

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

**Ch. Muhammad Ibrahim Zia, C.J.**

**Ghulam Mustafa Mughal, J.**

Civil Appeal No.218 of 2018

(PLA filed on 10.08.2018)

Muhammad Khan s/o Iqbal Khan, caste Mangral, r/o  
Karnoti, Tehsil and District Kotli.

....APPELLANT

**VERSUS**

1. Muhammad Khaliq s/o Shah Wali Khan, caste  
Mangral, r/o Karnoti, Tehsil and District Kotli.

....RESPONDENT

2. Muhammad Sharif s/o Muhammad Rafique,

3. Muhammad Sadique s/o PanuKhan, caste Mangral,  
r/o Karnoti, Tehsil and District Kotli.

.....PROFORMA-RESPONDENTS

(On appeal from the judgment and decree of the High  
Court dated 17.07.2018 in Civil Appeal No.36 of 2011)

FOR THE APPELLANT:

Mr. Mehboob Ellahi  
Chaudhary, Advocate.

FOR THE RESPONDENTS: Mr. Abdul Aziz Ratalvi,  
Advocate.

*Date of hearing:* 28.01.2019.

**JUDGMENT:**

**Ghulam Mustafa Mughal, J.**— This appeal by leave of the Court has been directed against the judgment and decree dated 17.07.2018, passed by the Azad Jammu & Kashmir High Court in Civil Appeal No.36 of 2011.

2. The facts forming the background of the captioned appeal are that Muhammad Khaliq, plaintiff-respondent, herein, filed a suit for possession on the basis of right of prior purchase against Muhammad Khan, defendant-appellant, herein, & others in the Court Senior Civil Judge Kotli, on 05.01.2011. It was averred that out of land comprising *khewat* No.13, measuring 9 *kanal*, 1 *marla*, and *khewat* No.11, measuring 4 *kanal*, 15 *marla*, total measuring 13 *kanal*, 17 *marla*, defendants No.2 and 3 had right of ownership along with *Shamilat Deh*. It was further averred that defendants No.2 and 3 sold the said land to defendant No.1 and also handed over the

possession of the land on 07.09.2000. It was stated that plaintiff and defendant No.2 and 3 (proforma-respondents, herein) are co-sharers, therefore, the plaintiff has right of prior purchase vis-à-vis respondent No.1. It was claimed that a factious amount of Rs.800,000/- has been mentioned in the sale-deed just to defeat the right of prior purchase of the plaintiff, whereas, fact of the matter is that the market value of the land is Rs.400,000/- and the same was actually paid. The suit was contested by the other side by filing written statement, whereby, the claim of the plaintiff was refuted. It was stated that as father of the plaintiff had purchased the land in the village, therefore, he is not entitled to any relief. It was also stated that the price of the land is Rs.800,000/- and the same has actually been paid. The learned trial Court framed issues in light of the pleadings of the parties and asked them to lead evidence in support of their respective claim. At the conclusion of the proceedings, the learned trial Court decreed the suit in favour of the plaintiff vide judgment and decree dated 30.07.2009. The defendant/appellant,

herein, Muhammad Khan, feeling aggrieved from the judgment and decree of the trial Court dated 30.07.2009, preferred an appeal before the learned District Judge Kotli which after necessary proceedings was dismissed through judgment and decree dated 26.04.2011 and the judgment and decree of the trial Court was maintained. Feeling dissatisfied from the judgment and decree recorded by the learned District Judge dated 26.04.2011, the second appeal was filed by the appellant, herein, before the Azad Jammu & Kashmir High Court which through the impugned judgment and decree dated 17.07.2018, has also been dismissed.

3. Mr. Mehboob Ellahi Chaudhary, the learned Advocate appearing for the appellant argued with vehemence that Muhammad Khan, appellant, herein, purchased the suit land from defendants No.2 and 3 (proforma-respondents, herein) comprising *Khewat* No.13, *Khasra* No.127 min, measuring 4 *kanal* 15 *marla*, *Khewat* No.11, *Khasra* No.135, measuring 3 *kanal* 7 *marla*, total measuring 8 *kanal* 2 *marla*, in lieu of

Rs.4,00,000/-. He submitted that Muhammad Khaliq, plaintiff/respondent, herein, filed a suit for possession on the basis of right of prior purchase on the ground that he is co-sharer in the suit land along with proforma-respondents, herein, and the land belonging to him is also adjacent to the suit land, hence, he has right of prior purchase vis-à-vis vendee, appellant, herein. The learned Advocate further argued that the plaintiff/respondent, herein, is neither co-sharer nor his land is situated adjacent to the sold land. The learned Advocate further argued that the Courts below have wrongly held that the plaintiff/respondent, herein, is co-sharer in the suit land and granted the decree of pre-emption. He submitted that all the Courts below have misread the record, hence, their conclusion was illegal and erroneous. He further submitted that the defendant/vendee, appellant, herein, is a co-sharer and is also in possession of the right of *Shafi-Khalit* but the learned trial Court has not framed proper issue in light of the stand of the defendant/vendee which resulted into erroneous decision.

4. Conversely, Mr. Abdul Aziz Ratalvi, the learned Advocate appearing for the respondents argued that all the Courts below have concurrently held that the plaintiff-respondent, herein, has preferential right of purchase vis-à-vis vendee/appellant, herein, hence, findings recorded by them on question of fact cannot be disturbed by this Court. The learned Advocate further submitted that though the appellant, herein/vendee has raised the plea that he is co-sharer and his land is adjacent to the sold land but neither any oral nor documentary evidence has been brought on record on the basis of which it could have been judged by the Courts below that he is co-sharer and has preferential right of purchase vis-à-vis plaintiff/respondent, herein.

5. We have heard the learned Advocates for the parties and gone through the record of the case. A perusal of the record reveals that the plaintiff, respondent, herein/pre-emptor has adduced sufficient documentary as well as oral evidence which shows that he is co-sharer in the suit land and his owned land is also adjacent to the

suit land. The defendant/vendee, appellant, herein, has produced no such evidence in rebuttal from which it could have been ascertained that he is co-sharer in the suit land. Neither the issue has been framed by the trial Court in this regard nor any evidence is on the record, therefore, the concurrent findings of fact cannot be disturbed by this Court until and unless it is found that the same are erroneous, perverse and capricious. The learned Advocate appearing for the appellant attempted to argue that framing of proper issues was the primary duty of the Court and the appellant cannot be penalized for the same. Though, it is correct, but the objection regarding not framing the proper issue could have been raised by the party at the earlier stage and if the same is not done it would be deemed to have been waived. Reference may be made to the case reported as *Munshi Muhammad Afzal Khan & another vs. Khadam Hussain Khan* [PLD 1978 SC(AJK) 73], wherein, at page 75 of the report it was observed as under:-

“In the instant case, our view is that there was no necessity of claiming any issue

except the issue framed by the trial Court. Besides, we also entertain the belief that it is also essential for the parties to draw the attention of the Courts to the omission of an issue and if an issue is not pressed on behalf of any of the parties at the time of framing of the issues, it must, in the circumstances, be held to have been waived. In the instant case, as said earlier, no issue was necessary and if at all a specific issue would have been necessary it was abandoned. This inference is further strengthened by the fact that the trial proceeded for a considerable long time yet nothing was said or done on behalf of the petitioners to claim any further issue.”

The upshot of the above discussion is that findings no force in this appeal, the same is hereby dismissed with no order as to costs.

JUDGE

CHIEF JUSTICE

Mirpur  
29.01.2019