SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.

Raja Saeed Akram Khan, J.

1. Civil Appeal No. 87 of 2015
   (PLA filed on 19.1.2015)
2. Civil Misc. No. 119 of 2015
   (Filed on 29.4.2015)

1. Munshi Khan,
2. Karamat Khan,
3. Khurshid Begum, widow,
4. Tanzeem Begum,
5. Shahnaz Begum,
6. Nishat Begum,
7. Shazia Begum, daughters of Muhammad Sadiq,
8. Jamila Akhtar, widow,
9. Hamza Salam Khan, son,
10. Shamshad Begum,
11. Hamaira Aslam,
12. Amira Aslam,
13. Nabeela Aslam,
14. Fakhira Aslam,
15. Bushra Aslam, daughters of Muhammad Aslam Khan, caste Bains Rajpoot, residents of village Roli, Tehsil and District Kotli.

.... APPELLANTS

VERSUS

Mehboob Khan s/o Muhammad Iqbal, caste Bains Rajpoot, resident of Village Roli, Tehsil and District Kotli.

..... RESPONDENT

(On appeal from the judgment of the High Court dated 21.11.2014 in Civil Appeal No. 42 of2008)

FOR THE APPELLANTS: Mr. Abdul Majeed Mallick, Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Mumtaz, Advocate.

Date of hearing: 21.12.2016.

JUDGMENT:

Mohammad Azam Khan, C.J— Mehboob Khan, plaintiff-respondent, herein, pre-empted two sales-deeds i.e. the sale-deed executed on 2nd August, 1997, in respect of the land bearing *Khewat* No. 17, *khata* No.125, *Khewat* No. 205, *khata* No. 981, comprising survey Nos. 1433, 1881/2, 1881/3, 1354/1, 1348 and 1362/1, measuring 22 *kanal*, 7½ *marla* and sale-deed executed on 5th August, 1997, in respect of the land bearing *Khewat* No. 17, *khata* No. 125 and 126, *khewat* No. 205, *khata* No. 981, comprising survey Nos. 1433, 1362/1, 1348, 1354, 1881/2 and 1881/1,

measuring 22 *kanal*, 7½ *marla*, by filing two suits in the Court of Senior Civil Judge, Kotli on 29th November, 1997, on the ground that he is co-sharer in the land, has share in آڑ-بنہ, owner in the village and the *khewat* and has prior right of purchase as compared to defendants No.1 to 4. After necessary proceedings, the trial Court dismissed both the suits. On appeals, the District Judge, Kotli decreed both the suits on the ground that the land of the plaintiff-respondents, herein, is contiguous to the land sold to the vendee. The defendants-appellants, herien, filed two appeals in the Azad Jammu and Kashmir High Court against the said judgments and the decrees. The High Court through a consolidated judgment dated 21st November, 2014, dismissed both the appeals, hence, this appeal by leave of the Court. Leave was granted to consider the following points:-

(a) whether one petition for leave to appeal from the judgment of the High Court recorded in separate appeals,

though consolidated, is competent or not;

(b) whether after the judgment delivered in case titled *Muhammad Sadiq Khan vs. Munshi Khan and others*, dated 20.6.2005, the petitioners are no more co-sharers in the land;

(c) whether the petitioners are co-sharers in the *shamilat-deh* land and;

(d) whether survey No. 1433, which is contiguous to survey No. 1432 which is in the ownership of the respondent falls in the *shamilat deh* land and whether the petitioners are also sharers in *shamilat deh* land as such and there exists any right of pre-emption in the respondent or not.

2. Mr. Abdul Majeed Mallick, Advocate, the learned counsel for the appellants, argued that the judgment of the High Court as well as that of the District Judge, Kotli is against law

and the record. While arguing the first point whether one petition for leave to appeal from the consolidated judgment and two decrees of the High Court recorded in separate appeals, is competent or not, he submitted that the land was though sold through separate sale-deeds, it was pre-empted by one party. The defendants were also the same in both the suits. The judgment and decree of the trial Court was passed on the similar questions of the fact and law. In the appeal, the similar questions of the fact and law were involved, therefore, only one petition for leave to appeal from the separate decrees decided through consolidated judgment is competent. The learned counsel relied upon the case reported as *Saraswathi Ammal and another vs. Rajagopal Ammal* (AIR 1952 *Madaras* 81) and submitted that the appeal has competently been filed. The learned counsel argued that in suit No. 285/2005, the sale-deed dated 2nd August, 1997, is in dispute, which was executed in respect of the land measuring 17

kanal, 10 *marla* with share in the *shamilat deh* land and share in the *Abadi deh* but the plaintiff, pre-emptor has not pre-empted the sale in respect of the share of the *Abadi deh* and the *shamilat deh*. Without assailing the sale of share in the *shamilat deh* and the *Abadi deh*, the suit is hit by partial pre-emption and not maintainable. The learned counsel further argued that although the point was neither taken in the written statement nor it was raised in the lower Courts but it has been raised in the petition for leave to appeal as well as in the concise statement, therefore, the same being pure legal question can be raised during the curse of arguments before this Court. The learned counsel relied upon the case reported as *Ghulam Nabi vs. Mst. Hussain Bibi and 3 others* (PLD 1981 SC (AJ&K) 42), *Abdul Ghani Farooqi vs. Chairman, AJ&K Council and 2 others* (2000 SCR 273) and *Muhammad Rafique vs. Qurban Hussain and another* (2016 SCR 796).

In the case reported as *Ghulam Nabi vs. Mst. Hussain Bibi and 3 others* (PLD 1981 SC (AJ&K) 42), this Court observed that *shamilat deh* land is the property for all practical purposes. The *shamilat deh* land is a separate entity and it is not right attached with some land or with some individual.

In the case reported as *Muhammad Rafique vs. Qurban Hussain and another* (2016 SCR 796), this Court observed that when the land was sold along with the share in *shamilat deh* land, but the pre-emptor failed to pre-empt the share in *shamilat deh* land, the suit is hit by partial pre-emption because *shamilat deh* land is a separate entity.

In the case *Abdul Ghani Farooqi vs. Chairman, AJ&K Council and 2 others* (2000 SCR 273), this Court observed that a law point which goes to the root of the case may be allowed to be raised during arguments as of right.

The learned counsel argued that the plaintiff filed a suit for pre-emption on the

ground that he is *shareek khewat*, *shareek khata* and *shareek* آڑبنہ, owner in the village and *mahal*, he has not filed the suit on the ground of contiguity, as such, he is not *Shafi Jar*. A decree on the ground of contiguity cannot be passed in favour of the plaintiff. The learned counsel referred to para 3 of the plaint. He relied upon the case reported as *Sain vs. Muhammad Din and others* (1995 SCR 208).

In the case reported as *Sain vs. Muhammad Din and others* (1995 SCR 208), this Court observed that it is a cardinal principle of law that in a suit for pre-emption, the plaintiff/pre-emptor is bound to prove the qualifications alleged in his pleadings and not on the basis of any other qualification which emerges out of the evidence of plaintiff/pre-emptor.

The learned counsel further argued that the plaintiff has based his case upon Exh. “PA”, the record of the rights pertaining to the year 1991-92, wherein one Abdul Razzaq and the defendants-appellants, herein, are entered as

the owner in the village. The learned counsel submitted that survey No. 1433 is of *shamilat deh* land, as is evident from Exh. “PB”. Abdul Razzaq and the defendants-appellants, herein, are entered as the owners in Exh. “PA”. The learned counsel further argued that the defendant-appellants, herein, are proved to be the owners in the village from the documents annexure “DA” and “DB”, as such, they are the sharers in the *shamilat deh* land and have right on the basis of Exh. “DA” and “DB”. The learned counsel argued that in file No. 284, the plaintiff had relied upon the judgment of the High Court Exh. “DE”, according to which, the land in the said suit falls in *khewat* No.193, while land in dispute falls in *khewat* No. 17 and 203. The District Judge as well as the High Court has relied upon the said judgment against law as the said judgment was not relevant. The learned counsel referred to the statement of the plaintiff-respondent, Mehboob, who stated that none of his survey numbers is adjacent to the land in

dispute. He also referred to a portion of his statement finding place at page 45, whereby he has admitted that he is not sharer in the land and at page 46, he stated that the land of Munshi Khan is adjacent to the land. He stated that it is correct that none of his land is adjacent to five survey numbers sold. From the statement of the plaintiff-respondent, herein, his case is not proved. The learned counsel requested for acceptance of the appeal and setting aside the decree of pre-emption. He lastly argued that the land has been sold with share in *shamilat deh* and *Abadi deh* in both the sale-deeds. *Shamilat deh* and *Abadi-deh* have not been pre-empted, therefore, the suit is hit by doctrine of partial pre-emption.

3. While controverting the arguments, Ch. Muhammad Mumtaz, Advocate, the learned counsel for the plaintiff-respondent, herein, argued that the judgment of the High Court is perfectly legal. Through two suits, two sale-deeds were challenged. Separate decrees were

passed by the three Courts below. One petition for leave to appeal from the two decrees is not competent. He submitted that, in fact, the defendants-appellants, herein, have filed only one appeal as is evident from the record. Only one decree has been annexed with the memorandum of appeal. The learned counsel submitted that a copy of the decree-sheet relating to file No. 284 of the Senior Civil Judge, has been annexed, which is a proof that the appellants filed only one appeal from the one decree-sheet relating to file No. 284. He submitted that firstly, the appeal being incompetently filed, merits dismissal as a whole, at the most, it can be treated as appeal from the decree passed in appeal No. 42 of the High Court arising out of file No.284 of the Senior Civil Judge, Kotli, which relates to the sale-deed registered on 5th August, 1997, while file No. 285 relates to the sale-deed dated 2nd August, 1997. The learned counsel submitted that the decree, which has not been challenged, has become final

due to non-filing of the appeal in respect of the sale-deed dated 2nd August, 1997. The sale-deed has become final on the basis of which the plaintiff-respondent is now co-sharer in the land. The learned counsel further argued that the question of partial pre-emption cannot be raised at this stage. It was neither raised in the written statement nor in the first appellate Court and in the High Court as well. The question cannot be raised, for the first time, in this Court. The learned counsel submitted that the defendants-appellants, herein, claim to be co-sharer in the land on the basis of sale-deed procured in early 1990. The judgment has been delivered against them on 20th January, 2005. After the said judgment, they are no more co-sharer in the land. The learned counsel further argued that the plaintiff-respondents, herein, is a *Shafi Jar* as is the requirement of law, on the basis of share in آڑبنہ. The learned counsel submitted that survey No. 1433 has been sold.

Survey No. 1432 is adjacent to the land, which is in the ownership of the plaintiff.

4. Ch. Muhammad Nasim, Advocate, another counsel for the plaintiff-respondent, herein, argued that the plaintiff-respondent, is the co-sharer as well as *Shafi Jar* in the land. His land's آڑبنہ is adjacent to the suit land and due to contiguity of آڑبنہ, the plaintiff-respondent, herein, is *Shafi Jar*. He has proved his case. The learned counsel submitted that the argument of the counsel for the defendants-appellants, herein, that the Courts below have incorrectly relied upon the judgment of the High Court, Exh. "DE", because the *khewat* in the said judgment is different. He submitted that land is not different, it is the same. In the new settlement the *khewat* number has been changed. The learned counsel further argued that Abdul Razzaq was an old tenant, who obtained the proprietary rights of the land and after obtaining the rights, he is no more *Moroos*, rather he has become owner in the land. The

defendants-appellants, herein, have not produced any proof that they are sharers in *Abadi deh*, as such, non-filing of the suit to the extent of *Abadi deh* and *Shamilat deh*, will not affect the suit of the plaintiff-respondents, herien. The learned counsel lastly requested for dismissal of the appeal.

5. We have heard the learned counsel for the parties and also perused the record with utmost care. First of all, we would like to decide the question of competency of one petition for leave to appeal from the single judgment and two decrees of the High Court recorded in two separate appeals, in separate cause of actions arising out of two separate sale-deeds and the separate suits.

6. In file No. 284 of 2005. Mehboob Hussain, filed a suit for possession on the basis of right of prior purchase, in the Court of Sub-Judge, Kotli on 29.11.1997, whereby he challenged the sale-deed executed on 5th August, 1997, by Abdul Razzaq, defendant No.5, in

favour of defendants No.1 to 4. Through the said sale-deed, land measuring 22 kanal and 7½ marla, bearing *khewat* No. 17, *khata* No. 125, *Khasra* No. 1433, *khata* No.126, *khasra* No.1362/1, *khewat* No. 205, *khata* No. 981, *Khasra* No. 1348, 1354/1, 1881/2, 1881/3.

7. In Civil file No. 285 of 2005, Mehboob Hussain, filed a suit for possession on the basis of the right of prior purchase in the Court of Sub-Judge, Kotli on 29th November, 1997, in respect of the land measuring 22 kanal 7½ marla, *khewat* No. 17, survey No. 1433, *khewat* No. 205, *khata* No. 981, survey No. 1362/1, 1348, 1354/2, 1881/2, 1881/3 sold by Abdul Razzaq, defendant No. 5 to defendant No.1 to 4, through sale-deed executed on 2nd May, 1997. The trial Court (Senior Civil Judge Kotli), through the separate judgments dated 30th July, 2007, dismissed both the suits. Dissatisfied, Mehboob Hussain filed two appeals in the Court of District Judge, Kotli. The District Judge, Kotli through the separate judgments accepted both

the appeals and decreed both the suit for possession on the basis of right of prior purchase. Dissatisfied, the appellants filed appeals No. 4/2008 and 43/2008 in the Azad Jammu & Kashmir High Court. The High Court through consolidated judgment dated 21st, November, 2014, dismissed both the appeals.

8. It is evident from the record that two suits in respect of two separate registered sale-deeds dated 2nd August, 1997 and 5th August, 1997, were filed by the defendant-respondent, herein. The suits were tried separately and dismissed through the separate judgments and decrees. Two appeals were filed in the court of the District Judge, Kotli. The District Judge, Kotli recorded two separate judgments and two decree-sheets were passed. Two appeals were filed by the defendants-appellants, herein, in the High Court. The High Court, though, disposed of the appeals through consolidated judgment but two separate decree-sheets were prepared by the High Court. Only one petition for leave to appeal

has been filed from the two decrees. The counsel for the defendants-appellants, herein, has heavily relied upon the case reported as *Saraswathi Ammal and another vs. Rajgopal Ammal* (AIR 1952 Maddaras 81). In the referred case, one suit in respect of the different proprieties was filed by the plaintiffs. The suit was partially decreed. Both the parties filed appeals in the High Court from the said decrees, which were partly accepted. In appeal before the High Court, an objection was raised that in the High Court there were more than one appeals, therefore, separate decree-sheets have to be prepared and one appeals is not competent. The Madras High Court, in para 6 of the judgment, observed that when several appeals are preferred from one decree in the same suit by different parties, they should be heard together and there can be only one decree of this Court as an appellate Court. It was observed as under:-

> "“6. On principle & on authority we are of opinion that when several appeals are preferred against the decree in the same suit by different

parties they should be heard together & there can be only on decree of this court as an appellate court the decision in the several appeals, which decree would supersede the decree of the trial court. To take a simple case, if A sues to recover Rs.10,000 from B but obtains a decree only for Rs.4,000 & his claim is dismissed as regards the remainder, & both the plff. & the deft. File appeals, in so far as each is aggrieved by the decree, & the appellate court be it this court or a court below accepts one of the appeals & dismisses the other appeal, with the re-suit that the suit is decreed or dismissed in its entirety then obviously both principle & common sense require that there should be one decree drafted as the decree of the appellate court. In an early case in 'Krishnamachariar v. Mangmmal' 26 Mad 91 Bhashyam Ayyangar J. observed:

"When an appeal is preferred from a decree of a court of first instance, the suit is continued in the court of appeal & re-heard either in whole or in part, according as the whole suit is litigated again in the court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the court of first instance. The mere fact that a matter is litigated both in the court of first instance & again thought only in part in the court of appeal, cannot convert or split the suit into two & three can be only one final decree in that suit, viz., the decree of the court of appeal.

> In my opinion, when there are different appeals from one & the same suit, they should all be disposed of together which, as far as I know, is the practice- & only one decree passed in appeal." It is well established for purposes of appeal it is such final decree of the appellate court from the date of which time would run for filing application for execution through the appeal may be only from a part of the decree. This rule has been applied to appease preferred to the lower appellate court. In 'Sanyasi Lingam v. Midugonda Gavramma' 16 MLJ 411, Boddam & Sankaran Nair, JJ., held that where from a decree in a suit two appeal were preferred to the lower appellate court but only one decree was passed by it it was sufficient if one second appeals was preferred to this court. The learned Judges held that the Dist. J. very properly heard the two appeals together & passed one judgment & one decree upon both the appeals. Refereeing to the single second appeal filed in this court, they say:
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> "Here there is only one appeal entered, & we think that the course adopted is right & that there was no necessity to enter two appeals & even if two appeals had been entered the proper course would have been to hear them together & to pass one decree."

In the referred case, only one suit was filed and both the parties filed cross appeals from the part of the decree. There were not two suits. The

authority is not relevant for resolution of the present appeal.

In the case reported as *Siraj Din and 11 others vs. Rajada* (1992 SCMR 979), suits No.6 and 7 of 1972, were filed by the same plaintiff against the same defendants claiming 1/6th share in two properties. The suits were consolidated and disposed of through single judgment by the Civil Judge. One appeal was filed in the Court of District Judge.

In the case reported as *Siraj Din and 11 others vs. Rajada* (1992 SCMR 979), suits No.6 and 7 of 1972, were filed by the same plaintiff against the same defendants claiming 1/6th share in two properties. The suits were consolidated and disposed of through single judgment by the Civil Judge. One appeal was filed in the Court of District Judge. One copy of the decree-sheet was annexed. The appeal was accepted and the suit was dismissed. During the course of arguments, it came to light that no appeal was filed from suit No. 7, whereupon, the

appellants filed second appeal along with an application under section 5 of the Limitation Act, for condonation of delay. The District Judge refused to condone the delay, whereupon revision petition was filed in the High Court, which was dismissed. On appeal, the Supreme Court of Pakistan observed that since the matter has direct bearing on the fate of the other suit, therefore, accepted the appeal and remanded the case to the High Court. It was observed in para 7 of the report as under:-

> "7. After hearing the learned counsel for the parties and going through the record, we find that in fact as the memo. of appeal filed before the District Judge shows at the very first opportunity the judgment in both the suits has been challenged. It was not an appeal in one case and not in the other. Copy of the decree-sheet of Civil suit No. 6 had been filed but not of Civil Suit No. 7 of 1972. If at that stage by examining the memorandum of appeal corrective steps had been taken and appellants asked to file copy of the decree-sheet and judgment separately in Civil Suit No. 7 of 1972 in order to bifurcate the composite attack, no such anomaly would have been resulted. The failure here and at this stage was partly of the Court and its functionary. The parties should have known better. All such technical

> failures could be remedied if properly attended to promptly. Even at the argument stage, the District Judge should have deferred the decision in order to achieve the same and after allowing the opportunity to the parties to file the same. There was no question confining to Civil Suit No. 6 of 1972 when in fact the substance of the appeal attacked the decision in both the suits."

In the case reported as *Khair Muhammad vs. Muhammad Hussain and others* (PLD 2006 Supreme Court 577), the landlord filed a suit for recovery of rent while the tenant filed a suit that the landlord is not entitled for the rent. Both the suits were consolidated and disposed of through consolidated judgment. One appeal was filed by the land lord. No appeal was filed in respect of the decree passed in favour of the tenant. In the High Court, the tenant took the plea that no appeal was filed to the extent of decree passed in his favour, therefore, the said decree would operate as res-judicata. The matter came before the Supreme Court of Pakistan and the Supreme Court of Pakistan after survey of the case law on the subject, observed that it was not necessary

for the respondent to challenge the decree passed in the suit of tenant to claim the same relief, which they could obtain in appeal against the decree passed in their suit. It was observed in para 5 and 6 as under:-

> "5. The submission made has been considered. Apart from the fact that it was not pressed before the learned High Court at the time of hearing, it has been otherwise no merit. In both the suits, the main controversy was whether the respondents were entitled to receive rent in respect of 1350 Sq. ft. It was decided by the trial Court in favour of the petitioner in his suit which was reversed by the learned trial first Appellate Court. Thus, as against the decree of the learned trial Court in Suit No. 55-A which was verbatim copy of the decree sheet in Suit No. 54-A, the decree of the learned first Court of appeal will prevail. Thus, in the circumstances of the case, it was not necessary for the respondents to challenge the decree passed in the suit of the petitioner to claim the same relief which they could obtain in the appeal against the decree passed in their suit. It was a case in which there was one decision followed by separate decrees. It was more a matter of form than of substance.
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> 6. The issue as to the effect of omission to challenge the second decree followed by a single judgment has been subject-matter of serious debate before the High Court of

> Madras, Patna, Calcutta, Allahabad, Rangoon, Oudh, Lahore and of this Court. The first important case to be noted is a Full Bench judgment of the Lahore High Court in Mr. Lachhml v. Mt. Bhulli (AIR 1927 lahore 289). This is an exhaustive survey of the precedent cases. In the said case, there were two cross suits about the same subject matter between the same parties which were consolidated and one judgment delivered in both the case but the decrees drawn were separate. An appeal was filed against only one of the decrees by one plaintiff in her suit. It was held by majority judgment that the un-appealed decree did not operate as res-judicata."

The law on the subject is settled that if one or more suits in respect of the same subject matter are filed and the suits are consolidated and disposed of through a consolidated judgment, then one appeal is competent. For example; "A" files a suit for possession of the land against "B" and "B" files a counter suit for declaration against "A". The suits are consolidated and dismissed through consolidated judgment. Two appeals are filed. The appeals are decided through consolidated judgment. One appeal is competent by the party. In another case if "A" files a suit for recovery of

Rs.10,000/- against “B”. The suit is decreed to the tune of RS.5,000/-. Both “A” and “B” file appeals and if the appeals are decided through consolidated judgment, only one appeal is competent against the said decree. But in the cases where the subject matter of the suits is different, separate suits are filed and tried separately, one appeal is not competent. Separate appeals have to be filed.

9. In the present case, two sale-deeds dated 2nd August, 1997, and 5th August, 1997, were pre-empted through separate suits bearing Nos. 284/2005 and 285/2005. The suits were tried separately. The judgments and decrees were passed separately. Two appeals were filed in the Court of District Judge. The District Judge accepted the appeals. The defendant-appellants, herein, filed two appeals in the Azad Jammu & Kashmir High Court. The appeals were disposed of through consolidated judgment, but two separate decrees were passed. The defendants-appellants, herien, filed

only one petition for leave to appeal from the two appeals arising out of the two suits. One petition for leave to appeal was not competent. Two separate petitions for leave to appeal should have been filed.

10. The land sold through two sale-deeds comes to 44 kanal 15 marla. Out of the total land measuring 44 kanal 15 marla, in the two sale-deeds each comprising of 22 kanal and 7½ marla land. Only one copy of the decree-sheet of the High Court passed in Civil Appeal No. 42 of 2008, which is continuation of the suit No. 284 of 2005, has been filed. The appellants have filed copies of the judgments and decrees of the trial Court, the judgments and decrees of the District Judge in both the appeals and copies of the memorandum of the appeals filed in the High Court in two appeals, on the basis of said record the appellants argued that one appeal from the two decrees is competently. Under Order XIII rule 3(1)(ii), of the Azad Jammu & Kashmir Supreme Court Rules, 1978, a petition for leave

to appeal shall be accompanied by the judgment and the order sought to be appealed from together with grounds of appeal or application before the High Court and order of the High Court refusing grant of certificate under section 42(11) of the Constitution, if any, the filing of copy of decree-sheet is not mandatory. The appellant has annexed certified copy of the judgment of the High Court and ground of appeal. Non-filing of the copy of decree-sheet will not materially affect, but the fact remains that cause of action in both the suits were different. Two sale-deeds were executed. Separate suits were filed by the plaintiff-defendants, herein, after separate trial, the judgments and decrees were passed separately, appeals were filed in the Court of District Judge and also in the High Court. When cause of action (sale-deeds) was different, one petition for leave to appeal was not competent. The question which remains and needs resolution is that whether the petition has to be dismissed or it is competent to the extent

of one decree. The appellants have annexed the copy of the decree-sheet of the High Court passed in appeal No. 42 of 2008, which is outcome of suit No. 284/2005. The petition/appeal from the judgment and decree passed in appeal No. 42 of 2008 of the High Court is competent. There is no appeal from the judgment of the High Court in appeal No. 43 of 2008.

11. It was argued by the counsel for the plaintiff-respondents, herein, that after non-filing of the appeal from the judgment of appeal No. 43 of 2008 of the High Court, the said decree attained finality and on the basis of which respondents have become co-sharers. The argument is misconceived. The pre-emptor must have a right of pre-emption at three stages; (i) at the time of sale; (ii) at the time of filing of suit; and (iii) at the time of decree. The plaintiff was not co-sharer when the decree in his favour was passed by the District Judge. The argument is not available to the plaintiff. Moreover,

improvements of status at a belated stage, confers no right in the plaintiff. It was observed in the case reported as *Mst. Sardar Begum vs. Rehmat Khan and 11 others* (PLJ 2013 SC (AJ&K) 172) as under:-

> "…The improvement of the status by a vendee for defeating a lawful right of prior purchase vested under the provisions of Prior Purchase Act in a plaintiff is not recognized by the Islam. It cannot be termed as just, morally correct, consonant with the rules of law and the principles of rules of positive law. No right accrued to the vendee under the provisions of the Right of Prior Purchase Act, 1993. In the case reported as *Haji Rana Muhammad Shabbir Ahmed Khan vs. Government of Punjab Province, Lahore* [PLD 1994 SC 1), it is observed that improvement of the status for defeating a lawful right is not recognized by the Islamic injunctions. In para 43 of the judgment, it is observed as under:-
>
> > '43. A careful study of the relevant details in the books of Islamic Jurisprudence makes it clear that the Muslim Jurists are of the pinion that any improvement in the4 status of the vendee after the institution of the suit does not defeat the right of pre-emptor, no matter whether the improvement was made by an intentional act of the vendee or has taken place according to some natural even, like succession.'"

12. It was vehemently argued by Mr. Abdul Majeed Mallick, Advocate that the land has been sold with share in *shamilat-deh*, share in *abadi-de* and آڑبنہ. The plaintiff has not pre-empted the share in *shamilat-deh* and share in *abadi-deh*, his suit is hit by the doctrine of partial pre-emption. The counsel for other side, argued that this question was neither raised in the written statement nor it was argued in the Courts below, so this question cannot be raised, for the first time, in the Supreme Court. A perusal of written statement and the judgments of the lower Courts reveal that objection was not raised in the written statement, however, the point was argued before the District Judge, but the District Judge has not resolved the same. This Court in a number of cases has observed that pure legal question, which goes to the root of the case, can be raised first time in this Court. Our previous view was that pure legal question not involving inquiry into fact, can be raised at any time in this Court even at the stage of arguments, but

later on, we changed our view and observed that if the pure legal question not raised in the Courts below is raised in the petition for leave to appeal and in the concise statement, then the same may be raised during the course of arguments and the Court has to decide the same. It was observed in the case reported as Abdul *Ghani Farooq vs. Chairman, AJ&K Council and 2 others* (2000 SCR 273) at page 275 as under:-

> "A law point which goes to the root of the case has been raised by the learned counsel for the respondents, Mr. Farooq Hussain Kashmiri, in his concise statement and was vehemently argued before us by him. This point does not find mention in the judgment under appeal and it appears to have been raised for the first time in this Court. It is a settled practice of this Court that a law point which goes to the root of the case is allowed to be raised even during arguments and can be raised as of right if it is duly incorporated in the memorandum of appeal or the concise statement."

Thus, we conclude that the question of partial pre-emption is a pure legal question, which has been raised by the defendant-appellants, herein, in the petition for leave to

appeal as well as in the concise statement. Being pure legal question, we decide the same.

13. A perusal of the sale-deed dated 5th August, 1997, reveals that the land measuring 22 kanal 7½ marla has been sold along with share in the *shamilat-deh* and *abadi-deh* of village Roli. The plaintiff has failed to challenge the sale-deed in respect of *shamilat-deh* land and *abadi-deh.* In the prayer clause, he has also not prayed for decree of pre-emption in respect of *shamilat-deh* land. In a number of cases, this Court held that *shamilat-deh* land is a separate entity, which is not part of the land. It has potential to be sold and when a pre-emptor fails to pre-empt the share in *shamilat-deh* land, then the suit is hit by the doctrine of partial pre-emption. In the case reported as *Muhammad Latif Khan and others vs. Lal Khan and others* (PLD 1979 SC (AJ&K) 123), the matter of partial pre-emption in respect of *shamilat deh* land came under consideration of this Court, wherein, it was observed as under:-

> "…The plain reading of this section which requires no deep thought and labored argument shows that the word 'land' is comprehensive to include 'right' in property as for instance right to receive rent, and any right to water enjoyed by the owner or occupier of the land as is mentioned under sub-clauses *(d)* and *(e)* of section 3 of the land Alienation At, 1900. We are thus of the considered view that 'share' in Shamilat and 'right' in Shamilat are synonymous and contain identical import and meaning. 'Share' in Shamilat means entitlement to property proportionate to one's entitlement or right whatever it is in 'Shamilat and 'right' in Shamilat means the 'share' which a person owns in 'Shamilat'. If a person sells the right of ownership to Shamilat it definitely conveys his proprietary rights to the extent of his share in Shamilat.

12-A. …….

We are, therefore, of the view that "Shamilat Deh" is a property for all practical purposes and intent. The 'share' or 'right' in Shamilat Deh land as said earlier being synonymous has a separate entity and it is not a 'right' attached with some land or with some individual. Practically, all the villages have their own 'Shamilat' but all the occupants of land cannot become owner and proprietor of 'Shamilat Deh'. To quote for instance, neither the tenants nor the '*adna maliks*' are entitled to any share in the Shamilat Deh. Only 'A 'ala Malik' is entitled to

> sell land without the share in Shamilat proportionate to his land and can retain full share of his 'Shamilat' and vice versa. It is to be noted that share of the Shamilat is always recorded in the record-of-rights in column of proprietors and is divided according to the holdings of the proprietors."

While relying upon the said judgment, this Court in the case reported as *Muhammad Rafique vs. Qurban Hussain & others* (2016 SCR 796) has observed as under:-

> "6. Right of pre-emption is recognized by the Statute and it is a right of substitution. A pre-emptor must take over the whole bargain. It is not upon the choice of a pre-emptor that he shall take the best part of the pre-empted property he likes and leave the worst part. The proposition has been considered by the Superior Courts of Pakistan and Azad Jammu & Kashmir in a number of cases. In the case reported as *Ghulam Muhammad and 3 others vs. Khushi Muhammad and another* [PLD 1973 SCR 444), it was observed as under:-
>
> > 'From the above observation, it is clear that ordinarily the pre-emptor must take over the whole bargain and he must seek pre-emption of the whole of the subject-matter of the sale and pay the entire price paid by the vendees as consideration. There are however, certain exceptions which according to the view taken in this decision do not include the vendor's defective or want of title

> and it is not open to the pre-emptor to give up the claim as he likes. In the light of the above observation it is clear that the respondents' case does not fall within the limitation specified in this decision. The partial pre-emption can only be permitted if it is as of necessity and not because the pre-emptor wants it.

Judging the facts of the present case on the principle laid down in the above mentioned observation, it is quite clear that the respondents have given up the claim in order to avoid further litigation which cannot be considered as of necessity. The respondents should not have given up their right to Khasra No. 620 simply because somebody else was claiming right in it. They should have also claimed pre-emption of Khasra No. 620 in spite of the fact that the vendors's title was in their opinion defective.'

In the case reported as *Muhammad Latif Khan and others vs. Lal Khan and others* [PLD 1979 SC (AJ&K) 123], the matter came under consideration of this Court in the circumstances that a sale-deed was pre-empted where a land was sold along with the share in *shamilat deh* land. The trial Court dismissed the suit being hit by partial pre-emption. The District Judge dismissed the appeal. A learned single Judge in the High Court accepted the appeal and decreed the suit but when the matter came up before this Court, the Court observed that the *shamilat deh* is a property for all practical purposes and intent. The share or right in *shamilat deh* land has a separate entity and it is not a right

attached with some land or with some individual. It was observed in para 12 of the report as under:-

> '…The plain reading of this section which requires no deep thought and labored argument shows that the word 'land' is comprehensive to include 'right' in property as for instance right to receive rent, and any right to water enjoyed by the owner or occupier of the land as is mentioned under sub-clauses *(d)* and *(e)* of section 3 of the land Alienation At, 1900. We are thus of the considered view that 'share' in Shamilat and 'right' in Shamilat are synonymous and contain identical import and meaning. 'Share' in Shamilat means entitlement to property proportionate to one's entitlement or right whatever it is in 'Shamilat and 'right' in Shamilat means the 'share' which a person owns in 'Shamilat'. If a person sells the right of ownership to Shamilat it definitely conveys his proprietary rights to the extent of his share in Shamilat.
>
> 12-A. …….

We are, therefore, of the view that "Shamilat Deh" is a property for all practical purposes and intent. The 'share' or 'right' in Shamilat Deh land as said earlier being synonymous has a separate entity and it is not a 'right' attached with some land or with some individual. Practically, all the villages have their own 'Shamilat' but all the occupants of land cannot become owner and proprietor of 'Shamilat Deh'. To quote for instance, neither the

> tenants nor the '*adna maliks*' are entitled to any share in the Shamilat Deh. Only 'A 'ala Malik' is entitled to sell land without the share in Shamilat proportionate to his land and can retain full share of his 'Shamilat' and vice versa. It is to be noted that share of the Shamilat is always recorded in the record-of-rights in column of proprietors and is divided according to the holdings of the proprietors."

Thus, we draw the conclusion that the suit is hit by the doctrine of partial pre-emption and is liable to be dismissed on the sole ground.

14. The suit for pre-emption was dismissed by the trial Court. The plaintiff filed appeal in the Court of District Judge, Kotli. The District Judge, Kotli decreed the suit on the ground of contiguity that survey No. 1433, which has been sold through sale-deed, is contiguous to survey No. 1432, which is in the ownership of the plaintiff-respondent, herein. In para 2 of the plaint, the plaintiff-respondent, herein, has based his claim and enumerated his qualification for filing the suit of pre-emption as co-sharer, *shareek khata*, *shareek* آڑبنہ , owner in

the village and *mahal.* For proper appreciation, para 2 is reproduced as under:-

A perusal of para 2 of the plaint reproduced hereinabove, is clear that the plaintiff has filed suit on the ground that he is sharer in *khewet*, sharer in آڑبنہ and sharer in village and *khewat.* He has not filed the suit on the ground of contiguity. Under section 14 of the Azad Jammu & Kashmir Right of Prior Purchase Act, 1993 (Bik), confers right of prior purchase in respect of sales of agricultural land and village immovable property (a) firstly in *Shafi-i-Sharik*; (b) secondly in *Shafi Khalit;* and (c) thirdly in *Shafi Jar*. Section 14 of the Jammu & Kashmir Right of Prior Purchase Act, 1993, speaks as under:-

> "14. Persons in whom right of prior purchase vests n respect of sales of agricultural land and village immovable property.—(1) Subject to the provisions of section 13 the right of prior purchase in respect of agricultural land and village immovable property shall vest:--

(a) Firstly in *Shafi-i-Sharik;*
(b) Secondly in *Shafi khalit; and*
(c) Thirdly in *Safi Jar.*

Explanation.—

1. "*Shafi Sharik*" means a person who is a co-owner in the corpus of the undivided immovable property sold with other person or persons.

2. "*Shafi Khalit*" means a participator in the special rights attached to the immovable property sold, such as right of passage, right of passage of water or right of irrigation.

3. "*Shafi Jar*" means a person who has a right of pre-emption because of owning an immovable property adjacent to the immovable property sold.

(2). .....
(3). ....."

First, right of pre-emption, vests in *Shafi Sharik.* The District Judge has observed that the plaintiff failed to prove that he is *Shafi Sharik.* No appeal was filed by the plaintiff-repondenet, herein, on this finding. There is no claim of the plaintiff-respondent, herein, in respect of *Shafi Khalit.* We have observed hereinabove that in para 2 of the plaint the plaintiff has not claimed

that he is *Shafi Jar.* The judgment can be based upon the pleadings of the parties. The point which was not part of the pleadings, cannot be made basis for delivering the judgment. When the platinff-respondent, herein, has not claimed the right of pre-emption on the basis of *Shafi Jar*, the Court has no jurisdiction to pass a decree on the ground that the land of the plaintiff-respondent, herein, is contiguous to the land sold. The proposition came under consideration of this Court in the case reported as *Sain vs. Muhammad Din and others* (1995 SCR 208), wherein, at page 212, it was observed as under:-

> "Coming to the merits of the case we may observe that plaintiff/pre-emptor in his plaint categorically claimed his preferential right on the basis of his being co-sharer and relationship with the vendor. But the High Court in clear violation of relevant law travelled beyond its jurisdiction and granted the decree of pre-emption in favour of the pre-emptor on the basis of contiguity of the land of the pre-emptor and the vendor and also on the ground that the suit land is in the possession of the pre-emptor who lives in the village where the land in dispute is situated, while the vendee-appellant lives in city of

> Muzaffarabad. The aforesaid finding recorded by the High Court is clearly violative of law and against the pleadings. It is a cardinal principle of law that in a suit for pre-emption the plaintiff/pre-emptor is bound to prove the qualifications alleged in his pleadings and not on the basis of any other qualification which emerges out of the evidence of the plaintiff/pre-emptor. Thus findings recorded by the High Court in negation to the pleadings of the plaintiff/pre-emptor are not in consonance with law and we hereby set aside the same.

Thus, it is concluded that decree passed by the District Judge on the ground of contiguity of the land of the plaintiff-respondent, herein, with the land sold is not maintainable. The suit is liable to be dismissed on the ground of partial pre-emption.

The result of the above discussion is that we accept the appeal to the extent of decree passed in appeal No. 42 of 2008, arising out of suit No.284 and set aside the decree passed by the District Judge and the High Court. The suit No. 284 filed by the plaintiff is dismissed. The miscellaneous application is also disposed of. No order as to costs.

CHIEF JUSTICE JUDGE

Mirpur.
.1.2017