

P L D 2002 Supreme Court 16

Present: Sh. Riaz Ahmad, Mian Muhammad Ajmal and Syed Deedar Hussain Shah, JJ

MIR ZAMAN and another---Appellants

versus

QURB.AN HUSSAIN --- Respondent

Civil Appeal No. 159 of 1998, decided on 20th September, 2001.

(On appeal from the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi, dated 20-5-1997 passed in Civil Revision

(a) Punjab Pre-emption Act (I of 1913)---

---S. 8(2)---Constitution of Pakistan (1973), Art.185(3)---Oustees from Islamabad area on account of construction of the capital---Notification excluding areas purchased by the oustees---Bar to exercise right of pre-emption---Contention of the vendees was that as soon as the Notification was issued a vested right was created in their favour which could not be taken away merely by the fact that the suit for pre-emption was decided on a date after two years of issuance of the Notification---Leave to appeal was granted by Supreme Court to consider the contention raised by the vendees.

Muhammad Zulfiqar v. Ghulam Khan 1991 SCMR 292 and Fazal Elahi v. Dewan Ali 1984 SCMR 1404 ref.

(b) Punjab Preemption Act (I of 1913)---

----S. 8(2)---Oustees from Islamabad area on account of construction of the capital---Notification creating bar to exercise right of pre-emption-- Applicability---After issuance of the Notification, the right of pre-emption against the sales made in favour of the persons who were certified oustees of Islamabad stood extinguished and after the loss of pre-emptive right of the pre-emptor, the pending pre-emption suit could not proceed any further as right to sue ceased to exist any more---Where decree had not been passed, the suit was liable to dismissal for having become infructuous.

Muhammad Zulfiqar v. Ghulam Khan 1991 SCMR 292; Fazal Elahi v. Dewan Ali 1984 SCMR 1404; Bibi Jan v. R.A. Monny PLD 1961 SC 69 and Shakar Khan v. Muhammad .Lal PLD 1978 SC (AJ&K) 126 ref.

(c) Punjab Pre-emption Act (I of 1913)---

----Ss. 4, 8(2) & 21---Right of pre-emption, exercise of---Oustees from Islamabad area on account of construction of .the capital---Notification creating bar to exercise right of pre-emption---Vendees were oustees from Islamabad and certificate in that respect was duly. issued by the Authorities-- During pendency of pre-emption suit against the vendees, the Notification was issued by the Government---Suit was decreed by the Trial Court, whereas the Appellate Court allowed the appeal and dismissed the suit on the ground that the Notification was applicable in the case---Judgment and decree passed by the Appellate Court was set aside by High Court in exercise of revisional jurisdiction---Plea raised by the pre-emptor was that exemption under the Notification

was not available to the vendee on the date of sale of the suit land, date of institution of the suit and the date on which the decree was passed---Validity---Notification, in the present case, came into effect on the date it was published, therefore, on extinguishment of pre-emptive right of the pre-emptor, the right to sue or to proceed to sue a right in a pending suit ceased to exist irrespective of the fact whether the sale had taken place before the Notification, and therefore, and in consequence, the suit was liable to be dismissed---Where no decree was passed the Notification was applicable and rendered the pre-emption suit against the certified oustees of Islamabad, to be infructuous---Judgment and decree passed by High Court was set aside and that of the Appellate Court was restored, by the Supreme Court in appeal.

Muhammad Zulfiqar v. Ghulain Khan 1991 SCMR 292; Fazal Elahi v. Dewan Ali 1984 SCMR 1404; Bibi Jan v. R.A. Monny PLD 1961 SC 69 and Shakar Khan v. Muhammad I .al PLD 1978 SC (AJ&K) 126 ref.

(d) Pre-emption---

---Right of pre-emption ---Pre-condition---Such right must persist till passing of decree but if such right is withdrawn before passing of decree, the same adversely hits the suit--Essential for pre-emptor to retain his right till the date of decree in order to be successful.

Bibi Jan v. R.A. Monny PLD 1961 SC 69 rei.

Muhammad Younis Bhatti, Advocate Supreme Court and Ijaz, Muhammad Khan, Advocate-on-Record for Appellants.

Bashir Ansari, Advocate Supreme Court and Imtiaz Muhammad Khan, Advocate-on-Record for Respondent.

Date of hearing: 24 April, 2001.

JUDGMENT

MIAN MUHAMMAD AJMAL, J.--This appeal by leave of the Court, is directed against the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 20-5-1997; whereby Civil Revision No.552-D of 1987 of the respondent was allowed, the judgment and decree passed by Additional District Judge, Islamabad date 5-10-1987 was set aside and that of the Senior Civil Judge; Islamabad dated 26-10-1982 was restored.

2. Brief facts of the case are that Mehrban, brother of the respondent sold his land measuring 19 Kanals, 13 Marlas situated at Chak Dakhli, Tehsil Sihala, District Rawalpindi to the appellants for an amount of 8,20,000 through registered sale-deed dated 28-5-1975. The respondent filed a suit in the Civil Court, Rawalpindi, for possession of the said land on the basis of his superior right of pre-emption being brother of the vendor and co-sharer in the Khata. He also averred that the sale price of the land was Rs.5,350. The suit was contested by the appellants. On the divergent pleadings of the parties, the trial Court framed necessary issues and recorded evidence of the parties. During the pendency of the suit, a notification was issued on 15-6-1976 exempting pre-emption rights for a period of two years in respect of the sales of land in favour of the oustees of Islamabad to Districts of Campbellpur, Rawalpindi and Jhelum. Thereafter, the appellants-vendees moved an application for amendment in the written statement praying that they be allowed to raise the plea of being oustees of Islamabad and hence the suit. land having been purchased by them in such capacity, was immune from pre-emptive attack in view of the aforesaid notification. The learned trial Judge

vide his interlocutory order dated 7-2-1979 held that the said notification was not fatal to the suit and could not be pressed into service as it was not in existence at the time of filing of the suit as such the suit was held to be competent. The appellants challenged the propriety of the said order in appeal before the learned District Judge, Islamabad who vide his order dated 16-3-1981 held that the suit was not maintainable as the notification was fatal to the suit and had retrospective effect. The respondent challenged the said order before the Lahore High Court, Rawalpindi Bench, Rawalpindi through R.S.A. No.53 of 1981, which was accepted on the ground that the appeal against the interlocutory order before the First Appellate Court was incompetent, therefore, on setting aside the same the case was remanded to the trial Court for decision afresh on merits. After remand, learned Senior Civil Judge, Islamabad vide his judgment dated 26-10-1982 decreed the suit holding that the appellants-vendees could not take benefit of notification dated 15-6-1976 and the suit of the respondent was held to be competent. However, the price mentioned in the sale deed was believed to be correct keeping in view upward trend in the price of the land. Feeling aggrieved, the appellants filed appeal, which was accepted by an Additional District Judge, Islamabad vide his judgment dated 5-10-1987, holding that the Notification dated 15-6-1976 was applicable to the instant case and the defendants were immune from the pre-emptive attack. Resultantly, the judgment and decree of the trial Court was set aside and the suit was dismissed. Feeling dissatisfied; the respondent filed Civil Revision No.552-D of 1987, which has been accepted by a learned Judge in Chambers of the Lahore High Court, Rawalpindi Bench vide judgment dated 20-5-1997 impugned herein. Leave to appeal was granted by this Court as under;--

"The learned counsel contends that as soon as the above notification was issued a vested right was created in favour of the petitioners which could not be taken away merely by the fact that the suit for pre-emption was decided on a date after two years of issuance of the said notification. In support of his contention, the learned counsel has relied on the case of Muhammad Zulfikar v. Ghulam Khan 1991 A SCMR 292 wherein relying on an earlier case of Fazal Elahi v. Dewan Ali 1984 SCMR 1404 this Court observed that the mandatory effect of the notification issued under section 8(2) of the Punjab Pre-emption Act has to be given effect to and as such right of pre-emption stands extinguished against a person who is a displaced affectee of Islamabad. The contention raised by the learned counsel for the petitioners, requires examination and we, accordingly grant leave to appeal to consider the same. "

3. Learned counsel for the appellants contended that Notification dated 15-6-1976 was issued during the pendency of the pre-emption suit, therefore, the same was applicable to the pending proceedings and in the light thereof the pre-emption suit was liable to be dismissed. Reliance was placed on Bibi Jan v. R.A. Monny PLD 1961 SC 69 and Shakar Khan v. Muhammad Lai PLD 1978 SC (AJ&K) 126.

4. On the other hand, learned counsel for the respondent submitted that no doubt the appellants were displaced persons from Islamabad but the said notification would have no effect on the suit of the respondent as the same was issued during the pendency of the suit and stood expired before the decree was passed by the trial Court.

5. We have heard the learned counsel for the parties and have gone through the record of the case. Admittedly, Notification, dated 15-6-1976 was issued during pendency of the suit, whereby the displaced persons of Islamabad were given exemption from pre-emption on the sale of land in their favour in the Districts of Campbellpur, Rawalpindi and Jhelum for a period, of two years. After, issuance of the said notification the appellants applied for permission to file amended written statement, which was allowed. However, learned trial Court on additional issue found that the said notification had no effect on the pending suit and consequently decreed the same. This finding was set aside by the learned First Appellate Court but the same was restored by the High Court in revision. Leave was granted to consider whether a right which

accrued to the appellants on issuance of the notification would terminate on the expiry of two years, the period fixed in the notification.

6, After the issuance of the said notification the right of pre-emption against the sales made in favour of the persons who were certified oustees of Islamabad stood extinguished and after the loss of pre-emptive right of the pre-emptor, the pending pre-emption suit could not proceed any further as right to sue ceased to exist anymore, as such the suit was liable to dismissal for having become infructuous. Reference may be made to *Mst. Bibi Jan and others v. Miss R.A. Monny* and another PLD 1961 SC 69, wherein this Court observed as under:--

"The words of notification appear to us to be plain and to be fairly susceptible of the interpretation that with the promulgation of the notification, all rights of pre-emption would cease to exist, in the area mentioned in the notification, whether they pertained to, sales that had already taken place or to those which were to be held hereafter. The only exception that could be recognised to this proposition would be in favour of cases in which decrees had already been obtained by the pre-emptors, prior to the notification. In the case of such an existing decree, it could not be said that the pre-emptor was seeking to enforce his right to pre-empt: The right had already been successfully asserted before the date of the notification. But in the absence of any such adjudication by a Court, there is no reason why full effect should not be given to, the comprehensive words of the notification, so as to non-suit plaintiffs who may have filed suit for pre-emption before the date of notification, as well as debar all pre-emptors from instituting suits to enforce their right of pre-emption in the area in question, subsequent to the date of the notification. We are, consequently, disposed to uphold the decision of the Courts below that the right of pre-emption possessed by the appellant was lost on the date that the impugned notification was issued in the present case. We, therefore, dismiss the appeal with costs."

In *Shakar Khan v. Muhammad Lal* (PLD 1978 SC (AJ&K) 126); it was observed:

"The right of pre-emption in the instant case possessed by the pre emptor was lost on the day the Notification was issued under section 6(2) pf the Right of Prior Purchase Act that had taken away the right of prior purchase and a decree- that was passed subsequent to the loss of the right to pre-empt, was not a valid decree in the eyes of law; because pre-emption is the right of a person of purchasing a land in preference to other person. Thus it connects a preferential right of purchase and it is necessary for pre-emptor to show that he was clothed with the superior right not only at the time of sale, but also at the time of institution of suit as well as at the time of the decree by the trial Court was passed in his favour. In case where he is deprived of such superior right before a decree is passed in his favour and the property is not by then legally vested in him under such decree, his suit becomes infructuous. The loss of the right to pre-empt, in law deprives such person of the right to prosecute his case any more. In these circumstances, the High Court has rightly reversed the finding of the two Courts below and dismissed the suit.

In *Fazal Elahi v. Dewan Ali* (1,484 SCMR 1404), this -Court observed:---

In the N.-W. F. P. Pre-emption Act XIV of 1950 section i9 is to the effect that where the purchaser having equal or a superior right to the pre-emptor, joins with him, a person having no right or having right inferior to the pre-emptor, the purchaser loses his preferential right, but there, is no corresponding provision to section 19 in the Punjab Pre-emption Act (I of 1913). This being so the right of pre-emption can be enforced subject to the condition and limitation laid down in the statute itself. Under section 6 of both the Pre-emption Acts a right of pre-emption shall exist in respect of agricultural land, village immovable property, and urban immovable property subject to the provisions and limitations contained in these Acts. This gives mandatory effect to the requirement of section 19 whereas in the Punjab Pre-emption Act there is no

such provisions and limitation. Therefore, mandatory effect would only be given to the exemption provided under section 8 (2) because where a statutory provision excluding right of pre-emption is contained categorically of cases basically the right of pre-emption extinguishes against a person i.e. who is a Certificate Holder. Therefore, the learned Judges of the High Court have come to the right conclusion that qua the share of Diwan Ali the right of pre-emption stands extinguished, and, therefore, the suit to that extent would stand dismissed. Thus, we find no merit in this petition which is accordingly dismissed."

In Muhammad Zulfiqar v. Gulab Khan 1991 SCMR 292, the notification in question came under consideration before this Court, wherein it was held that mandatory effect would be given to the exemption provided under section 8(2) of the Punjab Pre-emption Act and the right of pre-emption against a person who was certificate holder from Capital Development Authority to the effect that he was an oustee from Capital Area on account of construction of Capital, would be extinguished.

7. It has consistently been held that on issuance of notification of exemption of right of pre-emption, the right of pre-emption 'ceases to exist as the notification takes effect on the day of its publication, as such the same would apply to the pending suit where decree has not been passed. The notification was issued under subsection (2) of section 8 of the Punjab Pre-emption Act 1913, which reads as follows:--

"8 Provincial Government may exclude areas from pre-emption. ---(1)...

(2) The (Board of Revenue) may declare by notification that in any local area or, with respect to any land or property or class of land or property or with respect to any sale or class of sales no right of pre-emption or only such limited right as the Board of Revenue may specify, shall exist".

In exercise of the aforesaid provision of law the Central Board of Revenue vide Notification dated 15-6-1976 declared that no right of pre-emption shall exist in the Districts of Campbellpur, Rawalpindi and Jhelum in respect of sale of agriculture land not exceeding 12-1/2 acres of canal irrigated area or 50 acres of unirrigated area and other immovable property not exceeding the market value of Rs.10,000 in favour of a person displaced on account of construction of the Capital at Islamabad and certified to be so displaced by the Capital Development Authority, Islamabad. As far as the question of displacement of the appellants from Islamabad and its certification by the Capital Development Authority, Islamabad is concerned, it has been proved on record that the appellants were oustees from Islamabad on account of construction of Capital which has been certified by the C.D.A vide certificates Exh.D-6 and Exh.D-7. The learned Judge ill Chambers held them to be displaced persons duly certified by the C.D.A., Islamabad, as under:--

"In support of their contentions on the aforesaid additional issue that they were oustees of Islamabad Capital Territory, the respondents produced two certificates Exh.D-6 and Exh.D-7 issued by the Capital Development Authority certifying that Mahboob Hussain son of Zaman Khan and Zaman Khan son of Ali Khan respondents Nos.2 and 1 respectively were the oustees of Islamabad. In rebuttal, the petitioner/plaintiff produced copy of Register Haqdaran for the year 1973-74 (Exh.P6) and certificates Exh.P-7 and Exh.P-8 issued by the Capital Development Authority, Islamabad, copy of Register Haqdaran for the year 1973-74, for the village Sihala, shows that Mir Zaman son of Ali Ahmad, respondent No. 1, was owner of land in the village, while certificate Exh.P-7 establishes that Wilayat Khan son of Muhammad Khan's land was acquired by the Capital Development Authority and he was paid compensation thereof and that his son turban Hussain was an oustee of Islamabad. Exh.P-8 is certificate issued by the C.D.A. to the effect that Mir Zaman's land measuring 20 Kanals and 19 Marlas was acquired by C.D.A., and he was given alternate State land in Guddu Barrage area. In view of this documentary evidence showing that the respondents were oustees of

Islamabad Capital Territory, the objection. of the petitioner regarding disentitlement of the respondents being residents of the village where the disputed land was situated from claiming protection under the Board of Revenue, Government of Punjab, Notification No.2771-76/1060-LR-III, dated the 15th June, 1976, is devoid of any force. There is no evidence on the record to rebut the authenticity of the certificates (Exh.D-6 and Exh.D-7) issued by the acquisitioning authority (CDA). In fact, the certificate Exh.P-8, produced by the petitioner/plaintiff himself proves that respondent No. 1 was a displaced person of Islamabad and the land owned by him was acquired by the CDA and was given land in Guddo Barrage area in lieu thereof. Hence, simply owning of land in village Sihala does not establish that he was not a displaced person of Islamabad. For that purpose, legally, as required by Notification, dated the 15th June, 1976, certificates of the Capital Authority to this effect were sufficient proof to establish that the respondents were the displaced person of Islamabad. The other requisite regarding area of land acquired by CDA for attracting the exemption under the said Notification also applies to the disputed land. The only question which actually needs determination is whether the exemption under the Notification of the 15th June, 1976, is applicable in the present case."

The question whether exemption under the notification was applicable to the present case has been answered above in affirmative that since the notification came into effect on the day it was published which provided that no right of pre-emption shall exist, for a period of two years with respect to the sale of agriculture land not exceeding 12-1/2 acres of canal irrigated area or 50 acres of unirrigated area and other immovable property not exceeding the market value of Rs.10,000 in favour of a person displaced on account of construction of the capital at Islamabad. On the publication of the notification all rights of pre-emption ceased to exist in the Districts mentioned therein, as such it was applicable to the sales that had already taken place and the pending suits of pre-emption instituted on the basis of such sales and pre-emptive right could not be exercised in those sales which were to take place within the period stipulated in the notification. The argument that exemption was not available on the date of sale, date of institution of the suit and the date on which the decree was passed, has no substance, for, as stated above the notification came into effect on the date it was published, therefore, on extinguishment of the pre-emptive right of the pre-emptor, the right to sue or to proceed to sue a right in a 'pending suit ceased to exist irrespective of the fact whether sale had taken place before notification or thereafter, and in consequence, suit was liable to be dismissed. In pre-emption suit it is necessary that right of pre-emption must persist till the passing of the decree but if such right is withdrawn before, the passing of the decree, it would adversely hit the suit. In Mst. Bibi Jan's case (supra) it was observed that it was essential for the pre-emptor to retain his right of pre-emption till the date of decree in order to be successful. The exception provided in the notification is that it would not apply to those cases where decree had been passed in favour of the pre-emptors before its publication thus implies that in the cases where no decree had been passed the notification was applicable and rendered the pre-emption suit against the certified oustees of Islamabad, to be infructuous.

8. In view of the above, we accept this appeal, set aside the impugned judgment and decree of the High Court, restore that of the Additional District Judge, Islamabad, dated 5-10-1987 and dismiss the suit leaving the parties to bear their own costs.

Q.M.H./M.A.K./M-307/S Appeal allowed.

