

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE SAYYED MAZHAR ALI AKBAR NAQVI

(D.J) AFR

CIVIL APPEAL NO.2433 OF 2016

(Against the judgment dated 28.07.2015 of
the Peshawar High Court, D.I. Khan Bench,
D.I. Khan passed in C.R.No.25-D/2014)

Muhammad Iqbal etc.

...Appellant(s)

Versus

Nasrullah

...Respondent(s)

For the Appellant(s):

Ms. Afshan Ghazanfar, ASC
Syed Mastan Ali Shah Zaidi, ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondent(s):

Malik Ghulam Mustafa Kandwal, ASC

Date of Hearing:

15.09.2022

JUDGMENT

SAYYED MAZHAR ALI AKBAR NAQVI, J.- Through this appeal by leave of the Court, the appellants have called in question the *vires* of the judgment dated 28.07.2015 passed by the learned Single Judge of the Peshawar High Court, D.I. Khan Bench whereby the Civil Revision filed by the respondent was allowed and the judgments of the learned two courts below dismissing the suit filed by the respondent were set at naught.

2. Briefly stated the facts of the matter are that one Haji Kamal Din was owner in possession of a house and three shops situated at Paniala Road, Paharpur, D.I. Khan. The said Haji Kamal Din agreed to sell the said property to the appellants for a total sale consideration of Rs.57,00,000/- and both parties entered into an agreement to sell dated 25.01.2010. An amount of Rs.30,00,000/- was paid in cash whereas the remaining sale consideration of Rs.27,00,000/- was to be paid on 28.02.2010. It was further agreed that

delivery of possession of the property and proper documentation of sale will be made after payment of entire sale consideration. However, the remaining sale consideration was paid on 11.04.2010 instead of 28.02.2010. On 18.05.2010, the respondent/plaintiff filed a suit before the learned Civil Judge, Paharpur, for possession of the said property through pre-emption. The appellants joined the proceedings and filed an application under Order VII Rule 11 CPC seeking dismissal of the suit being pre-mature. After hearing the parties, the learned Trial Court rejected the application vide order dated 15.10.2010. The appellants challenged the said order before the Additional District Judge-V, D.I. Khan by filing Civil Revision, which was accepted vide order dated 10.01.2011 and the matter was remanded back to the learned Trial Court to decide the application afresh. On remand, the learned Trial Court again heard the arguments of the parties and ultimately vide order dated 17.03.2011 accepted the application filed by the appellants and dismissed the suit for pre-emption filed by the respondent. Being aggrieved by the dismissal of his suit, the respondent filed an appeal before the Additional District Judge, Paharpur, D.I. Khan, which was dismissed vide order dated 21.11.2013. The respondent assailed the concurrent findings of two courts below before the learned Peshawar High Court by filing Civil Revision No. 25-D/2014. The learned High Court vide impugned judgment dated 28.07.2015 allowed the Civil Revision, set aside the concurrent findings of the learned two courts below, dismissed the application filed by the appellants for dismissal of suit and remanded the matter back to the learned Trial Court to proceed in accordance with law. Hence, this appeal by leave of the Court.

3. At the very outset, learned counsel for the appellants contended that on 23.02.2010 when the respondent allegedly performed Talb-e-Muwathibat neither the sale was complete nor possession of the property was delivered to the appellants, therefore, performance of 'Talabs' before the completion of sale was pre-mature and the suit for pre-emption could not stand over it. Contends that an agreement to sell does not confer title of the subject matter and there always remain a risk that in case of any default of any clause of agreement to sell, the same may be revoked. Contends that in the agreement to sell, it was expressly mentioned that the possession would

be delivered after payment of balance sale consideration, which was paid on 11.04.2010. Lastly contends that the learned High Court has erred in comprehending the terms "sale" and "agreement to sell", as such, the impugned judgment reversing the concurrent findings of the two courts below is not sustainable in the eye of law.

4. On the other hand, learned counsel for the respondent has defended the impugned judgment. He contended that in the agreement to sell it was clearly mentioned that a complete sale has been made. Further contended that once possession is transferred, the sale becomes complete even if the balance sale consideration has not been paid, therefore, the learned High Court has passed a well reasoned judgment to which no exception can be taken. In support of his arguments, he relied on Muhammad Nazeef Khan Vs. Gulbat Khan etc (2012 SCMR 235).

5. We have heard learned counsel for the parties at some length and have perused the impugned judgments as also the case law cited by them.

The moot points, which need our consideration, are as to whether (i) an agreement to sell confers title; (ii) the agreement dated 25.01.2010 was conclusive at the time when the respondent allegedly performed Talb-e-Muwathibat i.e. 23.02.2010, (iii) if the sale was not complete, whether the suit filed by the respondent was competent/maintainable? A bare perusal of the agreement to sell shows that it had expressly been stipulated therein that sale deed would be executed and the possession would be delivered to the appellants after payment of outstanding balance out of total consideration. It is an admitted position that the balance sale consideration of Rs.27,00,000/- was paid on 11.04.2010, which means that agreement to sell between the parties had not been concluded at the time when the respondent had performed his first talab. It is settled law that an agreement to sell does not create any title or claim over the property. It also does not create ownership in the land and, as such, a person in whose favour such an agreement is made cannot claim a decree of title on the basis of incomplete sale consideration. Even if such an agreement

contains an acceptance of receipt of an earnest or partial payment of the total sale consideration, it does not need to be registered because all it does in lieu of is grant the right to get another document i.e. sale deed. Unless the sale deed is registered and title is transferred, the possibility always exists that the agreement to sell might be terminated in the event of breach of any provision contained therein. In this view of the matter, it can safely be concluded that on 23.02.2010 when the respondent performed Talb-e-Muwathibat, the sale was not complete, therefore, the subsequent performance of Talb-e-Ishhad and filing of suit for pre-emption was pre-mature. In almost similar circumstances, this Court in the case of Abdul Nasir Vs. Haji Said Akbar (2010 SCMR 1770) while elaborately discussing the relevant provisions of Khyber Pakhtunkhwa Pre-emption Act, 1987, held as under:-

"From the above statutory provisions it is clear that the right of pre-emption becomes enforceable within 120 days from the four situations noted above in clauses (a),(b),(c) and (d) of section 31, ibid. In the present case we have gone through the agreement to sell dated 30-7-2001 wherein it has expressly been stipulated that a sale deed shall be executed after payment of the balance consideration amounting to Rs.6,00,000. The obvious conclusion to be drawn from the contents of the agreement to sell between the vendor and the petitioners-vendees is that a sale as yet has not been concluded. This is so notwithstanding the fact that possession apparently has been delivered to the petitioners in anticipation of the sale.

2. Clause (c) of section 31 of the N.-W.F.P. Pre-emption Act reproduced above does speak of the period of limitation starting from the date a vendee takes physical possession, but this clause is also posited on the fact that a sale has taken place. Section 2(d) of the N.-W.F.P. Pre-emption Act defines sale. It is evident from this definition that it is not different from the usual connotation of the word "sale" which, encompasses the conveyance of title to the vendee. The agreement referred to above clearly specifies that the title in the property will be conveyed at a subsequent date after the balance consideration has been paid. It follows, therefore, that a sale has not, as yet, taken place.

(Underlined to lay emphasis)

6. So far as Muhammad Nazeef supra case cited by the learned counsel for the respondent is concerned, the same is distinguishable. In the said case, the appellant/pre-emptor did not make Talb-e-Muwathibat upon acquiring knowledge of the sale but proceeded to verify from the Patwari

regarding attestation of the sale mutation and made Talabs when the mutation was attested. This Court while discussing various provisions of law held that the law does not allow the pre-emptor to postpone the making of Talb-e-Muwathibat in order to make further inquiry or probe as to whether or not the sale was complete in all respects. The "Talab" is to be made regardless of the credibility of the information. Learned counsel for the respondent had argued that once possession is transferred, sale becomes complete even if the balance sale consideration has not been paid. This aspect does not sound sense as it does not create any right or title as per law. However, even if this argument is accepted, the same could not be of any help to the respondent because admittedly the possession was delivered to the appellants after they had paid the balance sale consideration on 11.04.2010, much after the performance of Talb-e-Muwathibat on 23.02.2010. It was also contended by learned counsel for the respondent that pursuant to Section 5 of the Transfer of Property Act, 1882, an agreement to sell also falls within the ambit of "permanent sale" as defined in Section 2(d) of the Khyber Pakhtunkhwa Pre-emption Act, 1987. Before discussing this aspect of the matter, it would be in fitness of things to reproduce the relevant provisions of law, which read as under:-

KPK Pre-emption Act, 1987

"2(d) "sale" means permanent transfer of the ownership of an immovable property in exchange for a valuable consideration and includes transfer of an immovable property by way of hiba-bil-iwaz or hiba-bi-shart al-iwaz.."

Transfer of Property Act, 1882

"5. Transfer of property defined. In the following sections 'Transfer of Property' means and act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [or to himself] and one or more other living persons: and 'to transfer property' is to perform such act."

7. A bare perusal of Section 2(d) of the KPK Pre-emption Act clearly suggests that the word "sale" has been defined in the same terms as it usually encompasses. In common parlance a transaction between the buyer and the seller in which the seller sells intangible or tangible goods, assets, or services against money is known as a sale. In the present case, the agreement to sell

mentions in unequivocal terms that the title to the property will be transferred at a later time once the remaining amount has been paid. Therefore, as discussed above, the sale had yet not taken place at the time when the respondent performed Talb-e-Muwathibat. Section 5 of the KPK Pre-emption Act, clearly states that "the right of pre-emption shall arise in case of sale" meaning thereby that when there is no sale i.e. conveyance of title from vendor to vendee, there would be no right of pre-emption. The ratio laid down in Abdul Nasir supra case is also to this effect. So far as Section 5 of Transfer of Property Act, 1882, is concerned, the same has wide connotation. It is nowhere mentioned in this Section that an agreement to sell would be considered as complete sale. It generally states that transfer of Property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons. Conveyance of property means conveyance of title to the vendee. Even otherwise, the Khyber Pakhtunkhwa Pre-emption Act is a special law and it is settled that where-ever there is a special and general principle of law applicable to a certain matter, the special law will prevail. Reliance is placed on Safi-ud-Din Kazi Vs. Pranab Chandra Roy Choudhary (PLD 1950 Dacca 37).

8. For what has been discussed above, this appeal is allowed, the impugned judgment of the learned Peshawar High Court dated 28.07.2015 rendered in Civil Revision No.25-D/2014 is set aside and the judgments of the lower *fora* are affirmed. The above are the detailed reasons of our short order of even date.

Islamabad, the
15th of September, 2022
Approved For Reporting
Khurram