Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No. 29 of 2010

Appellants	: Ahmed Raza Thaheem, Inayat Hussain, Abid Mian and Bharat Kumar, through Mr. M. Sulleman Unnar, Advocate.
Respondent No.1	: Ghulam Mohiuddin, through Mr. Ghulam Qadir Sial, Advocate.
Respondent No.2	: Nisar Ahmed, through Mr. Muhammad Arshad S. Pathan, Advocate.
Respondents3, 4 and 5	: Mukhtiarkar, Executive District Officer (Revenue) and Province of Sindh, through Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.
Respondent No.6	: Nazar Muhammad Memon called absent.
Respondent No.7	: Jan Muhammad Memon called absent.
Date of hearing	: 03.02.2014.

J U D G M E N T

***NADEEM AKHTAR, J.* –** Respondents 1 and 2 filed F.C. Suit No.11 of 2005 for pre-emption and permanent injunction against the appellants and respondents 3 to 7. The Suit was decreed vide judgment delivered on 19.07.2007 and decree drawn on 26.07.2007 by the Ist Senior Civil Judge Hyderabad. Against the said judgment and decree, the appellants and respondents 6 and 7 filed Civil Appeal No.120 of 2007 which was dismissed vide judgment delivered on 24.05.2010 and decree drawn on 31.05.2010 by the VIIth Additional District Judge Hyderabad. Against the concurrent findings of the trial Court and the appellate Court, the appellants have preferred this second appeal.

2. The relevant facts of the case, as averred in the plaint, are that respondents 1 and 2 / plaintiffs and respondents 6 and 7 / defendants 1 and 2 were the co-owners of an undivided and un-partitioned agricultural land measuring 17-04 acres in Survey Nos. 61, 62 and 297, Deh Ghanghra, Taluka City Hyderabad **('the land')**. Respondents 1 and 2 had their joint share of 66 Paisa comprising of 11-0 acres 17 ghuntas and 889 sq. ft., and respondent 6 and 7 had their joint share of 34 Paisa comprising of 5-0 acres 26 ghuntas and 200 sq. ft. The land, which was inherited by the parties from their respective

ancestors, was being irrigated from a single / common water course provided by the Government, and it was never partitioned officially. Respondents 1 and 2 filed F.C. Suit No.03/2005 for permanent injunction against respondents 6 and 7, wherein respondents 6 and 7 filed their written statement disclosing that they had sold their 34 Paisa share **('the disputed property')** on 08.01.2005 to the appellants through a registered sale deed. As the said Suit had become infructuous, the same was disposed of. After receiving this information in Court through the written statement filed by respondents 6 and 7, the attorney of respondents 1 and 2 **('the attorney')** at once made *talab-i-mowasibat* on 31.01.2005 at about 11:00 am. The attorney then made *talab-i-ishhad* to respondents 6 and 7 without delay in the presence of witnesses with reference to *talab-i-mowasibat*, affirming the intention of purchasing the disputed property. The attorney also made *talab-i-ishhad* to the appellants / vendees at the disputed property, and offered them the sale consideration paid by them, but the appellants refused. In the above background, respondents 1 and 2 / pre-emptors filed F.C. Suit No.11/2005 praying that, upon payment of Rs.3,000,000.00 by them, the appellants / vendees be directed to re-convey the disputed property to them, and the appellants be restrained from further selling or alienating the disputed property.

3. The appellants / vendees and respondents 6 and 7 / vendors filed their joint written statement, wherein they denied the assertions and allegations made in the plaint by respondents 1 and 2 / pre-emptors. It was denied by them that the attorney came to know about the sale of the disputed property on 31.01.2005 through the written statement of respondents 6 and 7 ; the attorney had made any of the *talabs* on 31.01.2005 ; and, respondents 1 and 2 had any right of pre-emption in relation to the disputed property. It was averred that the names of the alleged witnesses had not been disclosed in the plaint, and Suit No.03/2005 was disposed of on 17.02.2005.

4. On the basis of the pleadings of the parties, following six Issues were settled by the trial Court :

" 1. Whether the Suit is barred under any provision of law as such is not maintainable ?

2. Whether no cause of action was accrued to the plaintiff for filing instant Suit ?

3. Whether Suit is not maintainable due to misjoinder of defendant No.7, 8 ?

4. Whether the plaintiff has made demands as requires (!) under the Muhammad law ?

5. Whether the plaintiff is entitled (!) the relief as prayed for ?

*6. What should the decree be ?***"**

5. Respondents 1 and 2 / plaintiffs examined the attorney and the two witnesses who, according to them, were present at the time of making the *talabs*. Respondents 6 and 7 and appellant No.3 examined themselves. After evaluating the evidence produced by the parties and after hearing them, it was held by the trial Court that respondents 1 and 2 were entitled for the relief of pre-emption. Accordingly through the impugned judgment and decree, the trial Court directed respondents 1 and 2 to deposit the sale consideration of Rs.3,000,000.00 with the Nazir within 30 days, and respondents 6 and 7 were directed to execute the sale deed of the disputed property in favour of respondents 1 and 2 within 30 days from the date of deposit of the sale consideration. It was further ordered that the sale deed in respect of the disputed property executed by respondents 6 and 7 in favour of the appellants shall stand cancelled. Civil Appeal No.120/2007 filed by the appellants and respondents 6 and 7 against the judgment and decree of the trial Court, was dismissed by the appellate Court. Respondents 6 and 7 / vendors did not challenge the impugned judgments and decrees of the lower Courts further, and this second appeal has been filed only by the appellants / vendees by impleading the vendors as respondents 6 and 7. Thus the impugned judgments and decrees attained finality against the vendors / respondents 6 and 7 long ago.

6. I have heard the learned counsel for the appellants and respondents 1 and 2 at length, and have also examined the R & P of the trial Court with their able assistance. Respondents 6 and 7 remained absent, while the official respondents were represented by the learned Additional Advocate General, Sindh. It was observed by the trial Court that the burden to prove Issue Nos.1 and 3, which were dealt with together, was on the defendants, that is, the appellants and respondents 6 and 7. These Issues were decided in favour of the plaintiffs (pre-emptors) / respondents 1 and 2 by holding that the Suit was not liable to be dismissed on the ground of mis-joinder or non-joinder of parties. Regarding Issue No.2, it was observed by the trial Court that the burden to prove the same was also on the defendants (appellants and respondents 6 and 7). The contention of the defendants was that no cause of action had accrued to respondents 1 and 2 as the *talabs* were not made by them in accordance with law. This Issue was also decided in favour of the plaintiffs (pre-emptors) / respondents 1 and 2 by holding that as they were admittedly the co-owners and co-sharers in the joint *khata* and were enjoying the common passage and watercourse, cause of action had accrued in their favour in view of the sale of the undivided disputed property.

7. Issue No.4 related to the *talabs* made by the plaintiffs (pre-emptors) / respondents 1 and 2, which, according to the appellants and respondents 6 and 7, were never made and all assertions in this behalf were false. It was observed by the trial Court that the burden to prove this Issue was on the pre-emptors / respondents 1 and 2. In view of the contents of the plaint and the evidence led by respondents 1 and 2, it was held that the two *talabs* were made by them in accordance with law as they had shown their intention to purchase the disputed property for the same price at which it was sold to the appellants. In view of the above findings, the impugned decree was passed by the trial Court in favour of respondents 1 and 2.

8. The appellate Court also observed that respondents 1 and 2 / pre-emptors were co-owners of the undivided and un-partitioned land along with respondents 6 and 7 / vendors. Important admissions by the vendors / respondents 6 and 7 in their written statement and evidence were noticed by the appellate Court. It was noticed that respondent No.6 / defendant No.1 (vendor) had admitted in his cross-examination that the land was un-partitioned, and he had sold his undivided share therein ; and, no prior notice of sale was published in any newspaper. It was also noticed that respondent No.7 / defendant No.2 (vendor) had admitted in his cross-examination that respondents 1 and 2 / pre-emptors, being co-sharers in the land, had preferential right to purchase the same ; and, respondents 6 and 7 sold their share in the undivided / un-partitioned land. It was further noticed that the appellants and respondents 6 and 7 had admitted in their joint written statement the contents of paragraph 2 of the plaint, wherein respondents 1 and 2 had stated that they were the co-sharers in the land and, being *shafi-i-sharik*, had preferential right of pre-emption in the disputed property. It was held by the appellate Court that the statements made in the plaint and the attorney's evidence in relation to the *talabs*, corroborated the evidence given by the two other witnesses produced by the plaintiffs / respondents 1 and 2 ; and, the appellants and respondents 6 and 7 had simply denied the version of respondents 1 and 2. Regarding the date, time and place of making the *talabs*, it was held that such requirements under the Muhammadan Law were duly complied with by the plaintiffs / respondents 1 and 2. In view of the above observations and findings, the judgment and decree of the trial Court were maintained by the appellate Court by holding that the same did not require any interference.

9. The main contention of the appellants before the trial Court, the appellate Court, as well as before this Court in this appeal, was that the attorney had concocted a false story of making the *talabs*, which were never made ; the

requisite details of the *talabs* were not disclosed in the plaint ; as the mandatory requirements of the *talabs* were lacking, no cause of action had accrued in favour of respondents 1 and 2, and as such their Suit for pre-emption was liable to be dismissed. It was alleged throughout by the appellants that the attorney had falsely averred and deposed that Suit No.03/2005 filed by respondents 1 and 2 was disposed of on 31.01.2005 when respondents 6 and 7 filed their written statement, disclosing therein that they had sold the disputed property to the appellants ; after receiving this information in Court on 31.01.2005 through the written statement filed by respondents 6 and 7, he at once made *talab-i-mowasibat* at about 11:00 am ; and, he then made *talab-i-ishhad* to respondents 6 and 7 without delay in the presence of witnesses with reference to *talab-i-mowasibat*, affirming the intention of purchasing the disputed property. According to the appellants, Suit No.03/2005 was disposed of on 17.02.2005 and not on 31.01.2005, and as such there was no question of making the *talabs* by the attorney on 31.01.2005. The appellants have claimed that respondents 1 and 2 were aware of the sale much prior to the filing of Suit No.03/2005 as the sale was registered in their favour on 08.01.2005. They have asserted that in fact no *talabs* were ever made ; even otherwise the attorney was not specifically authorized by respondents 1 and 2 to make the *talabs* on their behalf ; and, the attorney was given special and limited power only to file Suit No.03/2005 through a special power of attorney, which came to an end when he filed the said Suit. It was urged on behalf of the appellants that in the absence of *talab-i-mowasibat* and *talab-i-ishhad* in the prescribed manner, and in the absence of the requisite details thereof in the plaint, the Suit ought to have been dismissed. In support of his submissions, the learned counsel for the appellants relied upon (1) *Mst. Rasoolan Bibi V/S Khizar Hayat*, ***2008 SCMR 37***, (2) *Bashir Ahmed and another V/S Mushtaq Ahmed*, ***2007 SCMR 895***, (3) *Khyber Khan and others V/S Haji Malik Amanullah Khan*, ***2007 SCMR 1036***, (4) *Muhammad Ilyas V/S Ghulam Muhammad and another*,***1999 SCMR 958***, (5) *Haji Noor Muhammad V/S Abdul Ghani and 2 others*, ***2000 SCMR 329***, (6) *Allah Dad V/S Bashir Ahmed and another*, ***PLD 2002 SC 488***, (7) *Khadim Hussain V/S Ghulam Eissa and others*, ***2009 SCMR 488***, and (8) *Unair Ali Khan and others V/S Faiz Rasool and others*, ***PLD 2013 SC 190***.

10. On the other hand, learned counsel for respondents 1 and 2 submitted that the case of the said respondents was a straightforward case for pre-emption, and as they had successfully discharged their burden in proving their right of pre-emption and the *talabs* made by them, the Suit was rightly decreed in their favour and the judgment and decree passed by the trial Court was rightly maintained by the appellate Court. He further submitted that minor discrepancies in the pre-emptor's claim are not considered to be fatal when

considerable time has elapsed in recording evidence. In support of his submissions, the learned counsel relied upon the cases of (1) *Hayat Muhammad and others V/S Mazhar Hussain*, ***2006 SCMR 1410***, (2) *Allah Bakhsh and another V/S Falak Sher*, ***2004 SCMR 1580***, (3) *Azmatullah through L.Rs. V/S Mst. Hameeda Bibi and others*, ***2005 SCMR 1201***, (4) *MushtaqHussain V/S Syed Ali Ahmad Shah*, ***PLD 1988 Lahore 722***, and (5) *Haji Noor Muhammad V/S Abdul Ghani and 2 others*, ***2000 SCMR 329***.

11. The contentions of the appellants that the attorney was not specifically authorized by respondents 1 and 2 to make the *talabs* on their behalf ; and, he was given special and limited power only to file Suit No.03/2005 through a special power of attorney, which came to an end when he filed the said Suit, do not appear to be correct. The power of attorney dated 15.01.2005 (Exhibit 36) executed by respondents 1 and 2 in favour of the attorney, was a general power of attorney as it was specifically mentioned therein that the attorney had been appointed as the general attorney by virtue thereof, to do all the acts etc. stipulated therein. Vide clause 10 of this power of attorney, respondents 1 and 2 had specifically authorized the attorney to file a Suit for pre-emption and to make *talabs* on their behalf. As the power of attorney was admittedly executed prior to 31.01.2005 and filing of the Suit for pre-emption, the attorney had full authority to make the *talabs* as well as to file the Suit on behalf of respondents 1 and 2.

12. A Suit for pre-emption can be filed only by the class of persons classified in Section 231 of the Muhammadan Law ; 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. The right of pre-emption and the cause of action to file a Suit for pre-emption arise only out of a valid, complete and bonafide sale by way of transfer of title and possession. It is an admitted position that respondents 1 and 2 / plaintiffs were the co-owners and co-sharers of the undivided and un-partitioned land, including the disputed property, and were also participators in the immunities and appendages of the land. Thus, being *shafi-i-sharik* and *shafi-i-khalit*, they had the right to claim pre-emption. It is also an admitted position that the disputed property was sold and handed over to the appellants by the other co-owners / respondents 6 and 7. Therefore, there is no doubt that cause of action for filing the Suit for pre-emption had accrued to respondents 1 and 2. The only question that has to be examined is whether the two prescribed *talabs* were made or not by respondents 1 and 2 in accordance with the principles of Muhammadan Law. A

perusal of the plaint shows that the date, time and place of both the *talabs* were specifically pleaded in paragraph 6 thereof. The assertion of the appellants that the requisite details of the *talabs* were not disclosed in the plaint is, therefore, not correct.

13. It was also stated in the plaint that the *talabs* were made in the presence of witnesses. However, the names of the witnesses were not mentioned. The fact about the presence of two witnesses was proved by respondents 1 and 2 in their evidence, as the attorney had disclosed their names in his evidence which remained un-rebutted, and the said two witnesses were also produced who corroborated the evidence of the attorney, which too remained un-rebutted. In any event, in *Haji Noor Muhammad* (supra) relied upon by the learned counsel for respondents 1 and 2, a larger Bench of five Hon'ble Judges of the Supreme Court of Pakistan confirmed the view taken earlier by the Hon'ble Supreme Court that the pleadings may refer to material facts, but the law does not require the pleadings to contain gist of all the facts and names of witnesses of the plaintiff ; and, the Suit for pre-emption is not an exception to such general principle, which is well established in our jurisprudence. In view of the above, the cases cited by the learned counsel for the appellants cannot be applied in the instant case.

14. Section 236 of the Muhammadan Law provides that *talab-i-mowasibat* and *talab-i-ishhad* must be made by the pre-emptor immediately as soon as he receives the information of sale. In this context, it hardly matters whether the earlier Suit No.03/2005 filed by respondents 1 and 2 was disposed of on 31.01.2005 or on 17.02.2005. In either case, the *talabs* were made on 31.01.2005, which in my humble opinion, respondents 1 and 2 had successfully proven. It is not material whether Suit No.03/2005 was pending or not when the *talabs* were made. Therefore, the submissions made on behalf of the appellants in this context have no force.

15. The learned trial Court had discussed the entire evidence and had given exhaustive findings on each and every issue after full application of mind. Likewise, the learned appellate Court also gave detailed reasons in the impugned judgment for agreeing with the learned trial Court. After examining and appreciating the evidence and the impugned judgments and decrees, I am of the considered opinion that the findings of both the learned Courts below are in accord with the evidence on record, and are based on proper appreciation of the evidence.

16. In *Muhammad Feroze and others V/S Muhammad Jammat Ali*, ***2006 SCMR 1304***, it was held by the Hon'ble Supreme Court that jurisdiction of High

Court is limited in second appeal to the extent of interference on a question of law and not on facts. In the case of *Abbas Ali Shah and 5 others V/S Ghulam Ali and another*, ***2004 SCMR 1342***, the Hon'ble Supreme Court was pleased to hold that ordinarily the findings of the appellate Court are not interfered with in second appeal if the same are found to be substantiated by evidence on record and are supported by logical reasoning. In *Fazal Rehman V/S Amir Hyder and another,* ***1986 PSC 1222***, the Hon'ble Supreme Court was pleased to hold that concurrent findings of fact reached by the lower Courts will not be disturbed by the High Court in second appeal, even if it disagrees with such findings on its own view of the evidence. In *Malik Katoo and three others V/S Allah Bakhsh and two others*, ***1986 PSC 635***, the Hon'ble Supreme Court refused leave and maintained the decision of the High Court dismissing the second appeal on the ground that a concurrent finding of fact could not be disturbed if the same is based on evidence. In the cases of *Fazal Ellahi V/S Sarfraz Khan*, ***1987 PSC 195*** and *Qurban Hussain etc. V/S Hukam Dad,* ***1984 PSC 939***, it was held by the Hon'ble Supreme Court that concurrent findings of fact could not be disturbed by the High Court.

17. The upshot of the above discussion is that the concurrent findings of both the learned lower Courts do not call for any interference by this Court in this second appeal, which is accordingly dismissed along with CMA No.764/2010 with no order as to costs.

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