JUDGMENT SHEET
THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Before:
Mr. Justice Muhammad Humayon Khan

Civil Revision No. S-212 of 2004

Riaz Hussain **…Applicant**

Versus

Muhammad Akbar Khan and another **…Respondent No. 1**

For the Applicant	:	Mr. Parkash Kumar, Advocate
For the Respondent No. 1	:	Mr. Abdul Ghafoor Hakro and Mr. Yahya Arbab Hakro, Advocates
On Court Notice	:	Mr. Allah Bachayo Soomro, Addl. Advocate General Sindh
Dates of Hearing	:	02.11.2026, 11.11.2026 and 16.11.2026
Date of Judgment	:	23.11.2026

JUDGMENT

Muhammad Humayon Khan, J.: These proceedings have arisen in the backdrop of a pre-emption claim on Shop measuring 42 square yards, bearing C.S. No. F/630/1, Ground Floor, near Circular Building, Risala Road, Hyderabad ("suit property"). The pre-emption claimant is the Respondent No. 1, who filed F.C. Suit No. 256 of 1998 against the Applicant (purchaser) and the Respondent No. 2 (owner/seller) for pre-emption and permanent injunction. The suit was before the learned Senior Civil Judge-I, Hyderabad.

2. In his suit, the Respondent No. 1 pleaded as follows:

i) The Respondent No. 1 and his brother, Muhammad Asghar Khan (not a party) purchased the upper floor of a house bearing C.S. No. F/630-A, measuring 73.7 square yards in Ward-F, consisting of C.S. No. F/630 and F/630/1 in Khokhar Mohalla, near Society, Hyderabad, by Registered Sale Deed dated 23.09.1984.

ii) The Respondent No. 2 owned the suit property, and the upper floor of the said shop is the house of the Respondent No. 1 and the staircase of the house is passing towards the Eastern side of the suit property whereas the drainage of the said house is passing through the suit property.

iii) The Respondent No. 1 is therefore a participator in the immunities and appendages and has the right of way and right to discharge of water. Accordingly, he has the status of shafi-i-khilat.

iv) The Respondent No. 1 has the right of pre-emption as he is the owner of the adjoining immovable property on the Eastern side and the upper floor of the suit property. Therefore, he is also shafi-i-jar and has the right of pre-emption.

v) The Respondent No. 1 and the Applicant and the Respondent No. 2 are Sunni Muslims and governed by Hanafi sect of the Muhammadan law.

vi) The Respondent No. 1 is doing poultry business at Lajpat Road, Hyderabad, since his father's time.

vii) On 08.07.1998, the Respondent No. 1 was sitting at his shop along with Ghulam Sarwar who is doing the same business in Hyderabad.

viii) At about 11:00 am, one Muhammad Ayaz Shaikh, who is also known to the Respondent No. 1 being a resident of the same Mohalla, informed the Respondent No. 1 that the Respondent No. 2 has sold the shop on the ground floor bearing No. F/630/1, and in possession of Mr. Mirza Ghaiasuddin, Advocate, to the Applicant.

ix) The Respondent No. 1 was surprised and on information he immediately, then and there and without any delay declared his intention and insisted on his right of pre-emption immediately on receiving the information of sale of the suit property and made talb-e-muwasibat that he is prepared to purchase the said shop as he has the right of pre-emption over it.

x) The Respondent No. 1 thereafter took the said Ghulam Sarwar and Muhammad Ayaz Shaikh to the Respondent No. 2 who is the owner

of Hydery Hotel near Circular Building, Hyderabad, and was sitting there.

xi) The Respondent No. 1 informed the Respondent No. 2 that he has just come to know about the purchase of the suit property by him and without any delay made talb-i-ishhad and declared his intention to purchase the suit property and stated that he is prepared to pay the consideration to him for which he has purchased.

xii) The Respondent No. 1 specifically recalled that he has already made talb-e-muwasabat at his shop at Lajpat Road, Sabzi Mandi, West Katcha, Hyderabad, without delay and that he received the information of sale from Muhammad Ayaz Shaikh.

xiii) The Applicant affirmed the sale in his favour from the Respondent No. 2 but refused to sell the suit property to the Respondent No. 1. Ghulam Sarwar and Muhammad Ayaz Shaikh were present at the time of the demands and refusal by the Applicant.

xiv) The Respondent No. 1 thereafter enquired from the office of the Sub-Registrar, Hyderabad, and came to know that the Respondent No. 2 has sold the suit shop to the Applicant through Registered Sale Deed dated 06.06.1998 for Rs. 100,000/-.

xv) The Respondent No. 1 is prepared to purchase the suit property from the Respondent No. 2 and the Applicant and pay the price along with expenses. The Applicant and the Respondent No. 2 are under the law bound to sell the suit property to the Respondent No. 1. Hence the suit.

3. The Respondent No. 2 filed his written statement and denied the case of the Respondent No. 1. He denied all the talbs, denied the right of pre-emption, denied the claimed status of the Respondent No. 1 and stated that the parties are shias by sect and that the property was sold by him to the Applicant for Rs. 350,000/-. He prayed for dismissal of the suit. The Applicant also filed his written statement in the same terms and prayed for the dismissal of the suit.

4. From the pleadings of the parties, the learned Senior Civil Judge framed six (6) issues which are as follows:

i) Whether the suit is maintainable under the pre-emption law?

ii) Whether plaintiff has right of pre-emption as he is shafi-i-jar?

iii) Whether plaintiff has made demands i.e. talab-e-mowasibat and talab-e-ishhad as prescribed under Muhammadan law?

iv) Whether plaintiff is entitled for any relief?

v) What should the decree be?

vi) Whether plaintiff is participator in immunities and appendages and has a right of way and right to discharge the water and is shafi-i-khalit?

5. At the trial, the Respondent No. 1 examined himself and the said Ghulam Sarwar and Muhammad Ayaz. On the other hand, the Applicant examined himself while the Respondent No. 2 did not appear. Finally, by Judgment dated 30.10.2001 and Decree dated 05.11.2001, the learned Senior Civil Judge decreed the suit of the Respondent No. 1. The findings recorded in the impugned Judgment are as follows:

i) Although Muhammad Asghar Khan being co-sharer has not been joined in the property, since the Respondent No. 1 is the head of the family, the right of pre-emption lies in him. It is not necessary that all the members of the family be joined but rather only one member is fit for claiming the right of pre-emption. Therefore, the suit is maintainable.

ii) The Respondent No. 1 has the right of pre-emption as shafi-i-jar and shafi-i-khalit.

iii) There is omission on the part of the Respondent No. 1 to make talb-e-muwasibat but, in light of the judgment in PLD 1985 Karachi 161 (g), the same cannot be fatal to the right which has been acquired under Muhammadan law.

iv) The Respondent No. 1 is entitled to the relief claimed and the suit was decreed.

6. Against the Judgment and Decree of the learned Senior Civil Judge, the Applicant filed Civil Appeal No. 198 of 2001 under s. 96 of the CPC which came up before the learned Additional District Judge-IV, Hyderabad. By Judgment dated 12.08.2004 and Decree dated 21.08.2004, the learned Additional District Judge dismissed the appeal after hearing the parties and maintained the Judgment and Decree of the learned Trial Court.

7. The Applicant thereafter preferred this revision application under s. 115 of the CPC before this Court against the concurrent findings of the learned Courts below. It was heard on a number of dates and by Order dated 10.05.2018 was dismissed by an earlier Single Bench of this Court in the absence of the Counsel for the Applicant. Against the Order dated 10.05.2018, the Applicant filed a restoration application which too was dismissed by Order dated 04.10.2018. Against the Order dated 04.10.2018, the Applicant filed Civil Petition No. 1133-K of 2018 before the Supreme Court of Pakistan and which was allowed by their Lordships in the following terms by Order dated 23.07.2020:

> "4. In the circumstances, we are of the view that a case for interference is made out. The petition, therefore, is converted into appeal and is allowed with the result that both the impugned orders dated 4.10.2018 and 10.5.2018 are set-aside. It is expected that the revision petition would be decided in the shortest possible time preferably within a period of 90 days."

8. The matter came up before the present Bench on 02.11.2026, 11.11.2026 and 16.11.2026 when learned Mr. Parkash Kumar for the Applicant, learned Mr. Abdul Ghafoor Hakro along with Mr. Yahya Arbab Hakro for the Respondent No. 1 and learned Mr. Allah Bachayo Soomro, the Additional Advocate General Sindh were heard by me and by means of my Order dated 16.11.2026 the revision was reserved for judgment.

9. Learned Counsel for the Applicant argued, inter alia, that the impugned Judgments and Decrees are illegal and based upon misreading and nonreading of evidence. He contended that the Respondent No. 1 failed to establish the mandatory talabs required for establishing his right of pre-emption. He stated that the requirements of neither talb-i-muwasibat nor talb-i-ishhad could be dispensed with by the Respondent No. 1. He argued that the learned Courts below seriously misinterpreted and ignored the law in holding that omission to mention talb-i-ishhad at the time of making the alleged demand was not fatal to the case of the Respondent No. 1. He argued that compliance of the requirements of making talbs is mandatory and he further contended that where the initial demand by talb-i-muwasibat is not proved, the subsequent making of talb-i-ishhad does not cure the defect. He further contended that performance of talbs is mandatory in nature and not mere formality. Learned Counsel referred to the evidence and pointed out that in the plaint the Respondent No. 1 stated that the talbs were performed at Hyderi Hotel, while during evidence, the Respondent gave a different version and stated that the alleged talb had been performed at Iqbal Hotel which is inconsistent and mutually contradictory. He contended that the date and time of the talbs has not been established by the Respondent No. 1 and the same is fatal. He finally argued that the concurrent findings recorded by the learned Courts below are within the scope of revision, relied on a number of reported cases and prayed for the revision to be allowed and the concurrent findings to be set-aside and consequently for the suit of the Respondent No. 1 to be dismissed.

10. On the other hand, learned Counsel for the Respondent No. 1 opposed the revision and supported the impugned Judgments and Decrees. He argued that the grounds of revision and the arguments advanced at the bar by the Applicant are beyond the scope of revision under s. 115 of the CPC. He contended that no misreading or nonreading of evidence nor any material illegality or irregularity have been pointed out by the Applicant in the concurrent findings of the learned Courts below. He argued that the Applicant has claimed in his written statement that he is

shia by sect, however, he has failed to prove the same and accordingly the settled principle is that a Muslim is presumed to be of the Hanafi sect unless proved otherwise by good evidence. He further argued that the sect of the vendor and the pre-emptor governs the pre-emption suit and not that of the vendee. He contended that the Applicant himself accepted that the staircase attaches to the wall of the suit property and as such the said evidence has gone unrebutted and cannot be challenged by the Applicant at this stage. He further argued that the learned Courts below have arrived at the correct conclusion that the talbs were duly proved inasmuch as all the necessary particulars have been pleaded whereas the failure to plead the specific particulars of time, place or witnesses of the talbs is not prejudicial as the same were matters of evidence. He referred to the contradiction between Iqbal Hotel and Hyderi Hotel and contended that the same was a minor discrepancy as both hotels are located adjacent to each other. He contended that the sale price was admitted to be Rs. 100,000/- according to the sale deed and as such the Applicant is bound by it. He further argued that minor discrepancies are not material. He repeated the assertion that the Respondent No. 1 is entitled to the right of pre-emption under the status of shafi-i-khalit and shafi-i-jar. He referred to the evidence of the Respondent No. 1 and contended that all the requirements of talbs under the pre-emption law have been duly proved by the Respondent No. 1. He argued that the omission to refer to the talb-i-muwasibat at the time of making talb-i-ishhad is not fatal to the case of the Respondent No. 1. He relied on a number of cases and finally prayed for the dismissal of this revision with costs.

11. The learned Counsel also filed their written arguments which were taken on the record. They also filed multiple reported authorities which have also been taken on the record and will be referred to when needed. Learned Counsel for the Applicant relied upon twenty cases while learned Counsel for the Respondent No. 1 relied upon more than thirty cases in his written arguments and filed five more under the cover of a statement.

12. The following points for determination arise in this case:

1) Whether the Respondent No. 2 (Vendor/Owner) is a shia by sect and what is the effect of his sect upon the right of pre-emption?

2) Whether the findings of the learned Courts below with respect to mentioning and proof of the particulars of talb-i-muwasibat and talb-i-ishhad are based upon misreading and nonreading of evidence and misinterpretation of the law?

Point No. 1

13. The first point that both the learned Courts below have not considered in their respective judgments is the sect of the Respondent No. 2 and its effect. Accordingly, it is necessary to independently give findings on the same.

14. The reason is that in two situations, namely where the pre-emptor is Shia and the vendor is Sunni, and where the vendor is Shia and the pre-emptor is Sunni, the Courts apply a logical juristic inference based upon the rule of reciprocity that the Shia law of pre-emption is to be applied. The rule of reciprocity explains this principle in the following manner:

i) A follower of the Shia sect cannot claim the wider rights and benefits under the Sunni law while remaining exempt from the corresponding burden. Indeed, a follower of the Shia sect cannot be compelled to follow the beliefs, laws and doctrines of the Sunni sect. Similarly, a follower of the Sunni sect cannot impose the corresponding burden upon the follower of the Shia sect.

ii) The same goes for a Sunni. A follower of the Sunni sect cannot be forced to follow the laws entailed under the Shia law and so cannot claim the wider benefits and rights thereunder as well. The example of this would be the same as when a Sunni would not be allowed to gain the shares of inheritance under Shia law, and a Shia would not be entitled to the rules of inheritance under Sunni law.

iii) Therefore, logically, the parties cannot be made to follow obligations relating to pre-emption in a non-reciprocal manner.

However, the sect of the buyer does not matter in enforcing the right of pre-emption between the pre-emptor and the vendor/owner.

15. In this regard, reference may foremost be made to s. 248 of Mulla's Principles of Mahomedan Law, 16th Edition, by M. Hidayatullah and Arshad Hidayatullah which reads (emphasis added):

> "**248. Sect-law as governing pre-emption. –** (1) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shias, the right of pre-emption is governed by the Shia law.
>
> (2) If the vendor is a Sunni, and the pre-emptor is a Shia, the right of pre-emption is, according to the Allahabad and Hyderabad High Courts, governed by the Shia law, on the principle of reciprocity explained in the notes to sec. 234 above.
>
> (3) **If the vendor is a Shia, and the pre-emptor is a Sunni, then according to the Allahabad and Hyderabad High Courts, the right of pre-emption is governed by the Shia law**; but according to the Calcutta High Court, it is governed by the Sunni law.
>
> (4) The personal law of the buyer is immaterial in these cases."

16. It will be seen that s. 248(3) of Mulla's Principles notes the position of the Allahabad High Court and the Hyderabad High Court respectively in **Pir Khan v Faiyaz ((1914) ILR 36 ALL 488)** and **Pasha Begum v Syed S. Hasan ((1955) Hyd. 676)** as also the conflict view in **Jog Deb v Mahomed ((1905) 32 Cal. 982)** delivered by the Calcutta High Court. However, the conflict position of the Calcutta High Court has not been followed in Pakistan and our courts tend to apply the principle of reciprocity followed in **Pir Khan** and **Pasha Begum (supra)**. The view in **Pir Khan (para 8)**, declining to follow the Calcutta High Court's judgment in **Jog Deb**, is as follows:

> "8. …As was pointed out in that case, the courts must apply the rule of justice, equity and good conscience. In the present case, if the

vendee and pre-emptor were to change places, the Shia could not pre-empt by reason of his own law, i.e. his own law would be applied to him. In justice when he sells his own law should be applied…"

17. That view is also available in **Qurban Husain v Chote and others ((1900) ILR 22 Allahabad 102, paras 6 to 8)** which is in the following terms (emphasis added):

"6. It is true that according to the *Hanaifeea* law it is not necessary that the pre-emptor should be of the same religion as the vendor. On p. 477 of Baillie's Digest, 2nd edition, that learned author says: - 'Islam on the part of the pre-emptor is not a condition.' He goes on to say, 'so that *zimmiees* (i.e., infidels subject to and under the protection of a Muhammadan Government) are entitled to exercise the right of pre-emption as between themselves or against Mooslims.' Those words as between themselves are to my mind an indication that though a person need not be of the same religion as the vendor to entitle him to take advantage of the *Haifeea* law of pre-emption, he must yet belong to a class of persons against whom a right of pre-emption can be enforced.

7. At p. 793 of his exhaustive judgment in the Full Bench case Gobind Dayal v. Inayatullah (1885) I.L.R. 7 All. 775, Mahmood J., observed: -- '**The rights and obligations created by that law (i.e. the Muhammadan law of pre-emption), as indeed by every other system with which I am acquainted, must necessarily be reciprocal.' It has not, I repeat, been shown to my satisfaction that it was ever the intention of the *Hanifeea* law to confer a right of pre-emption on a neighbour regardless of the fact that no reciprocal right could be enforced against him.**

8. The case relied on by the lower Courts, namely, Pir Bakhsh v. Sughra Bibi, Weely Notes, 1892, p. 34, differs from the present case, for there the plaintiff and the vendor were both Shias, whilst the vendee was a Sunni. But the following observation of the learned Judge who decided that case appears to me to be in point: --- **'I do not think that any rule of justice, equity and good conscience exists that would enable us to allow the plaintiff, who from the fact of her being Shia necessarily abhors the doctrines of the Sunni**

> **school, to take advantage of the law of that school in that regard to pre-emption, and to maintain the pre-emption suit, any more than if the plaintiff stood in the position of the defendant-vendee she could not be made liable to the doctrines of the Sunni school if the present vendee stood in the position of the plaintiff pre-emptor.'** For the above reasons I am of the opinion that this appeal cannot succeed, and I would dismiss it with costs.

18. A Division Bench of this Court was faced with a similar question in **Allah Bux v Jano and others (PLD 1962 (WP) Karachi 317, para 11)**. The Division Bench favoured the aforementioned view and relied upon Mohammadan Law in India and Pakistan by Babu Ram Verma, 3rd Edition, page 544, to sum up their holding. Accordingly, in **Allah Bux** the following view was given:

> "13. …
>
> 'The sect-law applicable to pre-emption cases shall be as follows: -
>
> (1) Where the vendor and the pre-emptor are both of one sect (either Sunni or Shia) the law of their sect shall apply.
>
> (2) If the pre-emptor is a Shia and the vendor is a Sunni, the Shia Law shall apply.
>
> (3) If the pre-emptor is a Sunni and the vendor is a Shia, the Shia Law shall apply."
>
> 14. Keeping in mind these authorities and the principles laid down by the Allahabad High Court in the cases referred to above, we are of the opinion that this case is governed by the rules of Shia law and, therefore, the respondents could not pre-empt the sale on the grounds urged by them. The learned District Judge was not right in decreeing their suit. Accordingly, we accept this appeal with costs throughout set-aside the judgment and decree of the District Judge and dismiss the respondents' suit."

19. Subsequently, in **Mumtaz Hussain and another v Muhammad Achar and 2 others (1991 CLC 209)** and **Iftikharuddin v Jamshed K.A. Marker and 11 others (PLD 1995 Karachi 608)**, the findings of the Division Bench of this Court in

Allah Bux have been followed. I may note that a somewhat different position is available in **Muhammad Saeed v Mst. Hajiani Noor Bai and others (1983 CLC 1883)** whereby a Single Bench of this Court has held that the sect of the vendor will prevail for purposes of pre-emption, however, the said judgment is not binding as **Allah Bux** was decided by a Division Bench and will therefore be binding to the extent of the inconsistency.

20. In these circumstances, I hold that where either the pre-emptor or the vendor/owner of the pre-empted property is a follower of the Shia sect, the law of pre-emption under the Shia jurisprudence will be applied on the principle of reciprocity.

21. The reason the question of sects of the pre-emptor and vendor, being either Shia or Sunni, is so relevant is because under the Shia law, the right of pre-emption cannot be claimed by reason of vicinage (shufa-i-jar) or participation in immunities and appendages (shufa-i-khalit), thereby leaving pre-emption to be claimed only under the status of shafi-i-sharik (as a co-owned in undivided property). This is noted in s. 249(2) of Mulla's Principles and endorsed in the cases of **Muhammad Saeed (supra; para 7(C))** and **Muhammad Ali v Muhammad Yaqoob and another (2018 YLR 2552 (GB))**. The relevant portion of the case of **Muhammad Ali** is para 14 which is reproduced below for clarity:

> "14. From bare reading of contents of aforesaid provisions of Mohammedan law it transpires that Shia Muslim personal law does not recognize the pre-emption right on the ground of vicinage or participation in the appendages of suit property i.e. Shafi Khalit and Shafi Jar in contemplation of section 249(2) of Mohammedan law…"

Accordingly, if either the vendor or the pre-emptor are proved to be followers of the Shia sect, it will have to follow that the right of pre-emption would not be available under the status of either shafi-i-jar or shafi-i-khalit.

22. In the present case, it appears that the Applicant (purchaser) and the Respondent No. 2 (owner/vendor) have both claimed to be Shias by sect. The Respondent No. 2, who is the owner of the suit property, has stated as follows in his Written Statement (Exh-11; pp. 65 to 70 of this Court's file) at para 7:

> "7. That para-7 of the plaint is denied. It is denied if the parties are Sunny muslims or are governed by Hanafi Sect of Mohammadan Law. It is submitted that all the parties are Shias."

The Applicant's sect as purchaser is irrelevant, but for all that matters, he has also claimed to be Shia in his Written Statement (Exh-13; pp. 71 to 75 of this Court's file). The Respondent No. 1 never once denied the written statement or its verification having been made by the Respondent No. 2 or the Applicant.

23. The Respondent No. 1 has conversely stated that the parties are Sunnis belonging to the Hanafi school of thought and has further controverted the claim that the Respondent No. 2 is a Shia and has stated as follows in his examination-in-chief (Exh-30; pp. 77 to 83): "I and defendants belongs to Sunny Sect of Muhammadan Law." However, in my view, the Respondent No. 1 is in no position to speak to the sect of the Respondent No. 2. It is settled law that the faith, sect and school of thought of a person are personal matters and the declaration by one person as to their own faith, sect and school of thought are to be taken at face value without entertaining any contrary claim by a third person. To my mind, a voluntary declaration of one's faith by that person during their lifetime is not open to challenge and no successful challenge can be made to the same by a third person. This aspect was considered at length by the Supreme Court in **Mst. Chanani Begum (Deceased) through LRS v Mst. Qamar Sultan (2020 SCMR 254, para 6)** and the following was held by their Lordships:

> "6. …There could be no better evidence made available to the Court then the declaration of such person to resolve the controversy regarding his/her faith. It is also to be kept in mind that the question of faith being very personal to oneself and a declaration of faith by

> one has to be accepted on its face value which, of course, is not open to challenge from anyone, therefore, such voluntary declaration even if made in some previous proceeding is of great persuasive value after the death of such person and, therefore, could be validly used in the subsequently instituted proceedings to determine the faith of such person. In the circumstances we are of the view that neither the bar as pleaded applies to such declaration nor it could be discarded."

I may note that in **Mst. Chanani Begum**, the question before their Lordships was relating to a voluntary declaration of faith by a person in earlier court proceedings after their death which was used in later proceedings. However, in my view, the present case is one level above the facts in **Mst. Chanani Begum** for the reason that the Respondent No. 2 has in the present proceedings himself professed himself to be of the Shia faith in his own written statement duly verified under oath.

24. In another case, **Muhammad Saeed (supra, para 7(b))**, an earlier Single Bench of this Court has considered the situation in the context of a pre-emption matter and under analogous circumstances. The vendor/owner of the pre-empted property there had been alleged to be of the Shia sect by a third party but the same was not claimed by the vendor/owner himself in their written statement. Accordingly, the Court held that the vendor/owner was best placed to speak to his own sect and school of thought and the same could not be imputed by a third person. The relevant observation of the Court is as follows:

> "7. (b) …I am also inclined to hold that a third person cannot arrogate upon himself the right to determine the faith of any other person. It was for respondent No. 3, the vendor to have made averment in his written statement to the effect that he being a Shia, no right of pre-emption could have been claimed in the circumstances of the instant case."

Further reference may be made to **Mumtaz Hussain and another v Muhammad Achar and 2 others (1991 CLC 209 Karachi, para 9)**, wherein another Single Bench of this Court has aptly observed as follows (emphasis added):

> "9. **Any person who professes Islam is a Muslim. The Muslims are again divided in two sects, viz. 'Sunni' and 'Shia'. Each sect is governed by its own laws. The sects can be renounced by a Muslim, either male or female at any time after attaining the puberty. It, therefore, follows that due credence should be given to the testimony of a person who claims to profess a particular sect and the Courts should not start with any presumption against such person. Basar (P.W-3) was the only person to speak about the sect to which he belonged and a third person cannot arrogate upon himself the right to determine the faith of other.** This view was in fact taken by Ajmal Mian, J (as he then was) in the case of Muhammad Saeed v. Mst. Hajiani Noor Bai and others, reported in 1983 CLC 1883. The grounds which prevailed upon the Courts below for rejecting the evidence of Basar (D.W-3) on this point were both feeble and faint and I am constrained to take a contrary view."

25. Learned Counsel for the Respondent No. 1 argued that a Muslim is presumed to be a follower of the Hanafi school of thought until the contrary is proved and, in this regard, he cited the cases of **Ghulam Shabbir and others v Mst. Bakhat Khatoon and others (2009 SCMR 644)**, **Abdul Rehman and others v Mst. Allah Wasai and others (2022 SCMR 399)**, **Pathana v Mst. Wasai (PLD 1965 SC 134)** and **Allah Bux (supra)**. However, I am afraid these cases do not advance the case of the Respondent No. 1 for the reason that they all are on the principle that there is an initial presumption that a Muslim practices the Sunni sect, however, the said initial presumption is not related to a person who is alive and very much capable of speaking as to their own beliefs and faith. The presumption may be invoked as a juristic inference and enabling source of proof for a dead or absent person's faith and sect inasmuch as the general population of the Indo-Pak region is Sunni Muslim belonging to the Hanafi school of thought, but where a person is alive, present and available to speak to their religious beliefs and sect, there is no occasion to bring in an equitable presumption to fill an evidentiary vacuum that does not exist in the first place.

26. Now, it may well be (and without any doubt there may be many cases) where a person may lie as to their faith and beliefs for purposes of legal or other advantages, however, the same cannot be investigated by this Court once the person makes an outward declaration of their faith and beliefs. After an outward declaration, nothing further is left for the Court to explore as the inner workings of the heart of a person are a matter between that person and Allah Almighty. I am fortified in this view by the Sunnah and Ahadith of the Holy Prophet (SAW) as reported in authentic narrations. In **Sahih Muslim 96a (Chapter 41: The prohibition of killing a disbeliever after he says La ilaha illallah, Book 1: Book of Faith)** (accessible at <https://sunnah.com/muslim:96a>), the following Hadith is available (emphasis added):

> "It is narrated on the authority of Usama b. Zaid that the Messenger of Allah (ﷺ) sent us in a raiding party. **We raided Huraqat of Juhaina in the morning. I caught hold of a man and he said: There is no god but Allah, I attacked him with a spear. It once occurred to me and I talked about it to the Apostle (ﷺ). The Messenger of Allah (ﷺ) said: Did he profess" There is no god but Allah," and even then you killed him? I said: Messenger of Allah, he made a profession of it out of the fear of the weapon. He (the Holy Prophet) observed: Did you tear his heart in order to find out whether it had professed or not?** And he went on repeating it to me till I wished I had embraced Islam that day. Sa'd said: By Allah, I would never kill any Muslim so long as a person with a heavy belly, i. e., Usama, would not kill. Upon this a person remarked: Did Allah not say this: And fight them until there is no more mischief and religion is wholly for Allah? Sa'd said: We fought so that there should be no mischief, but you and your companions wish to fight so that there should be mischief."

27. Similarly, another authentic Hadith is available to the following effect **(Sahih Bukhari 4351; Chapter 61: Sending 'Ali and Khalid رضي الله عنهما to Yemen, Book 64: Military Expeditions led by the Prophet (pbuh); (Al-Maghaazi); <https://sunnah.com/bukhari:4351>):**

> “Narrated Abu Sa`id Al-Khudri: `Ali bin Abi Talib sent a piece of gold not yet taken out of its ore, in a tanned leather container to Allah's Messenger (ﷺ). Allah's Messenger (ﷺ) distributed that amongst four Persons: 'Uyaina bin Badr, Aqra bin H`Abis, Zaid Al-Khail and the fourth was either Alqama or Amir bin at-Tufail. On that, one of his companions said, "We are more deserving of this (gold) than these (persons)." When that news reached the Prophet (ﷺ) , he said, "Don't you trust me though I am the truth worthy man of the One in the Heavens, and I receive the news of Heaven (i.e. Divine Inspiration) both in the morning and in the evening?" There got up a man with sunken eyes, raised cheek bones, raised forehead, a thick beard, a shaven head and a waist sheet that was tucked up and he said, **"O Allah's Messenger (ﷺ)! Be afraid of Allah." The Prophet (ﷺ) said, "Woe to you! Am I not of all the people of the earth the most entitled to fear Allah?" Then that man went away. Khalid bin Al-Walid said, "O Allah's Messenger (ﷺ)! Shall I chop his neck off?" The Prophet (ﷺ) said, "No, for he may offer prayers." Khalid said, "Numerous are those who offer prayers and say by their tongues (i.e. mouths) what is not in their hearts." Allah's Messenger (ﷺ) said, "I have not been ordered (by Allah) to search the hearts of the people or cut open their bellies."** Then the Prophet looked at him (i.e. that man) while the latter was going away and said, "From the offspring of this (man there will come out (people) who will recite the Qur'an continuously and elegantly but it will not exceed their throats. (They will neither understand it nor act upon it). They would go out of the religion (i.e. Islam) as an arrow goes through a game's body." I think he also said, “If I should be present at their time I would kill them as the nations a Thamud were killed.”

It is seen from the above narration that the Holy Prophet (SAW) even did not assume the religious faith and belief of a person who openly disrespected him. The Ahadith reproduced above are with respect to assuming the faith and religious beliefs of hypocrites (munfiqoon). Consequently, if we as humans are not entitled to make assumptions as to, or challenge, the religious beliefs of hypocrites or disbelievers, then there can be no question as to the sect of a person who fully and vehemently claims to be a Muslim. The entire discussion again comes down to the fact that a

person is entirely liable to God Almighty for his or her religious beliefs, and they are equally liable to God if they falsify the same before other fallible human beings.

28. In these circumstances, I hold that the plea of the Respondent No. 2 in his Written Statement that he is a Shia is to be taken at face value. The Respondent No. 2 is very much alive and best placed to speak to his own sect and religious beliefs and accordingly neither this Court nor the Respondent No. 1 are entitled to investigate the same. The result of this is that one of the parties between vendor/owner and pre-emptor in the instant case (Respondent No. 2) is a Shia and accordingly the pre-emption claim would be dealt with under the Shia law. It follows that the pre-emption claim of the Respondent No. 1 under the status of shafi-i-khalit and shafi-i-jar is not maintainable and the suit is liable to be dismissed.

29. I hold that the learned Courts below have committed serious illegality and irregularity in not giving their findings on the sect of the Respondent No. 2 as per his voluntary claim in his Written Statement. The concurrent findings of the learned Courts below are liable to be set-aside on this point alone. **Point No. 1** is answered accordingly in these terms.

Point No. 2

30. Although Point No. 1 is dispositive on its own, I am inclined to also give concise findings on Point No. 2 for completeness of the discussion and since the learned Courts below have focussed on this point. Challenge has been thrown specifically to the plea of talb-e-ishhad. In his plaint, the Respondent No. 1 has stated about having made talb-e-muwasibat in para 6 and then about talb-i-ishhad he pleaded as follows at para 7 (emphasis added):

> "7. **The plaintiff there-after [i.e. after making tab-i-muwasibat] took Ghulam Sarwar Jamali and said Muhammad Ayaz Shaikh and went to defendant No. 2 who is the owner of Hydery Hotel near Circular Building, Hyderabad and was sitting there.** The plaintiff informed him that he has just came to know about the

> purchase of suit property by him and without any delay made Ta[lb]-e-Ishhad he declared his intention to purchase the suit property and that he is prepared to pay the consideration to him for which he has purchased. The plaintiff specifically referred that he has already made Talb-e-Muwasabat at his shop at Lajpat Road, Sabzi Mandi, West Katcha, Hyderabad, without any delay when he received the information of sale of the suit property from said Muhammad Ayaz Shaikh."

31. However, in his examination-in-chief, he changed his version of visiting the Applicant at "Hydery Hotel" and stated that he visited another place called "Iqbal Hotel." The relevant portion of his examination-in-chief is reproduced below (Exh-30; pp. 77 to 83; emphasis added):

> "**Thereafter, I and Ghulam Sarwar Jamali along with Muhammad Ayaz came towards Riaz Hussain at Iqbal Hotel at Risala Road, Hyd: who meet with us** and I asked Riaz Hussain in presence of witnesses named above that now you have purchased the suit property and I intend to purchase the same because I have right to purchase the same…"

32. He was confronted about this position in his cross-examination wherein he attempted to improve his case and stated as follows:

> "Def. No. 2 have two hotel according to my knowledge one Hyderi and 2nd Iqbal Hotel, and he used to sit on both the hotels as per schedule. It is a fact that I stated in my plaint para-7 that I went along with PWs at Hyderi Hotel towards Riaz Hussain. It is incorrect to suggest that I did not come at Iqbal Hotel, but in fact Hyderi Hotel and Iqbal Hotel one adjacent to each other, we went 1st Hyderi Hotel and then Iqbal Hotel. Hyderi Hotel and Iqbal Hotel are adjoining to each other. It is fact that I not stated in my plaint that 1stly we went to Hyderi Hotel and then Iqbal Hotel."

33. On a plain reading of the examination-in-chief and cross-examination of the Respondent No. 1, it is clear that he has taken contradictory stands with respect to the place of making talb-i-ishad, in that he has claimed in one place (plaint) that the

talb was thrown at Hyderi Hotel while he has stated in his examination-in-chief that the same was made at Iqbal Hotel. Thereafter, when confronted in cross-examination, he attempted to improve his version by stating that both Hotels are stated adjacent to each other and in fact he first went to Hyderi Hotel and then to Iqbal Hotel. However, he has himself demolished his improvement by admitting that no such statement as to first going to Hyderi Hotel and then to Iqbal Hotel was made in the plaint.

34. Even the witnesses of the Respondent No. 1 have failed to support his version. The first witness for the Respondent No. 1 was Ghulam Sarwar (PW-1; Exh-35; pp. 85 and 87) who stated only about Iqbal Hotel in his examination-in-chief, whereas in his cross-examination he categorically stated that "[i]t is a fact that we did not went Hyderi Hotel but in fact we went to Iqbal Hotel." Even the second witness, namely Muhammad Ayaz (PW-2; Exh-36; pp. 89 and 91) did not support this version and stated that "[i]t is a fact that we did not went at the Hyderi Hotel." In **Allah Ditta through LRs and others v Muhammad Anar (2013 SCMR 866)**, the Supreme Court had a similar case wherein there was a material discrepancy in the evidence of witnesses as to the place of knowledge of the sale of pre-empted property (resulting in talb-i-muwasibat). Their Lordships placed great emphasis upon this discrepancy as to the place of knowledge and, while treating this as a "material discrepancy," held that the knowledge (and therefore talb-i-muwasibat) had not been proved. Accordingly, in view of the inconsistent and contradictory versions of the Respondent No. 1 and his witnesses, I have come to the conclusion that the Respondent No. 1 has failed to prove the place of making talb-i-ishhad and accordingly the talb is doubtful and not proved.

35. Apart from this, the Respondent No. 1 has even failed to prove in evidence or plead the specific time of making talb-i-ishhad in his plaint. In **Dr. Pir Muhammad Khan v Khuda Bukhsh and others (2015 SCMR 1243, para 19)** (also followed in **Mohammad Rafique v Gul Mohammad and others (2017 YLR 308 Karachi)**),

the Supreme Court while dealing with a pre-emption claim under the Muhammadan Law observed as follows:

> "16. …In the present case, apart from non-disclosure of the time, date and place of making talb-i-muwathibat and talb-i-ishhad, the names of two witneses of talb-i-ishhad were also not disclosed by the respondents in their pleadings…
>
> 19. …**Moreover, the use of word 'immediate' in the context of making talb-i-muwathibat and words the 'least practicable delay' in making talb-i-ishhad have their own connotation and significance, which has burdened the pre-emptor with some extra liability of showing complete promptness in making such demands rather than making talb-i-muwathibat in a casual manner and talb-i-ishhad in presence of two witnesses simpliciter.** Keeping in view these aspects, when we revert to the facts of the present case, we find that the two talbs were not made by the respondents in the required manner of vigilance and promptness."

This requirement of making talb-i-ishhad "with the lease practicable delay" is gathered from s. 236(2) of Mulla's Principles which provide as follows:

> "**236. Demands for pre-emption.—**No person is entitled to the right of pre-emption unless.
>
> (1) …
>
> (2) he has **with the least practicable delay** affirmed the intention, referring expressly to the fact that the *talb-i-mowasibat* had already been made, and has made a formal demand—
>
> (a) either in the presence of the buyer, or the seller, or on the premises which are subject of sale, and
>
> (b) in the presence at least of two witnesses. This formality is called talab-i-ishhad (demand with invocation of witnesses)."

36. In the plaint, the Respondent No. 1 has stated that after making talb-i-muwasibat he went to the Applicant and threw talb-i-ishhad, according to which the

Court can give him a fair benefit and assume that he went on the same date as the talb-i-muwasibat, i.e. 08.07.1998. However, the failure of the Respondent No. 1 to speak any word as to the specific time on which he made talb-i-ishhad is fatal to his case for the reason that it was his duty to prove that he made the second talb "with the least practicable delay." In his examination-in-chief, he has stated as follows:

> "Thereafter, I and Ghulam Sarwar Jamali along with Muhammad Ayaz came towards Riaz Hussain at Iqbal Hotel at Risala Road…"

The evidence of the two witnesses is also silent on the specific time of talb-i-ishhad. It is already well-settled that the burden of proving the requisite talbs lies on the pre-emptor: **Abdul Majeed and others v Haji Haq Nawaz (2026 SCMR 138)** and **Bashir Ahmed and another v Mushtaq Ahmed (2007 SCMR 895)**. Apart from this, under Arts. 118 of the Qanun-e-Shahadat Order, 1984, the burden of proving the affirmative fact of the talbs lied on the Respondent No. 1 being the pre-emptor and, since no evidence was produced with regard to the approximate time of talb-i-ishhad and the interval between the two talbs by the Respondent No. 1, the burden of proof never shifted and was never discharged. Accordingly, in my view the Respondent No. 1 has failed to prove talb-i-ishhad on the touchstone of "lease practicable delay."

37. Even assuming *arguendo* that talb-i-ishhad was made in due time, the Respondent No. 1 and his witnesses failed to depose as to whether, while making the second talb, the Respondent No. 1 had specifically and expressly referred to the making of talb-i-muwasibat. It has been stated in para 7 of the plaint that such reference was expressly made by the Respondent No. 1, however, this plea was not sought to be proved during evidence. In **Muhammad Khan v Manzoor Ahmed and another (2005 SCMR 1956)**, the Supreme Court had declined the pre-emption claim for the same reason, namely that the pre-emptor had failed to give affirmative and cogent evidence as to express reference to the first talb while making the second one. The relevant observation of the Supreme Court is available at para 4 and reads as follows:

> "4. When we called upon Mr. Jatoi, learned Advocate Supreme Court for the petitioner to convince us and to show from the record whether there was any misreading or non-reading of material evidence, learned counsel took us through the evidence of petitioner Muhammad Khan and his two sons Ahmad Yar and Muhammad Ayub. We are, however, unable to discern any evidence tending to have reference in the second demand to first demand. Since the petitioner himself is silent on this point, both of his witnesses also remained quiet. There is hardly any iota of evidence to establish that while making Talb-e-Ishhad petitioner had remotely referred to the first demand…"

A similar view is expressed in **Anwar Ali v Shah Nawaz and others (PLD 1989 Karachi 246)** by an earlier single Bench of this Court. Further reference may be made to s. 236(2) of Mulla's Principles of Muhammadan Law. In this regard, learned Counsel for the Respondent sought to rely upon a single bench case, **Hussain Bux v Mir Muhammad and 3 others (PLD 1985 Karachi 161)**, wherein a contrary view is indeed available to the effect that the failure to mention about the first talb when making the second will not render the right of pre-emption ineffective, however, the said view is no longer binding in view of the Supreme Court's judgment in **Muhammad Khan (supra)** and the subsequent view of this Court in **Anwar Ali (supra)**.

38. In this regard, the relevant portions of the evidence recorded by the Respondent No. 1 and his witnesses are reproduced below, at times by way of necessary repetition:

Respondent No. 1	**PW-1 Ghulam Sarwar (Exh-35)**	**PW-2 Muhammad Ayaz (Exh-36)**
"Thereafter, I and Ghulam Sarwar Jamali along with Muhammad Ayaz came towards Riaz Hussain at Iqbal Hotel at Risala Road, Hyd: who meet with us	"Thereafter, I, Muhammad Ayaz and Muhammad Akbar came at Iqbal Hotel where Riaz Hussain meet with us, Muhammad Akbar asked Riaz Hussain	"Thereafter, I along with Gh: Sarwar Jamali and plaintiff Muhammad Akbar went towards Riaz Hussain at his hotel namely Iqbal near Circular

and I asked Riaz Hussain in presence of witnesses named above that now you have purchased the suit property and I intend to purchase the same because I have right to purchase the same…"	that how you have purchased the shop because I have to right to purchase the shop, such fact also told to the witnesses by Muhammad Akbar earlier. Riaz Hussain replied that he had purchased the same therefore, did not sell/return."	Building Hyderabad, where Riaz Hussain meet with us. Where Muhammad Akbar asked Riaz Hussain that he had right of pre-emption and has right to purchase the same because suit shop. is behind my house, and further asked that he is ready to pay the consideration amount to him. Riaz Hussain refused to return the same/sold the same. Thereafter we returned back."

39. It is quite clear from a reading of the above that no evidence whatsoever has been recorded by the Respondent No. 1 or his witnesses to the effect that, while making talb-i-ishhad, he had specifically and expressly referred to talb-i-muwasibat (i.e. the first talb). The failure of doing so is fatal to the case of the Respondent No. 1 as the making of talb-i-ishhad has gone completely unproved.

40. In these circumstances, I am of the view that findings of the learned Courts below that the demands (talbs) were fully proved by the Respondent No. 1 are based upon a misreading and nonreading of the pleadings and evidence and misinterpretation of the law. In my considered view, the Respondent No. 1 has failed to establish talb-i-ishhad for multiple reasons. As such, I answer **Point No. 2** in the affirmative.

41. I am not unmindful that this revision has been made against concurrent findings of two learned Courts below, however, in a number of cases it has been held that concurrent findings are not set in stone and are prone to interference where the same are based upon misreading or nonreading of evidence or misinterpretation or non-application of the law. Reference may be made to **Mst. Faheeman Begum**

(Deceased) through LRs and others v Islam-ud-Din (Deceased) through LRs and others (2023 SCMR 1402, para 7), **Haji Wajdad v Provincial Government through Secretary Board of Revenue, Government of Balochistan and others (2020 SCMR 2046)** and **Abdul Sattar v Mst. Anar Bibi and others (PLD 2007 SC 609, para 6)**. In the circumstances of the case, I am of the view that a case warranting exercise of revisional jurisdiction under s. 115 of the CPC has been made out.

42. It follows that this revision application is allowed with the result that the concurrent Judgments and Decrees of both the learned Courts below are set-aside and F.C. Suit No. 256 of 1998 filed by the Respondent No. 1 is dismissed. There shall be no order as to costs.

JUDGE

Approved for reporting

Abdullahchanna/PS