IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Amin-Ud-Din Khan
Justice Shahid Bilal Hassan

Civil Petition Nos.406 of 2022
(Against the judgment dated 24.11.2021 of the Peshawar High Court, Bannu Bench, Bannu passed in C.R.No.30-B/2019)

Late Sher Ayaz Khan @ Sheraz Khana through His L.Rs. & others

... Petitioner(s)

Versus

Gul Najeeb Khan

... Respondent(s)

For the Petitioner(s):	Mr. Anwar Ul Haq, ASC Syed Rifaqat Hussain Shah, AOR
For Respondent:	Mr. Muhammad Aftab Alam Yasir, ASC Mr. Anis M. Shahzad, AOR
Date of Hearing:	09.12.2024.

JUDGMENT

SHAHID BILAL HASSAN, J. Through this petition filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 leave has been sought against the judgment dated 24.11.2021 passed by the Peshawar High Court, Bannu Bench, Bannu whereby C.R.No.30-B of 2019 filed by the petitioner(s) was dismissed.

2. Facts, in precision, are as such that attestation of mutation No.3720 dated 22.10.2010 germane to land measuring 4-Kanals 18-Marlas, from property detailed in the headnote of the plaint, situated in revenue estate of Nurar, Tehsil & District Bannu, culminated into filing of two suits: one by respondent and the other by one Rafique Khan. Record divulges that suit of Rafique Khan, rival pre-emptor, was dismissed by the learned trial Court, against which appeal as well as

revision also met with the same fate. The respondent in his suit averred that on Sunday i.e. 24.10.2010 at about 4.00 p.m. when he and Qismatullah Khan son of Gul Zaman were sitting in his house, Gul Naseeb Khan son of Gul Zaman Khan, imparted the information of sale in question; that the respondent then and there made jumping demand i.e. Talb-i-Muwathibat in presence of the said witnesses and sent the said witnesses to the present petitioner(s) for transferring the suit property to him (respondent) after receiving Rs.60,000/- but on refusal, on 27.10.2010 the respondent sent notice of Talb-i-Ishhad as per mandate of section 13(3) of the Pre-emption Act, 1987 in presence of the witnesses. However, the petitioner(s)/defendant did not coupe with the demand of the respondent; hence, he instituted the suit. Another suit was instituted by one Rafique Khan. The defendant(s) in both the suits submitted contesting written statements. Both the suits were consolidated and consolidated issues were framed. After conclusion of trial, the learned trial Court vide consolidated judgment and decree dated 19.07.2012 dismissed both the suits. The respondent and the rival pre-emptor being aggrieved preferred two separate appeals. However, the appeals were dismissed vide consolidated judgment and decree dated 27.11.2012. Separate revision petition(s) under section 115, Code of Civil Procedure, 1908 were filed. The revision petition bearing No.02-B of 2013 titled “Rafique Khan v. Sher Ayaz” was dismissed whereas revision petition No.65-B of 2013 titled “Gul Najeeb Khan v. Sher Ayaz” was accepted and the judgment of the appellate Court to the extent of appeal titled “Gul Najeeb v. Sher Ayaz and others” was set aside by the Peshawar High Court, Bannu Bench and the case was remanded to the appellate Court for deciding the fate of application seeking permission to amend the plaint and thereafter to decide the case afresh on merits vide judgment dated 22.06.2018. After remand, cross objections under Order XLI, Rule 22, Code of Civil Procedure, 1908 were filed by the present petitioners and the respondent moved an application seeking withdrawal of application submitted for amendment in plaint; the latter application was dismissed being not pressed. After hearing both the parties, the appellate Court vide judgment and decree dated 13.10.2018 allowed the revision petition, filed by the respondent and decreed the suit

against the petitioner(s), whereas dismissed the cross objections being barred by limitation. The petitioners being dissatisfied and aggrieved filed revision petition No.30-B of 2019 before the Peshawar High Court, Bannu Bench, Bannu; however, the same was dismissed vide impugned judgment dated 24.11.2021; hence, the instant petition.

3. We have given patient hearing to the learned counsel for the parties and have minutely gone through the record with their able assistance. There is no cavil to the proposition that in order to succeed in a suit for possession through pre-emption, it is imperative and essential to prove the performance of Talbs in accordance with law, prescribed under section 13 of N.W.F.P. Pre-emption Act, 1987 and when Talbs are not proved in accordance with law, same results fatal to the pre-emptor's case. For ready reference section 13 of the Act *ibid* is reproduced infra:

> *'13.* ***Demand of pre-emption.*** *---(1) The right of pre-emption of a person shall be extinguished unless such person makes demands of pre-emption in the following order, namely:---*
>
> *(a) Talb-i-Muwathibat;*
>
> *(b) Talb-i-Ishhad; and*
>
> *(c) Talb-e-Khusumat.*
>
> ***Explanation.****--- (i) "Talb-i-Muwathibat" means immediate demand by a pre-emptor in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of pre-emption.*
>
> ***Note.*** *--- Any words indicative of intention to exercise the right of pre-emption are sufficient.*
>
> ***Explanation.****--- (ii) "Talb-i-Ishhad" means demand by establishing evidence.*
>
> ***Explanation.****--- (iii) "Talb-e-Khusumat" means demand by filing a suit.*
>
> *(2) When the fact of sale comes within the knowledge of a pre-emptor through any source, he shall make Talb-i-Muwathibat.*
>
> *(3) Subject to his ability to do so, where a pre-emptor has made Talb-i-Muwathibat under subsection (2), he shall as soon thereafter as possible but not later than two weeks*

from the date of notice under section 32, or knowledge, whichever may be earlier, make Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgment due to the vendee, confirming his intention to exercise the right of pre-emption:

Provided that in areas where due to lack of post office facilities it is not possible for the pre-emptor to give registered notice, he may make Talb-i-Ishhad in the presence of two truthful witnesses.

(4) Where a pre-emptor has satisfied the requirements of Talb-i-Muwathibat under subsection (2) and Talb-i-Ishhad under subsection (3), he shall make talb-i-Khusumat in the Court of competent jurisdiction to enforce his right of pre-emption.'

4. The above provision of law makes it vivid that Talb-i-Muwathibat implies to 'jumping demand'/'immediate demand by a pre-emptor'. In Black's Law Dictionary, Eighth Edition one page 764 defines the word 'Immediate' to mean "occurring without delay; instant". In Webster Comprehensive Dictionary Encyclopaedic Edition on page 631 the word 'immediate' has been defined to mean "without delay; instant." Now, when the case in hand is considered and evidence adduced and produced by the respondent is dilated upon, it emerges on record that making of jumping demand/talb-i-muwathibat is not in accordance with the above provision of law i.e. abrupt after imparting of information of sale by the informer, because, during cross examination the present respondent Gul Najeeb (P.W.6), admitted it correct that when Gul Naseeb informed him about the disputed sale, then we brothers certainly consulted each other to file suit for pre-emption. The words deposed by him are reproduced in verbatim as under:

یہ درست ہے کہ جب مجھے گل نصیب نے سودا ہذا کے بارے مطلع کیا تو ہم بھائیوں نے یقینا شفع کرنے کا مشورہ کیا۔'

These words manifestly make it diaphanous that before making jumping demand, the respondent consulted with his brothers i.e. informer and Qismat Ullah Khan, thereafter, he performed Talb-i-Muwathibat and this fact has also been admitted by Gul Naseeb (P.W.5) during cross examination. Even the story of making Talb-i-

Muwathibat becomes dubious when the depositions of respondent and Gul Naseeb as well as Qismat Ullah as to presence of respondent and Qismat Ullah Khan are considered because P.W.5 (Gul Naseeb) deposed that he could not tell correctly that whether Gul Najeeb and Qismat Ullah were either sitting in the room of Gul Najeeb, or in his (Gul Naseeb) room or in the room of Qismat Ullah, when he informed Gul Najeeb about the transaction in question; whereas the respondent (P.W.6) deposed, during cross examination, that when Gul Naseeb imparted him information, he alongwith Qismat Ullah were sitting in his room on separate cots. However, Qismat Ullah (P.W.7) deposed, during cross examination, that we brothers have a room for the purpose of consultation and he alongwith Gul Najeeb Khan were sitting in the said room. Even, Gul Naseeb (informer), P.W.5 admitted it correct during cross examination that bargain in question was struck 4/5 months prior; volunteered that he gained knowledge at 3.45. However, learned counsel for the petitioners further put a question and this witness admitted it correct that Rasheed Patwari was his friend and further admitted it correct that prior to day of receiving information Rasheed Patwari used to meet him. In this scenario, either the respondent (plaintiff) or Gul Naseeb (informer) or Qismat Ullah (witness) is not disclosing the true facts and the story of making Talb-i-Muwathibat has been maneuvered and concocted only to exercise the right of pre-emption. Even otherwise, the respondent, informer and other witness are admittedly brothers and can safely be said to be interested witnesses, so their evidence needed to have been thwarted minutely but these delicacies and discrepancies had been ignored and were not considered/dilated upon by the appellate Court and High Court. Had the evidence been considered in toto and as a whole, the result would have been otherwise instead of the judgment impugned by the High Court.

The use of the word immediate is significant and cannot be undermined; a delay of two hours in making the demand of Talb-i-Muwathibat is not an immediate demand and such delay is fatal to a successful claim of pre-emption.[1]

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[1] Bashir Ahmed v. Muhammad Ramzan (2021 SCMR 134)

The right of pre-emption is a unique and a fragile right. Unlike many other rights bestowed by law, the exercise of this right depends entirely on the timely making of the various demands set out in section 13 of the Act, 1987. It is also obvious, from a bare reading of section 13 that the making of Talb-i-Muwathibat is the foundation on which the making of Talb-i-Ishhad and Talb-i-Khusumat is based. In fact, the timelines and conditions for the making of Talb-i-Ishhad and Talb-i-Khusumat provided in sections 13(3) and 13(4) of the Act *ibid* depend entirely upon the making of Talb-i-Muwathibat. Therefore, the date, time and place of making such demand is pivotal and foundational to the exercise of the right of pre-emption, the importance of which cannot be over-looked.[2]

5. Additionally, Rasheed Patwari, who purportedly imparted information to Gul Naseeb about the sale transaction in question has not been produced, who otherwise was necessary and essential witness so as to prove the fact that he actually conveyed the fact of the transaction in question on the claimed date i.e. 24.10.2010 to Gul Naseeb Khan (P.W.5). Therefore, when the position remained as such, the respondent, coupled with the above discussion, could not prove the performance of Talb-i-Muwathibat as per mandate of law. This Court has already held in judgment[3] that:

> *'Only the complete chain of the source of information of the sale can establish the essential elements of Talb-i-Muwathibat, which are: (i) the time, date and place when the pre-emptor obtained the first information of the sale, and; (ii) the immediate declaration of his intention by the pre-emptor to exercise his right of pre-emption, then and there, on obtaining such information. Reference in this regard may be made to the case of Farid Ullah Khan v. Irfan Ullah Khan (2022 SCMR 1231). In the present case, such chain of the source of passing on the information, as to the fact of the sale of the suit land has not been proved as Muhammad Basharat Ali has categorically refused to meet and share the information about the sale of the suit land with Ghulam Mustafa (the informer). The entire case of the respondents regarding the issuance of Talb-i-Muwathibat built on the hearsay evidence of Ghulam Mustafa (the informer) falls to the ground due to an incomplete chain of information about the sale of the suit land. Therefore, the learned trial Court correctly observed that when the source of information provided by the informer is not proved, the*

[2] Mir Muhammad Khan and 2 others v. Haider and others (PLD 2020 Supreme Court 233)
[3] Muhammad Riaz v. Muhammad Akram and others (2024 SCMR 692)

> *transmission of this information to the respondents also becomes highly doubtful. However, both the learned first appellate court and the learned High Court failed to take note of this important fact of the matter and set-aside the judgment and decree of the learned trial court. Therefore, we feel no hesitation to hold that the respondents failed to prove the validity of Talb-i-Muwathibat made by them for exercising their right of pre-emption over the suit land.'*

In this view of the matter, the best available evidence has been withheld by the respondent. Therefore, the adverse presumption as enunciated under Article 129(g) of Qanun-e-Shahadat, 1984 would arise against the respondent that had the said witness appeared in the witness box, he would not have supported the stance of the respondent.

6. When the first and primary Talb i.e. Talb-i-Muwathibat, is found to have not been proved, we need not examine the evidence on the making of the second Talb (Talb-i-Ishhad) as where Talb-i-Muwathibat is not proved to have been made then the performance of Talb-i-Ishhad and all other requirements to successfully enforce the right of pre-emption cannot withstand. The foundation of the right of pre-emption rests on the making of Talb-i-Muwathibat; if it is not made in accordance with the law, the entire superstructure collapses.[4] However, if we talk about the case in hand, the person (postman) who allegedly served the registered post A.D. upon the deceased petitioner Sher Ayaz Khan alias Sheraz Khan was not produced in the witness box, who otherwise was essential to have been brought in the witness box, especially when receipt of the same has been denied, so as to prove and determine the fact that he actually served the registered post A.D. upon the deceased petitioner; meaning thereby the service upon the addressee was not proved by the respondent.[5]

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[4] Farid Ullah Khan v. Irfan Ullah Khan (2022 SCMR 1231)

[5] *Mian Pir Muhammad and another* (PLD 2007 Supreme Court 302), *Allah Ditta through L.Rs. and others v. Muhammad Anar* (2013 SCMR 866), *Dr. Pir Muhammad Khan v. Khuda Bukhsh and others* (2015 SCMR 1243), *Munawar Hussain and others v. Afaq Ahmed* (2013 SCMR 721), *Muhammad Abaidullah v. Ijaz Ahmed* (2015 SCMR 394), *Bashir Ahmed v. Ghulam Rasool* (2010 SCJ 643), *Israr Ahmed and 3 others v. Haji Muhammad and another* (2009 Law Notes 377), *Subhanuddin and others v. Pir Ghulam* (PLD 2015 Supreme Court 69), *Sultan v. Noor Asghar* (2002 SCMR 682), *Manzoor Hussain (deceased) through L.Rs. v. Misri Khan* (PLD 2020 Supreme Court 749) and *Ahmad Bakhsh (deceased) through LRs v. Ameer Ali Khan* (2020 SCMR 873)

7. The compendium of the discussion above is that this petition is converted into an appeal and the same is allowed. Resultantly, the judgments passed by the learned first appellate court and the learned High Court are set aside and that of the learned trial court dismissing the suit is restored.

Judge

Judge

Islamabad:
09.12.2024
'Approved for reporting'
(M.A.Hassan)