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JUDGMENT SHEET

IN THE LAHORE HIGH COURT AT LAHORE

JUDICIAL DEPARTMENT

C.R.No.1305 of 2003

Sultan Ali Vs. Ghulam Hussain

J U D G M E N T

Date of hearing	**02.02.2012**
Petitioner by	Ch. Jahan Zeb Wahlah, Advocate.
Respondents by.	M/s.Dr.M. Ghulam Mohy ud Din Qazi, Malik Noor Muhammad Awan and Muddassar Mushtaq, Advocates.

NASIR SAEED SHEIKH, J: The petitioner who was the defendant in a civil suit filed by the respondents for possession through exercise of their right of pre-emption before the learned Senior Civil Judge Khushab on 13.11.1995 assails the judgments and decrees passed by the two courts below in the matter.

2. The subject land measuring 40 kanals 1 marla situated in Chak No.25/AMB, Tehsil and District Khushab described in the plaint was purchased by the petitioner through mutation No.186 dated 24.10.1995 for the sale price of Rs.300,000/-. The respondents who claimed themselves be the co-sharers in the joint khata and also owners of contiguous land alleged to have received information of the sale transaction in question on 15.11.1995 and after performing the necessary talabs instituted the suit for possession through exercise of their right of pre-emption in order to facilitate their already existing ownership.

3. The suit was contested by the petitioner denying all the claims raised by the respondents in their plaint. The learned Civil Judge framed the following issues out of the pleadings of the parties:-

ISSUES

1. *Whether the plaintiffs are Shafi Sharik, Shafi Khalit and Shafi Jar?OPP*
2. *Whether the requirement of Islamic talab has been fulfilled by the plaintiff?OPP*
3. *Whether the plaintiffs have no cause of action and locus standi to file the present suit?OPD*
4. *Whether the plaintiffs are estopped by their own words and conduct to bring the suit?OPD*
5. *Whether the suit is under valued for the purposes of court fee and jurisdiction?OPD*
6. *Whether the defendant is entitled to special costs under section 35-A of CPC?OPD*
7. *Whether the ostensible sale price has bonafide been fixed and actually paid?OPD*
8. *If issue No.8 is not proved then what was the market value of the suit land at the time of transaction?OPD*
9. *Whether defendant is entitled for incidental charges, If so to what extent?OPD*
10. *Relief.*

4. After allowing the parties to produce their respective evidence the learned Civil Judge Khushab decreed the suit in favour of the respondents vide judgment and decree dated 11.6.2002. The petitioner preferred an appeal against the judgment and decree of the learned trial court which appeal came up for hearing before the learned District Judge Khushab and the appeal was dismissed vide judgment and decree dated 02.6.2003. Through the instant Civil Revision the vendee/defendant has assailed the judgments and decrees passed by the two courts below.

5. It is contended by the learned counsel for the petitioner that in the contents of para-3 of the plaint the respondents narrated their claim of performance of the necessary talabs but there is no mention of the time and place by the respondents/plaintiffs of the performance of *Talab-i-Muwthibat.* It is further contended by the learned counsel for the petitioner that the claim of the respondents about the performance of both the talabs as raised in para-3 of the plaint

were specifically denied by the petitioner in his written statement and notwithstanding the non-mentioning of the time and place of making of the *Talab-i-Muwthibat,* the respondents did not produce the Postman in order to prove the delivery of the notice of *Talab-i-Ishhad* to the petitioner. The learned counsel for the petitioner has relied upon the judgments reported as ***MIAN PIR MUHAMMAD AND ANOTHER VS. FAQIR MUHAMMAD THROUHG L.RS. AND OTHERS (PLD 2007 SC 302), MST. BASHIRAN BEGUM VS. NAZAR HUSSAIN AND ANOTHER (PLD 2008 SC 559)*** and ***AKBAR ALI KHAN AND OTHERS VS. MUKAMIL SHAH AND OTHERS (2005 SCMR 431)*** in support of his contentions to argue that the above defects were fatal to the entitlement of the respondents to the judgments and decrees passed in their favour.

6. The learned counsel for the respondents has defended the judgments and decrees passed by the two courts below and has argued that at the time when the judgments and decrees were passed by the two courts below, the matter was decided in accordance with the law then prevailing. The learned counsel for the respondents contends that the respondents proved the making of *Talab-i-Muwthibat* by producing oral evidence and in the deposition of the respondents and their witnesses the time, place and date of making of *Talab-i-Muwthibat* was proved. The learned counsel further contends that the production of registered postal receipt of sending of notice upon the address of the petitioner was sufficiently proved. It is further contended that the two courts below have recorded the concurrent finding of facts and this Court in exercise of its revisional jurisdiction cannot set aside the findings recorded by the two courts below confirming the making of talabs which according to the learned counsel for the respondents is a factual controversy. The learned counsel for the respondents has prayed for the dismissal of the revision petition.

7. I have considered the arguments of the learned counsel for the parties.

8. The contents of para-3 of the plaint have been carefully gone through with the assistance of the learned counsels for the parties and it is an admitted position that the respondents did not mention the place and time of making of *Talab-i-Muwthibat* by them. The notice of *Talab-i-Ishhad* has also been produced by the respondents which is Exh.PA/1 and in the said notice also the time and place of making of *Talab-i-Muwthibat* by the respondents is not mentioned. This non mentioning of the performance of *Talab-i-Muwathibat* by the respondents with specification of time and date in the plaint has been comprehensively dealt with by the honourable Supreme Court of Pakistan in the judgment reported as ***MIAN PIR MUHAMMAD AND ANOTHER VS. FAQIR MUHAMMAD THROUHG L.RS. AND OTHERS (PLD 2007 SC 302)***. The paragraphs No.3, 4 and 5 of the reported judgment are very important and are reproduced.

> *"It is well-understood in the ordinary sense that the Talb-i-Muwathibat connotes to a jumping demand. It is also evident from the above provisions of law the Talb-i-Muwathibat means immediate demand by a pre-emptor. As Explanation I to section 13 of the Act provides that Talb-i-Muwathibat means immediate demand by a pre-emptor, therefore, it will be necessary to find out the exact meaning and connotation of the word "immediate' to determine the time or the period within which the Talb-i-Muwathibat is to be made by the pre-emptor after coming to know of the sale. For this purpose the meaning of the word 'immediate' will have to be examined from the dictionaries and from the decided cases, if any.*
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> *In Black's Law Dictionary, Eighth Edition on (one) page 764 defines the word 'Immediate' to mean "occurring without delay; instant"*
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> *In Webster Comprehensive Dictionary Encyclopaedic Edition on page 631 the word 'Immediate' has been defined to mean "without delay; instant."*

The definition and meaning of the word "immediate" has been considered by courts in several cases and it will be appropriate to refer to some of the decided cases relating to the definition of the word "immediate". In the case of Noor Khan v. Ghulam Qasim (2003 YLR 570) Lahore High Court while deciding the case arising out of pre-emption suit pronounced that word "immediate" would mean to act immediately, suddenly or a sudden rise or moment. The Court also took into consideration the meaning of jumping demand and observed that it would mean immediate demand made by the pre-emptor in the same meeting and sitting without any loss of time as soon as he received the information about the sale. In the case of Muhammad Ali v. Allah Bakhsh (2004 CLC 1949) the word "immediate" was interpreted to mean doing of a thing at once and without any delay.

It is observed that great emphasis and importance is to be given to this word in making of Talb-i-Muwathibat and it is necessary that as soon as the pre-emptor acquired knowledge of the sale of pre-empted property he should make immediate demand for his desire and intention to assert his right of pre-emption without the slightest loss of time. According to the dispensation which has been reproduced hereinabove after performing Talb-i-Muwathibat, in terms of section 13(2) of the Act, the pre-emptor has another legal obligation to perform i.e. making of Talb-i-Ishhad as soon as possible after making Talb-i-Muwathibat but not later than two weeks from the date of knowledge of performing Talb-i-Muwathibat, therefore, the question can conveniently be answered by holding that to give full effect to the provisions of subsections (2) and (3) of section 13 of the Act, it would be mandatory to mention in the plaint date, place and time of performance of Talb-i-Muwathibat because from such date the time provided by the statute i.e. 14 days under subsection (3) of section 13 of the Act shall be calculated. Supposing that there is no mention of the date, place and time of Talb-i-Muwathibat then it would be very difficult to give effect fully to subsection (3) of section 13 of the Act, and there is every possibility that instead of allowing the letter of law to remain in force fully the pre-emptor may attempt to get a latitude by claiming any date of performance of Talb-i-Muwathibat in his statement in Court and then on the

basis of the same would try to justify the delay if any, occurring in the performance of Talb-i-Ishhad. It is now a well-settled law that performance of both these Talbs successfully is sine qua non for getting a decree in a pre-emption suit. It may be argued that as the law has not specified about the timing then how it would be necessary to declare that the mentioning of the time is also necessary. In this behalf, it is to be noted that connotation of Talb-i-Muwathibat in its real perspective reveals that it is a demand which is known as jumping demand and is to be performed immediately on coming to know of sale then to determine whether it has been made immediately, mentioning of the time would be strictly in consonance with the provisions of section 13 of the Act. This Court in the case of Rana Muhamamd Tufail v. Munir Ahmed and another (PLD 2001 SC 13), declined to grant leave to appeal maintaining the judgment of the learned High Court as there was four hours delay in making the Talb-i-Muwathibat from the time of receiving the knowledge of the sale. In the case of Mst. Sundri Bai v. Ghulam Hussain (1983 CC 2441) High Court of Sindh, held the delay of 1-1/12 hour in making Talb-i-Muwathibat to be fatal to the scheme of Shufa when the pre-emptor was residing on the first floor while the purchaser/respondent was residing on the ground floor of the same building. In another case of Mt. Kharia Bibi v. Mst. Zakia Begum and 2 others (C.A.1618 of 2003) this view was endorsed.

Now we would consider the two judgments pronounced by this Court by larger Benches of equal strength in the cases of Haji Noor Muhammad v. Abdul Ghani and 2 others (2000 SCMR 329) decided on 27-10-1999 and Altaf Hussain v. Abdul Hameed alias Abdul Majeed through Legal Heirs and another (2000 SCMR 314) decided on 15-11-1999, wherein the consensus was that in view of the law of pleadings, it is not necessary to give the details of including the date, place and time of performance of Talb-i-Muwathibat. With utmost respect it is observed that while expressing the above view this Court did not take into consideration in detail the, importance and implication of the word immediate as has been provided in Explanation I to section 13 of the Act 1991 otherwise there was every possibility of arriving at the view

which we are intending to take in this case. However, we agree and endorse the view taken in both the judgments that there is no necessity of mentioning the name of witnesses because then it would be departure from the ordinary law of pleading as provided in Order 6 Rule 5, C.P.C. as evidence is not required to be noted in the pleadings and only necessary details are to be furnished for the purpose of making out a prima facie case to establish that a cause of action has accrued for invoking the jurisdiction of the Court for the redressal of grievance. Subsequently, a number of judgments were delivered including in the cases of Haji Muhammad Saleem v. Khuda Bakhsh (PLD 2003 SC 315) and Fazal Subhan and 11 others v. Mst. Sahib Jamala and others (PLD 2005 SC 977), wherein it was held that furnishing the date and time and place in the plaint is necessary to establish the performance of Talb-i-Muwathibat. Therefore, we endorse the view taken in the judgments and approve that a plaint wherein the date, place and time of Talb-i-Muwathibat and date of issuing the notice of performance of Talb-i-Ishhad in terms of section 13 of the Act is not provided it would be fatal for the pre-emption suit."

9. The default noted above is not inconsequential for the correct decision of the matter as per law laid down by the honourable Supreme Court of Pakistan; it certainly adversely affects the eligibility of the Respondents to get the judgments and decrees passed in their favour. The judgments and decrees passed by the two courts below therefore are not sustainable in view of the authoritative pronouncement made by the honourable Supreme Court of Pakistan in the above noted judgment. This Court is bound to follow the latest pronouncement of law made by the honourable Supreme Court of Pakistan. The contention of the learned counsel for the respondents that the judgments and decrees of the two courts below were in accordance with the law then prevailing is not entertainable.

10. There is another legal point which also plays a pivotal role in making the decision in the instant matter. The

respondents are alleged to have performed the *Talab-i-Ishhad* by sending notice of *Talab-i-Ishhad* to the petitioner through registered postal service. This claim of the respondents as alleged in the plaint was specifically denied by the petitioner in his written statement. The respondents have not produced the Postman during the trial to prove that the notice of *Talab-i-Ishhad* was either served upon the petitioner or was refused to be received by him. The honourable Supreme Court of Pakistan in the judgments reported as ***MUHAMMAD BASHIR AND OTHERS VS. ABBAS ALI SHAH (2007 SCMR 1105)*** and ***BASHIR AHMED VS. GHULAM RASOOL (2011 SCMR 762)*** has laid down the law that where in a pre-emption suit the plaintiff alleges the making of *Talab-i-Ishhad* by sending the notice of *Talab-i-Ishhad* through registered postal service to the defendant of the suit and this contention is denied by the defendant in his written statement, the plaintiff of such a suit must produce the Postman who makes an effort to deliver the notice of *Talab-i-Ishhad* to the defendant and prove its due delivery or refusal as the case may be. It was further held that if the Postman is not produced by such a plaintiff, he must fail in his suit. Applying the second principle of law as well upon the facts and circumstances of the case the respondents having failed to produce the Postman in order to prove the necessary service of the notice of *Talab-i-Ishhad* upon the petitioner, the respondents were not entitled to the grant of a decree of possession through exercise of their right of pre-emption. This Court is of the considered opinion that both the above mentioned questions are questions of law and can be taken cognizance of by this Court on the basis of the latest pronouncements made by the honoruable Supreme Court of Pakistan upon the subject.

11. The judgments and decrees passed by the two courts below are therefore not sustainable in view of the above case law. Resultantly the instant Civil Revision is **allowed.** The judgments and decrees passed by the two courts below in favour of the respondents are **set aside and the suit instituted by the respondents is dismissed.** The parties to bear their own costs.

(Nasir Saeed Sheikh)
Judge

Amjad

Approved for reporting.