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

R.A No.168 of 2006
[Niaz Ali & another v. Mst. Aisha & another]

Applicants	:	Niaz Ali and Ali Murad through Mr. Arbab Ali Hakro, Advocate
Respondent No.1 &2	:	Mst. Aisha and Mst. Nusrat Nazir through Mr. Muhammad Arshad S. Pathan, Advocate.
Date of hearing	:	24.05.2019.
Date of Judgment	:	**31.05.2019.**

J U D G M E N T

Faheem Ahmed Siddiqui, J: This Revision Application, challenges the impugned judgment dated 18.05.2006 passed by learned Additional District Judge, Kotri in Civil Appeal No.18 of 2005, where the learned appellate Court while dismissing the said appeal, maintained the order dated 20.04.2005, passed by learned Senior Civil Judge, Kotri, where plaint in F.C Suit No.18 of 2005 was rejected under Order VII Rule 11 C.P.C.

2. The matrix of the case is that the applicants (plaintiffs) filed suit for Pre-emption and Injunction against the respondents (defendants) stating therein that they are the owners of land bearing survey Nos.2 (6-30), 3(0-18), 6(0-23) and 7(1-10) total area 9-1 acres situated in Deh Tapo Kotri, District Jamshoro (previously District Dadu). It is stated that the said land was owned by their late father namely Mehar Khan and after the death of their father, the applicants became the owners of said land by way of inheritance. It is stated that adjoining to the said land of the applicants, there is land bearing survey Nos.394, 395, 397 and 398 total area 14-5 acres situated in the said Deh District

Jamshoro (previously District Dadu and hereinafter referred as suit land) and the same was purchased by the respondents to the extent of 66% share through registered sale deed No.637 dated 02.09.2002 from its previous owners namely Amir Ali S/o Rehmat Ali and Amir Ali Jesani S/o Rehmat Ali. It is further stated that applicants are in possession of suit land since long and cultivating the same. It is alleged that on 06.03.2005, three persons namely Colonel Attaur Rehman, Fayyaz Memon and Qamar along with thirty forty persons came at the suit land with police personnel and started damaging the wheat crops standing on the land and went away by saying the applicants and their harries to leave the land otherwise they will be implicated in false criminal cases. Thereafter, the applicants filed Constitutional Petition bearing C.P No.D-71 of 2005 before this Court against the illegal act of aforementioned persons wherein sought protection. During pendency of the said petition, the respondents filed application under Order 1 Rule 10 CPC as interveners and pleaded that they are the owners of suit land. Thereafter, the applicants came to know regarding the sale of suit land on 21.03.2005 and immediately asserted their right of pre-emption through Talab-e-Muwasbat. The applicants' claims to be a participant in the amenities and appendage of the suit land being adjoining to their own land. They further claimed themselves as 'Shafi-e-Khalit' and 'Shafi-e-Jar'. Later, they filed the instant suit for Pre-emption and Injunction but the same was dismissed and plaint was rejected U/O 7 Rule 11 CPC by the trial Court vide order dated 20.04.2005 and such order was also maintained by the learned appellate Court through the impugned judgment. Against the said judgment of the appellate Court, the instant revision application has been preferred.

3. Mr. Arbab Ali Hakro, learned Counsel for the applicants argues that the trial Court did not consider the averments of plaint as true and correct and illegally rejected the plaint by considering the defence of respondents which are not required to be seen while rejecting the plaint under Order 7 Rule

11 CPC. According to him, the trial Court while giving finding under Order 7 Rule 11, could not look into or consider the exterior matters even written statement is not solely considerable. His foremost objection is that in the impugned order passed by the trial Court, it has travelled beyond the scope of Order 7 Rule 11 of CPC and has discussed about a suit filed by the applicants seeking declaration regarding the property in question. According to him, while rejecting the plaint, the trial Court travelled beyond the record and mentioned about the earlier suit which was neither pleaded nor mentioned during arguments while the plaint rejected without notice. He submits that it creates serious doubts and question arises, how the trial Court came to know about the previous litigation. He alleges that in fact these facts were brought into the knowledge of the trial Court by the respondents behind the back; as such, there are serious issues of morality in this case. He also draws attention towards the observation of the trial Court regarding non-associating the seller of the suit property as party from which right of pre-emption is sought but the learned trial Court remained fail to appreciate that on account of non-joinder of party, plaint cannot be rejected even if learned trial Court finds that necessary party has not been impleaded then should allow the applicants to implead party but should not reject the plaint on that scope. He contends that the trial Court illegally applied provisions of pre-emption act though said act is not applicable in province of Sindh and applicants filed suit for pre-emption under Chapter XIII of Principle of Muhammadan Law and the findings of trial Court are in violation of Para 28 of Muhammadan Law by Mulla. He argued that both the Courts below have illegally held that applicants are neither 'shafi-e-khalit' nor 'shafi-e-jaar' and rejecting the plaint. He next explores right of applicant as 'shafi' by submitting that it is admitted position that the applicants are in possession of suit land from their ancestors and respondents purchased the suit land through registered sale deed on 21.03.2005 therefore, limitation period of

one year for enforcement right of pre-emption will start from the date of registered sale deed in terms of Article 10 of Limitation Act and the applicants filed suit within time. Lastly he prayed for allowing the instant revision application.

4. On the other hand, Mr. Muhammad Arshad S. Pathan, learned counsel for the respondents has submitted that the case of applicant does not fall within the ambit of pre-emption. After referring his counter affidavit, he submits that the land in question has been converted from agricultural to residential (sikni), as such, there is no question of common watercourse, hence, the applicant is not a 'shafi-e-khalit' and actually the property of the applicant is segregated from the land of respondents by a thoroughfare, hence, the applicant is not a 'shafi-e-jaar'. He emphasizes that not only the land of the respondents is converted into residential (sikni) but the layout plan has been approved in the year 1984 and lots of residential plots with amenities are to be carved out as per the approved layout plan. According to him, as per report of the Mukhtiarkar the applicants have encroached upon some portion of the land of respondents and an encroacher cannot prefer the right of pre-emption. Regarding the lands of applicants, his contention is that as they are relying upon Village Form-A; therefore, their lands are actually government land and they are only lessee, as such, they cannot claim pre-emption being tenant not owners of their lands. He submits that the land on which they rest their claim is not adjoining but even then since the said land was granted to them under MLR-64 as a lessee; therefore, being tenant they cannot prefer right of pre-emption at all. Regarding the suit filed by the applicants, he submits that question will arise why the said suit was not disclosed by the applicants in the subsequent suit. He submits that the same Court has dismissed the said suit a day earlier, as such, it was fresh in the minds of the learned trial Court as such this fact creeps in the mind of the learned trial Court at the time of rejecting plaint of applicants U/O 7 Rule 11 of

CPC. In the end, he submits that since the impugned order passed by trial Court and judgment passed by appellate Court are correct and proper; therefore, the same should be maintained.

5. After hearing the arguments advanced, I have analyzed the entire material placed before me in the light of valued submissions of the learned counsel of either side. I would like to address the primary question raised by the learned counsel for the applicants regarding describing about the facts and fate of a previous suit filed by the applicants in respect of the property through which they are claiming their right of pre-emption. The main objection of the learned counsel for the applicants is that when the said suit was neither pleaded nor argued, the discussion of the learned trial Court amounts to travelling beyond the scope of Order 7 Rule 11 of CPC. According to him, it amounts to discuss about the exterior matters which is neither justified nor appreciable. In this respect, I am of the view that at the time of rejecting a plaint or otherwise, the rule of thumb is that only the plaint is to be considered in a way that the averments of the plaint are supposed to be correct. Nevertheless, it does not mean that the trial Court cannot take judicial notice of a fact which is already in the knowledge of the trial Court. In the instant matter, and earlier suit filed by the applicants was heard and decided before the same Court by the same presiding officer and the same is only one or two days earlier to the filing of plaint of the instant suit. In such a situation, when some factual happening has taken place in the same Court only one or two days earlier of filing of the plaint of the instant matter. In my considered view, every Court or tribunal is fully justified to take judicial notice of the happening of some event or fact, which was taking place before the same Court. Since the suit was decided by the same presiding officer; therefore, the trial Court is fully justified in taking judicial notice of the earlier proceeding and the same is not amounting to travel beyond the scope of Order 7 Rule 11 of CPC.

6. The right of pre-emption or Shufaa is the right possess by one person to acquire a property sold to another in preference to that other by paying a price equal to that settled, or paid by the latter. In the language of the law it is a right to take possession of a purchased parcel of land, for a similar (in kind and quality) of the price, that has been set out on it to the purchaser (Ref: Bailie 1.475). Prior to operation of the right of pre-emption or 'shufaa' besides the imperative conditions regarding demands or 'Talabs', it is also necessary that there must be three conditions present in order to give a valid claim of such right. The first is that the pre-emptor must himself own property, Secondly, there must be a sale of certain property, and Thirdly, there must be certain relationship between the pre- emptor and the vendor in relation to the sold property. (Ref: 'Outlines of Muhammadan Law' by Asaf Ali Asghar Fyzee p. 289). From the definition of pre-emption, it clarifies that the right of pre-emption is a feeble right and the same only accrues after completion of sale with a bona-fide transaction and after fulfilling the condition attached to it.

7. The jurists' opinion is that a preemptor must be owner of the property in order to claim right of pre-emption. The principle does originate from the tradition, and is unexceptionable to the extent that the tradition of Prophet (P.B.U.H). The right of pre-emption, the milkiyat or the proprietor's interest in the property on which he based his right must be in him till the decree by a Qazi. It is necessary for a pre-emptor that he must enjoy full right of ownership on his property through which he is claiming his right but it is not necessary that he should be in actual possession of it. A mortgagee, tenant or mere Benamidar is not entitled to a pre-emption on any of the grounds the claim is founded. It is also settled rule of Islamic jurisprudence that the pre-emptor cannot pre-empt until he has proved his title. It is according to the views of Imam Abu Hanifa and Imam Muhammad and one of the two reports of Abu Yousif also mention the same view (Ref: Fataw-e-Alamgiri, p. 167, Volume 8,

Publisher Maktab-e-Rehmania). Thus mere possession gives no right of pre-emption or ‘Haq-e-Shuffa’. For establishing right of pre-emption ‘Haq-e-Shuffa’ according to Muhammadan Law there must be absolute ownership or ‘Milkyet’ in the contiguous land. In the present case, the applicants are not the absolute owner their own land, as they possess Village Form-A in support of their claim of ownership over the property from which it establishes that the land is actually government land and they are just tenant, as such the concept of absolute ownership or ‘Milkyat’ is missing on the property through which they claim their right of pre-emption, hence, they cannot claim the ‘Haq-e-Shufa from the respondents. I have also gone through the plaint of the suit filed by the applicants and found that the same is not properly drafted. For establishing the right of pre-emption through Talab-e-Khashoomat, it is necessary that before the Court firstly a direction is sought against the seller with a prayer that the purchaser be substituted with the preemptor. And if the seller is not found then the preemptor has a right to go after the purchaser. It is worth noting that neither the seller is made party nor the substitution is sought in prayer clause. The plaint is also silent about the source of knowledge regarding the sale when they preferred ‘Talb-e-Muwasbat’ and it is also silent about the witnesses before whom the applicants have preferred ‘Talab-e-Ishad’ and only in case of denial or avoidance to the second demand i.e. ‘Talab-e-Ishad’, the third demand i.e. Talab-e-Khashoomat can be made before Court by filing a suit for pre-emption.

8. The decisive conclusion of the entire above discussion is that the plaint filed by the applicants is not only missing the necessary ingredients in respect of their claim but also they have no cause of action as such they cannot prefer their right of pre-emption on the basis of adjoining property across the thoroughfare and owned by them under village Form-A, which was rightly

rejected by the trial Court. Resultantly, the Revision Application is **dismissed** as no order as to cost.

JUDGE

Abdullah Channa/PS
Hyderabad
Dated 31.05.2019.