Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Revision Application No. 180 of 2010

Date of hearing : 26.02.2013

Applicants : Muhammad Soomar through his L.Rs. through Mr. Rafique Ahmed, Advocate.

Respondents 1 to 4: Javed Ali, Sikandar Ali, Sajjad Ali & Imtiaz Ali through Mr. Shamsuddin Memon, Advocate.

Respondent No.5 : Nawab Ali called absent.

J U D G M E N T

NADEEM AKHTAR, J. **– The applicants, who are the legal heirs of Muhammad Soomar, have filed this Civil Revision Application against the concurrent findings of the learned trial court and the learned lower appellate court. F.C. Suit No.40/2007 filed by Muhammad Soomar against the respondents praying for a decree for pre-emption and permanent injunction, was dismissed by the Senior Civil Judge Badin vide judgment and decree dated 21.07.2009 and 25.07.2009, respectively. Civil Appeal No.61/2009 filed by Muhammad Soomar against the said judgment and decree, was also dismissed by the Ist Additional District Judge, Badin, vide judgment and decree dated 10.03.2010.**

2. The relevant facts of the case are that agricultural land bearing Survey Nos. 45/5-11 and 55/6-8, measuring about 11-19 acres, situated in Deh Sialki, Tapo Nindo Shehar, Taluka and District Badin, hereinafter referred to as "the land", was originally owned by Nawab Ali, the present respondent No.5. On 28.05.2002, the land was purchased from respondent No.5 by respondent No.1 Javed Ali through a registered sale deed in his own name and in the names of his minor brothers, the present respondents 2 to 4.

3. Muhammad Soomar, the predecessor-in-interest of the present applicants, hereinafter referred to as "the deceased", filed F.C. Suit No.40/2007 before the Senior Civil Judge Badin against the respondents for pre-emption and permanent injunction. It was the case of the deceased that the land owned by respondent No.5 was lying barren and *banjarqadeem*; the land was settled over W/C No.10-L, Ali Wah Large, along with his land ; the deceased and his brother owned agricultural lands of about 94-07 acres surrounding the land in the same *Deh*; since the land was barren and *banjar,* it was being used by him since long as *chandan* to discharge dirty and excess water from his lands without any objection by any one ; due to this reason, the land became his "*zaroorat*", and as such he requested respondent No.5 that he will purchase the land whenever the same is sold by respondent No.5 ; he was kept on false hopes by respondent No.5, who was his relative ; about seven days prior to the filing of the Suit, respondent No.1 visited the landat about 05:00 p.m., where the deceased was also present along with his *haarees* Muhammad Usman, Manzoor and Ghulam Qadir ; respondent No.1 disclosed to the deceased that he had purchased the land, and he will not allow the deceased to use the land for discharging dirty or

excess water ; as soon as the deceased came to know about this fact, he immediately made *Talb-e-Muwasebat* in the presence of the above named *haarees* / witnesses, showing his interest in purchasing the land by paying the same price therefor ; and, respondent No.1 did not agree and went to his village.

4. It was also the case of the deceased that at about 06:30 p.m., he went to the house of respondent No.1 along with the above named *haarees* / witnesses and one Zameer Ahmed, where respondents 1 to 4 were present ; the deceased requested respondent No.1 to sell the land to him, and he made *Talb-e-Ishhad* in presence of all the said witnesses, but respondent No.1 refused to accept his demand and also refused to disclose the date of the purchase of the land ; the deceased obtained the copy of the registered sale deed of the land from the Registrar's office at Hyderabad ; the said copy revealed that respondent No.1 had purchased the land on 28.05.2002 in his own name and in the names of his minor brothers, the present respondents 2 to 4 ; and, the land was purchased by respondents 1 to 4 in the year 2002, and for five years, that is, till the year 2007, they intentionally avoided to visit the land in order to deprive the deceased from exercising his preferential right of pre-emption over the land.

5. Respondents 1 to 4 filed their written statement wherein it was denied by them that the deceased had been using the land to discharge dirty and excess water from his lands. It was specifically denied by them that the deceased came to know about purchase of the land by them just before filing the Suit, and it was averred by them that the deceased was fully aware of such fact from the date of the sale in their favour as they had constructed a Government Boys Primary School on the land, which was functioning since long with a large number of students studying therein. It was further averred by respondents 1 to 4 that the Suit filed by the deceased was barred by time and his alleged right of pre-emption, if any, had extinguished as the deceased did not assert any right on the land and remained silent for a long period of five years. It was also specifically denied by them that the deceased made any of the *Talbs*, or that the deceased came to their house along with witnesses for such purpose. It was stated by the said respondents that there was no question of refusal on their part as no *Talbs* were ever made by the deceased, and as such no cause of action had accrued to the deceased.

6. In view of the pleadings of the parties, the learned trial court framed the following six issues :-

"1. Whether the suit is not maintainable ?

2. Whether the suit is time barred ?

3. Whether the plaintiff did not made the Talb-e-Muwathibat in presence of witnesses Muhammad Usman, Manzoor and GhulamQadir at about 05:00 P.M about 7 days before filing of the Suit, when the Defendants came on suit land and for the first time disclosed his purchase and claimed ownership ?

4. Whether thereafter on the same day the plaintiff along with his above witnesses and one Zameer Ahmed went to the house of the Defendants 1 to 4 and made Talb-e-Ishhad referring the Talb-e-Muwathibat in presence of above witnesses and requested to re-sale of the suit land at the same rate the defendants had purchased?

5. Whether the plaintiff is entitled for the relief claimed ?

6. What should the decree be ?"

7. The deceased examined himself and two other witnesses ; namely, Usman and Manzoor, who according to him, were present when he made the two *talabs* to respondent No.1. Respondents 1 to 4 examined respondent No.1, and one Zamir Ahmed, who according to the deceased, accompanied him to the house of respondents 1 to 4 when the deceased made *Talb-e-Ishhad*. At the time of final arguments before the learned trial court, the counsel for the deceased plaintiff remained absent.

8. Issue No.2 was decided by the learned trial court in the affirmative by holding that the Suit was barred under Article 10 of the Limitation Act, 1908. It was held that the date of knowledge of the sale of the land in favour of respondents 1 to 4 was not mentioned in the plaint by the deceased in order to ascertain the period of limitation, but in view of the admission made by the deceased in his cross examination that respondent No.1 got sanctioned a school in the year 2006 and constructed such school on the land, the deceased had the knowledge since the year 2006 that the land had been purchased by respondents 1 to 4. Issue No.1 was decided by the learned trial court by holding that the Suit was not maintainable, and as such Issues No.3 and 4 were decided in the affirmative and negative, respectively. It was held that though the plaintiff's witnesses had supported his version, but Zamir Ahmed, who according to the deceased, accompanied him to the house of respondents 1 to 4 when he made *Talb-e-Ishhad*, stated in his deposition that the deceased and his witnesses never came to him and he did not accompany them to the house of respondent No.1. It was observed by the learned trial court that Zamir Ahmed had not been produced as a witness by the deceased, but he was produced by respondents 1 to 4 as their witnesses. In view of the above findings, the Suit filed by the deceased was dismissed by the learned trial court.

9. Being aggrieved with the dismissal of his Suit, the deceased filed Civil Appeal No.61/2009 before the I[st] Additional District Judge, Badin, wherein the following two points for determination :-

"i. Whether the appellant has made first demand Talb-e-Muwasbat and second demand Talab-e-Ishad according to law ?

ii. What should the Decree be ?"

After examining the evidence available on record, the learned lower appellate court came to the conclusion that in fact no first demand / *Talb-e-Muwasebat*/ jumping demand was made by the deceased in accordance with the Mahummadan Law, and in the absence of this mandatory requirement, the right of pre-emption could not be enforced. It was further held by the learned lower appellate court that the second demand / *Talb-e-Ishhad* was also not made by the deceased in accordance with law, as he had not referred to his first demand while making the second demand. The appeal filed by the deceased was dismissed vide impugned judgment and decree dated 10.03.2010.

10. I have heard the learned counsel for the parties and have also examined the record with their able assistance. I have noticed that in his deposition, the deceased plaintiff had stated that when respondent No.1 had disclosed to him the fact about purchasing the land, he simply told him that he would suffer as the land was situated between his other lands. The deceased never claimed in his

deposition that he actually made the first demand / *Talb-e-Muwasebat* to respondent No.1. Regarding the second demand / *Talb-e-Ishhad*, it was stated by him that the same was made by him at the house of respondents 1 to 4 in presence of witnesses. Under Section 236 of the Muhammadan Law, no person is entitled to the right of pre-emption unless (1) he declares his intention to assert such right immediately on receiving information of the sale, which formality is called *Talab-e-Muwasebat* (literally, demand of jumping, that is, immediate demand); and unless(2) he with the least practicable delay affirms the intention, referring expressly to the fact that the *Talab-e-Muwasebat* had already been made, and makes a formal demandeither in the presence of the buyer, or the seller, or on the premises which are the subject of sale, andin the presence of at least two witnesses, which formality is called *Talb-e-Ishhad* (demand with invocation of witnesses). Thus, in order to enforce his right of pre-emption, it is mandatory for the pre-emptor to make both the demands / *Talbs* in accordance with the above provision. It is to be noted that in the absence of the first demand /*Talb-e-Muwasebat*, the second demand / *Talb-e-Ishad*, if made, becomes ineffective and unenforceable.

11. The above view expressed by me is supported by the following authorities of the Hon'ble Supreme Court:

(i) In the case of *Mrs. Shafia Begum V/S Ibrahim and 4 others*, ***PLD 1989 Supreme Court 314***, the Honble Supreme Court was pleased to hold *inter alia* that the failure to make the *Talbs* at proper times extinguishes the so-called right of pre-emption ; hence it is not a part of procedural law, but falls in the substantive field, rather an integral part of the right of *Shufa*. It was further held that without all the demands being made on time, there would be no *Shufa* as the right to *Shufa* would come into existence only through proper *Talbs*, and the law of *Shufa* which is devoid of these essential elements of demands on time, is against *Sunnah* and thus repugnant to the Injunctions of Islam.

(ii) In *Shafi Muhammad V/S Muhammad Hazar Khan and 5 others*, ***1996 SCMR 346***, the Hon'ble Supreme Court was pleased to hold that in a Suit for pre-emption, the pre-emptor is bound to make *Talb-e-Muwasebat* and *Talb-e-Ishhad* as contemplated by law before filing the Suit. It was further held that where recital in the plaint did not make mention of any particulars that were required to be disclosed in connection with *Talb-e-Muwasebat* and *Talb-e-Ishhad*, the presumption would be that the plaintiff had failed to make the first two *Talbs* as contemplated by law before filing the Suit, and such Suit would not be maintainable.

(iii) The Hon'ble Supreme Court was pleased to hold in the case of *Allah Dad V/S Bashir Ahmed and another*, ***PLD 2002 Supreme Court 488***, that it is now well settled that reference to *Talb-e-Muwasebat* is necessary while making *Talb-e-Ishhad* in order to confirm that the pre-emptor is really interested in the property and wanted to enforce his right by making both the *Talbs*, that is, *Talb-e-Muwasebat* and *Talb-e-Ishhad*. It was further held that ordinarily *Talb-e-Muwasebat* is not made before the vendee because no sooner pre-emptor acquires knowledge that the property on which he has a right of pre-emption has been sold by the vendor, he without wastage of time in presence of witnesses is bound to make *Talb-e-Muwasebat* which is also known jumping *Talb*, therefore, when he will perform the second demand, that is, *Talb-e-*

Ishhad, he should attribute such words which would be sufficient to gather his intention that earlier to it he has already made ***Talb-e-Muwasebat***. It was finally held that trial court had rightly non-suited the plaintiff because he did not make reference to ***Talb-e-Muwasebat*** while performing ***Talb-e-Ishhad*** for the purpose of enforcing his right of pre-emption.

12. In the instant case, the deceased plaintiff did not make the first demand / ***Talb-e-Muwasebat***, nor did he refer to ***Talb-e-Muwasebat*** while performing the purported second demand / ***Talb-e-Ishhad***. Therefore, he failed in making the two ***Talbs*** as contemplated by law before filing the Suit. In view of the above discussion, it can be safely concluded that the concurrent findings of both the learned courts below are neither perverse nor patently against the evidence, nor the evidence was misread, nor any material piece of evidence had been ignored by the learned courts below, and there was no jurisdictional error in the proceedings. The applicants have not been able to show that the concurrent findings of facts recorded by the learned courts below are unsustainable. The findings of both the learned lower courts are based on correct appreciation of evidence, and full and proper application of mind. I do not find any infirmity or illegality in the impugned judgments and decrees, which in my humble opinion, do not call for any interference by this Court. This Civil Revision Application is, therefore, liable to be dismissed.

The above are the reasons of the short order announced by me on 26.02.2013, whereby this Civil Revision Application was dismissed along with C.M.A. No. 617 of 2010.

J U D G E