

**2004 C L C 231**

**[Peshawar]**

**Before Ijaz-ul-Hassan Khan, J**

**Mst. WAJIDA BEGUM and others---Petitioners**

**versus**

**Mst. SHAMIM AKHTAR and others---Respondents**

Civil Revision No.125 of 2001, decided on 10th November, 2003.

**(a) North-West Frontier Province Pre-emption Act (X of 1987)---**

---S. 5---Transfer of Property Act (IV of 1882), S.54---Pre-emption suit---Transaction of gift alleged to be a sale ---Proof---Pre-emptor in order to succeed in suit was obliged to satisfy judicial conscience of Court through cogent and convincing evidence that transaction shown to be a gift was in fact of sale and device had been adopted to thwart preemption claim---Mere allegation of pre-emptor that suit transaction was sale, in absence of any documentary proof, would not be a valid piece of evidence and could not be considered for brushing aside genuine and bona fide claim of defendants:

**(b) North-West Frontier Province Pre-emption Act (X of 1987)---**

---S. 5---Transfer of Property Act (IV of 1882), S.54---Pre-emption suit---Gift by husband in favour of wife in lieu of dower was alleged by plaintiff to be a sale---Proof---Trial Court and Appellate Court dismissed suit---Validity---Plaintiff had not proved payment of sale price---through cogent and reliable evidence---Sale was, thus, not complete in terms of S.54 of Transfer of Property Act, 1882---Husband had transferred land in his wife's name in lieu of dower in addition to dower fixed at time of marriage---Not unusual on the part of husband to alienate suit property in favour of wife by way of "Tamlik" in lieu of dower amount---Evidence produced by plaintiff to prove that in fact suit transaction was a sale and not a "Tamlik" was highly discrepant and fell short of required standard---Courts below on basis of evidence on record had found suit transaction a "Tamlik" and not a sale---High Court dismissed revision petition.

Juma Khan v. Mst. Shamim and 3 others 1992 CLC 1022; Abdul Zahid v. Haji Gulab 2002 CLC 4; Executive Engineer C&W Mansehra and 2 others v. Muhammad Nasim Khan and 4 others 2002 CLC 427; Muhammad Qasim and 6 others v. Muhammad Hussain and 8 others PLD 2001 Lah. 9; Riaz Hussain v. Board of Intermediate and Secondary Education and others 2000 SCMR 661; Shaukat Nawaz v. Mansabdar and another 1988 SCMR 851; Muhammad Akhtar v. Mst. Manna and 3 others 2001 SCMR 1700; Muhammad Bakhsh v. Elahi Bakhsh and others 2003 SCMR 286; Mst. Janat Bibi v. Faqir Muhammad 1998 MLD 837; Mst. Falak Naz v. Federal Land Commission, Islamabad and another 2002 CLC 518; Jan Muhammad v. Mst. Salamat Bibi and another 2002 SCMR 1408; Muhammad Afzal and 2 others v. Rehmatullah and another PLD

1990 Pesh. 131; Mst. Wilayat Jan and another v. Muhammad Sharif and another 1985 SCMR 1131; Yar Baz Khan v. Lal Nawaz PLD 1996 Pesh. 86; Muhammad Azim Khan v. Mst. Muqaisa and another PLD 1968 Pesh. 120; Muhammad Irshad and 4 others v. Sardar Khan 1981 CLC 124; Muhammad Afzal and others v. Jan Muhammad and others 2003 SCMR 1286; Gulzar, Khan v. Kist. Shahzad Bibi and another 1996 SCMR 487; Shah Nawaz v. Inayatullah and another PLD 1988 Pesh. 126; Durab Khan v. Mst. Sabv\_ani PLD 1952 Lah. 421; Mst. Manzoor Elahi v. Muhammad Nawaz and others 2002 MLD 988; Muhammad Daud v. Mst. Suriya Iqbal and another PLD 2000 Pesh. 54; Anwar Zaman and 5 others v. Bahader Sher and another 2000 SCMR 431; Mehra and 6 others v. Muhammad Yunas and 20 others 2003 SCMR 759; Taj Muhammad v. Mst. Zaitoon and another PLD 1995 Pesh. 135; Gulwali Khan v. Safdar Saleem and 10 others 1997 MLD 3075; Sardar Zaman Khan v. Government of N.W.F.P. and others 2001 CLC 1041; Maqbool Rehman v. Mst. Munawar 2001 CLC 1804; Muhammad Irfan Khan and 4 others v. Mst. Nasreen Anwar 2001 CLC 1256; M. Malik v. Mst. Razia PLD 1988 Lah. 45; Muhammad Ali's case 1984 SCMR 94; Muhammad Shafi v. Allah Dad Khan PLD 1986 SC 519 and Irfanuddin's case 1996 SCMR 1386 ref.

### **(c) Transfer of Property Act (IV of 1882)---**

---S. 54---Sale---Essential condition---Proof of payment of some price in cash for thing sold necessary.

It is necessary that some price in cash must be paid for the thing sold.

According to section 54 of Transfer of Property Act, it is to be proved that price/consideration has been paid to the owner.

M. Malik v. Mst. Razia PLD 1988 Lah. 45 and Muhammad Ali's case 1984 SCMR 94 rel.

### **(d) Islamic Law---**

---Dower---Practice of transferring land in favour of wife, in lieu of dower not uncommon between families.

### **(e) Civil Procedure Code (V of 1908)---**

---Ss. 96, 100 & 115---Exercise of discretion by Court below--Interference in appeal and revision---Scope---Principles.

Interference in revision with decisions regarding matters, which are within the discretion of subordinate Court is not warranted, unless order is contrary to the principles governing the exercise of such discretion or the Court had acted perversely or arbitrarily. Improper exercise of discretion may be corrected in appeal, but not in revision. Revisional jurisdiction is directed against the irregular exercise, nonexercise or illegal assumption of jurisdiction and not against the conclusion of law or fact not involving question of jurisdiction, however, erroneous that may be. It is settled principle of law that findings recorded by the Court of competent jurisdiction cannot be interfered with by High Court in exercise of its revisional jurisdiction under section

115. C.P.C. unless such findings suffer from jurisdictional defect, illegality or material irregularity.

Haji Muhammad Din v. Malik Abdullah PLD 1994 SC 291fol.

**(f) Civil Procedure Code (V of 1908)---**

---O. XLI, R.31---Judgment in appeal---Duty of Appellate Court to give decision on every point and discuss all grounds on which finding of Court below is based.

Appellate Court is required to give its decision with regard to each and every point for determination and the contentions raised and against should be disposed of by a speaking order. Appellate Court is further required to discuss all the grounds on which the finding of Court below is based.

**(g) Civil Procedure Code (V of 1908)---**

---O. XLI, R.27---Remand - of case by Appellate Court ---Scope--Remand should not be ordered, when no evidence is to be recorded or evidence on record is sufficient for Appellate Court to decide issue/question itself---Principles.

If the entire evidence on record is available, which is sufficient for -the Appellate Court to pronounce judgment and decide the issue, it is riot necessary to remand the case for trial to the lower Court particularly when no evidence is to be recorded.

Remand should not be lightly ordered, if the evidence on record is sufficient for the Appellate Court to decide the question itself. There can be no bar to the Court doing so.

Pramatha Nath Chowdhry and 17 others v. Kamir Mondal and others PLD 1965 SC 434 fol.

Ziaur Rehman Khan for Petitioners.

M. Khalid Rehman Qureshi for Respondents.

Date of hearing: 6th October, 2003.

**JUDGMENT**

Muhammad Farooq Khan (since dead and represented by his legal heirs) and Muhammad Haroon Khan, plaintiffs instituted suit on 15-10-1977 in the Court of Senior Civil Judge, D.J. Khan against Mst. Shamim Akhtar and her husband Muhammad Saeed Khan defendants, for possession through pre-emption of suit-land (details whereof have been given in the head note of the plaint) alleging that in fact suit property was sold by defendant No.2 in favour of his wife defendant No.1 on the basis of Mutation No.146 attested on- 13-9-1976 in consideration of Rs.20,000 but the transaction in question was given a false colour of "TamliK" in order to frustrate the pre-emptive rights of the plaintiffs. The suit was resisted and property in question

was stated to have been transferred by defendant No.2 in favour of defendant No.1 in lieu of dower and thus not pre-emptible: Relevant issues were framed and pro and contra evidence was recorded by the parties.

2. Upon consideration of the evidence, learned Senior Civil Judge, D.I. Khan proceeded to hold that defendant No.2 had gifted the property in favour of defendant No. 1 in lieu of dower and thus, the same was immune from pre-emption. Consequently, she dismissed the suit through her judgment and decree, dated 22-3-1994. She also found the suit barred by time an appeal was preferred thereagainst, before learned District Judge, D.I. Khan. During the pendency of appeal an application was moved under Order 41, rule 27, C.P.C. for grant of permission to adduce additional evidence. The application was allowed vide order, dated 16-9-1999 Ultimately, vide judgment, dated 6-9-2001 the impugned judgment and decree, dated 22-3-1994 was maintained and the appeal was dismissed on the ground that payment of sale consideration has not been proved and the suit property was transferred by defendant No. 1 in the name of defendant No.2 in lieu of dower.

3. This revision petition is directed against the concurrent findings of two Courts below viz. Senior Civil Judge. D.I. Khan and District Judge, D.I. Khan. The petitioner by way of filing instant revision have assailed the legality, propriety and correctness of the judgments and decrees, dated 22-3-1994 and 16-9-1999.

4. Mr Ziaur Rehman, Advocate for the petitioners contended, inter alia, that the impugned judgments and decrees of the Courts below are patently against law and facts on record; that the unchallenged evidence of overwhelming and overriding effects on issue of sale, has been side tracked and ignored without any legal justification; that the two agreements to sell one in favour of petitioner, dated 17-6-1976 (Exh.A.W.3/1) and the other (Exhs.A.W.2/1 and A.W.2/2) were kept at shelf without any justification and excluded out of consideration; that the impugned judgment and decree of the Appellate Court are in violation of the provisions of Order 4:, rule 31, C.P.C. and that the learned District Judge has acted in utter disregard, of law and principle of justice and failed to apply judicial mind or to act in a manner required by law. He has neither referred the case-law cited on each and every issue by the petitioners in support of their case nor has he discussed or distinguished the same from the facts of this case. Such violation is contrary and in disregard of all fair play as well as is violative to the doing of substantial justice. Concluding the arguments, the learned counsel maintained that judged and considered from whatever angle, the learned District Judge as well as the trial Court both have acted in disregard of law, against the principle of justice as well as the mandatory provision of the C.P.C., the pre-emption law and against the provisions of the Qanun-e-Shahadat Order, therefore, both the impugned judgments and decrees, being void, coram non judice, without jurisdiction are the outcome of misreading, non-reading, misappraisal and non-appraisal of evidence and, therefore; are not sustainable. In support of the contentions, reliance was placed on Juma Khan v. Mst. Shamim and 3 others 1992 CLC 1022, Abdul Zahid v. Haji Gulab 2002 CLC 4, Executive Engineer C&W Mansehra and -2 others v. Muhammad Nasim Khan and 4 others 2002 CLC 427, Muhammad Qasim and 6 others v. Muhammad Hussain and 8 others PLD 2001 Lah. 9, Riaz Hussain v. Board of Intermediate and Secondary Education and others 2000 SCMR 661; Shaukat Nawaz v. Mansabdar and another 1988 SCMR 851, Muhammad Akhtar v: Mst. Manna and 3 others 2001 SCMR 1700, Muhammad Bakhsh v. Elahi Bakhsh and others 2003 SCMR 286, Mst.

Janat Bibi v. Faqir Muhammad 1998 MLD 837 (Lahore), Mst. Falak Naz v. Federal: Land Commission, Islamabad and another 2002 CLC 518, Jan Muhammad v. Mst. Salamat Bibi and another 2002 SCMR 1408, Muhammad Afzal and 2 others v. Rehmatullah and another PLD 1990 Pesh. 131, Mst. Wilayat Jan and another v. Muhammad Sharif and another 1985 SCMR 1131, Yar Baz Khan v. Lal Nawaz PLD 1996 Pesh. 86, Muhammad Azim Khan v. Mst. Muqaisa and another PLD 1968 Pesh. 120, Muhammad Irshad and 4 others v. Sardar Khan 1981 CLC 124 and Muhammad Afzal and others v. Jan Muhammad and others 2003 SCMR 1286.

5. Mr. Khalid Rehman Qureshi, Advocate appearing on behalf of the respondents, on the other hand, supported the impugned judgments and decrees and maintained that the conclusion of fact arrived concurrently by both the lower Courts warrants no interference particularly when no specific misreading or non-reading of evidence has been pointed out. To support the pleas he placed reliance on Gulzar Khan v. Mst. Shahzad Bibi and another 1996 SCMR 487, Shah Nawaz v. Inayatullah and another PLD 1988 Pesh. 126, Durab Khan v. Mst. Sabyani PLD 952 Lah. 421, Mst. Manzoor Elahi v. Muhammad Nawaz and others 2002 MLD 988, Muhammad Daud v. Mst. Suriya Iqbal and another PLD 2000 Pesh. 54, Anwar Zaman and 5 others v. Bahader Sher and another 2000 SCMR 431, Mehra and 6 others v. Muhammad Yunas and 20 others 2003 SCMR 759, Taj Muhammad v. Mst. Zaitoon and another PLD 1995 Pesh. 135, Gulwali Khan v. Safdar Saleem and 10" others 1997 MLD 3075, Sardar Zaman Khan v. Government of N.-W.F.P. and others 2001 CLC 1041, Maqbool Rehman v. Mst., Munawar 2001 CLC 1804 and Muhammad Irfan Khan and 4 others v. Mst. Nasreen Anwar 2001 CLC 1256.

6. The main controversial matter which calls for decision in this case is whether the impugned transaction was a 'sale and subject to the right of pre-emption of the petitioners. This dispute is covered by Issue No.4 which may be reproduced as under:--

Whether the transaction is a sale or otherwise? OPP

7. It needs no reiteration that in order to succeed in a suit, the preemptor is obliged under the law to satisfy the judicial conscience of the Court through cogent and convincing evidence that the transaction shown to be a gift was in fact of sale and device was adopted to thwart the pre-emption claim. From the evidence produced by the petitioners nowhere it has been established that any consideration change hands between respondent No. 1 and respondent No.2. All the witnesses produced by the petitioners have given the evidence in the nature of hearsay and no one has witnessed any consideration changing hands. It is necessary that some price in cash, must be paid for the thing sold. The word "sale" is defined in M. Malik v. Mst. Razia PLD 1988 Lah. 45 in the following terms:--

"Sale means transfer of ownership in exchange for a price paid or promised or part paid and part promised where sale was made orally and reported to Patwari by parties thereto who had admitted payment of the consideration and delivery of possession on the basis whereof mutation was entered. Sale would be effected and completed on that day and not when mutation in respect thereof, was sanctioned.",

In Muhammad Ali's case 1984 SCMR 94 the word "sale" was defined in the following terms:--

"Sale is defined as being a transfer of ownership for sale price is an absolute transfer of rights in property-sold and no rights are left in transferor. Essential elements of sale are (i) the parties; (ii) subject-matter; (iii) transfer or conveyance and (iv) price or consideration. "

According to section 54 of Transfer of Property Act it is to be proved on record that the price/consideration has been paid to the owner. In the present case consideration/price is not proved on record then sale is not completed in terms of section 54 of Transfer of Property Act. In the present case petitioners failed to prove element of consideration/price on record through reliable and cogent evidence. Two documents (Exh..A.W.3/1 and Exh.A.W.2/1 and Exh.A.W.2/2) have been brought on record to prove the factum of sale. These documents have been excluded out of consideration by the Courts below and rightly so for want of proof. Muhammad Shafi v. ' Allah Dad Khan PLD 1986 SC 519 and Irfanuddin's case 1996 SCMR 1386 . It may be observed here that the parties are closely related to each other. Muhammad Haioon Khan and his brother late Muhammad Farooq Khan petitioners are real brothers of Muhammad Saeed Khan respondent No.2. The latter has acquired the suit property through inheritance of his father. The parties belong to respectable family of Sarai Saleh District Haripur. The practice of transferring lands in favour of wives in lieu of dower is not uncommon between the family. It has come in evidence that Muhammad Haroon Khan petitioner has also transferred certain landed property in the name of his wife in lieu of dower in addition to the dower fixed at the time of marriage. Respondent No. 1 is the wife of respondent No. 2. There is nothing unusual on the part of respondent No.2 to alienate the suit property in favour of respondent No. 1 by way of "Tamlik" in lieu of dower amount. The evidence produced by the petitioners to " prove that in fact the suit transaction was a sale and not a "Tamlik" is highly discrepant and falls short of the required standard. The learned counsel for the petitioners could not point out any proof on the file establishing that the transaction in question was in reality a sale and it was given a false colour of "Tamlik" in order to defeat the pre-emption suit.

8. Although this Court is not called upon to reappraise the evidence on record in exercise of its revisional jurisdiction yet in the interest of justice, I have scanned through the evidence and feel that the findings of both the Courts below are in consonance with the evidence on record. Both the Courts have rightly clinched the factual controversies, have dealt with the matter in a threadbare manner and came to the conclusion that transaction in question is in reality a "Tamlik". The contentions raised by the learned counsel for the petitioners have duly been taken care of and dealt with by the Courts below very aptly which are not open to exception. Findings of fact recorded by the trial Court and affirmed by the Appellate Court are based on correct and careful appraisal of evidence, and the grounds urged stand conclusively determined by the judgments of the two Courts below. The mere allegation of the petitioners that suit transaction is sale, in the absence of any documentary proof is not a valid piece evidence and cannot be considered for brushing aside genuine and bona fide claim of the respondents. Both the judgments of the Courts below are well-reasoned and have been passed after perusal evidence on record. The lower Courts after having discussed the total evidence on record and undertaking in depth study of the oral and documentary evidence on record have found the transaction a "Tamlik" and not a sale.

9. Interference in revision with decisions regarding matters which are within the discretion of subordinate Court is not warranted unless order is, contrary to the principles governing the exercise of such discretion or the Court had acted perversely or arbitrarily. Improper exercise of discretion may be corrected in appeal but not in revision. Revisional jurisdiction is directed against the irregular exercise, nonexercise or illegal assumption of jurisdiction and not against the conclusion of law or fact not involving question of jurisdiction, however, erroneous they may be. It is settled principle of law that findings ,recorded by the Court of competent jurisdiction cannot be interfered with by the High Court, in exercise of its revisional-Jurisdiction, under section 115, C.P.C. unless such findings suffer from jurisdictional defect, illegality or material irregularity. Haji Muhammad Din v. Malik Abdullah PLD 1994 SC 291.

10. Learned counsel for the petitioners also contended that the Appellate Court is required to give its decision with regard to each and every point for determination and the contentions raised for and against should be disposed of by a speaking order. He added that the judgment and decree of the Appellate Court is violative of the provisions of Order 41, rule 31, C.P.C. which has rendered the impugned judgment unsustainable in law. The learned counsel maintained that it is a fit case to be remanded to the learned Appellate Court enabling it to record a speaking judgment in accordance with the law. The submission of the learned counsel is devoid of force. All the issues formulated in the case have been dealt with carefully and the reasoning returned are supported by actual evidence on the file. It is true that the Appellate Court is required to give its decision with regard to each and every point for determination -and the contentions raised for and against should be disposed of by a speaking order. It is also true that the Appellate Court is further required to discuss all the grounds on which the finding of the Court below is based. In the instant case all the legal formalities have been duly complied with and no prejudice seems to have been caused to the petitioners. The learned Appellate Court has given elaborate findings on each and every point. The judgment of the Appellate Court had been recorded keeping in view the provisions contained in Order. 41, rule 31; C.P.C. The parties are locked in litigation since' 1977 and during the first round of litigation the matter has been taken to the august Supreme Court of Pakistan as well. Having regard to the facts and circumstances , of the case I do not consider it appropriate and in the interest of justice to accept the revision petition and remand , the case for retrial. Sufficient material is available on the record and the same has been properly considered and looked into. It is well-settled view that if the entire evidence on record is available which is sufficient for the Appellate Court to -pronounce judgment and decide the issue, it is not necessary to remand the case for trial to the lower Court particularly when no evidence is to be recorded. Reference can be made to Pramatha Nath Chowdhry and 17 others v. Kamir Mondal and others PDL1965 SC 434 where similar question was considered with the following observations: --

"It remains now to examine one other argument advanced on behalf of the appellant, namely, that in any event the learned Judges should not have decided the case themselves but should have remanded the case to the proper Court for determination of the question as to whether there was a valid tenancy in this case. We are unable to accept this contention. A remand should not be lightly ordered if the evidence on the record is sufficient for the Appellate Court to decide the question itself. There can be no bar to the Court doing so. Having examined the reasons given by the learned Judges of the High Court for deciding this question we are unable to say that the evidence was not so

sufficient. There was adequate evidence on the record upon which the decision of the learned Judges in the High Court could have been based. We see no reason, therefore, to interfere only on this ground."

11. In the result for the foregoing reasons finding no substance .in this revision petition I dismiss the same with no order as to costs.

S.A.K./988/R

Revision dismissed.