his intention by the pre-emptor to exercise his right of pre-emption, then and there, on obtaining such information. In the present case, such chain of the source of passing on the information, as to the fact of sale of the suit land has not been proved, and the entire case as to making of *Talb-i-Muwathibat* is built on the hearsay evidence of the respondent's brother, Farman Ullah **(PW-4)**. This omission raises doubts on the veracity and truthfulness of the witnesses produced by pre-emptor.

Circumstances contrary to version of *Talb-i-Muwathibat*

8.5. Thirdly, the assertion of a pre-emptor as to having come to know of the sale of the land, on a particular date and making of *Talb-i-Muwathibat* on that date, being his personal and private act, cannot ordinarily be contradicted by the *vendee* through direct

evidence; he can rebut such assertion, mostly by circumstantial evidence. The courts below have failed to appreciate that, when two persons of a family come up with an oral version of obtaining and conveying the first information of the sale, which are their personal and private acts, the authenticity of it can be examined only by testing the chain of the source of passing on and obtaining such information, as well as by establishing the circumstances that are inconsistent with their such version.

8.6. In the present case, the petitioner specifically asserted in his written statement, and in his testimony **(DW-5)**, that he obtained possession of the suit land in presence of the respondent, on 11.05.2006, got repaired the existing rooms already built thereon, and built a new room thereon, and that the respondent had also taken the soil from the suit land for his brick kiln with the petitioner's permission. By these assertions of specific facts, the petitioner sought to prove that the respondent was aware of the sale of the suit land before 22.06.2009, the date on which he claimed to have knowledge thereof and made his *Talb-i-Muwathibat* to exercise his right of pre-emption over the suit land. In fact, the respondent did not deny these assertions of the petitioner while making statement as **(PW3)**, nor were these assertions disputed by him in cross-examination of the petitioner **(DW-5)**. The respondent disputes the said assertions of the petitioner by referring to the deed of sale agreement **(Exh-DW-1/1),** wherein it has been written that the possession of the suit land shall be given after payment of the total consideration amount at the time of sanction of the sale mutation**.** If the recital in the sale agreement **(Exh-DW-1/1)**, referred to by the respondent, is accepted to be true, even then the possession of the suit land would have been delivered to the

petitioner either on 23.05.2008 when the vender **(DW-1)** executed the registered deed of general power of attorney **(Exh-DW-1/3)** in favour of the petitioner's brother-in-law, Ihsaan Ullah **(DW-4),** after receiving the total consideration amount, or on 27.02.2009 when the sale mutation **(Exh-PW-1/1)** was sanctioned. In these circumstances, as well as, in view of the fact that when the respondent owned land adjacent to the suit land and also had been using the common passage and watercourse, his assertion that he came to know of the sale of the suit land on 22.06.2009, and not when the possession of the suit land was handed over by the vendor **(DW-1)** to the petitioner, does not appeal to a prudent mind. It is a settled principle of appraising evidence that the statement of a witness must be consistent with the circumstances of the case before the same is believed and relied upon, as a man can lie but circumstances not.

Preponderance of probability – failure to prove *Talb-i-Muwathibat*

9. All the afore-noted facts and circumstances, when examined on the evidential standard of preponderance of probability applicable to civil cases, lead this Court to the irresistible conclusion that the respondent failed to establish the chain of the source of obtaining the information as to the fact of sale of the suit land from the first communication up to it reaching him; that he having owned land adjacent to the suit land with the common rights of passage and water, was aware of the sale of the suit land since the taking over possession of the suit land by the petitioner; and most importantly, that the testimony of Arif Ullah **(PW-5)** points to the fact that the respondent had knowledge of the sale of the suit land on the very date of the sanction of the sale mutation, that

is, 27.02.09, and not on the date he claimed to have knowledge of the sale, that is, 22.06.2009. The respondent is, therefore, found to have failed to prove making of the *Talb-i-Muwathibat* in accordance with the law.

Talb-i-Ishhaad

10. When the first and primary *Talb*, that is, *Talb-i-Muwathibat*, is found to have not been proved, we need not examine the evidence on the making of the second *Talb*, that is, *Talb-i-Ishhad*, as where *Talb-i-Muwathibat* is not proved to have been made then the performance of *Talb-i-Ishhad* and all other requirements to successfully enforce the right of pre-emption cannot withstand.[2] The foundation of the right of pre-emption rests on the making of *Talb-i-Muwathibat*; if it is not made in accordance with the law, the entire superstructure collapses.[3]

Right of pre-emption is of a feeble nature

11. Needless to mention that right of pre-emption is of a feeble nature as it stands extinguished if the *Talbs* are not made in accordance with the law,[4] and it is also deemed to have been waived, if the pre-emptor has acquiesced in the sale or has done any other act of omission or commission which amounts to waiver of the right of pre-emption.[5]

Interference with the concurrent findings of facts

12. Lastly, we would like to address the contention of the learned counsel for the respondent that this Court does not interfere with the concurrent findings of facts of the courts below.

---

[2] Muhammad Khan v. Haider PLD 2020 SC 233 (5-MB).
[3] Subhanuddin v. Pir Ghulam PLD 2015 SC 69.
[4] The Khyber Pakhtunkhwa Pre-emption Act 1987, section 13.
[5] The Act Ibid, section 15.

This contention of the learned counsel is correct, we must concede, if taken as stating the general rule, which rule is, however, in no way an absolute one and, admits exceptions depending on the facts and circumstances of each case. Needless to say, the exceptions do not destroy the authority of the rule, they rather affirm it. The scope of interference by this Court with the concurrent finding of the courts below, as authoritatively expounded by a five-member larger bench of this Court in **Federation v. Ali Ihsan**[6], is well settled. This Court does not normally go behind a concurrent finding of fact, if that finding is not vitiated by any error in point of law, but this rule is not a cast-iron one, and there may be cases of such an unusual nature as will constrain the Court to depart from it in order to prevent a miscarriage of justice. This Court, therefore, does not hesitate to review the evidence in spite of a concurrent finding of the courts below, if it be shown with absolute clearness that some substantial error is apparent in the manner in which the courts below have dealt with the facts, or if the finding is on the face of it against the evidence or so patently improbable or perverse that to accept it would amount to perpetuating a grave miscarriage of justice.

13. In the present case, the courts below have, as above noted, misdirected themselves in restricting their approach to appraise the evidence of the respondent produced to prove *Talb-i-Muwathibat*, in isolation of the attending circumstances of the case, and by overlooking an important principle of the law of evidence embodied in Article 71 of the Qanun-e-Shahadat 1984,

[6] PLD 1967 SC 249.

which requires that oral evidence must be direct. These errors of the courts below on points of law, have constrained us to depart from the rule of not interfering with the concurrent findings of facts of the courts below, in order to prevent the miscarriage of justice.

14. For the above reasons, we convert this petition into appeal and allow the same. The judgments and decrees of the courts below are set aside, and the suit of the respondent is dismissed. As we have overturned the concurrent findings of the courts below, the parties are left to bear their own costs.

Judge

Announced in open Court Judge
On 26th April, 2022, at Islamabad.

Judge

Approved for reporting
Arif