IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

IInd Civil Appeal No. S – 03 of 2006

Date of hearing: 07.02.2022

Date of judgment: 07.02.2022

Mr. Manoj Kumar Tejwani, Advocate for the Appellants.
Mr. Abdul Qadir Shaikh, Advocate along with Mr. Abdul Aziz Shaikh Advocate for Respondents.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. – Through this IInd Appeal, the Appellants have impugned judgment dated 14.3.2006 passed by the 1st Additional District Judge, Sukkur, in Civil Appeal No.54 of 2004, whereby while dismissing the Appeal, the judgment of the Trial Court (2nd Senior Civil Judge, Sukkur) dated 26.3.2004 passed in F.C. Suit No.30 of 2003 dismissing the Suit of the Appellant has been maintained.

2. Heard both the Learned Counsel and perused the record.

3. As per record the Appellants had filed a Suit for pre-emption and injunction, in respect of the Suit property on the ground that the Appellant being sole owner of the adjacent properties and the Appellant being Shafi-i-Jar was entitled for the purchase of the same as a pre-emptor, whereas, instead of this, the property was sold by Respondent No.4 to Respondents No.1 to 3; hence, the Suit. The Appellants case is that as required in law, he had immediately, in presence of witnesses had demanded Talb-e-Muwathibat by exercising the right of pre-emption; and also made the second demand as soon as it came into his knowledge that the property had been sold through registered sale deed dated 11.1.2003. It is an admitted position that insofar as the plaint is concerned, the Appellant failed to disclose the names of the witnesses and the learned trial Court had non-suited the Appellant on this ground along with various other defects in the case of the Appellant and evidence led by him. Secondly, the learned trial Court also non-suited the Appellant on the ground that the property which was being claimed under pre-emption was not exactly adjacent to the Appellants property as there was a strip in between the two. It would be advantageous to refer to the finding of the trial court which reads as under;

> "It is observed that the defendant No.4 has sold the suit land to the defendants Nos.1 to 3 through registered sale deed and the defendants have produced the said registered sale deed It is also observed that after purchase of the suit land the defendants Nos.1 to 3 are in possession and enjoyment of the same and in this regard the defendants have produced 23 photographs of the suit land and the plaintiff has not denied the said photographs and the plaintiff claimed that he has right of pre emption over the suit land and has made Talab-I-Mowasibat and Talab-I- Ishhad according to law but in the present matter the defendants have vehemently denied the claim of plaintiff, therefore, heavy burden lies upon the plaintiff to prove that he has right of pre emption over the suit land and has made the Talabs-I- Mowasibat and Talab-I-Ishhad according to the law but in the present matter neither the plaintiff has produced any documentary proof to show that the suit land is adjacent to his land and even otherwise the plaintiff has not disclosed the names of two witnesses in whose presence he has demanded the above talabs as the above both talabs should be made before the witnesses being necessary ingredient for their validity held it would be proper that names of such witnesses were also specified in the plaint and mere omission to mention names in plaint might not lead to adverse inference except in certain specific circumstances and no reliance having been placed on evidence of chance witness, Talab-e-Ishhad had not been established to have been made in presence of two witnesses (Reliance is placed on 1985 CLC (Karachi) 2327 and moreover no person is entitled to the right of pre emption unless he has declared his intention to assert the right immediately on receiving information of the sale as in the present matter the defendants have clearly stated that the plaintiff was well knowledge about the sale of the suit land prior to 15.1.2003 and even after the knowledge of the sale of the suit land the plaintiff has neither approached to them for purchase of the suit land nor demanded any talabs and the plaintiff has not given any explanation in this respect and mere simple statement of the plaintiff that he has demanded both the talabs according to law has no value in the eye of law as the pre emptor (plaintiff) is entitled enforce his right of pre emption in respect of the suit land. Moreover it has come on the record that the plaintiff has not proved that the suit land is adjoining/adjacent to his land as such the plaintiff does not have the pre emption right as the plea of the defendants is that there is strip in between the suit land the land of the plaintiff therefore, according to the defendants that the plaintiff is not Shafi Jar and in support of their contention defendants have examined their witness Hamzo who deposed that there is 1and in between the land of plaintiff and the suit land which belongs to M.F.R.0 and the land of plaintiff is not adjacent with the suit land and he has also denied the suggestions of learned counsel for the plaintiff in this regard. Under these circumstances the plaintiff has miserably failed to prove that he has right of pre emption over the suit land and he has made the above talabs according to law. Hence these issues are decided in the negative".

4. However, it is a matter of record that the Appellate Court overturned the findings of the trial court in respect of the land claimed as not being adjacent as well as in respect of non-mentioning the names of the witness in the pleadings and decided the same in favor of the Appellant and instead decided the appeal on its merits. It is a matter of record that insofar as the Respondents are concerned, they never challenged such finding of the Appellate Court in favor of the Appellant, perhaps for the reason that the Appellate Court, despite these findings in favor of the Appellants, dismissed the Appeal on merits. It would be advantageous to refer to the finding of the Appellate Court on merits of the case which reads as under;

> "I have perused the evidence given by the witnesses. First of all it is necessary to mention here that both the witnesses are closely related to the appellant and there are material contradictions in the evidence of witnesses and the appellant on the point of talabs which have already been given above for example on the point of first demand the claim of appellant is that he was present in S.No.31 alongwith

witnesses Qadir Bux and Muhammad Ibrahim when respondent No.1 came there and disclosed about the purchase of property but witness Muhammad Ibrahim as Exh.40 has deposed that he and Qalandar Bux had gone to the Yousuf who brought them on the land. The question is that when respondent No.3 without advance information had gone to the land of appellant and met with him how he came to know about the arrival of the respondent at the land and he arranged witnesses with him. Moreover the essential requirements of the talabs as observed by the superior courts have not been fulfilled in this matter. There are following requirements of talab-i-Ishhad.

(a) That the Talab should be made against the seller, if the property sold is still in his possession, or against the purchaser, or upon the property sold

(b) That Talab should be made in the presence of not less than 2 witnesses.

(c) That while making Talab-e-Ishhad, reference is required to be made to the Talab-e-Muwasibat. Mulla's Principles of Mohammedan Law, 1977 Pakistan Edn.S.326 and Muhammad Luqman V. Amir Ali PLD 1969 Dacca 64 and other Mohamedan Law Talab-I-Muwasibat (immediate claim) and Talab Ishhad (claim by affirmation and taking to witness) can be performed simultaneously although ordinarily required to be made separately".

In this matter witnesses have not stated categorically that at the time of second demand reference of first demand was given by the appellant which is one of the essential requirements of law. The reliance is placed on (I) PLD 1992 Quetta 69 (II) PLD 1978 (Karachi) 732 (III) PLD 1987 (Karachi) 515 (IV) 2005 SCMR 1231.

For the reasons enumerated above I have reached to the conclusion that appellant/plaintiff has failed to prove the demands according to law, therefore, point No.2 is answered in negative. Therefore, in view of the findings on the point No.2 appeal stands dismissed, however, with no order as to costs".

5. Perusal of the aforesaid findings clearly reflects that the Appellants had failed to lead any convincing evidence in support of their claim, whereas, the said evidence, including that of the Appellant himself, along with the two witnesses (which is the material evidence in pre-emption cases) has been consistently contradictory and hearsay. The Appellant in his cross-examination has stated that *"it is not a fact that Defendant No.1 to 3 have purchased the suit land through secretly"*. Again he has stated that ***"it is not a fact that on 15.1.2003 Ali Hasan came to me and demanded the vacant possession of the Suit land"***. He has further deposed that *"it is fact that the date was not mentioned on which I had approached to the defendants Nos.1 to 3 for re sale of the suit land"*. Appellants witness Muhammad Ibrahim (PW-2-Exh-40) in his examination in chief has stated that *"on 15.1.2003 I alongwith Qadir Bux and Muhammad Yousuf went on S.No.31, it was about 11-.00 a.m. and at that time Ali Hasan came there and disclosed that he alongwith defendants No.2 to 3 had purchased the*

suit land from the defendant No.4 and asked plaintiff to vacate the land in dispute which are in his possession..”. This deposition of the Appellants witness contradicts the Appellant himself who while responding to the same question has stated that *it is not a fact that on 15.1.2003 Ali Hasan came to me and demanded the vacant possession of the Suit land*. In a similar manner the second witness Qadir Bux PW-3-Exh-41 in verbatim has also contradicted the Appellants evidence. While confronted, the learned Counsel for the Appellant has made a feeble attempt to argue that the said evidence must be read as a whole and not in piece meal. To that it may be observed, that to a certain extent, it is true that the evidence is always to be read as a whole; however, considering the fact that this is a case of pre-emption and the crucial element involved is the talab and its timing along with credible evidence. This can only be proved when corroborated with the evidence of witnesses to such a talab. This is not the case in hand; rather it is the opposite as the very time and date of presence of Respondents is not supported by the two witnesses of the Appellants. In that case it does not amounts to reading the evidence in peace meal.

6. The Hon’ble Supreme Court in a very recent unreported case of *Chaudhry Riaz Ahmed v Munir Sultan Malik (Civil Appeal No.1798 of 2016)* vide judgment dated 12.11.2021 has dealt with a similar situation and has been pleased to dismiss the appeal, wherein, the Revisional Court had set-aside the concurrent findings of the two courts below through which the Suit was decreed. It has been observed as under;

> 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-Muwat hi bat and Talb-e-Ishhad. For proving Talb-e-Muwat hi bat 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-Jshhad 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.

7. In view of hereinabove facts and circumstances of this case, since the Appellants have failed to point out any illegality or misreading in the orders passed by the forums below, therefore, by means of a short order on 7.2.2002 Appeal was **dismissed** and these are the reasons thereof.

J U D G E

Abdul Basit