

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Justice Musarrat Hilali
Justice Aqeel Ahmed Abbasi

27/25

Civil Petition No.3586 of 2023

(Against the judgment dated 29.05.2023 of the Peshawar High Court, D.I.Khan Bench passed in Civil Revision No.140-D of 2015 with Civil Misc. Nos.144-D of 2015, 148-D of 2019 and 95-D of 2020)

Qayum Nawaz

... Petitioner

Versus

Gulab Khan and others

... Respondents

For the Petitioner: Mr. M. Anwar Awan, ASC

For the Respondents: N.R.

Date of Hearing: 07.04.2025

ORDER

AQEEL AHMED ABBASI, J.- The instant civil petition for leave to appeal has been filed under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 against the judgment dated 29.05.2023 passed by the learned Single Judge of the Peshawar High Court, D.I.Khan Bench in Civil Revision No.140-D of 2015.

2. Brief facts leading to the present controversy are that the petitioner pre-empted the sale mutation No.1372 dated 21.11.2009 whereby respondents No.1 and 2 jointly purchased land measuring 52 Kanals 19 Marlas. The petitioner claimed performance of Talabs in accordance with law and prayed for decree of his suit of pre-emption. Apart from the present

petitioner, the subject property was also pre-empted by Dr. Askar Mehmood and others, who filed their separate pre-emption suit. Both the suits filed by the petitioner and Dr. Askar Mehmood and others were consolidated and the present petitioner was denoted as rival pre-emptor. The learned Trial Court after consolidating both the suits processed the same in accordance with the procedure and finally dismissed both the suits vide consolidated judgment and decree dated 18.12.2012. The said judgment and decree were assailed by the petitioner by filing an appeal before the learned Additional District Judge, Paharpur, D.I.Khan, which was dismissed vide judgment and decree dated 21.04.2015, whereafter, the said judgment and decree assailed by the petitioner by filing Civil Revision No.140-D of 2015 under Section 115 of the CPC before the Peshawar High Court, D.I.Khan Bench which has been dismissed through impugned judgment dated 29.05.2023 and has been assailed by the petitioner through instant civil petition for leave to appeal.

3. Learned counsel for the petitioner has argued that courts below have erred in facts and law while dismissing the claim of pre-emption, inspite of the fact that the petitioner has promptly issued notice of Talb-e-Ish'had to both the vendees, whereas, the examination of Postman who delivered the notice was not necessary in the instant case as the respondents did not deny the receipt of service of notice of Talb-e-Ish'had. According to the learned counsel sufficient evidence was produced by the petitioner to support his claim of pre-emption, however, the courts below have failed to appreciate the factual position with

regard to service of notice of Talb-e-Ish'had and have dismissed the claim of the petitioner on technical grounds. It has been prayed that the impugned judgment passed by the Peshawar High Court, D.I.Khan Bench as well as the judgment and decree passed by the courts below may be set aside and the instant civil petition may be allowed.

4. Heard the learned counsel for the petitioner and perused the record. It is pertinent to mention that there is concurrent findings of fact and law of the two courts below which has been duly affirmed by the Peshawar High Court, D.I.Khan Bench through impugned judgment in Civil Revision No.140-D of 2015 filed under Section 115 of the CPC wherein, after detailed scrutiny of facts and appraisal of the evidence produced by the parties, it has been held that the petitioner failed to prove that notice of Talb-e-Ish'had was duly served upon the respondents on their address under registered cover acknowledgement due. Admittedly, the Postman who according to the petitioner delivered the notice was not examined, whereas, RPW-1, the Postman of the Post Office of Paharpur who produced destruction certificate in his cross-examination stated as under:-

"یہ درست ہے کہ رجسٹری مذکورہ بالا نہ تو میں نے بک کی ہیں اور نہ ہی
تقسیم کی ہیں۔ میں نہیں بتا سکتا کہ مذکورہ بالا رجسٹری ہائے کے ذریعے کیا
چیز ارسال کی گئی تھی۔"

Similarly, RPW-2, the Postmaster of Post Officer Saddar Bazar and RPW-3, Postmaster of Post Office Mandhra Kalan also produced destruction certificates of the record, however, none of the witnesses of Post Office confirmed the delivery of the notice

and acknowledgement due upon the respondents. Moreover, the respondents in their written statements have categorically denied the receipt of notice of Talb-e-Ish'had, therefore, the burden was upon the petitioner to prove that such notice was issued and delivered under acknowledgement due upon the respondents. However, keeping in view the facts and circumstances of the instant case and the evidence available on record the petitioner could not discharge such burden satisfactorily as per law. According to Section 13(3) of the Khyber Pakhtunkhwa Pre-emption Act, 1987, the pre-emptor is required, after making Talb-i-Muwathibat to make Talb-e-Ish'had soon thereafter not later than two weeks from the date of knowledge, by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgement due, to the vendee, confirming his intention to exercise the right of pre-emption, whereas, merely sending a notice in writing without establishing that such notice has been duly served under registered cover acknowledgement due upon the vendee does not meet the requirements of law. A perusal of the record further reveals that the purported notice of Talb-e-Ish'had issued to the respondent No.2 contained the mutation No.1373, whereas, the number of pre-empted mutation is 1372, therefore, the learned Peshawar High Court, D.I.Khan Bench was justified to conclude that the petitioner has absolutely not performed the Talb-e-Ish'had against the respondent No.2 (co-vendee) with regard to property purchased through suit Mutation No.1372, therefore, it has become a partial pre-emption, whereas, in terms of Section 19 of the Khyber Pakhtunkhwa Pre-emption Act, 1987, the bar on

such like pre-emption cases is also attracted in the instant case. Such an omission otherwise constitutes waiver on the part of pre-emptor to pre-empt the sale in view of the provisions of Section 15 of the Khyber Pakhtunkhwa Pre-emption Act, 1987.

5. In view of hereinabove facts and circumstances of the instant case, we do not find any factual error or legal infirmity in the impugned judgment passed by learned Single Judge of the Peshawar High Court in Civil Revision No. 140-D of 2015, which does not require any interference by this Court. Accordingly, this petition is dismissed in limine, and the leave to appeal is refused.

8/1/-----J
8/1/-----J

Islamabad.

07.04.2025

~~Not~~ Approved For Reporting'
(Zubair)