

2020 M L D 1017

[Peshawar (Abbottabad Bench)]

Before Shakeel Ahmed, J

GHULAM HUSSAIN SHAH (Deceased) through L.Rs. and 11 others---Petitioners

Versus

MUHAMMAD KHALID KHAN---Respondent

Civil Revision No. 196-A of 2013, decided on 11th November, 2019.

(a) Khyber Pakhtunkhwa Pre-emption Act (X of 1987)---

---S. 13---Talbs, demand of---Failure to prove talb-i-ishhad---Non-production of postman---Production of photocopy of talb-i-ishhad---Effect---Plaintiff's suit for pre-emption was dismissed---Validity---Vendee had denied receipt of notice of talb-i-ishhad---Postman, who had delivered the notice of talb-i-ishhad, was not produced by the plaintiff---Photocopy of notice of talb-i-ishhad was produced, which was inadmissible in evidence---Plaintiff had not proved the notice through secondary evidence and failed to mention the date of dispatch of notice of talb-i-ishhad in the plaint as well as in his statement recorded before the court, therefore, courts below had rightly held that the plaintiff had failed to prove issuance and service of notice of talb-i-ishhad---Revision petition, being bereft of merit, was dismissed, in circumstances.

Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Afsar v. Afsar Khan 2015 SCMR 311 and Muhammad Sarwar Khan and 2 others v. Din Muhammad and 7 others 2006 YLR 2411 ref.

Allah Ditta v. Muhammad Anar 2013 SCMR 866 rel.

(b) Khyber Pakhtunkhwa Pre-emption Act (X of 1987)---

---S. 13---Talbs, demand of---Scope---Talb-i-Muwathibat envisages firstly, the act of prospective pre-emptor coming to know of the factum of sale, secondly, such knowledge or information emanating from a sitting or meeting and thirdly declaration of his intention to pre-empt the suit property immediately on getting knowledge of the sale---Pre-emptor is, thereafter, required to make the demand of Talb-i-Ishhad, as soon as possible but not later than two weeks from the date of notice of sale, for the knowledge of vendee by sending a notice in writing attested by two truthful witnesses, under a registered postal cover with acknowledgment due, confirming his intention to exercise his right of pre-emption---Pre-emptor then has to make a demand of Talb-i-Khusumat by filing a suit in a competent court of law for enforcing his right of pre-emption.

(c) Khyber Pakhtunkhwa Pre-emption Act (X of 1987)---

---S. 13---Talbs, demand of---Feeble right---Scope---Pre-emption right, being a feeble right, pre-emptor seeking to exercise such right is bound to perform and fulfil its requirements and any failure in that behalf would deprive him of success in getting a pre-emption decree.

Wahid Bakhsh v. Abdul Qayyum and others 1997 MLD 2945 ref.

Muhammad Shafique Awan for Petitioners.

Khalid Rehman Qureshi for Respondent.

Date of hearing: 11th November, 2019.

JUDGMENT

SHAKEEL AHMED, J.---Instant revision petition has assailed the judgments and decree dated 10.03.2011 and 28.03.2013 passed by the learned Civil Judge, Haripur and the Additional District Judge-III, Haripur, whereby petitioner's suit for possession through pre-emption and appeal were dismissed, respectively.

2. The brief facts necessary for adjudication of lis at hand are that vide registered deed No.1513 attested on 02.11.2004, the respondent purchased land measuring 04 kanals 17 marlas. Petitioner fled suit for pre-emption claiming superior right of pre-emption. It was pleaded in the plaint that actual sale consideration was Rs.3,00,000/- and fictitious amount of Rs.15,00,000/- was displayed as sale consideration with mala fide intention in order to defeat right of pre-emption of the petitioner/ plaintiff. The suit was resisted. The learned trial court seized of the matter dismissed the suit vide judgment dated 10.03.2011. However, it was held that Talb-i-Muwathibat was successfully proved and petitioner had superior right of pre-emption, and finding was also rendered that actual price as claimed by the respondent/defendant was Rs.15,00,000/-. Being aggrieved, petitioner filed appeal, which was dismissed vide judgment dated 28.03.2013, hence, this petition.

3. It has been argued by the learned counsel for the petitioner that petitioner was non-suited merely on the ground that date, time and place of notice of Talb-i-Ishhad was not mentioned in the plaint, which is not the requirement of law. Regarding actual consideration of the suit land he argued that the learned trial court as well as appeal court ignored the documentary evidence produced in shape of ousat yaksala and merely relied on the price rendered in the registered deed, which is not warranted by law and prayed for setting aside the impugned judgments of the courts below.

4. As against that learned counsel appearing on behalf of the respondent raised two-fold grievance; firstly, that neither Talb-i-Muwathibat nor Talb-i-Ishhad was proved in accordance with law and secondly that findings of facts rendered by the courts below are immune for interference in revision petition.

5. I have heard arguments of the learned counsel for the parties and have gone through the record with their valuable assistance.

6. The three demands asserting the right of pre-emption have their own respective connotation the first demand i.e. jumping demand/Talb-i-Muwathibat is defined in the first explanation to subsection (1) of section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987, which envisages firstly, the act of prospective pre-emptor coming to know of the factum of sale, secondly, such knowledge or information emanating from a sitting or meeting and thirdly declaration of his intention to pre-empt the suit property immediately on getting knowledge of the sale, which is commonly known as Talb-i-Muwathibat or jumping demand. He shall be thereafter, required to make the demand of Talb-i-Ishhad by establishing evidence as soon as possible but not later than two weeks from the date of notice under section 13 of the ibid Act, for the knowledge, wherever, may be earlier, by sending a notice in writing attested by two truthful witnesses to the vendee, under a registered postal cover with acknowledgment due confirming his intention to exercise the right of pre-emption, then comes the demand for Talb-i-Khusumat by filing a suit in a competent court of law for enforcing his right of pre-emption.

7. It is evident from the record that vendee has denied receipt of the notice of Talb-i-Ishhad. PW-1 Mati ur Rehman, Town Inspector, GPO, Haripur admitted in cross examination that postal receipt bearing No.1063 dated 24.11.2004 was neither written by him nor he can tell who was posted as clerk in GPO during relevant day. He showed his inability to tell whether notice/registered letter was served upon the addressee/vendee or not. Admittedly, the postman, who delivered the notice of Talb-i-Ishhad has not been produced by the petitioner/pre-emptor in terms of the law laid down by the august Supreme Court of Pakistan in the case reported as Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105).

8. In this context reference may also be made to the case reported as Allah Ditta v. Muhammad Anar

(2013 SCMR 866) where it was held as under:

"Affirmative onus to prove the receipt of notice of Talb-i-Ishhad was on the pre-emptor, therefore, notwithstanding the admission of attorney of the vendee, it was obligatory on the pre-emptor to have proved sending of notice by leading affirmative evidence, which undoubtedly required the production of the postman."

This same view was followed by the august Supreme Court of Pakistan in the case reported as *Afsar v. Afsar Khan* (2015 SCMR 311)".

9. Another interesting aspect of the case is that photocopy of notice of Talb-i-Ishhad was produced in the deposition of Syed Jamal Hussain Shah PW-6 (special attorney of the legal heirs of the deceased Ghulam Hussain) which is inadmissible in evidence. The petitioners / plaintiffs have not been able to prove the said notice through secondary evidence. In this behalf reference may be made to the case reported as *Muhammad Sarwar Khan and 2 others v. Din Muhammad and 7 others* 2006 YLR 2411, moreover, petitioners failed to mention date of dispatch of notice of Talb-i-Ishhad in the plaint as well as in his statement recorded before the court, therefore, courts below rightly held that petitioners failed to prove issuance and service of notice of Talb-i-Ishhad.

10. From the discussing made hereinabove, I can safely conclude that notice of Talb-i-Ishhad as required under section 13(3) of the Khyber Pakhtunkhwa, Pre-emption Act, 1987 was not served upon the addressee/ vendee which is essential for success of the pre-emption.

11. It is pertinent to mention that the pre-emption right, being a feeble right of pre-emptor seeking to exercise such right was bound to perform and fulfill its requirements and any failure in that behalf would deprive him of success in getting a pre-emption decree. In this respect reliance can be placed on the judgment reported as *Wahid Bakhsh v. Abdul Qayyum and others* (1997 MLD 2945 Peshawar).

12. For what has been discussed hereinabove, the revision petition being bereft of any merit, is hereby dismissed.

SA/286/P

Revision dismissed.