Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

R.A No.S-18 of 2015

Applicant	:	Muhammad Yousuf s/o Khair Muhammad, **t**hrough Mr. Jamshed Ahmed Faiz, Advocate
Respondents No.1&4:		Nemo
Province of Sindh:		**T**hrough Mr. Ahmed Ali Shahani Assistant Advocate General
Date of hearing	:	**11.09.2023**
Date of Decision	:	**02.10.2023**

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("**the Code**"), the Applicant has impugned Judgment and decree dated 06.01.2015, passed by III-Additional District Judge, Mirpur Mathelo ("**the appellate Court**") in Civil Appeal No.01 of 2013, whereby, the Judgment dated 01.12.2012 and decree dated 05.12.2012 passed by Senior Civil Judge, Ubauro ("**the trial Court**") in F.C. Suit No.111 of 2010, through which the suit of the applicant was dismissed has been maintained by dismissing the Appeal.

2. Briefly stated the facts of the matter are that the applicant/plaintiff instituted a suit for possession through pre-emption, seeking enforcement of his right of pre-emption against the private respondents, regarding the sale of a portion of agricultural land admeasuring 09-00 Acres out S. Nos.168/3 (03-37), 168/1(04-00), 166/3(01-31), 166/1(04-00), 164/3 (04-00), 207/2(04-00), 167/4(03-37), 167/2(04-00), 167/1 (04-00), 168/4(03-37), 164/4(4-00), 166/2(02-16), 166/4 (3-37) situated in Deh Islam Lashari Taluka Ubauro District Ghotki (`**the suit land**`). According to the applicant/plaintiff, the suit land was sold by defendant No.4 in favour of defendant No.1 through a registered Sale Deed. The applicant/plaintiff claimed in the plaint that he, being a *Shaf-i-Sharik* (co-sharer in the suit land) and *Shaf-i-Khalit*

(having right way and water to his land), had a superior right of pre-emption against the respondents and had also made *Talab-i-Mowasibat* (immediate demand) on 20.9.2010 and *Talab-i-Ishhad* (demand by establishing evidence) in the presence of two witnesses on the same date, as per the law. It is also stated that the applicant/plaintiff approached defendant No.1 (buyer) at his residence, asking him to transfer the suit land by way of a registered Sale Deed in his favour, but he refused once and for all; thus, he filed the suit.

3. The respondent/defendant No.1 filed his written statement and denied the assertions of the applicant/plaintiff by stating that he purchased the suit land from defendant No.4 in the month of June 2006 through oral agreement, which is prior to the applicant becoming co-sharer with the defendant No.4. It is further stated that the suit land partitioned at the site since long according to Photostat copy of registered Sale Deed annexed by the applicant with the plaint, he become co-sharer with other four persons in the suit land in the year, 2007 and June, 2009 without notice and knowledge of defendant No.1.

4. Defendants No.2 to 5 did not turn up, and accordingly, they were proceeded against *exparte* by the trial Court.

5. On the divergent pleadings of the parties, the learned trial court framed the following six issues:-

i. Whether suit is maintainable under the law?
ii. Whether the plaintiff has cause of action to file the suit?
iii. Whether the plaintiff made demands as required under the law?
iv. Whether the plaintiff has got superior right of pre-emption by Shaf-i-Sharik and Shaf-i-Khalit?
v. What should the decree be?

6. To establish his case, the plaintiff examined himself as PW-1 at Ex.47; he produced registered Sale Deeds, Mutation

entries as Sale Deed in respect of the present sale transaction at Exhs.47/A to E; PW-2 Altaf Hussain at Exh.48; PW-3 Qamardin at Ex.48, and then the plaintiff closed his side vide statement at Ex.49.

7. Defendant No.1 Nizamuddin examined himself as DW-1 at Exh.52; DW-2 Mirchoo Tarat at Exh.53, and then defendant No.1 closed his side vide statement at Ex.54.

8. After examining the evidence produced by both the parties and hearing both the parties counsel, the trial Court vide Judgment dated 01.12.2012 and decree dated 05.12.2012 dismissed the suit of the applicant, which was challenged through Civil Appeal No.01 of 2013, but the appellate Court also dismissed the same vide Judgment and decree dated 06.01.2015.

9. None has appeared on behalf of Respondents No.1 & 4 despite issuance of notices through all modes of service, including publication in 'daily Kawish' dated 06.06.2023, and service was held good vide order dated 11.08.2023.

10. At the very outset, learned Counsel representing the appellant contended that the impugned judgments and decrees passed by both lower Courts are based on conjectures and surmises; besides, the same suffered from misreading and non-reading of evidence as well as not based on documentary and oral evidence available on record, hence cannot be sustained. It is contended that the learned trial Court has failed to consider while deciding issue No.1 that the plaintiff has successfully proved that he has the right of pre-emption; besides failed to consider while deciding issue No.2 & 4 that the plaintiff/applicant is the owner and co-sharer in the suit land, hence superior right of pre-emption over the suit land. It is further argued that the trial Court and the Appellate Court did not consider the facts of the case and dismissed the suit by denying the right of pre-emption. Lastly, it is submitted that both the judgments and decrees passed by learned lower Courts suffer from gross illegalities and irregularities not sustainable

under the law and are liable to be set aside. In support of his contention, learned Counsel for the Applicant has placed reliance upon the case law reported as **1998 SCMR 2102, 1997 MLD 1017, 2014 CLC 98, PLD 2000 Karachi 112, PLD 1978 Karachi 732 & PLD 1991 CLC 209**.

11. Conversely, the learned A.A.G., while refuting the contention, argued that the Revision is not sustainable under the law and it is a case of concurrent findings, and in Revisional Court, the facts recorded by the inferior Courts cannot be disturbed; therefore, this Revision is not maintainable under the law.

12. The arguments have been heard at length, and the available record has been carefully evaluated with the able assistance of the learned Counsel for the parties. I have also scrutinized the exactness and meticulousness of the judgments and decrees of both the lower Courts with a fair opportunity of the audience to the learned Counsel for the Applicant to satisfy me as to what has acted by the Courts below in the exercise of their jurisdiction either illegally or with material irregularity.

13. Before dilating upon the merits of the case, the scope of the Revisional jurisdiction of the High Court is limited, especially when there are concurrent findings of fact recorded by the trial as well as appellate Court. There are numerous case laws on this point; however, if any, can be made to the case of Mst. **FAHEEMAN BEGUM (DECEASED) THROUGH L.RS AND OTHERS VS. ISLAM-UD-DIN (DECEASED) THROUGH L.RS AND OTHERS**, reported in **2023 SCMR 1402**, in which Apex Court has held as under: -

> *"If the concurrent findings recorded by the lower fora are found to be in violation of law, or based on misreading or non-reading of evidence, then they cannot be treated as being so sacrosanct or sanctified that cannot be reversed by the High Court in revisional jurisdiction which is pre-eminently corrective and supervisory in nature. In fact, the Court in its revisional jurisdiction under*

> *section 115 of the Code of Civil Procedure, 1908 ("C.P.C."), can even exercise its suo motu jurisdiction to correct any jurisdictive errors committed by a subordinate Court to ensure strict adherence to the safe administration of justice. The jurisdiction vested in the High Court under section 115, C.P.C. is to satisfy and reassure that the order is within its jurisdiction; the case is not one in which the Court ought to exercise jurisdiction and, in abstaining from exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law, or with material irregularity, or by committing some error of procedure in the course of the trial which affected the ultimate decision. The scope of revisional jurisdiction is restricted to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality in the Judgment of the nature which may have a material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law."*

Similarly, in the case of **HAJI WAJDAD V. PROVINCIAL GOVERNMENT THROUGH SECRETARY BOARD OF REVENUE GOVERNMENT OF BALOCHISTAN, QUETTA AND OTHERS reported in 2020 SCMR 2046**, it was held by the Apex Court that:

> *"There is no cavil to the principle that the Revisional Court, while exercising its jurisdiction under section 115 of the Civil Procedure Code, 1908 ("C.P.C."), as a rule is not to upset the concurrent findings of fact recorded by the two courts below. This principle is essentially premised on the touchstone that the appellate Court is the last Court of deciding disputed questions of facts. However, the above principle is not absolute, and there may be circumstances warranting exception to the above rule, as provided under section 115, C.P.C. gross misreading or non-reading of evidence on the record; or when the courts below had acted in exercise of its jurisdiction illegally or with material irregularity".*

14. On examining the pleadings and impugned Judgments passed by the Courts below, the pivotal point which needs to be addressed in order to reach a just decision is that: -

> "Whether the applicant/plaintiff has established his pre-emptive right in accordance with Muhammadan Law and both the Courts below

were not justified in dismissing the suit of applicant/plaintiff...?"

15. Before going into the evidence and case of the parties, it is necessary to have a glimpse of the pre-emption of a Muslim under Muhammadan Law. In Pakistan, the claim from pre-emption, as far as Provinces of KPK and Punjab are concerned, is now governed by the law which is called Punjab Pre-emption Act, 1991 (previously it was Act I of 1913) and Khyber Pukhtunkhwa Pre-emption Act, 1987 (previously it was N.-W.F.P. Act XIV of 1950). The name of *"Khyber Pukhtunkhwa"* was substituted vide Khyber Pakhtunkhwa Act No.IV of 2011. There is no statutory law on pre-emption as far as Provinces of Balochistan and Sindh are concerned. Therefore, here, law of pre-emption will be governed, if there is an established custom or according to the Islamic Law. Keeping in view the principles laid down in the case titled as ***Government of N.-W.F.P. Through Law Secretary v. Malik Said Kamal Shah (PLD 1986 SC 360)***, Case of ***Suo Motu Shariat Review Petition (PLD 1990 SC 865)***, Case of ***Haji Rana Muhammad Shabbir Ahmad Khan v. Government of Punjab Province, Lahore (PLD 1994 SC 01)*** and in view of Article 227 of the Constitution of Islamic Republic of Pakistan, the principles of pre-emption which are in consonance with the Injunctions of the Holy Qur'an and Sunnah may be made basis for a Muslim to exercise right of pre-emption in the Province of *Sindh*. Needless to mention here that it is the duty of the Sindh Government to consider the enforcement of law of pre-emption through an Act as proposed by the Islamic Ideology Council. Unless any Act on the law of pre-emption is introduced in the Province of Sindh, the principles of law of pre-emption as laid down by Faqihs and Scholars of Muslim Jurisprudence (in reference to the Hadiths) are very much applicable to the suits for pre-emption filed by the parties as it is not violative of any custom, usage or personal law. It is would be expedient to examine the Para -226 of the Muhammadan Law dealing with pre-emption, as under: -

> *"**226. Pre-emption:** The right of shufaa or pre-emption is a right which the owner of an immovable property possess to acquire by purchase another immovable property which has been sold to another person".*

16. Para-231 deals with the persons who may claim pre-emption. It reads as under: -

> "*The following three classes of persons and no others are entitled to claim pre-emption, namely:*
>
> ***(1)** a co-sharer in the property [**Shafi-i-Sharik**];*
>
> ***(2)** a participator in immunities and appendages, such as a right of way or a right to discharge water [**Shafi-i-khalit**] and*
>
> ***(3)** owners of adjoining immovable property **[shafi-i-jar]**, but not their tenants nor persons in possession of such property without any lawful title. A Wakif or Mutawalli is not entitled to pre-empt, as the Wakf property does not vest in him.*
>
> *The first class excludes the second, and the second excludes the third. But when there are two more pre-emptors belonging to the same class they are entitled to equal share of the property in respect of which the right is claimed.*
> ***Exception**: The right of pre-emption on the third ground, viz., that of vicinage does not extend to estates of large magnitude, such as villages and zamindaris, but is confined to houses, gardens and small parcels of land. The right, however, may be claimed by a co-sharer.*

17. Para-232 deals with the question when the right of pre-emption arises. It reads as under: -

> *"**Sale alone gives rise to pre-emption**,-The right of pre-emption arises out of a valid complete and bona-fide sale. It does not arise out of gift (hiba), sadagah, wakf inheritance, bequest or a lease even though in perpetuity. Nor does it arise out of a mortgage even though it may be by way of conditional sale; but the right will accrue, if the mortgage is foreclosed. An exchange of properties between two person subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands, on the same footing as a conditional sale; such an exchange does, not extinguish the ownership in the property and does not give rise to the right of pre-emption. But if one of the parties dies without cancelling the exchange, the transaction will mature*

into two sales and will give rise to the right of pre-emption."

18. Para-233 makes it clear that ground of pre-emption must continue until the decree is passed. It reads as under: -

> *"**Ground of pre-emption must continue until the decree is passed:** The right in which pre-emption is claimed - whether it be co-ownership or participation in appendages, or vicinage must exist not only at the time of sale, but at the date of the suit for pre-emption and it must continue up to the time the decree is passed. But it is not necessary that the right should be subsisting at the date of the execution of the decree or at the date of the decree of the Appellate Court. The reason is that the crucial date in these cases in the date of the decree of the Court of first instance. The pre-emptor must hold the land until the pre-emption matter is finally decided by the ultimate Court."*

19. Para-236 prescribes the condition to be fulfilled before a right of pre-emption is enforced. It reads as under: -

> *"**Demands for pre-emption** - No person is entitled to the right of pre-emption unless:-*
> ***(1)** He has declared his intention to assert the right immediately on receiving information of the sale. This formality is called Talab-i-mowasibat (literally, demand of jumping, that is, immediate demand), and unless;*
> ***(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 and has made of a formal demand: -*
> ***(a)** Either in the presence of the buyer or the seller or on the premises which are the subject of sale and*
> ***(b)** In the presence at least of two witnesses. The formality is called talab-i-ishhad(demand with invocation of witnesses).*
> ***Explanation I:** The talab-i-muwathibat should be made after the sale is completed. It is of no effect if it is made before the completion of the sale.*
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> ***Explanation V:** No particular formula is necessary either for the performance of talab-i-mowasibat or talab-i-ishhad so long as the claim is unequivocally asserted."*

20. Para-238, reads thus:

> *"**Tender of price not essential**. - It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the talab-iishhad; it is sufficient that he*

> *should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer.*"

21. Para-245 deals with suit for pre-emption and what the claim must include, which reads as under:-

> *"Where the property is sold to a single buyer, a person claiming to pre-empt must pre-empt the whole interest comprised in the transfer to the buyer. A suit which does not ask for pre-emption of the whole of such interest is defective, and should not be entertained."*

22. Para- 247 deals with legal device for evading pre-emption. It reads as under: -

> *"Legal device of evading pre-emption - When is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption."*

23. It is a background of this legal position. I have to appreciate the evidence on record in this case to find out whether the applicant/plaintiff has made out a case of pre-emption. The perusal of contents of plaint reveals that the two pleas regarding pre-emption are that the applicant/plaintiff is co-sharer *Shaf-i-sharik* and way of water to his land *Shaf-i-Khalit* having his pre-emptive right over the suit land which was sold by defendant No.4 in favour of defendant No.1. In this regard perusal of findings rendered by both the Courts below in impugned Judgments as well as documentary evidence in shape of registered Sale Deeds and mutation entries (Exh.44/A to 44/D) produced by the applicant shows that he is co-sharer in the suit land and way of water to his land, as clear from Para-231, referred to above under the Muhammadan Law of two clauses out of three i.e co-sharer in the property and the participator in immunities and appendages such as right of way or a right to discharge water.

In that context, the findings of both the Courts below are well reasoned and do not require any interference.

24. Now, to see that the applicant/plaintiff has made the demands in terms of Para-236 as set out above, which prescribes the conditions precedent to be satisfied before the Courts would uphold the claim for pre-emption. The requirements are: firstly, the person claiming pre-emption right has to declare his intention to assert the right immediately on receiving the information of the same. That is formally called *Talab-i-Mowasibat*. Secondly, with the least practicable delay, affirmed intention and making formal demand either in the presence of the buyer or seller or on the premises which are the subject of sale, in the presence of at least two witnesses. The second formality is called *Talab-i-Ishhad* (demand for invocation of witness). Only after that can he resort to the third step of filing a suit to enforce a pre-emptive right if the earlier two demands are not complied with. Therefore, it is clear that when a person wants to enforce the pre-emptive right that is conferred on him by the custom, the requirement prescribed under the law is to be strictly followed. The essence of this pre-emptive right is, firstly, that he must express his intention to purchase the property immediately upon receiving the information of the sale. Then, he has to follow such communication by making a demand to the purchaser or seller in the presence of two witnesses. If such a demand is not complied with, a cause of action arises for him to file a suit within one year from the date of sale to enforce the right of pre-emption. It is the requirement prescribed in the Muhammadan Law. Therefore, when the customary right is sought to be enforced in a Court of law, all the custom prescriptions must be meticulously followed.

25. In the instant case, the applicant/plaintiff has stated in his plaint that on 20.9.2010 at about 5:00 p.m., when he was available at his Otaq, where one Altaf Ahmed (**PW-2**) came and informed him that the suit land has been transferred by

defendant No.4 in favour of defendant No.1 by way of registered Sale Deed for an adequate sale consideration of Rs.180,000/-, on receiving such information he had immediately without loss of time then and there announced the purchase of suit land on the same price, declaring his intention to purchase the suit land exercising the superior right of pre-emption being *Shaf-i-Sharik* and *Shaf-i-Khalit.* However, Altaf Ahmed (**PW-2)** did not disclose the source of information or the name of any person who informed him about the sale. Altaf Ahmed also did not state in his examination-in-chief the source of information. However, he has stated in his cross-examination that he was informed by one friend regarding the transaction of the suit property at the office of Mukhtiarkar Mirpur Mathelo, and the name of his friend was Ali Jan. But, the name of said Ali Jan is neither mentioned in the plaint, nor the applicant/plaintiff examined him. At this stage, I am fortified with the case of **Farid Ullah Khan vs Irfan Ullah Khan (2022 S C M R 1231)**, wherein Apex Court has held as under: -

> *"8.2 Secondly, no person who could have testified that he had direct knowledge of the sale of the suit land has been examined by the respondent. All the evidence produced on the source of information on the sale of the suit land is hearsay. The brother of the respondent, Farman Ullah (PW-4), who had informed him about the sale of the suit land, could not tell the names of the persons who were talking about the sale of the suit land in the Chok of the village, except the one who had died. Thus, no one was examined by the respondent to substantiate the version of Farman Ullah (PW-4) of how he had come to know of the sale."*
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> *8.3 In Subhanuddin v. Pir Ghulam1, a case of similar facts, the person who had conveyed the information of the sale to the brother of the pre-emptor, who in turn passed it onto the pre-emptor, as is in the present case, was not produced as a witness. Based on the said facts, this Court held that the elements of Talb-i-Muwathibat had not been proved, with the following observation:*
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> *"7. It was the respondent's case that upon his return from Punjab he was informed about the sale by his brother (Taj Ali). Taj Ali, lives in the*

> *same house as the respondent, but did not know whether the respondent was in the village when the sale took place, nor when the respondent returned from the Punjab and that he was informed about the sale by his nephew Nazir. The initial burden of proof with regard to these facts (the conveying of the information of sale and price) lay upon the respondent, and to establish the same Nazir could have been called to give evidence, as the evidence in this regard (which was oral) was required to be direct and of the witness who saw, heard or perceived it himself (Article 71 of the Qanun-e-Shahadat Order, 1984), but Nazir was not produced as a witness. Consequently, an important and relevant fact was not proved by the respondent and on this ground alone the suit merited dismissal as Talb-i-Muwathibat is required to be made immediately upon learning of the sale".*
>
> *(Emphasis added)*

26. Now coming to the second demand, i.e. *Talb-i-Ishhad,* which was to be made as prescribed in Para No.236(2), which provides that plaintiff/he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *Talab-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 the subject of sale and (b) in presence at least of two witnesses and that formality is called *Talab-i-Ishhad* (demand with invocation of witnesses). In this regard, the applicant/plaintiff **(PW-1)** has stated in his evidence that on the very day (20.9.2010), he called two witnesses, namely Altaf Hussain **(PW-2)** and Qamar Din **(PW-3)** and along with them, he came to the suit land, where he specifically referred to witnesses that he had performed first demand at Otaq declaring his intention to purchase the suit land by exercising the right of pre-emption. However, in his cross-examination, he stated that Nizamuddin/ defendant No.1 (buyer) is residing at S. No.166/3, where his house is constructed. Therefore, question arises here that when the buyer/defendant No.1 was in possession of the suit land, then why he has not made *Talab-iIshhad* directly to the buyer/defendant No.1, for which no explanation has been

furnished by the applicant/plaintiff. **Mr. Baillie**, in his Digest of Muhammadan Law in Chapter III (of the demand of pre-emption), says:--

> *"If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he please, make the demand in the presence of the seller or of the premises; or he may make it in the presence of purchaser, though he is not in possession because he is the actual proprietor.* ***But if possession has been taken by the purchaser, Kurukhee has said that it is not valid to take witnesses to the demand in the presence of the seller. Moohummud, however, has expressly said in the Jama Kubeer that it is lawful after deliver to the purchase on a liberal construction, though not by analogy.***
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> *(Emphasis added)*

27. There is another aspect of the case that the applicant/plaintiff has annexed the copy of the registered Sale Deed dated 12.11.2009, with the plaint through which defendant No.4 sold out the suit land to defendant No.1, so also stated the cause of action accrued to him on the same date 12.11.2009. It means that the applicant had prior knowledge of the sale and managed/concocted the whole story of pre-emption and making Talabs by disclosing the cause of action from 12.11.2009 While the certified copy of said Sale Deed was obtained by the applicant on 03.4.2012 for producing the same in evidence, prior to one week of adducing his further examination-in-chief. The applicant also failed to furnish any explanation in his plaint or proof of how and where he obtained a copy of said Sale Deed.

28. Notwithstanding, it is also settled law that the right of pre-emption being a feeble right, the pre-emptor is to be put to strict proof as to the making and the observance of the requisite talbs. In the case of Farid Ullah Khan (cited supra), the Apex Court in Para No.11 of the Judgment has also held that -

> *"11. Needless to mention that right of pre-emption is of a feeble nature as it stands extinguished if the Talbs are not made in accordance with the law,[4] and it is also deemed to have been waived,*

> *if the pre-emptor has acquiesced in the sale or has done any other act of omission or commission which amounts to waiver of the right of pre-emption."*
>
> *(Emphasis added)*

29. In the light of the aforesaid discussion, I am satisfied that neither the applicant has proved the requirements of *Talab-i-Mowasibat* and *Talab-i-Ishhad* in accordance with the law. At the same time, applicant was already in the knowledge of the transfer/sale of the suit land and his assertion that he was informed about the transfer/sale of the suit land on 20.9.2010 is managed story to create the cause of action.

30. For the foregoing reasons, both Courts below have properly appreciated the record and correctly dismissed the suit as well as the Appeal, and the concurrent findings of the Courts below are based on valid reasons, and no misreading or non-reading of evidence is pointed out by the learned Counsel for the applicant warranting interference by this Court. Therefore, the instant Revision application is devoid of merits, which is accordingly dismissed.

J U D G E

Faisal Mumtaz/PS