In the Supreme Court of Pakistan
(Appellate Jurisdiction)

Present:
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Dost Muhammad Khan
Mr. Justice Umar Ata Bandial

Civil Appeal No.503 of 2006
(On appeal from judgment of Peshawar High Court, Peshawar dated 20.2.2006 passed in R.F.A. No.177/2003)

Dr. Pir Muhammad Khan

Appellant

Versus

Khuda Bukhsh etc.

Respondents

For the appellant: Qazi Muhammad Anwar, Sr. ASC
Mr. Sher Muhammad Khan, ASC
Mr. M. S. Khattak, AOR

For respondents No.1-5: Mr. Wasim Sajjad, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

Respondents No.6-7: Ex-parte

Date of hearing: 24.3.2015

Judgment

Anwar Zaheer Jamali, J – The relevant facts of the case leading to this litigation are summarized as under:-

2. On 13.3.1991, the respondents No.1 to 5 (in short 'the respondents') filed a suit for possession through pre-emption against the appellant, in respect of land admeasuring 12 kanals 6 marlas, situated in village Balogram, Tehsil Babozai, District Swat (in short 'the suit land'), before the Court of Assistant Commissioner Swat, empowered under the PATA Regulations 1975, to entertain

such proceedings. The plaint in this suit was rejected by the Court on 8.6.1991, on the ground that the sale of suit land had not been completed as yet, therefore, such proceedings were premature and incompetent. The appeal and the revision petition filed by the respondents against such order were also dismissed/rejected, vide orders dated 5.1.1992 and 22.7.1992 passed by the Additional Commissioner Malakand and Home Secretary, NWFP, respectively.

3. After the execution and registration of sale deed in respect of suit land in favour of appellant on 26.1.1992, the respondents filed another civil suit for the same relief on 25.2.1992, with the averments that in order to defeat their right of pre-emption an exorbitant sum of Rs.15,00,000/- was shown as sale consideration of the suit land instead of its actual market value of Rs.1,92,000/-. In this suit, on an application dated 1.10.1992, filed by the appellant/vendee, vide order dated 9.6.1993, the respondents were directed to deposit 1/3rd of the sale price and furnish bank guarantee for the remaining 2/3rd, which order they challenged before the Additional Commissioner Malakand for reduction of the sum to be deposited as 1/3rd of the sale price. The appellate Court reduced the sum from 1/3rd to 1/5th vide order dated 18.12.1993, which order was upheld in revision petition before the Home Secretary

(NWFP), vide order dated 19.1.1994, with directions to the respondents to deposit the amount within two months. Instead of making compliance of such order, on 19.3.1994, the respondents filed an application for extension of time to deposit the pre-emption money, whereas in the meantime, by operation of law, on 14.5.1994, the suit was transferred from the Court of Assistant Commissioner to the Court of Senior Civil Judge/Aala Ilaqa Qazi, Swat, where, in terms of the Court order dated 17.5.1994, they were allowed to deposit 1/5th of the sale consideration at their own risk, which they accordingly deposited on 18.5.1994.

4. During the further proceedings in the suit, issues were framed by the Court on 25.5.1994. However, on 9.6.1994, the vendee/appellant filed another application for dismissal of the suit on the ground that respondents failed to deposit 1/5th of the pre-emption money within two months, as directed by the appellate Court in its order dated 19.1.1994. The Court of Senior Civil Judge, Swat, vide its order dated 7.7.1994, allowed the said application and accordingly dismissed the suit on this ground. This order was challenged by the respondents before the Court of District Judge by putting notional valuation of the appeal at Rs.200/-, though plaint in the suit was admittedly valued at Rs.1,92,000/- and at the relevant time the District Judge,

Swat, by virtue of section 18 of the Civil Courts Ordinance 1962, lacked pecuniary jurisdiction to hear any appeal valuing more than Rs.50,000/-. This appeal, upon such objection raised by the appellant was, therefore, dismissed as withdrawn on 22.9.1994. Later on, these two orders were upheld by the Peshawar High Court, vide order dated 11.3.1997, passed in R.F.A. No.60 of 1994, against which C.P.L.A. No.932 of 1997 was filed by the respondents before the Supreme Court of Pakistan, which was converted into appeal and accepted vide order dated 27.11.2002, and the case was remanded to the Court of Senior Civil Judge/Aala Ilaqa Qazi, Swat, to decide it afresh on merits, in terms of the following observations:-

> "i) Both the parties be permitted to lead evidence in support of their respective contentions and thereafter, the matter be decided on all the points including legal pleas, which may be raised on the basis of pleading of the parties.
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> ii) The matter shall be decided, as early as possible, preferably within six months from receipt of this order.".

5. In the post remand proceedings, parties evidence was recorded, other procedural formalities were completed and finally the suit of the respondents was dismissed by the Court of Senior Civil Judge/Aala Ilaqa Qazi, Swat, vide its judgment and decree dated 5.11.2003.

On 17.12.2003, this judgment was challenged by the respondents before the Peshawar High Court, Peshawar in R.F.A. No.177 of 2003, which was allowed vide impugned judgment dated 20.2.2006 and consequently, their suit was decreed. It is against this judgment that the present appeal has been preferred by the appellant/vendee.

6. We have heard the arguments of Qazi Muhammad Anwar and Mr. Wasim Sajjad, learned Sr. ASCs for the appellant and respondents respectively. In his submissions, learned Sr. ASC for the appellant made two fold submissions. In the first place, he challenged the maintainability of the appeal instituted before the Peshawar High Court, Peshawar on 17.12.2003, for the reason that looking to the valuation of the suit in the plaint, which was Rs.1,92,000/-, it should have been preferred before the concerned Court of District Judge, having enhanced pecuniary jurisdiction from Rs.50,000/- to Rs.5,00,000/- by virtue of amendment in the Civil Courts Ordinance by Act No.IV of 1994, dated 19.8.1994, extended to PATA w.e.f. 6.8.1995. Thus, the proceedings in appeal before the Peshawar High Court were incompetent and not maintainable in law. As to the merits of the case, his submission was that during the intervening period, before the application of NWFP Pre-emption Act 1987 to PATA

w.e.f. 25.9.1994, the claim of respondents was regulated under the general provisions of Muhammadan Law, which provided strict conditions for compliance regarding making demands of *'talb-i-muwathibat'* and *'talb-i-ishhad'* in conformity with it, which, in the present case were not fulfilled by the respondents, but this important legal aspect of the case was not at all attended to by the High Court in its impugned judgment, while extending relief to them. For this purpose, he also referred to the pleadings of the respondents as per averments made in the plaint, and contended that such averments lacked material facts and particulars, which were necessary and required to be disclosed by the respondents for effectively exercising their right of pre-emption. Even the names of two attesting witnesses of *talb-i-ishhad* were not disclosed in the plaint or the purported notice dated 18.2.1992, which in the given circumstances of the case, were extremely necessary besides disclosure of other material facts such as time, date, month, year and place where *talb-i-muwathibat* and *talb-i-ishhad* were made by the respondents. For this purpose, he also invited our attention to the two lists of witnesses; one submitted by the respondents on 9.6.1994 after the framing of issues on 25.5.1994 and the other on 6.3.2003 submitted during post remand proceedings in the suit, which contained the names of two different sets of witnesses. His

further submission was that this material flaw in the case of respondents that the two witnesses of *talb-i-ishhhad* now examined by them were not cited in the earlier list of witnesses submitted by them in the year 1994, was sufficient to falsify their claim of pre-emption. He also argued that delay in making *talb-i-muwathibat* and *talb-i-ishhad* in contravention to the requirements of the principles of Muhammadan Law was yet an additional factor, which was apparent upon perusal of evidence of the respondents and their witnesses. Thus, overlooking all these important legal aspects of the case, the High Court was not justified in passing its impugned judgment in favour of the respondents in a superficial manner. He further made reference to the judgment of the trial Court of learned Senior Civil Judge/Aala Ilaqa Qazi, Swat dated 5.11.2003, wherein, according to him, some material aspects of the case were duly considered by the Court, which resulted in the dismissal of the suit of the respondents. In support of his contentions, learned Sr. ASC, Qazi Muhammad Anwar, placed reliance upon the following cases:-

i) Government of NWFP versus Said Kamal Shah **(PLD 1986 S.C. 360);**

ii) Sardar Ali versus Muhammad Ali **(PLD 1988 S.C. 287);**

iii) Safida Begum versus Ibrahim **(PLD 1989 S.C. 314);**

iv) Muhammad Hanif versus Sultan **(1994 SCMR 279);**

v) Abdul Hameed versus Muzamil Haq **(2005 SCMR 895);**

vi) Pir Muhammad versus Faqir Muhammad **(PLD 2007 S.C. 302);**

vii) Muhammad Ismail versus Muhammad Yousaf **(2012 SCMR 911)** and

viii) Muhammad Ali versus Humera Fatima **(2013 SCMR 178).**

7. Conversely, Mr. Wasim Sajjad, learned Sr. ASC for the respondents, in his arguments contended that it was not at all the requirement of law that each and every minute detail about the mode and manner of exercise of right of pre-emption by the respondents in support of their claim was to be unfolded in the plaint or the names of their witnesses of *talb-i-ishhad* were to be disclosed in the plaint. Thus, such arguments have no legal force. He further argued that indeed the proceedings in the case in hand, having been instituted on 26.2.1992, during the intervening period when no statutory law of pre-emption was in force in PATA, are to be regulated under the principles of Muhammadan Law of pre-emption, as held by the Supreme Court in the cases of Sardar Ali and others versus Additional Secretary Home and TA Department & others **(1996 SCMR 1480)** and Muhammad Siddique versus Muhammad Ashraf **(2005 SCMR 1231).** However, for this purpose, the respondents, in order to prove their case, have met all the legal requirements of making *talb-i-muwathebat* and *talb-i-*

ishhad, as per Muhammadan Law, which fact has been duly appreciated by the High Court in its impugned judgment. Thus, such findings of fact recorded by the appellate Court are not open to interference in this appeal. Responding to the arguments on behalf of the appellant about two lists of the witnesses filed by the respondents, he did not dispute that names of both the witnesses of *talb-i-ishhad* i.e. Sher Bacha son of Amir Bacha and Abdul Khaliq son of Yaray did not find place in the first list of witnesses filed by the respondents in the year 1994. However, regarding this aspect, he argued that it is not an issue of such a serious magnitude which could prove fatal to their case, as it can be considered as an instance of oversight or mistake at the time of submission of earlier list of witnesses on behalf of the respondents. Stressing upon the genuineness of the claim of respondents, learned Sr. ASC also made detailed reference to the proceedings in their earlier suit for pre-emption filed by them before the registration of sale deed on 26.1.1992, which reflected the clear stance of the respondents in setting up their adverse claim of pre-emption over the suit land, and tempted the appellant for showing exorbitant sale consideration of Rs.15,00,000/- in the registered sale deed to defeat their claim. Replying to other arguments of the learned Sr. ASC for the appellant, as regard the forum of appeal availed by the respondents against the judgment of

the Senior Civil Judge dated 5.11.2003, he contended that as per the provisions of Suit Valuation Act and the provisions of Civil Court Ordinance 1962 read with Amendment Act IV of 1994, at the time of filing the appeal on 17.12.2003, the remedy was rightly availed by the respondents before the Peshawar High Court, thus no exception could be taken regarding this legal position. For this purpose, he also made reference to the contents of the plaint in the suit and the memo of appeal filed before the High Court, showing flexibility in the stance of the respondents regarding valuation of the suit and leaving it open for adjudication by the Court itself. Summing up his arguments, learned Sr. ASC contended that right of pre-emption under the Muhammadan law is a substantive right, which shall not be allowed to succumb at the alter of technicalities of law, particularly, in an Islamic State, as in the present case from no stretch of imagination it could be said that the respondents ever defaulted in fulfilling their legal obligations in this regard. In support of his submissions, learned Sr. ASC placed reliance upon the following cases:-

i) Sher Muhammad versus Ahmad **(AIR 1924 Lahore 380);**

ii) Ghulam Hussain Shah versus Hidayatullah Khan **(1981S.C.(AJK&K) 55);**

iii) Ditta Khan versus Muhammad Zaman **(1993 MLD 2105);**

iv) Fazal-ur-Rehman versus Zavedi Jan **(2005 CLC 1415);**

v) Daud Shah versus Waris Shah **(2014 SCMR 852)** and

vi) Muhammad Hanif versus Tariq Mehmood **(2014 SCMR 941).**

8. We have carefully considered the submissions made before us by the learned ASCs and scanned the case record of the proceedings in the suit before the Court of Senior Civil Judge/Aala Ilaqa Qazi, Swat, as well as the appellate Court. For the just disposal of this appeal on merits, there is no dispute between the parties that the suit for possession through pre-emption having been instituted by the respondents on 25.2.1992, when there was no statutory law of pre-emption inforce in KPK and PATA, its proceedings are to be regulated under the general principles of Muhammadan Law of pre-emption. Moreover, at this stage, only the post remand proceedings in terms of the order dated 27.11.2002, passed in Civil Appeal No.744 of 1998, as reproduced above, are relevant and material for this purpose.

9. The instant suit for possession through pre-emption was instituted by the respondents before the Court of Assistant Commissioner, Saidu Sharif on 25.2.1992, with the assertions that after their failure in getting the requisite relief of pre-emption in the first round of litigation for the

technical reason that sale deed in respect of suit land in favour of appellant Dr. Pir Muhammad Khan was not registered by that time, when they got such information from the office of Sub-Registrar on 15.2.1992, they immediately made *talb-i-muwathibat* and *talb-i-ishhad* and thus became entitled for a decree for pre-emption in their favour. In reply to these assertions, written statement was filed by the appellant on 26.07.1992, wherein, besides, denial of facts regarding exercise of right of pre-emption by the respondents by making *talb-i-muwathibat* and *talb-i-ishhad* in accordance with the principles of Muhammadan Law, maintainability of the suit was also challenged on various legal grounds.

10. At the stage of evidence, the respondents/ pre-emptors had in total examined seven witnesses out of whom PW-1 Hidayatullah Khan was one of the pre-emptor. He firstly deposed that it was the time of *Zuhr* prayer in the year 1991 and month of March, when Aziz-ur-Rehman alias Lali Gul reached at their (pre-emptors) *hujra* and informed them about the sale of the suit land. Soon thereafter, he for self and on behalf of his brother Karim and other brother Adalat Khan exercised their right of pre-emption by making *talb-i-muwathibat* and *talb-i-ishhad*. However, after their failure in the first round of litigation, when they again acquired the knowledge of sale on 15.2.1992 from the office

of Sub-registrar, that sale of suit land had taken place through registered sale deed on 26.1.1992, they made *talb-i-muwathibat* and then *talb-i-ishhad* in presence of PWs Sher Bacha and Abdul Khaliq. He further stated that it happened at 10:00 a.m. on the same day, which was Saturday. Later on they also went to the suit land and again made *talb-i-ishhad,* in presence of witness Mian Gul Bashir Bacha, who had also reached there. In addition to it, the other witnesses examined on behalf of respondents are PW-2 Aziz-ur-Rehman alias Lali Gul, PW-3 Mian Gul Bashir, PW-4 Abdul Khaliq, PW-5 Sher Bacha, PW-6 Moosa Muhammad (Postmaster), and PW-7 Sher Akbar (Patwari). From the deposition of these witnesses, we have noticed that the respondents have examined PW-4 Abdul Khaliq and PW-5 Sher Bacha as witnesses, in whose presence PW-1 acquired knowledge about the execution of registered sale deed dated 16.1.1992, in respect of the suit land in favour of the appellant and he for self and on behalf of other respondents exercised their right of pre-emption by making *talb-i-muwathibat* and *talb-i-ishhad*. Surprisingly, name of none of these two witnesses of *talb-i-ishhad* had appeared in the first list of witnesses dated 09.6.1994, while the name of only one witness Sher Bacha had appeared in the second list of witnesses dated 19.3.2003, which contained names of other witnesses Shah Rawan son of Totkey, Gul Zamin Khan son

of Gojer, Shah Sefyan son of Muhammad Akber, Sarbuland Khan son of Sober, Safor son of Katuza and Razi Mund son of Wazir. Thus, even in the second list of witnesses the name of other witness of *talb-i-ishhad* PW-4 Abdul Khaliq was missing, which surfaced only when he appeared in the witness box to depose. This fact alone is sufficient to show that introduction of their name as witnesses of two *talbs* was an afterthought and for this reason alone names of these two witnesses of *talb-i-muwathibat* and *talb-i-ishhad* were also withheld by the respondents in their pleadings. This admitted fact from the case record, thus, seems to be fatal to the claim of the respondents as regards their right of pre-emption under the general principles of Muhammadan Law, which cannot be overlooked or condoned for the reason that it may be due to oversight or some mistake that names of these witnesses, except PW-5 Sher Bacha, remained uncited in the two lists of witnesses. Not only this, but from the careful reading of evidence, adduced on behalf of the respondents, we have also seen that there are also material contradictions as regards their claim of acquiring knowledge of sale on 15.2.1992 qua making *talb-i-muwathibat* and *talb-i-ishhad*, which shortcomings cannot be lightly brushed aside, particularly in a case of pre-emption where strict adherence to the requirements of law for making *talb-i-muwathibat* and *talb-i-ishhad* is necessary.

11. Apart from it, when we look at the pleadings of the respondents in their suit, we find that undoubtedly it lacked material particulars, which were required to be disclosed/unfolded in the plaint to give a fair chance to the appellant to put up his defence. For ease of reference paragraph No.3, which is the only paragraph of the plaint relating to making of *talbs* by the respondents is reproduced as under:-

"3۔ یہ کہ مدعا الیہان نے مدعا علیہ نمبر 1 کو بیع کا علم ہوتے ہی کہا ہے کہ مدعیان کا حق شفع بمقابلہ مدعا علیہ نمبر 1 غالب اور فائق تر ہے۔ مدعیان نے نسبت بیع علم ہوتے ہی طلبِ مواثبت کیا اور بعد طلبِ اشہاد بھی کر کے مدعا علیہ کو کہا کہ اراضی مذکور متدعویہ پر مدعیان کا حق شفع غالب اور فائق تر ہے اور مدعا علیہ اصولِ زر بیع لے کر اراضی متدعویہ پر مذکور کا قبضہ حوالے مدعیان کرے لیکن وہ انکاری ہے اس لئے دعویٰ ہذا کی ضرورت لاحق ہوئی ہے۔"

12. Indeed, the provisions of Order VI, CPC are to be kept in mind for the purpose of drafting a plaint, Rule-2, whereof provides that *pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.* But, this rule, providing some guidelines regarding the contents of a plaint, cannot be read in isolation to, *inter alia,* Rule-4, which provides that *in all cases in which the party pleading relies*

on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleading.

13. By now, much case law regulating the principles of pleadings in a suit for pre-emption has developed, which provide necessary guidelines for this purpose. Here a reference to the case of Muhammad Ali v. Mst. Humera Fatima and two others **(2013 SCMR 178)** will be useful, wherein after making reference to plethora of other case law on the subject of pleadings in a suit for pre-emption, this Court observed as under:-

> "7. With regards to the necessity of pleading the requisite details of Talb-i-Muwathibat, the matter recently yet again came up before this Court. After noting and quoting the previous judgments of this Court on the point including, Pir Muhammad v. Faqir Muhammad (PLD 2007 SC 302), Bashiran Begum v. Nazar Hussain (PLD 2008 SC 559), Haq Nawaz v. Muhammad Kabir (2009 SCMR 630) and Ghafoor Khan v. Israr Ahmed (2011 SCMR 1545), this Court in its judgment, reported as Muhammad Ismail v. Muhammad Yousaf (2012 SCMR 911), held as follows:--
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> > "4. Having heard learned counsel for the petitioner at some length, we find that a bare reading of para 2 of the plaint in the suit filed by the petitioners/pre-emptor indicates that petitioner did

> mention that he came to know about the impugned sale on 5-3-1996 and immediately declared that he would preempt but neither mentioned the place where he acquired knowledge of the sale nor the time or the witnesses in whose presence he performed Talb-i-Muwathibat."

8. We have examined the plaint in the instant case in the light of the requirement of pleading Talb-i-Muwathibat with the necessary details and particulars and find that the same does not fulfill the criterion laid down by this Court quoted above. The absence of the necessary details with regard to time, date and place and the witnesses in whose presence Talb-i-Muwathibat was made was fatal to the suit, as was correctly held by the trial Court and the First Appellate Court.

9. Furthermore, not only Talb-i-Muwathibat has to be pleaded in the plaint with the requisite details and particulars, but also has to be proved through cogent evidence. After appraisal of the evidence of the record, the trial Court returned a finding that the Talb-i-Muwathibat has not been proved. The said finding was affirmed by the First Appellate Court. This concurrent finding of fact has been upset in the limited jurisdiction of a Second Appeal without any legal or factual basis. In the impugned judgment no misreading or non-reading of evidence or misapplication of law, pertaining to evidence has been mentioned. Consequently, there was no occasion to set aside the concurrent findings of fact."

14. Besides, following further discussion in the above judgment is equally apt for amplifying the legal position about the application of principles of Muhammadan Law regarding exercise of right of pre-emption and making *talb-i-muwathibat* and *talb-i-ishhad* at the relevant time

when no statutory law pertaining to pre-emption existed in Swat (PATA):-

> “5. On the date of the filing of the suit in the instant case i.e. 17-12-1989, no statutory law pertaining to pre-emption existed in the Province of the Punjab and the suit was to be filed and maintained in accordance with the Classical Islamic Law of Pre-emption wherein Talb-i-Muwathibat is a sine qua non for exercising a right of pre--emption. During the pendency of the suit before the trial Court, the Act of 1991, was promulgated. Section 35, refers to Talb-i-Ishhad, while dispensing with notice thereof. The various provisions of the Act of 1991 (including, section 35 thereof), were challenged on the ground of being repugnant to the Injunctions of the Islam. The matter was adjudicated upon by the Shariat Appellate Bench of this Court in its judgment, reported as Haji Rana Muhammad Shabbir Ahmad Khan v. Government of Punjab Province, Lahore (PLD 1994 SC 1). In the said judgment, with reference to section 35, it was held as follows:--
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> "57. It is, therefore, held that section 35(2) of the Act 1991 is repugnant to the Injunctions of Islam in so far as it exempts the cases pending or instituted during the period from Ist of August, 1986 to 28th of March, 1990 from the requirements of Talb-i-Muwathibat, and extends the right of limitation for them up to one year. However, the provision of sending a notice to the vendee, as contemplated in section 13 of the Act 1991, can be dispensed with in relation to these suits, because as mentioned earlier, sending of notice is not a substantive requirement in the Shari'ah to affect the Talb-i-Ishhad. On the contrary, it is procedural provision enacted by the legislature on the basis of expediency. Therefore, it is open for the legislature to dispense with this requirement altogether or with respect to certain cases."

> 6. The aforesaid judgment took effect on 31-12-1993, while the suit in the instant case was still pending before the trial Court. Thus, in the instant matter however, which way the lis is examined, there can be no escape from the fact that the Talb-i-Muwathibat was required to be pleaded and proved in order to obtain a decree of pre-emption, both in terms of Classical Islamic Law and the Act of 1991."

15. To gain further support to the principles of pleadings to be adhered to by a pre-emptor in his pleadings, reference to the case of Mian Pir Muhammad v. Faqir Muhammad **(PLD 2007 SC 302)**, will also be useful, which had approved earlier view in the case of Haji Muhammad Saleem v. Khuda Bakhsh **(PLD 2003 SC 315)** and Fazal Subhan v. Mst. Sahib Jamala **(PLD 2005 SC 977)**, that furnishing the date, time and place in the plaint is necessary to establish performance of *talb-i-muwathibat* and *talb-i-ishhad*.

16. In our opinion, principles of Muhammadan Law of pre-emption, which is the original source of statutory law on this subject, set out equally high standard for making *talb-i-muwathibat* and *talb-i-ishhad,* as prescribed under the statutory law, except that written notice of *talb-i-ishhad* is not required for this purpose. Therefore, mere bald assertion by the respondents in their pleadings coupled with sketchy evidence adduced by them is of no help to their

case. As a matter of fact, unless the names of the two witnesses of *talb-i-ishhad* and informer of pre-empted sale were disclosed by the pre-emptors in their pleadings, how the vendee of the pre-empted sale could be in a position to assess the veracity of their claim or credibility of such witnesses, if they were for the first time introduced to him in the witness box. In the present case, apart from non-disclosure of the time, date and place of making *talb-i-muwathibat* and *talb-ishhad*, the names of the two witnesses of *talb-i-ishhad* were also not disclosed by the respondents in their pleadings. Even the witnesses cited in the first list of witnesses filed in Court on 09.6.1994, did not contain their names, as the witnesses of *talbs-i-ishhad,* which, according to the respondents own case, were for the first time mentioned in the second list of witnesses during the post remand proceedings, that too to the extent of only one witness. It is pertinent to mention here that even in the purported notice of *talb-i-ishhad* dated 18.2.1992, which was otherwise not required under the Muhammadan Law of pre-emption, but got issued by the respondents through their lawyer, they did not bother to disclose either the time, date or place of making the two *talbs* or the names of two witnesses of *talb-i-ishhad.* All these facts are sufficient to conclude that non-disclosure of these material particulars at different stages of the proceedings was not mere mistake or

oversight but a deliberate act of the respondents with some ulterior motive, which was fatal to their claim of pre-emption. Some of these aspects seem to have been discussed by the Court of Senior Civil Judge in its judgment dated 05.11.2003, but the appellate Court in its impugned judgment did not care to consider the reasons assigned by the trial Court for dismissal of the suit, what to talk of discarding them for any cogent reason.

17. Another aspect of the case, which has negative impact over the claim of the respondents in exercising their right of pre-emption over the suit land in a lawful manner is the fact that as per averments made in the plaint and the deposition of PW-1 Hidayatullah, only he made the requisite *talbs* alongwith his brother Adalat Khan, who also exercised such right on behalf of his other three brothers, Khuda Bakshsh, Sardar Ali Khan and Karim Bakhsh, all sons of Mustajab Khan on the basis of power of attorney dated 02.6.1987 in his favour. Admittedly, the said document, typed on a twenty-five Rupees stamp paper, is special power of attorney, which is to be construed strictly as per its contents. The contents of this power of attorney reveal that it was executed by Khuda Bakhsh, Karim Bakshsh, Sardar Ali and Hidayatullah Khan in favour of Adalat Khan, but it contained no specific delegation of power in his favour for

exercising the right of pre-emption over the suit land on behalf of its executants. Thus, for all intent and purposes, no right of pre-emption was legally exercised on behalf of respondents Khuda Bux, Karim Bux and Sardar Ali. Moreover, the said attorney, Adalat Khan, also did not bother to appear in the witness box to offer himself to the test of cross examination as regards his purported authority to exercise right of pre-emption on their behalf. Withholding of such evidence by the respondents has not been explained anywhere, which gives an adverse presumption as regards the merits of their claim of making *talb-i-muwathibat* and *talb-i-ishhad*, strictly as mandated under the provisions of Muhammadan Law.

18. Another legal aspect of the case, which needs due consideration is the definition of *talb-i-muwathibat* and *talb-i-ishhad* under the general principles of Muhammadan Law qua the statutory law applicable in the province KPK and PATA, which are *parimateria*. Mere comparative reading of these two provisions of law on the same subject reveals that for making valid demands of *talb-i-muwathibat* and *talb-i-ishhad* the language and legal requirements are substantially one and the same, except that under the statutory law condition of written notice of *talb-i-ishhad,* has been added, which of course is not the requirement under

the Muhammadan Law of pre-emption. Moreover, use of word 'immediate' in the context of making *talb-i-muwathibat* and words 'the least practicable delay' in making *talb-i-ishhad* have their own connotation and significance, which has burdened the pre-emptor with some extra liability of showing complete promptness in making such demands rather than making *talb-i-muwathibat* in a casual manner and *talb-i-ishhad* in presence of two witnesses simplicitor. Keeping in view these aspects, when we revert to the facts of the present case, we find that the two *talbs* were not made by the respondents in the required manner of vigilance and promptness.

19. The legal objections as regards the maintainability of the appeal filed by the respondents before the Peshawar High Court despite the fact that at the relevant time admittedly pecuniary jurisdiction of the District Court, Swat was upto Rs.5,00,000/-, has also much force, as, for the purpose of ascertaining the pecuniary jurisdiction, it will be the valuation shown in the plaint which will be material for this purpose. The perusal of copy of plaint, available in the Court file, reveals that the suit for possession through pre-emption instituted by the respondents was specifically valued by them at Rs.1,92,000/-, therefore, the remedy of appeal available to

them on 17.12.2003 was before the concerned District Court at Swat and not before the Peshawar High Court. This important legal aspect of the case, however, did not receive much attention of the Peshawar High Court in its impugned judgment and was discarded for flimsy reasons having no legal force.

20. We have carefully examined the cases cited at the bar by both the learned ASCs. There is no cavil to the principles propounded therein, but looking to the facts and circumstances of the case in hand, as discussed above, the judgment cited on behalf of the respondents are distinguishable, having no relevancy or applicability to the facts of the present case.

21. The upshot of above discussion is that the impugned judgment of the High Court is liable to be set aside and the suit for pre-emption filed by the respondents is also liable to be dismissed.

22. Foregoing are the reasons for our short order dated 24.3.2015.

Judge

Judge

Islamabad the
24th March, 2015
Approved for reporting.
Riaz

Judge