

JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
PESHAWAR  
(Judicial Department)

**C.R No. 1060-P/2022**

*(Wajid Ghani Vs. Wakeel Ghani)*

**Present:** *Mr. Munfat Ali, Advocate for petitioner.*  
*Mr. Shahabullah Khan, Advocate for respondent.*

Date of hearing: **18.07.2024**

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.-** Impugned through instant civil revision petition is the judgment and order of the learned Additional District Judge-II, Mardan at Takht Bahai dated 23.11.2022 whereby the judgment and order of the learned Civil Judge-II, Takht Bhai dated 15.09.2022 was set aside, the suit was restored, and the respondent/plaintiff was directed to deposit 1/3<sup>rd</sup> of the sale consideration of the pre-empted amount.

**2.** Briefly, the respondent Wakeel Ghani (**pre-emptor**), filed a suit for recovery of possession in respect of the property as mentioned in headnote of the plaint situated in the revenue estate of Sher Garh, Tehsil Takht Bhai, purchased by the present petitioner Wajid Ghani through Mutation No. 4689 attested on 18.02.2022 and Mutation No. 4713 attested on 06.04.2022. On getting knowledge regarding sale of the pre-empted land from Muhammad Iqbal son of Jan Muhammad on 25.04.2022 at 10:00 A.M in presence of Zahir Gul son of Haleem

Gul, Zia-ur-Rahman son of Darwesh Gul and Abdi Ali son of Muhammad Iqbal, when they all were present at 'Chopal Fruit Farosh', as such, he then and there announced his intention to pre-empt the property which was sold in lieu of Rs.30,00,000/-, however, per contention of the respondent/pre-emptor, an exaggerated amount was mentioned in the mutations which is inoperative upon his right. *Talab-e-Muathibat* was followed by *Talab-e-Ishhad* by sending a notice under the cover of registered AD. The respondent/pre-emptor filed the suit on 28.05.2022 before Civil Judge, Tehsil Takht Bhai being based upon his superior right of the suit property. After verification about the contents of the plaint as correct, it was directed vide order dated 28.05.2022 that the suit be registered in the relevant register with further directions to the respondent/pre-emptor to deposit 1/3<sup>rd</sup> of the pre-emption amount within 30 days and the case was posted for 04.07.2022. On the date fixed, the respondent/pre-emptor moved an application seeking extension for deposit of the 1/3<sup>rd</sup> of the pre-emption amount along with affidavit. The case was adjourned to 29.07.2022 and thereafter for 05.09.2022. On the date fixed the trial Court was apprised that the respondent/pre-emptor had moved an application for transfer of the suit with further request that it may be adjourned till decision of the transfer application. The case was posted for 15.09.2022 when

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the learned trial Court, after hearing the parties, dismissed the suit under Section 24(2) of the Khyber Pakhtunkhwa Pre-emption Act, 1987 ("**the Act of 1987**") for non-deposit of 1/3<sup>rd</sup> of the pre-emption amount. The respondent/plaintiff preferred appeal which was allowed vide judgment and order dated 23.11.2022, hence, instant petition.

3. Learned counsel for the petitioner/vendee contended that the mandatory provision of the Act of 1987 was violated which in clear terms dictates the dismissal of the suit for failure on the part of pre-emptor for non-compliance of the directions of the Court about deposit of 1/3<sup>rd</sup> of the pre-emption amount. He argued that not only the order of the Court was disobeyed but on 04.07.2022 an application was moved for extension of time. The learned counsel further contended that when the pre-emption amount is not deposited under S. 24(2) of the Act of 1987, the suit of the respondent/pre-emptor was no more in the field after lapse of the time provided by the Court, as such, the Court was functus officio and could not extent the time. He went on to say that the learned appellate Court has fallen into error while allowing the appeal and extending the time in negation of the mandatory provision of the Act of 1987, as such, the learned appellate Court has committed an illegality, and the impugned order requires reversal.

4. Conversely, learned counsel for the respondent/pre-emptor contended that neither the pre-emptor was directed to deposit 1/3<sup>rd</sup> of the total sale consideration nor specific date was given to him regarding which he has moved an application to the effect that the latter part of the order sheet No.2 dated 28.05.2022 was hand-written with fountain pen as compared to the remaining printed portion of the order sheet, hence, the directions with regard to depositing 1/3<sup>rd</sup> of the pre-emption amount were added in the order sheet later on in absence of the pre-emptor. According to him, the failure on the part of the pre-emptor in non-depositing the 1/3<sup>rd</sup> of the pre-emption amount could not be attributed to pre-emptor being not his fault rather it was the act of the Court for which no one could be blamed or penalized. He added that the Court has got ample powers to extend the time under S. 148 of the Civil Procedure Code, 1908 and the prayer of the pre-emptor was rightly considered by the learned appellate Court, therefore, the amount has already been deposited and this petition has become infructuous.

5. Arguments heard and record perused.

6. The main questions involved in the instant petition requiring resolution by this Court are (i) **whether non-compliance of the directions of the Court for depositing 1/3<sup>rd</sup> of the pre-emption amount could be resulted into dismissal of the suit under S. 24(2) of the**



Act of 1987? (ii) Whether the directions of the Court for depositing 1/3<sup>rd</sup> of the total sale consideration are mandatory? and (iii) Could the Court extend the time for depositing 1/3<sup>rd</sup> amount after expiry of the time provided by the Court? Section 24 of the Act of 1987 deals with depositing of the 1/3<sup>rd</sup> of the sale price of the property by the pre-emptor. Sub-section (2) of S. 24 pertains to the failure on the part of the pre-emptor and consequences thereof, which for convenience is reproduced as under:

24. (1) In every suit for pre-emption the Court shall require the plaintiff to deposit in such Court one-third of the sale price of the property in cash within such period as the Court may fix.

Provided that if no sale price is mentioned in the sale deed or in the mutation, the Court shall require the deposit of one-third of the probable value of the property.

**(2) Where the plaintiff fails to deposit one-third of the sale price or the probable value of the property within the period fixed by the Court, his suit shall be dismissed.**

(3) Where the plaintiff withdraws the sum deposited under-sub-section (1), his suit shall be dismissed.

***(emphasis added)***

In the instant matter, it was categorically mentioned by the respondent/pre-emptor that the property was sold in favor of the petitioner/vendee through two mutations i.e., mutation No. 4689 dated 18.02.2022 and mutation No. 4713 dated 06.04.2022, however, in order to defeat the right of pre-emption, an exaggerated amount of Rs.30,00,000/- (thirty lacs) was mentioned in the mutations which has never been paid, in such an eventuality in accordance with sub-section

(2) of S. 24 of the Act of 1987 as reproduced above, the pre-emptor was required to deposit 1/3<sup>rd</sup> of the total sale consideration as mentioned in the mutations within the period fixed by the Court. The record reflects that the learned trial Court has directed the registration of the case after verification of the contents thereof with further direction to the pre-emptor to deposit 1/3<sup>rd</sup> of the total sale consideration with specification of 30 days. It is worth mentioning that the directions for depositing 1/3<sup>rd</sup> of the pre-emption amount were given to pre-emptor on 28.05.2022 whereafter the case was fixed for 04.07.2022 and as per directions of the trial Court, the respondent/pre-emptor could deposit the amount on or before 28.06.2022 but he moved an application seeking extension of time on the date fixed by the Court i.e., 04.07.2022 and even thereafter he waited rather sought adjournment, moved an application before the learned District Judge for transfer of the case and ultimately his suit was dismissed on 15.09.2022 on the ground of his failure to comply with the directions of the learned trial Court for depositing 1/3<sup>rd</sup> of pre-emption amount. The learned trial Court has not only given the specific time i.e., 30 days to the respondent/pre-emptor but the directions for depositing of 1/3<sup>rd</sup> of the total sale consideration was also mentioned in order sheet No.2 dated 28.05.2022. Neither the directions of the Court were ambiguous or vague rather the same were explicit

and clear, nor the time given to respondent/pre-emptor was short for depositing the 1/3<sup>rd</sup> of the pre-emption amount. There was a period of 30 days for depositing the specific amount, but the pre-emptor failed in complying with the directions of the Court. Sub-section (2) of S.24 of the Act of 1987 as reproduced above provides that failure of the pre-emptor would result into dismissal of the suit. Since, penal provision has been provided by the legislature in the matter, therefore, the directions of the Court could never be termed to be directory in nature rather it was mandatory as held by the superior Courts that whenever the axillary clause i.e., "shall" or "may" is there in any statute but added by the penalty then it shall be termed to be mandatory provision, otherwise it shall be regraded as directory in nature. During arguments, learned counsel for the respondent/pre-emptor made reliance on "Rehman-ud-Din and another Vs. Sahibzada Jehanzer" (2004 SCMR 418) and contended that in view of the principle laid down by the apex Court in the referred to above judgment, the pre-emptor was required to be dealt with low magnitude of consequences of dismissal of the suit for the act of the Court. In the mentioned case, the trial Court had dismissed the suit and although the learned appellate Court, while accepting the appeal, extended the time and allowed the pre-emptor to deposit 1/3<sup>rd</sup> of the total sale consideration but the facts of the mentioned case are

distinguishing from the facts of the present case as in the mentioned case the pre-emptor had handed over 1/3<sup>rd</sup> of the pre-emption money to an official of the Court who had failed to deposit the same in time. The ratio of the judgment relied upon by the respondent/pre-emptor is that if pre-emptor is not vigilant in exercising his right of pre-emption, no discretion can be exercised in his favour and he must face consequences of the dismissal of suit as the Court in such cases is not supposed to condone the default while exercising power under S. 148, CPC by taking away the valuable right of the opposite party, therefore, the case law relied upon by the respondent/pre-emptor is going against him. In the case of "Malik Tariq Mahmood and others Vs. Ghulam Ahmed and others" (PLD 2017 S.C 674) it was observed by the apex Court that when reasonable time was provided to pre-emptor for depositing the 1/3<sup>rd</sup> of the pre-emption amount without specification of the time then in such an eventuality the time for depositing the amount could not be extended in view of S.148, CPC. It was observed by the apex Court that:

**10. As to the second limb of the submission i.e. when the suit after filing is not formally placed in Court for orders or when there is an omission on the part of the Court (like in the instant case) in timely directing the pre-emptor to deposit the *zar-e-soim* and the pre-emptor takes shelter of subsection (1) which subjects the deposit under the order of the Court, by taking a defence that since there was no order of the Court directing deposit of *zar-e-***



*soim*, therefore, pre-emptor could not be penalized by invoking the provisions of subsection (2) which provides dismissal of suit on account of non-deposit of *zar-e-soim* within a maximum period of 30 days. Though a pre-emptor in view of subsection (1) must be ready and have in his pocket the required amount of *zar-e-soim* at the time of filing of suit and to show his bona fide should ensure that the order for deposit of *zar-e-soim* is promptly passed so its compliance be effected in terms of the first proviso. However, since the required deposit is subject to the order of the Court, therefore, in cases where Court omits to pass order or the matter is not placed in Court within the time frame as provided in the first proviso then the pre-emptor cannot be blamed and penalized for such non-deposit as the deposit of *zar-e-soim* is subject to the order of the Court and this Court in such circumstances by upholding the principle that an act of Court shall prejudice no man, has condoned such default. Reference can be made to the case of *Nabi Ahmed v. Muhammad Arshad* (2008 SCMR 1685). However, in such cases upon realizing its mistake the Court while granting time for payment of *zar-e-soim* would not be exercising power under the first proviso which empowers the Court to grant any period of time upto 30 days in one go or by extending the period from time to time upto the maximum of 30 days but would remedy its fault under the age old principle "*Actus curiae neminem gravabit*" i.e. an act of the Court shall prejudice no man, therefore, once a reasonable time is granted for deposit of *zar-e-soim* to remedy its mistake, the Court shall have no power to extend and grant further time. Even otherwise, time for deposit of *zar-e-soim* is not granted to the pre-emptor to generate fund from his resources as the pre-emptor must have in his pocket one-third of the sale price of the property sought to be pre-empted while approaching the Court.

Reliance may also be placed on "*Sher Zada*

*Vs. Shaukat Ali and another*" (2019 MLD 2029),

**“Jansher and another Vs. Mst. Zamina and others”**  
**(2017 CLC Note 91)** and **“Jerhanzeb Khan Vs. Jan**  
**Muhammad” (2009 MLD 837).**

**7.** Insofar as the controversy as to whether the provisions of section 24 of the Act of 1987 are directory or mandatory, this issue came up before this Court in the case of **“Wali Khan Vs. Waheed Ghani Khan” (2013 MLD 360, Peshawar)**, wherein this Court, while going through from the relevant provisions of law along with the principle enunciated by the apex Court in the cases of **Muhammad Nawaz (1995 SCMR 105), Nazir Ahmad (1999 SCMR 342), Muhammad Irshad (1991 SCMR 2149), Bhai Khan (1986 SCMR 849), Muhammad Yusuf (2007 SCMR 1485), Riaz Hussain (2005 SCMR 1664) and Shujat Ali (PLD 2006 SC 140)**, has held that:

(i) The provisions of section 24 of the Act are mandatory and the time fixed for payment of the initial 1/3<sup>rd</sup> of the sale price ought not to be extended.

(ii) The provisions of section 25 of the Act are directory' and the Courts may in appropriate cases extend the time period for payment of the pre-emption amount decided.

(iii) The criteria for determining whether to allow the time period to the pre-emptor under section 25 of the Act, would depend upon whether the delay was caused due to 'bona fide' conduct of the pre-emptor or the 'act of the Court'.

(iv) After a Court has decided a case, it cannot, unless it has assumed review jurisdiction or to correct any clerical or arithmetical mistake, extend the period of payment of pre-emption amount under section 25 of the Act.

(v) A Court having decided a matter cannot assume the jurisdiction and extend the time period under section 148 of the C.P.C. in pre-emption cases, as provided under sections 24 and 25 of the Act, as the said statute has a stipulated time period mentioned therein.”

The principle enunciated by this Court that the provisions of section 24 of the Act of 1987 are mandatory and the Court cannot extend the time for payment of 1/3<sup>rd</sup> of the preemption amount whereas section 25 is for deposit of 2/3<sup>rd</sup> of the remaining amount is also mandatory in view of the dicta laid down by the apex Court in Muhammad Yusuf's case (2007 SCMR 1485), wherein the apex Court has held that the delayed payment reflects the contumacious conduct of the pre-emptor, which affects his *bona fide* intention, wherein he could not be held entitled for discretionary relief. Similarly, in Muhammad Nawaz's case (1995 SCMR 105), it was held by the Hon'ble Supreme Court that:

“However, neither a trial Court nor an appellate Court can extend time for deposit of pre-emption money once the matter stands disposed of and it is no-longer pending before it. In such an event, the direction contained in the original decree to the effect that in case of failure to deposit the pre-emption money the suit shall stand dismissed, becomes effective. However, the above rule seems to be subject to one exception, namely, that if an appellate Court varies the finding of the Court below on the quantum of the pre-emption money, in other words it either increases or reduces the same, in that event, it should fix fresh reasonable time for deposit of the pre-emption money and in the absence of any such fixation, the pre-emptor may deposit the same within reasonable time.”

8. Thus, to cut it short, the above discussion, question No. (i) formulated above is answered in affirmative by holding that non-compliance of the directions of the Court for depositing 1/3<sup>rd</sup> of the pre-emption amount would result into dismissal of the suit under S. 24(2) of the Act of 1987. Similarly, about question No. (ii), the directions of the trial Court for depositing 1/3<sup>rd</sup> of the total sale consideration are mandatory in nature and non-compliance thereof by the pre-emptor would result into dismissal of his suit. As far as the last question is concerned, the Court cannot extend the time for depositing 1/3<sup>rd</sup> of the pre-emption amount after expiry of the time provided by the Court.

9. Thus, for what has been discussed above, it is held that the learned appellant Court could not extend the time rather the learned trial Court had given a specific time to the pre-emptor for depositing of the amount with specification of 1/3<sup>rd</sup> of the total sale consideration of the pre-empted property as mentioned in the mutations, as such, non-compliance of the directions of the learned trial Court by the respondent/pre-emptor could not be cured, hence, the learned appellant Court has committed an illegality by extending the time to pre-emptor for depositing 1/3<sup>rd</sup> of the total sale consideration which is in utter disregard of the mandatory provision of Section 24(2) of the Act of 1987. Resultantly, instant petition is allowed, the order

of the learned appellate Court is set aside and that of the learned trial Court is restored with no order as to cost.

**Announced**  
**Dt:18.07.2024**

  
**JUDGE**