

ORDER SHEET

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

R.A. No. 32 of 2011.

DATE ORDER WITH SIGNATURE OF JUDGE

10.01.2020.

FOR HEARING OF C.M.A. 78/2011.
FOR HEARING OF MAIN CASE.

Mr. Sundar Das Advocate for applicant.

Service was affected through all modes including publication. The service was held good on 29.08.2019. No one has appeared to represent the respondents. It is the case of the applicant that he filed a suit for pre-emption. While the suit was pending adjudication an application under order VII rule 11 CPC was filed for rejection of the plaint. The trial court while hearing the stay application / miscellaneous application concludes that the applicant / plaintiff has not produced any document to show that he is in possession of the suit land as a lessee. He further ruled that no document has been placed on record to show that the plaintiff is adjacent Khatedar of the suit land. Hence the applicant had no prima facie case, as declared by the trial court at the interlocutory stage.

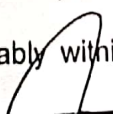
I have heard learned counsel for applicant. No doubt under the settled principle of law the requirement to claim pre-emption is 'Talbi-Muwasibat' and 'Talbi-Ishhad' to be made in presence of two witnesses, however, the plaintiff / applicant can not allowed to establish his case at the interlocutory stage which could only be established by way of evidence or by way of summoning the witnesses after framing of issues. At the most it calls for the dismissal of stay application or the suit, in case issue of maintainability was framed, however, there is no such bar to file such suit, which may attract the provisions of order VII rule 11 CPC for rejection of the plaint. The plaint was in fact rejected by trial court on these factual counts which order was maintained by the appellate court.

Mr. Sundar Das learned counsel for the applicant has relied upon 2000 SCMR 53 where on identical facts the case was remanded to proceed in accordance with law. The relevant part in terms of paras-5 & 6 of the aforesaid order is reproduced as under:-

5. We have not been impressed by the reasoning adopted by the learned two Courts below and the learned Single Judge in the High Court. The 'bar of a suit under any law for the time being in force', cannot be legally taken at par with the 'extinguishments of the right of pre-emption under section 13 of the Act'. Clause (d) of Order VII, Rule 11, C.P.C. is applicable where the suit appears to be prime facie barred by any law, from a perusal of the statement in the plaint and no inquiry is needed. For instance, where a suit is time-barred, or is bad for multifariousness, or where a requirement as to prior notice has not been fulfilled or where consent of Advocate-General has not been obtained under section 92, C.P.C. or the suit is filed by an unregistered Firm or issue raised concerning the execution, discharge or satisfaction of a decree and a cognizance is barred under section 47, read with Order XXI, Rules 22 and 103, C.P.C. The learned counsel for the respondents has not been able to bring to our notice any law under which the suit for pre-emption in the instant case was barred. So far as the extinguishments of right of pre-emption under section 13 of the Act, is concerned, it is altogether of a different connotation having no such implication as to bar the suit for pre-emption. The right of pre-emption could obviously be extinguished if the 'Talabs' have not been made at all or if made they were not made in accordance with the requirements of section 13 (ibid). This presupposes trial of issue of a fact. It does not, therefore, denote any such bar of the suit within the contemplation of clause (d) of Order VII, Rule 11, C.P.C.

6. We are of the considered view that the suit was not at all barred under clause (d) of Order VII, Rule 11, C.P.C. We are, therefore, inclined to convert this petition into an appeal, allow the same, set aside the impugned orders and remand the case to the learned trial Judge to proceed with the case strictly in accordance with law and decide the issues including the one "as to whether the petitioner has been able to establish that he had made the requisite Talabs within the contemplation of section 13 of the Act." Costs to follow the event.

In view of the above facts and circumstances, I deemed it appropriate to provide an opportunity to the applicant to adduce evidence in respect of the queries raised in defence which are factual in nature. The revision application, as such, is allowed. The trial court is directed to proceed with the matter in accordance with law and dispose it of preferably within a period of six (06) months.


Sd. Muhammad Shafi Siddiqui
Judge.