Form No: HCJD/C-121

ORDER SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Revision No.888 of 2011
Farzand Ali Versus Muhammad Ishaq

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary

13.10.2017 M/s Sheikh Usman Karim Ud Din and Ch. Amir Rehman, Advocates for the petitioner
Rana Muhammad Anwar, Advocate for the respondent

Tersely, the respondent instituted a suit for possession through pre-emption in respect of land measuring 5 kanals 17 marlas, situated in village Samo Bala, Tehsil & District Gujranwala, contending therein that the petitioner purchased the land from Zulfiqar Ali through sale deed registered on 03.04.2001 and the respondent/plaintiff got knowledge of the sale on 26.08.2001, at evening time when he was sitting at his Dera alongwith his brother Ghulam Abbas and father through Haji Muhammad and pronounced talb-e-muwathibat in presence of witnesses. Thereafter, on the same day, he alongwith Ghulam Abbas and said Haji Muhammad went to the petitioner and repeated his said demand of pre-emption and requested him to receive the consideration amount but the petitioner declined. It was further maintained that on 28.08.2001, the respondent prepared notice of Talb-e-Ishhad at his office situated at District Court, Gujranwala in presence of Ghulam Abbas and Haji Muhammad. Haji Muhammad affixed his thumb impression and Ghulam Abbas signed the said notice of Talb-e-Ishhad which was dispatched to the petitioner through registered A.D. It was asserted that the sale in question was held secretly in consideration of Rs.30,000/- but just to avoid

pre-emption the same was mentioned as Rs.160,000/-; hence, the suit.

The defendant No.2 (Zulfiqar Ali) was proceeded against ex parte, whereas the present petitioner/defendant contested the suit by filing written statement and controverted the averments of the plaint by raising preliminary as well as factual objections. The learned trial Court framed issues; both the parties adduced their evidence, oral as well as documentary, in pro and contra. The learned trial Court after hearing the arguments vide impugned judgment and decree dated 01.07.2009 decreed the suit of respondent/plaintiff; against the said judgment and decree the petitioner preferred an appeal, which was dismissed vide impugned judgment and decree dated 08.03.2011. Being aggrieved of the said judgments and decrees, the petitioner has filed the instant civil revision.

2. Opening arguments, the learned counsel for the petitioner has submitted that the suit was barred by limitation, but, this aspect of the case was not considered by the learned Courts below; mere contention that such plea was not taken in written statement does not liberate the learned trial Court from considering the question of law i.e. limitation, rather the learned trial Court is bound to consider such question at its own. Reliance in this regard has been placed on *Haji Abdullah Khan and others v. Nisar Muhammad Khan and others* **(PLD 1965 Supreme Court 690)**, *Hakim Muhammad Buta and another v. Habib Ahmad and others* **(PLD 1985 Supreme Court 153)**, *Haji Muhammad Shah v. Sher Khan and others* **(PLD 194 Supreme Court 294)**, *Maulana Nur-Ul-Haq v. Ibrahim Khalil* **(2000 SCMR 1305)**, *Qasim Ali v. Rehmatullah* **(2005 SCMR 1926)**, *Muhammad Khan v. Muhammad Amin (decd) through L.Rs. and others* **(2008 PSC 1443)**, *Mst. Kausar Parveen v. Muhammad Iqbal* **(PLD 2012 Supreme Court 760)**, *Muhammad Zahid v. Dr. Muhammad Ali* **(PLD 2014 Supreme Court 488)** and *Noor Din and another v. Additional District*

Judge, Lahore and others **(2014 SCMR 513)**. He submits that material contradictions in the depositions of the P.Ws. have not been considered and undue weight has been given to the evidence produced by the respondent, thus, gross misreading and non-reading of evidence has been committed which has caused miscarriage of justice. Reliance has been placed on *Ghafoor Khan (deceased) through LRs. v. Israr Ahmed* **(2011 SCMR 1545)** and *Allah Ditta through L.Rs. and others v. Muhammad Anar* **(2013 SCMR 866)**. He contends that the respondent has not proved performance of talbs as per mandate of law because neither the postman nor the A.D. has been produced by the respondent; therefore, the suit ought to have been dismissed instead of decreed as has been done by the learned trial Court and confirmed by the learned appellate Court. Relies on *Muhammad Ramzan v. Lal Khan* **(1995 SCMR 1510)**, *Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others* **(PLD 2007 Supreme Court 302)**, *Muhammad Bashir and others v. Abbas Ali Shah* **(2007 SCMR 1105)**, *Muhammad Sharif through Mst. Irshad Bibi and others v. Walayat Khan* **(2008 SCMR 248)**, *Khan Afsar v. Afsar Khan and others* **(2015 SCMR 311)**, *Muhammad Iqbal and others v. Muhammad Hanif through L.Rs.* **(2016 CLC Note 89-Lahore)**, *Muhammad Akbar v. Muhammad Yaqoob and others* **(2016 CLC 1402-Lahore)**, *Saeeda Ghazala and 3 others v. Tahira Naz and 10 others* **(2016 CLC 1438-Lahore)**, *Amir Khan v. Muhammad Taj* **(2017 CLC Note 94)**, *Haji Makhan through Legal Representatives v. Mian Muhammad Zaman* **(2017 CLC Note 117)**, *Ali Muhammad v. Malka Hussain* **(2017 CLC 463-Lahore)** and *Basharat Ali Khan v. Muhammad Akbar* **(2017 SCMR 309)**. He, by placing further reliance on *Hasil and another v. Karam Hussain Shah and others* **(1995 SCMR 1385)**, *Nawab Din through L.Rs. v. Faqir Sain* **(2007 SCMR 401)** and *Muhammad Akram v. Mst. Zainab Bibi* **(2007 SCMR 1086)**, the learned counsel for the

petitioner has prayed for setting aside of the impugned judgments and decrees as well as dismissal of the suit.

3. Contrarily, learned counsel for the respondent has supported the impugned judgments and decrees and has further argued that the respondent has fulfilled the required Talbs in accordance with law; that the suit has been filed well within time prescribed under law, even the point of limitation has not been raised by the petitioner while submitting written statement. He adds that concurrent findings on facts have been recorded and re-appraisal of evidence cannot be made while exercising powers under section 115 of the Code of Civil Procedure, 1908. He has prayed for dismissal of the civil revision in hand. Reliance has been placed on *Sultan Ali and another v. Mirza Moazzam Baig* **(1987 MLD 2583(1)-Karachi)**, *Muhammad Ramzan v. Ahmad Bux and another* **(1991 SCMR 716)**, *National Bank of Pakistan v. Khushal Khan* **(PLD 1994 Peshawar 284)**, *Messrs Tribal Friends Co. v. Province of Balochistan* **(2002 SCMR 1903)** and *Province of Punjab through Collector and others v. Muhammad Saleem and others* **(PLD 2014 Supreme Court 783)**.

4. Heard.

5. First of all, this Court deals with the submission made by the learned counsel for the respondent to the effect that concurrent findings on facts have been recorded and re-appraisal of evidence cannot be made while exercising powers under section 115 of the Code of Civil Procedure, 1908; in this regard, it is observed that the concurrent findings when are found result of misreading and non-reading of evidence or result of material irregularity, the same can be interfered with in exercise of supervisory revisional jurisdiction. In this regard reliance is placed on *Habib Khan and others v. Mst. Bakhtmina and others* **(2004 SCMR 1668)**, *Ghulam Muhammad and 3 others v. Ghulam Ali* **(2004 SCMR 1001)** and *Sultan*

Muhammad and another v. Muhammad Qasim and others **(2010 SCMR 1630)**, wherein it has invariably been held:

> *'17. Indeed, the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case, are not open to question at the revisional stage, but where on record the position is contrary to it, then the revisional Court in exercise of its jurisdiction under section 115, C.P.C. or this Court, in exercise of jurisdiction under Article 185(3) of the Constitution, are not denuded of their respective powers to interfere and upset such findings.'*

In view of the above, it is settled principle that when the concurrent findings suffer from misreading and non-reading of evidence or material illegality and irregularity, the same can be rectified by exercising supervisory jurisdiction.

6. Now, this Court adverts to the second objection with regards to limitation. It has been argued by learned counsel for the respondent that the petitioner's side has not raised objection with regard to limitation while submitting written statement, so at this stage, no such plea can be raised. In this regard, it is observed that matter of limitation cannot be left to pleadings of the parties but it is duty of the Court to consider the same and the question of limitation being mandatory cannot be waived and even if waived can be taken up by party waiving it and by Court itself, too; however, there is an exception to this that defendant, in exceptional cases, is barred from raising plea of limitation on general principle of estoppel arising from his conduct particularly if plea belatedly taken involved an inquiry on facts; but in the present case, the position is otherwise. In this regard reliance is placed on *Hakim Muhammad Buta and*

another v. Habib Ahmad and others **(PLD 1985 Supreme Court 153)** wherein it has been held:

> *'The question of limitation may be one of fact or of law, if former the Court is not bound to go into it unless raised by the parties, and if latter the Court is as a general rule bound to raise an decide it, although not raised by the parties.'*

In this regard guidance can also be sought from *Haji Muhammad Shah v. Sher Khan and others* **(PLD 1994 Supreme Court 294)** wherein it has been held:

> *'With regard to limitation it is not disputed that question of limitation is a mixed question of fact and law and even if the plea of limitation is not pressed it is the duty of the Court to determine such issue.'*

Thus, the objection that as the petitioner has not raised objection with regard to limitation while submitting written statement, so the same cannot be agitated at this belated stage, has no force and is misconceived, the same is discarded.

It is an admitted fact that sale in question was carried out through registered sale deed. Section 30 of the Punjab Pre-emption Act, 1991 provides:

> ***'30. Limitation***.— *The period of limitation for a suit to enforce a right of pre-emption under this Act shall be four months from the date—*
>
> *(a) of the registration of the sale deed;*
>
> *(b) of the attestation of the mutation, if the sale is made otherwise than through a registered sale deed;*
>
> *(c) on which the vendee takes physical possession of the property if the sale is made otherwise than through a registered sale deed or a mutation; or*

> *(d) of knowledge by the pre-emptor, if the sale is not covered under paragraph (a) or paragraph (b) or paragraph (c).*

Plain reading of the above provision of law provides that the period of limitation for a suit to enforce a right of pre-emption under this Act shall be four months from the date of the registration of the sale deed and section 31 of the Act will not come in the way, because presumption of truth is attached to the act of the Registrar until and unless the same is proved otherwise and where a case is covered by any specific earlier clause i.e. (a), (b) & (c) of section 30 of the Act, clause (d) cannot be resorted to. In this regard reliance is placed on *Qasim Ali v. Rehmatullah* **(2000 SCMR 1926)**, *Maulana Nur-Ul-Haq v. Ibrahim Khalil* **(2000 SCMR 1305)** and *Mst. Kausar Parveen v. Muhammad Iqbal* **(PLD 2012 Supreme Court 760)**.

Pursuant to the above, in the present case, it is an admitted fact that date of sale through registered sale deed is 03.04.2001, thus, in this case the date of limitation would start from date of registration of the sale deed instead of date of knowledge and when we compute the period from the said date, it ends on 03.08.2001, on which date the District Judiciary observes Summer Vacation and no regular work except urgent nature is entertained; thus, the respondent instituted the suit on 01.09.2001, on the first opening day of the Courts, after summer vacation as per mandate of section 4 of the Limitation Act, 1908, which would be considered well within time. Reliance is placed on *Muhammad Ramzan v. Ahmad Bux and another* **(1991 SCMR 716)**, *Messrs Tribal Friends Co. v. Province of Balochistan* **(2002 SCMR 1903)** and *Province of Punjab through Collector and others v. Muhammad Saleem and others* **(PLD 2014 Supreme Court 783)**.

7. It has been asserted and pleaded by the respondent/ plaintiff that he came to know about the disputed sale deed on 26.08.2001 at evening time when he alongwith his brother

Ghulam Abbas and father was sitting at his Dera, Haji Muhammad informed him about the disputed sale and he, then and there, made jumping demand and on the same day went to the petitioner/defendant and offered him to receive the sale actual sale price and to mutate the suit land in his favour, but on petitioner's refusal, on 28.08.2001, he sent notice Talb-e-Ishhad under attestation of witnesses. The deposition of the petitioner (P.W.3) has been supported by the P.Ws. 4 and P.W.5, in their examination; however, during cross examination, the respondent categorically admitted that the whole story of making talb-e-muwathibat is fabricated as is evident from:

یہ غلط ہے کہ ایسی کوئی مجلس منعقد نہ ہوئی تھی اور طلب مواثبت والی کہانی فرضی نہ ہے۔

Such a mistake cannot be expected from an Advocate as he knows consequences of such like narration; even this aspect of the case finds support from the cross examination conducted on P.W.5, brother of the present respondent, who during cross examination admitted that:

بیع سے قبل ذوالفقار کا اراضی متداویہ پر قبضہ تھا اور بیع کے بعد اراضی متداویہ پر قبضہ فرزند مدعا علیہ نمبر 1 کا چلا آ رہا ہے۔

So when soon after the sale, the possession was changed and the petitioner was in possession of the same, the factum of sale, especially through registered sale deed, could not be under curtain for such a long period and the story maneuvered by the respondent, as has been admitted during cross examination, only to exercise right of pre-emption cannot be believed. The learned Courts below have failed to appreciate evidence in true perspective and the judgments and decrees suffer from misreading and non-reading of evidence; thus, the same are reversed on this point.

8. Now comes the second Talb i.e. Talb-e-Ishhad. Mere sending of notice was not sufficient but service of its addressee was necessary to be proved, which is lacking in this case, because P.W.1 (Muhammad Shahid, Clerk Post Office)

during cross examination deposed that on Ex.P1 address of the defendant (petitioner) is available, but Ex.P1 does not find mentioned caste and post office of the defendant. Akin to him, P.W.2 (Asif Ali, Postman), during cross examination, deposed that he could not tell who received the registry. Meaning thereby the service of addressee of the alleged notice was not affected. Even this aspect finds support from the fact the Acknowledgement Due, showing acceptance or refusal, was not brought on record; thus, this Talb was also not proved by the respondent as per mandate of law. In this regard reliance is placed on *Muhammad Bashir and others v. Abbas Ali Shah* **(2007 SCMR 1105)**, *Allah Ditta through L.Rs. and others v. Muhammad Anar* **(2013 SCMR 866)**, *Khan Afsar v. Afsar Khan and others* **(2015 SCMR 311)**, *Muhammad Iqbal and others v. Muhammad Hanif through L.Rs.* **(2016 CLC Note 89-Lahore)**, *Muhammad Akbar v. Muhammad Yaqoob and others* **(2016 CLC 1402-Lahore)**, *Saeeda Ghazala and 3 others v. Tahira Naz and 10 others* **(2016 CLC 1438-Lahore)**, *Amir Khan v. Muhammad Taj* **(2017 CLC Note 94)**, *Haji Makhan through Legal Representatives v. Mian Muhammad Zaman* **(2017 CLC Note 117)**, *Ali Muhammad v. Malka Hussain* **(2017 CLC 463-Lahore)** and *Basharat Ali Khan v. Muhammad Akbar* **(2017 SCMR 309)**.

9. It is a settled principle of law that when law requires a thing to be done in a particular manner then it would be a nullity in the eyes of law if not performed in that very prescribed manner. In the present case, as discussed above, the respondent has not substantiated his stance and has not proved performance of talbs as per dictates and provisions of section 13(3) of the Punjab Pre-emption Act, 1991, but even then the learned Courts below have passed the impugned judgments and decrees obliging him, which has resulted in miscarriage of justice; thus, the learned Courts below have failed to exercise vested jurisdiction in accordance with law. The impugned

judgments and decrees are not upto the dexterity and are not entitled to hold field further.

10. For the foregoing reasons and discussions, by placing reliance on the judgments supra as well as *Muhammad Akram v. Mst. Zainab Bibi* **(2007 SCMR 1086)**, the civil revision in hand is accepted, impugned judgments and decrees dated 01.07.2009 and 08.03.2011 passed by the learned trial Court and learned Appellate Court, respectively, are set aside, consequent whereof the suit instituted by the respondent stands dismissed. No order as to the costs.

(Shahid Bilal Hassan)
Judge

M.A.Hassan

Announced in open Court on _____.

Judge