

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present:**

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL  
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

**Civil Petition No.223-P/2012**

(Against the judgment dated 06.03.2012  
passed by the Peshawar High Court, Bannu  
Bench in C.R. No.325-B/11)

Sakhi Jan & another

...Petitioners

**Versus**

Qamar Ali Khan

..Respondent

For the petitioners: Mr. Muhammad Javed Yousafzai, ASC

For the respondent: Mr. Zafar Iqbal, ASC

Date of hearing: 28.7.2021

**ORDER**

**MAZHAR ALAM KHAN MIANKHEL, J.-** The respondent (plaintiff of the suit) had exercised his right of pre-emption by filing a suit for pre-emption against a sale mutation No.3486 dated 28<sup>th</sup> July, 2008 for an area of 20 kanals of land purchased by the petitioners (defendants) comprising of four khasra numbers in four different khatahs as reflected in the plaint. After a hot contest between the parties, suit of the respondent was partially decreed by the Civil Judge, Lakki Marwat vide his judgment and decree dated 24<sup>th</sup> March, 2010. The petitioners feeling aggrieved, questioned the same by way of appeal but the appeal was dismissed by the District Judge, Lakki Marwat vide his judgment and decree dated 29<sup>th</sup> September, 2011 and same was the fate of civil revision of the petitioners before the Peshawar High Court, Bench at Bannu vide judgment dated 6<sup>th</sup> March, 2012. The petitioners still not satisfied with the findings of the three Courts below, have sought leave to appeal against the impugned judgment through instant petition.

2. We have heard the learned counsel for the parties and have gone through the available record. It is evident from the record that respondent was a co-sharer in suit khata No.967/4 khasra No.248. So, the area transferred from the said khasra number in favour of petitioners vide impugned mutation measuring 05 kanals 09 marlas was decreed in his favour. Similarly the petitioners were recorded co-sharers in khasra No.2478 of khata No.205, area measuring 01 kanal and 06 marlas and the respondent having no such right, his suit to that extent was dismissed.

3. It is also an admitted position that both the parties were the contiguous owners to the remaining two khasra numbers i.e. khasra No.2479 of khata No.204 and khasra No.2482 of khata No.966/1 and the trial Court after considering this evidence on the record, divided the suit property of these two khasra numbers in two equal shares under Section 20 of the Khyber Pakhtunkhwa Pre-emption Act, 1987 (the '**Act of 1987**') and the said findings were upheld by the appellate Court in appeal as well as the High Court in revision.

4. The only question which required our consideration was the distribution of the property under Section 20 of the Act of 1987 between the parties having equal status and right of pre-emption on the basis of contiguity. The pre-emptor/respondent is single and has not joined with him any other co-emptor whereas vendees are two in number and all the three having similar status and right of pre-emption, whether the property has to be divided in two equal shares between the pre-emptor and the two vendees or it has to be divided in three equal shares on *per capita* basis. The learned counsel for the parties placed reliance on two conflicting views of this Court of two Member Benches one favouring the petitioners and the other the respondent; Khan Gul Khan and others Vs. Daraz Khan (2010 SCMR

**539)** relied upon by the petitioners while Muhammad Tariq and 4 others Vs. Asif Javed and another (2009 SCMR 240) relied upon by the respondent. Both the learned counsel argued that except these two conflicting views, there is no other judgment of this Court interpreting and clarifying the provisions of Section 20 of the Act of 1987. In the given situation, initially we were of the view that the matter be placed before Hon'ble the Chief Justice for constitution of a Larger Bench on the above said conflicting views but Mian Hikmat Ullah, learned ASC, present in Court in some other case, with permission of the Court, submitted that the issue in hand has already been settled by a three Member Bench of this Court and sought some time to produce the said case law. The learned ASC, on the next day, produced almost all the judgments of this Court in which question of Section 20 of the Act of 1987 was dealt with. Relevant in this regard is the case of Faizullah Khan and others Vs. Haji Abdul Hakeem Khan (2011 SCMR 1802). It has also affirmed the two Member Bench judgment in the case of Khan Gul Khan (supra). The crux of the findings is that in such like situations, the property has to be distributed as *per capita*. Further simplifying the matter, we may add that the number of pre-emptors and the vendees, having the same status and pre-emption right, will get the property under pre-emption in equal shares. The relevant para of the said judgment is reproduced herein below:-

“17. It is to be mentioned here that this Court has taken conflicting views in two recent judgments in the cases of Muhammad Tariq (supra) and Khan Gul Khan (supra). In Muhammad Tariq's case a two member Bench of this Court has held that the Legislature has divided the preemptor and the vendee into two distinct classes, and if the pre-emptor and the vendee have equal right of pre-emption the property would be shared by them equally notwithstanding the

number of pre-emptors or the vendees; if the other version of per capita basis is to be accepted then the whole sense of the section would altogether be damaged, all the rulings of this Court are in favour of the division of the property in equal shares i.e. 50/50 or ½ each because the contesting parties are two different classes. Whereas, in Khan Gul Khan's case another two member Bench of this Court after thorough examination of the case-law on the subject, while taking a different view has held that the conclusion drawn in Muhammad Tariq's case that legislature has divided the pre-emptor and the vendee into two distinct classes i.e. the pre-emptor and the vendee, is not in consonance with the provisions of section 20; it is the qualification of the vendee which qualified him to share the property in terms of section 20; the law laid down in Amir Hasan's case and other cited judgments, mentioned therein, is the correct law; therefore, the parties were declared to be entitled to share the property on the principle of per capita".

This judgment was again relied upon by yet another three Member Bench of this Court in the case of Rustam Vs. Aurangzeb and others (2014 SCMR 146). We may add that for the purpose of distribution of property under Section 20 of the Act of 1987, analogy can also be derived from the provisions of Section 9 of the Act of 1987 which reads as under:-

**"9. Method of distribution of the property where more than one person equally entitled.-**  
Where more than one person are found by the Court to be equally entitled to the right of pre-emption the property shall be distributed amongst them in equal shares."

5. We appreciate the fair and valuable assistance rendered by Mian Hikmat Ullah, learned ASC, and feel sorry and not happy with the level of assistance rendered by the learned counsel for the parties. Had they been fully prepared and equipped with the latest

view of this Court, then the matter would have been decided there and then.

6. In view of the above discussion, we while maintaining the findings of Courts below, modify the judgment of the trial Court dated 24<sup>th</sup> March, 2010 on issue No.6 and that of the Appellate Court and the High Court and hold that the share and area transferred by way of impugned mutation in khasras No.2479 and 2481 be distributed between the two petitioners/vendees and pre-emptor/respondent in three equal shares on the principle of *per capita*. Pre-emption amount, if already deposited by the pre-emptor/respondent is in excess, can be withdrawn by the pre-emptor. Needless to say, if pre-emption amount has not been deposited as per decree of the trial Court, the pre-emptor has to face the consequences as per law.

7. This petition is converted into appeal and allowed. Rest of the findings of the Courts below are maintained. Costs should follow the event.

Judge

Judge

Peshawar,  
28<sup>th</sup> July, 2021  
APPROVED FOR REPORTING  
Nasir Khan /-