SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.

Ghulam Mustafa Mughal, J.

Civil Appeal No. 356 of 2018

(PLA Filed on 10.9.2018)

Bashir Khan s/o Misri Khan, caste Sudhan r/o Tarala, Tehsil Sehnsa District Kotli, Azad Kashmir.

.... APPELLANT

VERSUS

1. Ahmed Hussain s/o Karam Dad, caste Sudhan r/o Thali Sehnsa District Kotli, Azad Kashmir.

..... RESPONDENT

2. Muhammad Ishaq Khan s/o Nazir Hussain, caste Sudhan r/o Karaiyout, Tehsil Sehnsa District Kotli, Azad Kashmir.

....PROFORMA RESPONDENT

(On appeal from the judgment of the High Court dated 11.7.2018 in Civil Appeal No. 142 of 2016)

FOR THE APPELLANT: Mr. Muhammad Yaqoob Khan Mughal, Advocate.

RESPONDENT NO.1: In person.

Date of hearing: 9.4.2019.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal by leave of the Court arises out of the judgment dated 11.7.2018 passed by the Azad Jammu & Kashmir High Court in civil appeal No. 142 of 2016.

2. The precise facts forming the background of the captioned appeal are that Muhammad Ishaq Khan, vendor, respondent, herein, alienated land comprising *khasra* No. 442 min measuring 5 kanal, situated in village Thali Tehsil Sehnsa District Kotli in lieu of Rs.30,00,000/- vide sale-deed dated 12.5.2011. Bashir Khan, appellant, herein, brought a suit for pre-emption on the basis of right of prior purchase against the said vendor in the Court of Civil Judge Sehnsa on 8.9.2011. It was claimed that plaintiff and vendor are co-sharer in the *Khewet* and defendant No.1 has no such right, hence, the plaintiff has right of prior purchase. It was averred that bargain was struck in lieu of Rs.10,00,000/- and the same is the market value of the land, but in order to defeat the right

of prior purchase of the plaintiff, defendants No.1 and 2 in connivance with each other has entered the consideration amount in the sale-deed as Rs.30,00,000/-. The suit was contested by the defendants by filing written statement whereby they have refuted the stand taken by the plaintiff. It was claimed that the plaintiff has no cause of action. It was further stated that the plaintiff has himself arranged the sale and negotiated with defendants No.1 and 2. It was further stated that on the guarantee of the plaintiff, defendant No.1 has paid the consideration amount to defendant No.2 and also executed an agreement-to-sell on 26.7.2005, hence, the plaintiff has consented in the bargain and execution of the sale-deed, therefore, he has waived his right of pre-emption. The remaining paragraphs of the plaint were also refuted. In light of the respective pleadings of the parties, the learned trial Court framed issues and directed the parties to lead evidence pro and contra. At the conclusion of

the proceedings the learned trial Court vide judgment and decree dated 29.1.2016 decreed the suit on the ground that the plaintiff has prior right of pre-emption. Ahmed Hussain, vendee, feeling aggrieved from the judgment dated 29.1.2016 recorded by the Civil Judge Sehnsa, challenged the same by way of appeal before the Additional District Judge Sehnsa, which met the same fate and was dismissed by the learned Additional District Judge Sehnsa vide judgment and decree dated 21.10.2016. Feeling aggrieved from the judgment and decree passed by the learned Additional District Judge Sehnsa dated 21.10.2016, Ahmed Hussain, filed second appeal before the Azad Jammu & Kashmir High Court on 20.12.2016, which was accepted through the impugned judgment dated 11.7.2018 on the ground that pre-emptor has waived his right of pre-emption while participating in the bargain and standing as surety for payment of the consideration amount.

3. Mr. Muhammad Yaqoob Khan Mughal, the learned Advocate appearing for the appellant has argued that right of prior purchase on the basis of co-sharer in the *Kheewet* and *Khata* has been established by the pre-emptor and the same has also been acknowledged by the learned High Court but the judgment passed by the Civil Judge and the Additional District Judge, Sehnsa have been vacated on the ground that the pre-emptor has waived his right of pre-emption. The learned Advocate argued that mere presence in the bargain or standing as surety for payment of the amount does not prove the waiver. The learned Advocate argued that for proving waiver, a very strong and cogent evidence is required which was missing in the case in hand. He submitted that the learned High Court has accepted the statement of Muhammad Ishaq Khan only on the ground that a portion of his statement has not been challenged in cross-examination. He submitted that in such like cases this type of evidence

cannot be accepted because a pre-emptor has a statutory right and can only be deprived of his right on the basis of cogent and convincing evidence. In support of his submission the learned Advocate has placed reliance on the cases reported as *Nazar Ahmed & others vs. FAzal Hussain & 11 others* (2005 SCR 75), *Muhammad Ejaz Khan and 4 others vs. Sikandar Shah and 14 others* (2012 SCR 318), and *Mst. Alamah Bibi and 4 others vs. Muhammad Bashir and 6 others* (PLD 1994 SC (AJ&K) 26).

4. Conversely, respondent No.1 has appeared in person and reiterated the grounds taken in the concise statement. It was submitted by him that the learned Civil Judge as well as the Additional District Judge Sehnsa fell in error while deciding issue No.7 in light of the pleadings as well as the statements of the witnesses. It was further stated by him that the High Court has properly appreciated the evidence as the sale was much within the knowledge of the pre-emptor and he has not

shown his willing to purchase the property in question, therefore, subsequently, he cannot pre-empt the sale by filing a suit.

5. We have heard the learned Advocate appearing for the appellant as well as respondent No.1. It may be stated that in order to deprive the pre-emptor on the ground of waiver, a very strong evidence is required. In the present case the learned High Court has decided the case against the pre-emptor mainly on the ground that in the written statement it was pleaded by defendants No.1 and 2 that bargain was struck between defendants No.1 and 2 in presence of the appellant and due to his efforts sale was executed, therefore, he has waived his right of pre-emption. The other evidence which persuaded the learned High Court for coming to the impugned conclusion is the statement of Nasir Mehmoor, Muneer Ahmed and Adil Ahmed, witnesses. It was stated that Muhammad Ishaq, vendor, went twice to the plaintiff and demanded an amount of

Rs.40,00,000/- and lastly Muhammad Ishaq came with Bashir Khan on 5.5.2005 and the consideration amount was determined as Rs.30,00,000/-. We are of the view that this evidence is not sufficient for defeating the right of pre-emption of the pre-emptor. No evidence has been led that the pre-emptor was asked to purchase the land for the same amount and the amount was in his knowledge and thereafter in presence of witnesses he has refused to purchase the land in question. The question of waiver has been considered by this Court in *Mst. Alamah Bibi's* case (PLD 1994 Supreme Court (AJ&K) 26), wherein, at page 30 of the report after considering the dictionary meaning of the terms "Waiver" and the case law on the subject, it was observed as under:-

> "The consensus, therefore, is that at the time of the alleged waiver the right of pre-emption must exist and that pre-emptor should be shown to have abandoned or relinquished such right knowingly. An act or omission of a pre-emptor to the transaction of sale

> is not deemed sufficient to deprive him of his superior right which in fact accrued at the time of completion of the sale. Likewise it was necessary to prove that pre-emptor was alive to his right and in that state of circumstances by his conduct he waived such right. Section 18 and 19 of the Right of Prior Purchase Act deal with the statutory waiver but a pre-emptor may be estopped from claiming his right of prior purchase on account of his other acts such as clear refusal to purchase or agreeing to forgo his claim. In order that a plea of waiver may succeed it should be proved that the right of pre-emption if already vested was extinguished by some act of person to whom it belonged or before it actually arose on the execution of the sale-deed. Thus in the one case it would amount to relinquishment of the right and in the other to a representation express or implied that he would not enforce it."

Again at page 31 of the report, it was observed as under:-

> "(iii) The other evidence brought on the record by respondents

> has no relevance to substantiate the plea and the argument that witnesses though cross-examined but not specifically challenged on the point of waiver, also carries no substance as a particular fact of waiver is not proved by the statement of those witnesses. Therefore, the fact cannot be deemed to have been proved merely because the witnesses were not challenged specifically on this point. In this regard reliance is placed on Muhammad Malik v. Muhammad Shafi (Civil PLA No. 5 of 1994 decided on 29.3.1994)."

In *Muhammad Ejaz Khan's* case (2012 SCR 318) the judgment of *Mst. Alamah Bibi's* case referred to hereinabove was followed. The same principle has been reiterated in other cases referred to and relied upon by the learned Advocate for the appellant. On the basis of the above case law, we can safely conclude that mere refusal to purchase the suit land at a high price or purchase the same at some less than demanded

one has not been considered as waiver. Similarly, mere presence of pre-emptor at the time of bargain is also not considered sufficient for defeating the right of pre-emption of a pre-emptor. In some cases even a pre-emptor was marginal witness and it was held that the attestation by the pre-emptor on the sale-deed neither established the fact that he was a consenting party.

The upshot of the above discussion is that the appeal is accepted and the impugned judgment dated 11.7.2018 passed by the learned High Court is set aside. The judgment and decree passed by the learned Judge Sehnsa is hereby restored. The pre-emptor shall deposit the decreetal amount along with expenses of the sale-deed within one month from the date of communication of this judgment, if the same has not already been deposited, failing which his suit would be deemed to have been dismissed.

JUDGE JUDGE.

Muzaffarabad.
10.4.2019