IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 66 of 2006

Abdul Majeed v. Muhammad Tahir Mujahid and others

Date of hearing: **17-01-2022**
Date of announcement: **01-04-2022**

Mr. Nishad Ali Shaikh, Associate of Mr. A. M. Mobeen Khan, Advocate for the Applicant.
Mr. Mumtaz Ali Jahangir Lashari, Advocate, holding brief on behalf of Mr. Manoj Kumar Tejwani, Advocate for Respondent No.1.

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** This Civil Revision Application has been filed by the Applicant impugning judgment dated 06-03-2006, passed by the District Judge, Sukkur in Civil Appeal No.41 of 2002, whereby, while dismissing the Appeal, judgment dated 19-06-2002 passed by 1st Senior Civil Judge, Sukkur in F.C. Suit No.22 of 1996, has though been maintained as to final conclusion regarding dismissal of the Suit filed by the Applicants; however, finding of the said Court in respect of Issue Nos.1 & 2 has been set-aside.

2. The Applicant being aggrieved has filed this Civil Revision Application against the above judgment of the Appellate Court; however, it may be noted that insofar as the Respondents are concerned, they have not impugned the said Appellate judgment, though apparently, there are certain findings in favour of the Applicant, whereby, the judgment of the learned Trial Court on various issues has been reversed; but since ultimately the Appeal has been dismissed, perhaps for that reason, the Respondents have not filed any Revision Application against the said judgment.

3. Both learned Counsel for the Applicant as well as Respondent No.1 have filed their written synopsis. I have gone through the same and perused the record.

4. It appears that the Applicant had filed a Suit before the 1st Senior Civil Judge, Sukkur for pre-emption and perpetual injunction against the Respondents. Respondent No.1 was the purchaser of property being pre-empted, whereas, Respondents No.2 to 11 were the sellers of the property in respect of which pre-emption right was claimed. Before the trial Court the said Respondents were declared Ex-parte and never came forward to

contest the Suit. The case of the Applicant was that the property in question was adjacent to the Applicant's property, and as soon as the same was sold through registered sale deed on 27-07-1995, he claimed a right of pre-emption immediately. The learned Trial Court had settled four (04) issues in the following terms:

1. *Whether the suit is not maintainable according to law?*
2. *Whether the plaintiff has right of pre-emption over the suit property?*
3. *Whether the plaintiff had made Talab-i-Mowasibat and Talab-i-Ishhad according to law?*
4. *What should the decree be?*

5. The finding of the Trial Court was against the Applicant in respect of all issues; however, the Appellate Court has overturned the same in favour of the Applicant in respect of Issues No.1 & 2 by holding that not only the Suit was competent; but even the right of pre-emption did exist in favor of the Applicant, notwithstanding the fact that mutation of property had not been recorded in his favor after death of this father as it automatically devolved upon him. Hence, for the present purposes, it is only Issue No.3 which is under dispute and by which the Applicant is aggrieved. It would be advantageous to refer to the finding of the learned Appellate Court on this main dispute, which reads as under:

> **"***Adverting to issue No. 3 it may be observed that this was the crucial of all issues. The learned Advocate for the appellant conceded that the appellant was not Shafi-Sharik (as claimed in the plaint) but was Shafi-Jar within the meaning of para/Section 231 of Muhammadan Law and being the Shafi-Jar, he was entitled to claim the pre-emption. Referring to the finding of the learned Judge on issue No.3 and the stance of the respondent No.1 in this behalf, he contended that as required under para/Section 236 of Muhammadan Law, two demands known as talab-i-mowasibat and talab-i-ishhad had been satisfactorily made. Elaborating his contention, he claimed that on learning about the sale in question, the appellant instantly asserted his right and affirmed the same without any least practicable delay in presence of two witnesses specifically referring therein to his earlier demand.*
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> *As against above, the learned Advocate for the respondent No.1 contended that since the right of pre-emption was a feeble and fragile one, it was incumbent upon the appellant to have expressly mentioned in the pleadings i.e (the plaint) every bit of the material fact such as the place where for the first time he gained the knowledge about the sale and the source through which he gained it. In support of his view he referred to rule 4 of Order VI CPC. Further according to him, any fact not mentioned in the pleadings but figuring in the evidence could not be legally considered. In support of such view he referred to the cases of Hakim Ali versus Muhammad Salim (1992 SCMR 46) and Basit Sibtain versus Muhammad Sharif (2004 SCMR 578).*
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> *Assailing the "demands" allegedly made by is the appellant, the learned advocate contended that the appellant had for the first time disclosed the place of gaining the knowledge about the sale, in his*

evidence but again he had not specifically named both the witnesses in it, and therefore, the logical conclusion was that he had failed to satisfy the requirement of law while asserting the right of pre-emption. It may be advantageous to reproduce hereunder para/Section 236 of the Muhammadan Law for the proper appreciation of the point.

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

On careful reading of the above para/Section, it would appear that the second demand i.e talab-i-ishhad has to be made in presence of not less than two persons. The appellant had although mentioned in the plaint that he made the said demand in presence of two witnesses (without naming them) and even if it is accepted that the appellant was not required to give the names of the witnesses in the pleadings as contended by his Advocate, on the basis of rule laid down in case of Haji Noor Muhammad versus Abdul Ghani and others (2000 SCM R 329), it would yet be noticed that he had not given the name of the witnesses in his evidence either. For the first time he took name of only one witness i.e Bahadur Khan in his evidence but he had not named any where if Jan Muhammad was also one of the witnesses in whose presence he made the second demand. He took the name of witness Jan Muhammad in his cross examination in a different context and that too in reply to a question put to him in the cross examination by the advocate for the respondent. It may be added here that it was witness Bahadur, who had named Jan Muhammad in his evidence but not the appellant himself as such. This omission on the part of appellant, in my view, was fatal to his claim. Further it has been observed that witness Bahadur appeared more vigilant than the appellant himself to make up the lacunae. However, it would be borne in mind that the evidence of witness Bahadur was recorded on a subsequent date and possibly he had been prompted to fill the gaps left by the appellant. Here I may refer to the case of Jadal versus Abdul Majeed and others (PLD 1978 Kar 732) where striking a note of caution as to strict observance of the manner of "the demands" a fairly successful claim for pre-emption, was turned down only for want of non-reference to the first demand. It only emphasizes that the demands have to be made strictly in accordance with its requirement. The situation in the present case does not appear to be much distinguishable. It is essential that the demand was made without any loss of time but it would appear from the evidence, on record, which has also been taken note of, by the learned Judge, that the appellant gained the knowledge on 06.09.1995 but made the demand on the second day i.e 07.09.1995, and it is here, in my considered vide that the appellant failed to satisfy that the demand were made in accordance with their original sprit as contemplated under the Mohammadan Law. Accordingly I have come to an irresistible conclusion that the demands were not made properly. That being so, the finding of the learned Judge on issue No.3 is maintained.

> *The upshot of the foregiong discussion is that the findings of the learned Judge on issue No. 1 & 2 are set aside and reversed while his finding on issue No.3 is maintained. In the ultimate analysis, however, it is held that the suit of appellant was rightly dismissed. The present appeal consequently fails and the same is dismissed. The parties are left to bear their own costs.***"**

6. Perusal of the aforesaid finding of the Appellate Court clearly reflects that the Applicant had firstly failed to plead the right of pre-emption and the Talab-i-Ishhad in his pleadings along with details of witnesses; however, even notwithstanding this deficiency, he in his evidence as well, failed to mention the names of the two witnesses as required under the Muhammadan Law. It further appears that while being cross-examined, he disclosed the names of the witnesses and that too was in a different context in response to some question put to him by the Respondent's Counsel. It further appears that apparently to cure such defect one of the witnesses of the Applicant came forward in his evidence to name the other witness and since the said evidence was recorded subsequently on a later date as that of the Applicant, therefore, such piece of evidence was correctly discarded by the Trial Court as well as by the Appellate Court. Apparently, the case of the Applicant was dismissed by holding that the Applicant had failed to make actual demands as required under the Muhammadan Law for claiming the right of pre-emption and to that there appears to be no exception; nor any illegality has been pointed out on behalf of the Applicants in appreciation of such evidence. The Plaintiff in his cross examination admitted that "*it is correct that I have not stated in my plaint that on first time, I acquired knowledge regarding sale of property in question on 6.9.1995 though my witness Bahadur. I have not stated in regarding time. Witness Bahadur is my nephew. Jan Muhammad is also my relative"*. He has further deposed that *"it is correct that I have not stated in my plaint that I have made second demand in presence of witnesses"*. On this piece of evidence, no case was made out by the Applicant to claim any right under pre-emption. Even if a benefit is granted to the Applicant by relaxing the rule as to non-disclosure of the two witnesses in his pleadings, the Applicant had also miserably failed to bring the same in his evidence, and therefore, no further discretion could have been exercised in favour of the Applicant. In the written arguments again, nothing has been brought on record as to the above observations on finding of fact recorded by the two Courts below.

7. It is settled that non-production of one of the witnesses of the notice of Talb-i-Ishad, by the party asserting the right of pre-emption would lead to

the conclusion that it has failed to prove the Talb-i-Ishad[1]. It is equally settled law that in the plaint the time, date and place of Talb-i-Muwathibat must necessarily be pleaded along with the source of information of the sale pre-empted[2]. If the Plaintiff fails to produce one of the alleged two witnesses of notice of Talb-i-Ishad, therefore in our view he failed to prove the Talb-i-Ishad[3]. Per settled law the performance of Talb is not a formality, rather it is substantial for the Plaintiff to prove Talbs in accordance with law, otherwise the Suit is defeated, whereas, in a Suit for pre-emption performance of Talbs is a sine qua non before filing of a Suit[4]. Lastly, in this case witnesses are also discrepant on other relevant details regarding time and manner the Talbs were made; contradictions are such in nature that stance taken by one witness cannot be accepted without first excluding the others and vice versa[5]; hence, the Courts below were fully justified in excluding their statements.

8. Lastly, it is needless to observe that a finding on a question of fact by the First Appellate Court based on appraisal of evidence and inference drawn therefrom could not be interfered with by the High Court under section 115, C.P.C. merely because the said Court on reappraisal could form a different opinion about the evidence based on different inferences drawn by it.[6] It is also settled law that a mere fact that another view of the matter was possible on appraisal of evidence, would not be a valid reason to disturb concurrent finding of fact in a Civil Revision[7]. It is further settled that High Court cannot upset finding of fact; however erroneous such finding is, on reappraisal of evidence and take a different view of such evidence[8].

9. In view of hereinabove facts and circumstances of this case, there appears to be no reason to interfere with the concurrent findings of the two Courts below to the extent of Issue No.3 which has been decided against the Applicant by the Trial Court as well as by the Appellate Court, and therefore, this Civil Revision Application does not merit any consideration and is hereby **dismissed** with pending application.

Dated: 01-04-2022

J U D G E

Abdul Basit

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[1] Nusrat Bibi v Nazir Akhtar (2015 SCMR 808)
[2] Muhammad Anwar v Safeer Ahmed (2017 SCMR 404)
[3] Bilal Ahmad v Abdul Hameed (2020 SCMR 445)
[4] Sultan v Noor Asghar (2020 SCMR 682)
[5] Ahmad Baksh v Ameer Ali Khan (2020 SCMR 873)
[6] ABDUL QAYUM V. MUSHK-E-ALAM (2001 S C M R 798)
[7] Abdul Ghaffar Khan v Umar Khan (2006 SCMR 1619)
[8] Muhammad Feroz v Muhammad Jamaat Ali (2006 SCMR 1304)