IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL APPEAL NO. 840 OF 2017
(On appeal against the judgment dated 10.02.2017 passed by the Lahore High Court, Lahore in RSA No. 135/2010)

Sardar Muhammad (deceased) through LRs

... Appellants

Versus

Taj Muhammad (deceased) through LRs and others

...Respondent(s)

For the Appellants: Mr. Salman Mansoor, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondent (1): Malik Muhammad Kabeer, ASC

Date of Hearing: 06.04.2023

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.-

C.M.A. No. 2175/2022

Through this application, the applicant seeks setting aside of the ex-parte order. For reasons mentioned in this application and subject to all just exceptions, this CMA is allowed and the ex-parte order is set aside.

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2. Through this appeal under Article 185(2)(d) of the Constitution of Islamic Republic of Pakistan, 1973, the appellants have assailed the judgment dated 10.02.2017 passed by the learned Single Judge of the Lahore High Court, Lahore whereby the Regular Second Appeal filed by the respondents was allowed, the judgment and decree of the learned Appellate Court dated 29.04.2010 was set aside and the

judgment and decree of the learned Trial Court dated 07.11.2009 was restored.

3. Briefly stated the facts of the case are that respondent Nos. 1 to 3 purchased land measuring 37 kanals 9 marlas in Chak No. 148 GB, Tehsil and District Toba Tek Singh through mutation No. 1072 dated 17.11.2013 for a total sale consideration of Rs.450,000/-. Later on, the said respondents exchanged the suit property with respondent Nos. 4 & 5 against their corresponding land measuring 33 kanals 4 marlas situated in Chak No. 161/GB, Tehsil Gojra, District Toba Tek Singh vide mutation No. 1073 dated 23.12.2003. On 08.03.2004, the predecessor-in-interest of the appellants namely Sardar Muhammad filed a suit for possession through pre-emption on the ground of having superior right of pre-emption being a co-sharer of the disputed property. The suit was contested by the respondents/defendants. Out of the divergent pleadings of the parties, the learned Trial Court framed as many as seven issues and ultimately vide judgment and decree dated 07.11.2009 dismissed the suit. The predecessor-in-interest of the appellants filed an appeal before the learned Additional Sessions Judge, Toba Tek Singh/Appellate Court, who vide judgment and decree dated 29.04.2010 accepted the appeal and set aside the judgment and decree of the learned Trial Court. Being aggrieved, the respondents/defendants filed Regular Second Appeal before the learned Lahore High Court, who vide impugned judgment accepted the same, set aside the judgment and decree of the learned Appellate Court and restored that of the learned Trial Court. Hence, this appeal.

4. At the very outset, learned counsel for the appellants contended that the appellants/plaintiffs had proved both Talb-e-Muwathibat and Talb-e-Ishhad in accordance with law but the learned High Court brushed it aside by treating the performance of Talabs as concocted story merely on the basis of unfounded presumption. Contends that the notice of Talb-e-Ishhad was duly dispatched through registered post and in this regard the Postman, Branch Postmaster and Postmaster of Post Office Kachehri were produced in evidence as PW-1 to PW-3

respectively. Contends that the receipts of the registered envelop were duly exhibited in evidence. Contends that the respondents/defendants have failed to highlight an obvious deficiency in the performance of Talb-e-Ishhad. Lastly contends that the learned High Court has arrived at the wrong conclusions without applying the law applicable thereto and the same is the result of mis-reading and non-reading of evidence, therefore, the same may be set at naught.

5. On the other hand, learned counsel for the respondents defended the impugned judgment by stating that the learned High Court has passed a well reasoned judgment, which is based on correct appreciation of the evidence available on the record, therefore, the same needs no interference. Contends that the evidence of Zafar Iqbal, Postman (PW-1) clearly reveals that the notice of Talb-e-Ishhad was affected only on one defendant namely Muhammad Bashir, therefore, such service was not a service in the eye of law.

6. We have heard learned counsel for the parties at some length and have perused the available record with their able assistance.

7. There is no denial to this fact that the right of pre-emption is a very weak right. To succeed in a suit for pre-emption the first and the foremost condition is that the plaintiff has to plead that before filing of suit he had 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 there must be specific time, date and place of knowledge pleaded in the plaint. Thereafter, the same shall be followed by sending of notice through registered post, which shall be served on the defendants. The learned High Court has rightly held that if performance of single talab skips or not proved, the superstructure and edifice of the suit falls on the ground. It was the claim of the predecessor-in-interest of the appellants Sardar Muhammad that he came to the knowledge of the disputed sale on 23.12.2003 at about 01:00 pm while he was sitting in front of his drawing room in Chak No. 293/GB. Anwar Ahmed (PW-5) came to him and informed about the disputed sale to which he promptly alleged

his right of pre-emption and therefore made Talb-e-Muwathibat. However, his stance was controverted by the respondents/defendants who said that they had purchased the property from Mst. Ameena Begum etc. Balqees Bibi and Mumtaz Bibi were real sisters of the plaintiff Sardar Muhammad while Ameena Begum was her sister-in-law. Rashid and Arshad were his real nephews while Samina was his niece and being closely related to the said Mst. Ameena Begum etc, the plaintiff knew about the sale of the disputed property. Ashiq Ali (DW-3) was attesting witness of the sale mutation No. 1072 dated 17.11.2013 whereby land measuring 37 kanals 9 marlas was sold to the respondents/defendants. He in categorical terms stated that the sale consideration was paid in the presence of the plaintiff. The said Ashiq Ali had no enmity with the plaintiff nor had he any blood relations with the defendants. Anwar Ahmed (PW-5) was tenant/lessee of the plaintiff, who used to cultivate the agricultural land of the plaintiff situated in his khewat. This fact was also admitted by the plaintiff. In this eventuality, the evidence of said Anwar Ahmed is not free from doubt. To prove the notice of Talb-e-Ishhad, although the plaintiff had produced Zafar Iqbal, Postman as PW-1. However, a bare perusal of his statement shows that the notices were not directly delivered to the defendants Taj Muhammad and Raj Muhammad. The postman stated that it was defendant Muhammad Bashir, who had received the notices on behalf of the other two defendants Taj Muhammad and Raj Muhammad. Similarly, the notice sent to Abdul Jabbar, defendant, was received by defendant Abdul Ghafoor. This fact was also admitted by the plaintiff himself in paragraph 5 of his amended suit filed by him before the learned Trial Court. In a similar case reported as Munawar Hussain Vs. Afaq Ahmed (2013 SCMR 721) this Court has held as under:-

> "So far as Talb-e-Ishhad is concerned, admittedly the service on one of the two petitioners-defendants/vendees namely Muhammad Akram was not personally effected and according to learned counsel for the respondent, it was effected on his brother and co-vendee Munawar Hussain appellant. The afore-referred service is not a service in the eyes of law. It is not the case of respondent/plaintiff either that service of notice of Talb-e-Ishhad on the said vendee was made through registered post acknowledgement due. The contention that service on the co-

> vendee should be presumed as service in law is not backed by any provision of law and therefore, is not tenable."

8. In Mir Muhammad Khan Vs. Haider (PLD 2020 SC 233) the pre-emptor could not prove that the notice of Talb-e-Ishhad was ever served on the vendee. The five members bench of this Court categorically held that "it fell upon the pre-emptor in the case to prove that the notice had been delivered. By failing to prove the same or even producing the postman who allegedly delivered the notice, the pre-emptor failed to establish the sending or receipt of the notice for the performance of Talb-e-Ishhad." In view of the law laid down by this Court, it was the plaintiff/pre-emptor who had to prove that the notice had been delivered to all the defendants but he himself admitted that same was not the case. The service of Talb-e-Ishhad is a prerequisite and if the performance of the same is not proved beyond any shadow as well as in the prescribed form, then the whole structure falls on the ground. In these circumstances, the learned High Court has correctly appreciated the material aspects of the case and the conclusions drawn are in line with the guidelines enunciated by this Court on the subject. Learned counsel for the appellants has not been able to point out any legal or factual error in the impugned judgment, which could be made basis to take a different view from that of the learned High Court.

9. For what has been discussed above, this appeal having no merit is dismissed and the impugned judgment passed by the learned High Court is upheld meaning thereby that the judgment and decree of the learned Trial Court dated 07.11.2009 shall remain intact.

JUDGE

JUDGE

Islamabad, the
6th of April, 2023
Approved For Reporting
Khurram