

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**BANNU BENCH.**  
(Judicial Department)

**C.R No.57-B/2016.**

**Musa Khan....Vs.... Ahmad Jan and another**

**JUDGMENT**

Date of hearing: **18.01.2018.**

Appellant-Petitioner: **Musa Khan By Gul Diaz Khan**  
**Wazir, Advocate.**

Respondent : **Ahmad Jan & another by Haji Zafar**  
**Iqbal, Advocate.**

**SHAKEEL AHMAD, J.**--- This petition calls into question the judgments and decrees dated 31.10.2014 of the learned trial Judge and dated 1.02.2016 of the appellate Court (Additional District Judge-II, Lakki Marwat), whereby suit of the petitioner for possession through right of pre-emption for the suit land measuring 16 Kanals, 12½ Marlas in Khata No. 302/529/602 in Khasra No.2439 in Mauza Manjwala, was dismissed.

2. It has been argued by the learned counsel for the petitioner that the Courts below have wrongly non-suited the petitioner on the ground that he failed to perform *Talabs* as required under Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987; that both the Courts below have

acted in disregard of law and well settled principles of justice and have drawn wrong conclusion; that the findings of the Courts below on issue No.4 are in conflict with the evidence on record, which resulted in gross miscarriage of justice, therefore, warrants interference.

3. Conversely, the learned counsel representing the respondents argued that the petitioner has failed to prove making of *Talabs* as provided under Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987, therefore, the suit was rightly dismissed.

4. As the submissions made at the bar were mainly confined to the issue of *Talabs*, therefore, the evidence on this point requires consideration.

5. The learned appeal Court while giving findings on issue No.4 held that notice of *Talab-e-Ishhad* was not served upon defendant Ahmad Jan and that the petitioner/plaintiff has failed to prove making of *Talabs* in terms of Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987.

6. The learned trial Judge has written almost same and similar findings.

7. I find that a bare reading of para 2 of the plaint in the suit filed by the petitioner/pre-emptor reflects that the petitioner did mention that he came to know about the

impugned sale on 3.09.2012, on Monday at 03.00 p.m in his house through his son Khalid Raza (PW-6) in presence of Rahimullah (PW-5), he there and then expressed his intention to pre-empt the suit land by filing the suit in their presence. He sent the notices of *Talab-i-Ishhad* on 04.09.2012, Ex.PW-4/1 and Ex.PW.4/2 alongwith acknowledgement due (Ex.PW-1/3 & Ex.PW-1/4), endorsed by the marginal witnesses.

8. Perusal of the evidence on record reveals that PW-4 Musa Khan (Pre-emptor) stated that on 03.09.2012 at 03.00 p.m he alongwith his son Rahimullah was sitting in his house, in the meanwhile his son Khalid Raza came and informed him about the impugned mutation No.2775 attested on 29.08.2012 (Ex.PW-2/2) and there and then he disclosed his intention to pre-empt the suit land in presence of Khalid Raza (PW-6) and Rahimullah (PW-5) and on 04.09.2012, he sent the notices the *Talab-i-Ishhad* to the defendants, which were duly served upon them. The notices were duly signed by the defendants. Rahimullah Khan PW-5, supported the aforesaid contention of the petitioner, Khalid Raza (PW-6), who is informer, stated in his examination-in-chief that on 03.9.2012, he came to know about impugned sale in his shop situated in his village and on the same day at about 3.00 p.m he informed about the

same to his father in his house in presence of his brother namely Rahim Ullah and there and then the petitioner disclosed his intention to pre-empt the suit property. When he was cross-examined, he stated as under:-

جس روز انتقال تصدیق ہوا اس روز میں نے صبح کے تین بجے اپنے والد کو آگاہ نہیں کیا بلکہ سہ پہر کے تین بجے اپنے والد کو آگاہ کیا تھا۔

9. A plain reading of the aforesaid statement clearly indicates that he had the knowledge of the sale mutation from the date of attestation i.e. 29.8.2012, and he informed his father about the same on the same day (29.8.2012) at 03:00 p.m. but, in examination-in-chief stated that he came to know about sale mutation on 03.9.2012 and informed his father on the same day at 03:00 p.m., which is self-contradictory. This inference is further strengthened from the relationship between PW-6 and vendor as both are brothers inter se. This is a material discrepancy in the statement of PW-6 regarding the day of the sale of the suit land and the information furnished to his father/pre-emptor. This material discrepancy is fatal to the suit of the petitioner.

10. Before giving findings on the objection regarding service of notice of *Talab-i-Ishhad* upon the defendant No.2/Ahmad Jan, it would be appropriate to reproduce Section 26 of the West Pakistan General Clauses Act, 1956, which prescribes the meaning of service by post

which is applicable to the Province of Khyber Pakhtunkhwa, is as under.

**“26. Meaning of service by post.---**

*Where any West Pakistan Act authorizes or requires any document to be served by post, whether the expression “serve” or either of the expressions “give” or “send” or any other expression is used then unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the documents and unless the contrary is proved, to have been effected at the time at which the latter would be delivered in the ordinary course of post.”*

**11.** It would also be advantageous to reproduce Section 13(3), of the Khyber Pakhtunkhwa Pre-emption Act, 1987, which reads as under.

*“13(3) Subject to his ability to do so, where a pre-emptor has made Talb-i-Muwathibat under sub-section (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 acknowledgement due to*

*the vendee, confirming his intention to exercise the right of pre-emption:*

*Provided that in areas where owing 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.”*

12. The defendants/vendees have specifically denied receipt of notice of *Talab-i-Ishhad*. The Postman was examined as PW-3. He produced acknowledgement due cards in his examination-in-chief as Ex.PW-1/3 & Ex.PW-1/4 respectively, and stated that both these acknowledgment dues were received by Sultan Khan. He further stated in his cross-examination that he is not the delivery man of the aforesaid acknowledgment due and that these notices were delivered by his predecessor Khan Badshah Postman, but he was not produced before the Court. Therefore, it cannot be stated that the requisite *Talab-i-Ishhad* has been made as required by Section 13(3) of Khyber Pakhtunkhwa Pre-emption Act, 1987.

13. The fact that the notices were sent would be not sufficient for making of *Talab-i-Ishhad*. The vendee must be apprised about the intention of the pre-emptor. The acknowledgment due cards were presented as Ex.PW-1/3 & Ex.PW-1/4, these were signed by Sultan Jan and not by

Ahmad Jan defendant. The general law as contained in Section 26 (supra) of the Provincial General Clauses Act, 1956 is not applicable. Section 13(3) of the Khyber Pakhtunkhwa Pre-emption Act, 1987 says “under registered cover acknowledgment due” which does not find mention in Section 26 of the General Clauses Act, 1956, applicable to the Province of Khyber Pakhtunkhwa. In the case of **“Muhammad Bashir Vs. Abbas Ali Shah” (2007 SCMR 1105)**, it was held as under:-

*“The requirement of, “sending a notice in writing” is followed by a rider i.e. “under registered cover acknowledgement due”. This signifies that the intention of law is not merely a formal notice on the part of the pre-emptor conveying his intention to pre-empt but a notice served on the addressee to apprise him about his intention to pre-empt. To say that mere “sending of notice” is enough would make the expression “acknowledgment due” redundant’. The service of the addressee as prescribed in law therefore is imperative. If the acknowledgement card carried an endorsement of “refusal” or “not accepted”, a presumption of service would arise unless it is rebutted. The expression “sending notice” came up for consideration in Thammiah b. v. Election Officer [1980] 1 Kant L.J. 19*

*and the Court held that it means, “that it should reach the hands of the person to whom it has been given and the giving is complete when it has been offered to a person but not accepted by it.”*

The case of ***Muhammad Bashir*** (supra) was followed by the august Supreme Court of Pakistan in the cases of “***Bashir Ahmad Vs. Ghulam Rasool***” (2011 SCMR 762) and “***Allah Ditta Vs. Muhammad Anar***” (2013 SCMR 866).

14. The upshot of the above discussion is that I find no illegality, irregularity or jurisdictional defect in the concurrent findings of the Courts below, therefore, the same are upheld and the revision petition in hand being bereft of merit is dismissed in *limine*.

*Announced.*

*Dt: 18.01.2018.*

**J U D G E**