IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Civil Revision No. S – 216 of 2010

**(Sachedino (deceased) through his LRs v.
1st.Additional District Judge, Ghotki & others)**

Date of hearing : 11-04-2022
Date of Decision : 13-05-2022

Mr. Tariq G. Hanif Mangi, Advocate for the Applicants
Mr. Sarfraz A. Akhund, Advocate for Respondents 3 to 5
Mr. Mehboob Ali Wassan, Assistant Advocate General

JUDGMENT

Muhammad Junaid Ghaffar, J. – Through this Civil Revision, the Applicant has impugned judgment dated 25.8.2010 passed by 1st Additional District Judge, Ghotki, in Civil Appeal No. 16 of 2004, whereby, the Appeal has been dismissed and Judgment dated 08.01.2004 passed in F.C Suit No.53 of 1993 by Senior Civil Judge, Ghotki, has been maintained, through which the Suit of the Applicant was dismissed.

2. Heard learned Counsel for the parties and perused the record.

3. It appears that the Applicant had filed a Suit for possession through pre-emption and injunction on the ground that he was co-sharer in the suit property, which was sold to defendants 1 and 2 by defendant No.3, whereas, a right of pre-emption was created in his favour as he was willing to purchase the said share sold to the defendants. The learned trial Court settled the following issues;-

1. Whether the sale dated 29.3.1992 was made in contravention of Martial Law Regulations No.64, 64/A and 115. If so, what is its effect?

2. Whether plaintiff made necessary demands as required under the Law?

3. Whether the suit of the plaintiff is not maintainable according to law?

4. Whether suit is undervalued and deficiently stamped?

5. Whether the plaintiff is not entitled to pre-empt the suit land?

6. What should the decree be?

Additional issues

1. Whether the suit is privately partitioned? If so, to what effect?

2. Whether the defendant No.3 i.e. vendor is muslim belong to Shea sect? If so, to what effect?

4. After recording evidence, the trial Court came to the conclusion that the Applicant had failed to prove his case. Accordingly, the Suit was dismissed, which has been maintained in Appeal through impugned judgment; hence this Civil Revision Application.

5. Learned Counsel for the Applicant has raised only one legal proposition that as per record and evidence it was established that the Applicant had made the first demand i.e. *Talab-i-Muwathibat* immediately and therefore, in view of the judgment reported as *1985 C L C Karachi 1037 (Budho v. Karim Bux)*; it was not mandatory to even call for the second Talab i.e. *Talab-i-Ishhad* nor it was required to be proved. He has placed further reliance on the case of *Noor Muhammad v. Abdul Ghani (2000 SCMR 329)*. This proposition has been controverted by the Respondents Counsel by placing reliance on a subsequent judgment reported as *PLD 2020 Supreme Court 233 (Mir Muhammad Khan and 2 others v. Haider and others)* and has argued that the judgment referred to by the Applicant's Counsel does not apply either on facts or in law.

6. The argument of the Applicant's Counsel that if a pre-emptor has established and proved the first demand or *Talab-i-Muwathibat*, then he is not required in law or in facts to establish and prove the second Talab i.e. *Talab-i-Ishhad* and his reliance on the aforesaid cases does not appear to be a correct approach; rather is misconceived in view of the latest / subsequent judgment of a five member bench of the Honourable Supreme Court in the case of ***Mir Muhammad Khan*** **(*supra*)** as relied upon by Respondents Counsel. In this judgment, the Honourable Supreme Court has considered the entire case law to this effect and has also discussed the judgment in the case of *Haji Noor Muhammad (Supra)* which has been relied upon by the Applicant's Counsel and has been pleased to approve a subsequent judgment in the case of *Mian Pir Muhammad and another v. Fakeer Muhammad and others (PLD 2007 SC 302),* whereby, the

judgment in the case of ***Haji Noor Muhammad (Supra)*** was already disapproved. In the case of ***Mian Pir Muhammad*** a five member bench of the Honorable Supreme Court had the occasion to examine this issue, including the issue that whether it was mandatory for a pre-emptor to disclose in his plaint the entire details of making the first demand i.e. *Talab-i-Muwathibat* along with the date, time and name of the witnesses. It was held as follows;

> 4. It is observed that great emphasis and importance is to be given to this word in making of Talb-i-Muwathibat and it is necessary that as soon as the pre-emptor acquired knowledge of the sale of pre-empted property he should make immediate demand for his desire and intention to assert his right of pre-emption without the slightest loss of time. According to the dispensation which has been reproduced hereinabove alter performing Talh-i-Muwathibat. in terms of section 13(2) of the Act, the pre-emptor has another legal obligation to perform i.e. making of Talb-i-Ishhad as soon as possible after making Talb-i-Muwathibat but not later than two weeks from the date of knowledge of performing Talb-i-Muwathibat, therefore, the question can conveniently be answered by holding that to give full effect to the provisions of subsections(2) and (3) of section 13 of the Act, it would be mandatory to mention in the plaint date, place and time of performance of Talh-i-Muwathibat because from such date, the time provided by the statute i.e. 14 days under subsection (3) of section 13 of the Act shall be calculated. Supposing that there is no mention of the date, place and time of Talb-i-Miwathihat then it would be very difficult to give effect fully to subsection (3) of section 13 of' the Act, and there is every possibility that instead of allowing the letter of law to remain in force fully the pre-emptor may attempt to get a latitude by claiming any date of' performance of Talh-i-Muwathibat in his statement in Court and then on the basis of the same would try to justify the delay if any, occurring in the performance of Talb-i-Ishhad. ***It is now a well-settled law that performance of both these Talbs successfully is sine qua non for getting a decree in a pre-emption suit.*** it may be argued that as the law has not specified about the timing then how it would be necessary to declare that the mentioning of the time is also necessary. In this behalf, it is to be noted that connotation of Talb-i-Muwathibat in its real perspective reveals that it is a demand which is known as jumping demand and is to be performed immediately on coming to know of sale then to determine whether it has been made immediately, mentioning of the time would be strictly in consonance with the provisions of section 13 of the Act. This Court in the case of Rana Muhammad Tufail v. Munir Ahmed and another (PLD 2001 SC 13), declined to grant leave to appeal maintaining the judgment of the learned High Court as there was four hours delay in making the Talb-i-Muwathibat from the time of receiving the knowledge of the sale. In the case of Mst. Sundri Bai v. Ghulam Hussain (1983 CC(sic) 2441) High Court of Sindh, held the delay of 1-1/2 hour, in making Talb-i-Muwathibat to he fatal to the scheme of Shufa when the pre-emptor was residing on the first floor while the purchaser /respondent was residing on the ground floor of the same building. In another case of Mst. Kharia Bibi v. Mst. Zakia Begum and 2 others (C.A. 1618 of 2003) this view was endorsed.

7. Since, there were a number of conflicting and overriding views of the Hon'ble Supreme Court on the said issue, once again the matter was taken up by the Hon'ble Supreme Court in the case ***Mir Muhammad Khan*** **(*supra*)** and it was held that the pre-emptor even under ordinary

procedural law has to comply with the relevant provisions of Civil Procedure Code including Order VI Rule 2 CPC to state all material facts necessary for the purposes of establishing a cause of action and in the context of the exercise of the right of pre-emption, he shall also disclose the date, time and place of performance of *Talab-i-Muwathibat*, which is the most material fact as all subsequent acts towards successfully exercising and enforcing the right of pre-emption are dependent on the first demand. It was further held that it therefore, stands to reason that the material and necessary facts required to prove the making of *Talab-i-Muwathibat* must be mentioned within the pleadings from the commencement of an action claiming a right of pre-emption so as to set out with clarity the case of the pre-emptor. As to the argument of Applicant's Counsel as noted above, the Hon'ble Supreme Court in para-19 of the said Judgment has been pleased to hold as under;-

> "19. In light of these findings, it is clear that the Petitioner in C.P.No.1084 of 2011 and the Appellant in C.A No.1711 of 2007 both failed to prove that they met the requirements for the performance of Talb-i-Muwathibat as per this Court's judgment in *Mian Pir Muhammad* (supra). Furthermore, the Appellant in C.A No.353 of 2013 also failed to prove the serving of notice of *Talb-i-Ishhad* required under Section 13(3) of the 1991 Act. The testimony of the witnesses produced by him also contradicted his claims regarding the performance of *Talb-i-Muwathibat* and cast doubt on his assertions regarding the fulfillment of all the demands required therein. It is settled law that if *Talb-i-Muwathibat* is not proved to have been made then the performance of *Talb-i-Ishhad* and all other requirements for a successful demand of pre-emption cannot be proven. ***Similarly, even if Talb-i-Muwathibat has been made in accordance with the law if any of the requirements for the performance of Talb-i-Ishhad are not fulfilled the suit for possession through pre-emption is bound to fail."***

8. It is also settled law that either way and notwithstanding the provisions of the Pre-Emption Act, (as are in force in Punjab and Khyber Pakhtunkhwa, whereas it is not codified in the Province of Sindh and Baluchistan and Muhammad Law is being followed in such cases) on the date of the filing of the suit even if no statutory law pertaining to pre-emption existed in the Province and the suit was to be filed and maintained in accordance with the Classical Islamic Law of Pre-emption, the requirement of proving and establishing a case is a sine qua non for exercising a right of pre-emption[1].

[1] Muhammad Ali v Mst. Humera Fatima (2013 SCMR 178)

9. Lastly, there are concurrent findings of facts recorded by the two courts below, and in absence of any exceptional circumstances, like misreading and non-reading of law or for that matter misapplication of law, which are completely lacking in this case, they are not to be interfered with ordinarily. In view of hereinabove facts and circumstances of this case and the law settled by the Hon'ble Supreme Court as above the contention of the learned Counsel for the Applicant appears to be misconceived and against the dicta already settled in the aforesaid case of ***Mir Muhammad Khan (supra)***. Accordingly, this Civil Revision Application does not merit any consideration and is hereby ***dismissed***.

Dated: 13.05.2022

Judge

ARBROHI