JUDGMENT SHEET
PESHAWAR HIGH COURT, MINGORA BENCH
(DAR-UL-QAZA), SWAT.
JUDICIAL DEPARTMENT

Civil Revision Petition No.54-M of 2015 with C.M No. 115-M/2015

JUDGMENT

Date of hearing……..26-10-2017....……

Petitioners: (Sarzaminand others) by Mr. Fazal Ghafoor, Advocate.

Respondents:(Wali Muhammad) by Mr.Mukaram Shah, Advocate.

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MUHAMMAD NASIR MAHFOOZ, J:-This civil revision petition under section 115 of Civil Procedure Code, 1908 (**"CPC"**) read with paragraph 10sub paragraph 8 of ShareeNizam of AdalRegulation, 2009 is directed against the judgment and decree dated 08.01.2015 passed by the learned Additional District Judge-II/Izafi Zilla Qazi Swat, whereby, appeal was accepted and decree/judgment dated 17.04.2014 passed by Civil Judge-V was set aside.

2. Brief and essential facts leading to the present petition are that respondent/plaintiff filed a suit for possession through preemption of an agricultural area measuring 07 kanals 08 marlas

comprising khasra No. 68 and 69 in khata No.860 situated in village Zara Khela, Tehsil Barikot District Swat, sold per two mutations No. 2302 and 2303 dated 12.12.2011 on the ground of co-sharer ship in khata in question. That the petitioners/defendants contested the suit by submitting their written statement and after framing of issues evidence of both the parties were recorded; that after completion of trial and hearing of both the parties the suit of the respondent/plaintiff was dismissed by the learnedtrial court vide judgment and decree dated 17.04.2014. Aggrieved from the said order the respondent/plaintiffpreferred an appeal before the learned Additional District Judge/Izafi Zilla Qazi which was allowed vide impugned judgment and decree dated 08.01.2015, hence this petition.

3. Valuable arguments of the worthy counsel for the parties were heard and available record carefully perused.

4. Petitioner No.1-defendant/ vendee purchased the suit property measuring 7 kanals 8 marls vide two mutations No. 2302 for the area of 02 kanal and 19 marlas and 2303 for the area 04 kanal and 19 marlas both attested on 12.12.2011 Ex

PW1/1 and Ex PW1/2 from petitioners No. 2 to 5. This transaction were preempted by the respondent/plaintiff by filing a suit of preemption on 16.03.2012 and in para 2 of the plaint he has alleged to have performedtalabs when he got knowledge of the impugned transaction on 02.03.2012 through his sonIzzat Khan in the presence of two persons Umer Raziq s/o Umer Babar and Khan s/o Jehanzeb PW-2 and PW-3 herein, in his Baitek at BaleedaShamozai. He stated to have performed TalbeMuwathibatthere and then and later on 06.03.2012performedTalbeIshaad by sending notices through registered AD Ex PW1/3 while the receipts of post office is Ex PW1/4. The sale price was alleged to be Rs. 02 lac in plaint but actually sale price of Rs. 05 lac as mentioned in the impugned mutations has been acceptedto be correct by the courts below.

5. Learned trial court dismissed the suit on 17.04.2014 for non-performance of Talabs on issue No. 5. Learned appellate court has accepted the appeal and decreed the suit by setting aside the judgment and decree of learned trial court. For the purpose of decision in this court it is essential to re-appraise the evidence as the courts are at variance.

Firstly perusal of para-2 of the plaint reveals that the date and place of performance ofTalbeMoasibat is mentioned but the time is not mentioned which is a glaring illegality. Though the learned counsel for petitioner referred to a note mentioned on the plaint wherein the accrual of cause of action of 02.03.2012 is mentioned along with time 10:00a.m morning on Friday but that could not fulfill the requirements of Section 13 of Preemption Act which has to be part of the pleadings and not mere vague assertions. Moreover, there are substantial contradiction in the statement of PWs regarding the arrival of informer to the Baitekof his father besides the fact that the preemptor is father and the alleged informer is his son which itself appears to be a homemade story. There is contradiction in the statements of PW-1 where he has stated that witnesses PW-2 and PW-3 came to the Baitek at 9:00 a.m and had breakfast while the informer son was also present at the time of breakfast and had also taken the breakfast with them.On contrary PW-2 who is the plaintiff/preemptor had invited the witnesses for breakfast when his son was also present at about 9:55 a.m and PW-3 stated that he had gone to Baitek of preemptor at 8:30 a.m or 9:00 a.m in the morning

but the informer Izzat Khan was not present with them, he also stated that he had not taken breakfast with PW-2 and remained in his fields till he heard about the sale of preempted land.

6. It is noteworthy, that the examination in chief of witnesses in civil cases in this area is presented in the form of affidavits which are attested by the oath commissioner outside the court and at the time of statement in court the witnesses merely refer totheir affidavits without formally exhibiting all the documentsthat are being relied upon. In this respect it may be mentioned, that it can be accepted as the affidavit but the exhibition of documents must be made in court in the presence of Presiding Officer as well as opposite counsel so as to provide opportunity to the opposite counsel regarding any objection that can be raised. Similarly counsel for the respondent has raised such like objections at the time when the PWs were referring to their affidavitswithout even exhibiting the affidavit in court. So very substantial noncompliance of the Qanoon-e-Shahadat Order, 1984, is apparent on the face of record,therefore the contentions as raised in the plaint and in the affidavits are un proved on record and such like cursory reference to the

affidavit could notfulfill the pre-requisites of Section 13 of Preemption Act as well as the same could not be equated to an examination in chief recorded in court. As mentioned above the cross examination of the PW-1 to PW-3 reveals contradiction which cannot be treated as minor contradictionsas august superior courts has laid down stringent procedure for the grant of decree in a preemption suit particularly when the contentions are not properly recorded through examination in chief in court. Post Man who had issued registered notice TalbeIshaad has not been examined in court. The non-compliance of Provision of Qanoon-e-Shahadat besides the glaring contradiction are quite substantial enough to defeat the suit of preemptor/respondent which has been ignored by the learned appellate court while allowing the appeal of respondent. According to Article 132 of the Qanoon-e-Shahadat Order, 1984,examination of a witness by a party who calls him is examination in chief who is to be cross examined subsequent to the examination in chief and according to Article 133, witnesses shall be first examined-in-chiefand according to Sub Article 2 the examination and cross examinationmust relate to relevant facts. Here firstly, the notice TalabIshaad

per se is not a proof of its contents unless properly exhibited in court and secondly the affidavit per se is not the proof of contents of Talabs unless exhibited alongwith the documents mentioned therein. Learned counsel for petitioner referred to (**2012 CLC page 334)** and (**PLD 2005 S.C 315)** whereas learned counsel for respondent cited (**PLD 2003 Peshawar page53)**, (**PLD 2003 Peshawar 179)**, (**2004 MLD 650) and (2005 YLR page 60)**.

7. Learned appellate court has not discussed the aspect of non-exhibition of notice in examination-in-chief which has got adverse ramifications on the rights of preemptor/respondent. According to precedents of august Superior courts the very purpose ofmentioning of date, time and place in the plaint duly proved through witnesses in court is the only established procedure for proving TalbeMuwathibatand TalbeIshaadbut by not exhibiting notice TalabIrshadin court it would become redundant,besides if the documents marked as Exhibits outside the court are treated to be proper exhibits as are legally required inside the court would violate the principles of Qanoon-e-Shahadat Order, 1984. Mere attestation of affidavits would not amount to accept the genuiness of contents of the

notice. The findings arrived at by the learned appellate court requires interference in revisional jurisdiction by this court as it suffers from mis-reading and non-reading of evidence and by granting decree it has resulted in material irregularity and illegality.

In view of above discussion this revision petition is allowed, the impugned judgment and decree of learned appellate court is set aside and suit of the respondents stands dismissed with no order as to costs.

Dt.26-10-2017. *J U D G E*

(Sanaullah) **(SB) Hon`ble Mr.Justice Muhammad Nasir Mahfooz.**