

JUDGMENT SHEET

IN THE LAHORE HIGH COURT MULTAN BENCH,
MULTAN
(JUDICIAL DEPARTMENT)

RSA No.09 of 2001.

Hanif Ullah Khan, etc

Vs.

Muhammad Iqbal

JUDGMENT

DATE OF HEARING: 06-05-2015.
APPELLANTS BY: M/s Syed Muhammad Ali Gillani and Mughees Aslam Malik, Advocates.
RESPONDENT BY: Syed Athar Hassan Shah Bukhari, Advocate.

AMIN-UD-DIN KHAN, J. Through this appeal the appellants/defendants have challenged the judgment & decree dated 21.03.2001 passed by the learned District Judge, Rajanpur, whereby the appeal filed by the respondent/plaintiff was accepted, by way of which, the judgment & decree dated 30.01.1979 passed by the learned Civil Judge, Jampur dismissing the suit for pre-emption filed by the respondent/plaintiff, were set aside.

2. The brief facts of the case are that on 29.05.1978 the respondent-plaintiff filed a suit to pre-empt the sale of double story house fully described in the head note of plaint purchased by the defendant through registered sale deed registered on 02.06.1977 for a consideration of Rs.25,000/-. The case of plaintiff that same was sold for a consideration of Rs.10,000/-.

The written statement was filed on 18.07.1978 and objection was raised that part of suit property is a shop, which has wrongly been mentioned as 'Baithak', therefore, property is exempted from pre-emption. It was also stated that in Jampur city there is no custom of pre-emption and it was stated that property was purchased for a consideration of Rs.25,000/- and is mortgaged with the National Bank for consideration of Rs.25,000/-, therefore, its value is Rs.50,000/-. In reply to Para 3 of the plaint it is admitted that it is residential property but it has been stated that there is no custom of pre-emption in Jampur city. In reply to Para 4 of the plaint, contiguity of plaintiffs' house with the suit property has been denied. Learned trial Court on 18.07.1978 framed the following issues:-

1. Whether the plaintiff has got superior right of pre-emption. OPP
2. Whether the sum of Rs.25,000/- was fixed or paid in good faith. OPD
3. Otherwise what was the market value of the suit property at the time of its sale. OP Parties
4. Whether the custom of pre-emption was prevalent in the disputed locality before the commencement of the pre-emption Act 1913. OPP
5. Whether some shop is attached to the suit property. If so its effects. OPD
6. Relief.

On 18.07.1978 Mr. Muhammad Aslam Advocate was appointed as Local Commission to inspect the spot, report about the market value of suit property and also the description of suit property

stating that whether any shop is situated in the suit property. The Local Commission submitted its report on 26.07.1978. The plaintiff raised the objection upon the report and issue No.3-A was framed, which is as follows:-

3-A Whether the report of the Local Commission is liable to be set aside. OPP

The plaintiff's evidence was recorded on 02.10.1978 and the defendant's evidence was recorded on 09.11.1978. On 16.01.1979 counsel for the plaintiff made a statement that he does not want to produce rebuttal evidence. On 28.01.1979 issue No.5-A was framed, which is as follows:-

5-A Whether the suit property was pre-emptable? OPP

Vide judgment & decree dated 30.01.1979 suit of the plaintiff was dismissed. The appeal was preferred on 12.07.1979, which was accepted vide judgment and decree dated 07.04.1980 and the suit was decreed for a sale consideration of Rs.25,000/-. The vendee-defendant preferred regular second appeal No.367 of 1980 against the judgment & decree dated 07.04.1980 passed by the learned District Judge, which was accepted by this Court vide judgment dated 20.11.2000 and the matter was remanded to the learned first appellate Court with the direction to decide the appeal, as the findings on issue No.5-A were challenged before this Court, keeping in view the direction given by this Court and the remand order, learned District Judge vide impugned

judgment & decree dated 21.03.2001 accepted the appeal and as such the suit was decreed. Hence, this second appeal.

3. Learned counsel for the appellant/defendant argues that the findings recorded by the learned first appellate Court on issue No.5-A are erroneous and have been recorded by ignoring the evidence available on the file produced by the vendee-defendant. Prays for acceptance of this appeal and dismissal of the suit.

4. On the other hand, learned counsel for the respondent/plaintiff-decree holder argues that finding of fact has been recorded by learned first appellate Court keeping in view the remand order passed by this Court and in accordance with the evidence available on the file, therefore, no case of interference by this Court while exercising jurisdiction under section 100 of the CPC has been made out and as such the appeal is liable to be dismissed.

5. I have heard the learned counsel for the parties at full length and also gone through the record of case as well as the findings of two courts below.

6. The series of facts are that learned first appellate Court in pre-remand judgment & decree dated 07.04.1980 reversing the findings of learned trial Court decreed the suit. This shows that the findings of issue No.3-A were also reversed, though specifically same have not been mentioned in its judgment because without setting aside the findings of learned

trial Court on issue No.3-A the passing of decree was not possible, as in the reference with regard to the market price of suit property the Local Commission was also directed to report about the specification of property whether there exist any shop in the suit property, the suit has been decreed, meaning thereby the findings on issue No.3-A were also reversed and during previous appeal filed before this Court by the present appellant, findings of issue No.5-A were only challenged and the matter was remanded to that effect only, which confirm that the findings of issue No.3-A though were not specifically under issue but the learned District Judge in post-remand proceedings dealt with issue No.3-A and issue No.5-A and answered both the issues in affirmative and decreed the suit.

7. Now the position is that the findings of issues No.3-A and 5-A are in issue before this Court in this appeal. Learned counsel for the parties have also advanced arguments to this extent only. So far as issue No.3-A is concerned, though at the time of reference made to the Local Commission vide order dated 18.07.1978 the Commission was directed to report about the market value of suit property and report whether it is shop or not. In my view both these questions were not referable to the Local Commission, as it was the duty of parties to prove their respective pleadings by producing evidence in the Court and after shifting of onus to the other party to rebut the same. It was the duty of Court to decide the issue in the light of evidence

of the parties, Court cannot delegate its powers to the Local Commission. Now the question of fixation of price is not in issue, as both the parties have admitted that the price of suit property was Rs.25,000/-. The only question that whether it is a shop or not, this question can be decided by preponderance of evidence, it cannot be decided banking upon the report of Local Commission. Overall evidence of the parties is to be seen in the light of history of litigation and its pendency for the last 37 years and it is a fact that each case is to be decided only on its merits. The only question to be determined before this Court is whether part of suit property is shop or not, therefore, at this second appeal stage due to the requirement and circumstances of this case I am going into the pleadings and evidence of parties. As I have noted earlier that in Para-3 of the plaint it has been mentioned that the property is residential. I would like to quote Para-3 of the plaint as under:

In reply to Para 3 of the plaint it has been admitted that it is a residential property. The reply of Para 3 of plaint in written statement is as under:

8. Now I examine the sale deed Ex.P-2, wherein admittedly the suit property has been mentioned as residential house and through loan from National Bank the same was

purchased and the residential house was mortgaged with National Bank. This position has been admitted by the appellant/vendee-defendant. Though in the preliminary objections raised in the written statement it has been stated that it is shop but in reply to Para 3 of plaint, in written statement when it has been admitted that it is residential house, there was no need for the plaintiff to prove that it is a residential house when in reply of Para 3 of plaint the fact that it is residential house has been admitted, an admission need not be proved. In the above circumstances, I am unable to disagree with the well reasoned findings recorded by the learned first appellate Court. Therefore, no case for interference by this Court while exercising jurisdiction under section 100 of the CPC has been made out. So far as the findings of fact are concerned, no detailed scrutiny of evidence is permissible while dealing the matter under section 100 of the CPC but according to the circumstances of each case the Court can scrutinize the necessary evidence.

9. For what has been discussed above, this appeal fails and the same is hereby dismissed.

(AMIN-UD-DIN KHAN)
JUDGE

Qurban*

Approved for Reporting

Judge