IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Civil Revision No.52-P/2015

Noor-ul-Basar s/o Sadeequllah,
r/o Mohallah Kajhor Masjid,
Village Nabi Tehsil Lahore,
DistrictSwabi.

Petitioner

Versus

Sher Ali Shah s/o Rahim Ullah,
r/o Nabi Tehsil Lahor,
District Swabi.

Respondent

For Petitioner :- Mr. Muhammad Ayaz Majid, Advocate.

For Respondent :- Mr. Muzamil Khan, Advocate.

Date of hearing: 30.10.2017

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This revision petition has been filed by petitioner Noor-ul-Basar, against the judgment dated 19.11.2014 of learned Additional District Judge, Lahor, whereby he set-aside the judgment and decree of the learned trial Court/Civil Judge-I, Lahor, dated 28.03.2014 and decreed the pre-emption suit of the Sher Ali Shah respondent-plaintiff.

2. Precisely stated facts forming the background of the instant revision petition are that respondent Sher Ali Shah filed a pre-emption suit against the petitioner qua sale

of 19 Marla land in Khata Nos.346/840, 547/841 bearing Khasra Nos.1395/1, and 1356, situated within the revenue estate of Mauza Nabi Tehsil Lahor, District Swabi, fully described in the heading of the plaint effected through an un-registered sale deed No.344 dated 03.04.2010. Respondent averred in the plaint that when he came to know about the suit sale on 16.05.2011 at 9.00 p.m., at his Hujra, situated in Mohallah Garhai, through one Shah Qasim, in presence of Qari Muhammad Farid, Mir Dadullah and Islam ud Din, he there and then performed Talb-e-Muwathibat, and on 17.05.2011, sent a notice Talb-e-Ishhad to the petitioner and thereby fulfilled the requirement of second mandatory Talab. He claimed superior right of pre-emption on the basis of co-ownership, contiguity and participator in the amenities attached to the suit property.

3. The stance of the respondent, particularly, with regard to performance of the requisite Talbs, was controverted by the petitioner in his written statement. From the divergent pleadings of the parties, issues were framed, in support whereof, the parties adduced their respective evidence. On conclusion of trial, the learned trial Court, dismissed the suit vide judgment dated 28.03.2014, against which respondent filed appeal and the same was allowed, resultantly, the judgment and decree of the trial Court was set aside and suit of the respondent was decreed in his

favour vide judgment dated 19.11.2014, hence, this revision petition.

4. Learned counsel for the petitioner argued that respondent has miserably failed to prove the mandatory Talabs through cogent evidence as required under the law, but the learned Appeal Court by not appreciating the evidence in its true perspective arrived at an erroneous conclusion while granting a pre-emption decree in favour of the respondent, hence, is liable to be set aside.

5. Conversely, learned counsel for the respondent while supporting the impugned judgment sought dismissal of the revision petition.

6. Arguments of learned counsel for the parties heard and record perused with their able assistance.

7. Admittedly, the right of pre-emption is required to be proved strictly in accordance with law through cogent, coherent and trustworthy evidence. In the case in hand, in proof of the first mandatory Talab, respondent Sher Ali Shah while appearing as PW.4, reiterated all the details about the day, date, time, place, and persons in whose presence he declared his intention of pre-emption on getting knowledge about the suit sale through Qasim Shah. He also produced Dilbar Ali and Mir Zadullah, the alleged participators of the "Majlis" in which he performed the jumping demand, but failed to produce Qasim Shah. He being an informer of the suit sale was the most important

witness of the first Talab. Respondent has not furnished any explanation, much less plausible as to why he could not be produced. In the circumstances, presumption would be that had Qasim Shah been produced he might not have supported the stance of the respondent. The fate/effect of non-production of informer in a pre-emption case croped up before the Hon'ble Supreme Court in case, titled, **"Muhammad Mal Khan Vs Allah Yar Khan" (2002 SCMR 235),** wherein one Tayya Khan was the informer of suit sale, who, during trial could not be produced. The Hon'ble Supreme Court held that:-

> "It was also not clarified/explained by the plaintiff in his statement as to why Tayyab Khan could not be produced as it was not stated that he was either won over by the other side or that he had turned hostile towards him for some other reasons or that out of fear of the defendant or for some other consideration the defendant was successful to prevent him to deposed in favour of the plaintiff. Article 129 (g) of Qanun-e-Shahadat reads :-
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> "That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."
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> Therefore, in absence of any explanation by the plaintiff as to why he withheld Tayyab Khan from examining as his witness the legal presumption would be that in case he had been produced then his deposition must have been against him".

Same view has been reiterated by the Hon'ble Supreme Court in case titled, **"Abdul Rehman Vs Haji Ghazan Khan" (2007 SCMR 1491),** in the following words:-

> "A pre-emptor claiming right of pre-emption, as a matter of prudence, ought to seek corroboration to satisfy reasonably the judicial mind of the Court that Talb-i-Mwathibat was made by him enabling him to make the other demand (Talb-i-Ishhad). In this case, failure to put the informer in the witness-box, seen from that angle as well, raises a logical presumption that appellant feared that the witness, if examined, could not stand the test of cross-examination or that the witness would not support him or that his evidence would be against him".

In case titled **"Subhanuddin and others Vs Pir Ghulam" (PLD 2015 Supreme Court 69),** the Hon'ble Supreme Court has held the non-production of informer in a pre-emption suit is a sufficient ground for dismissal of the pre-emptor's suit. For the sake of convenience, the relevant part of the judgment is reproduced below:-

> "It was, the respondent's case that upon his return from Punjab he was informed about the sale by his brother (Taj Ali). Taj Ali, lives in the same house as the respondent, but did not know whether the respondent was in the village when the sale took place, nor when the respondent returned from the Punjab and that he was informed about the sale by his nephew Nazir. The initial burden of proof with regard to these facts (the conveying of the information of sale and price) lay upon the respondent, and to establish the same Nazir could have been called to give evidence, as the evidence in this regard (which was oral), was required to be direct and of the witness who saw, heard or perceived it himself (Article 71 of the Qanun-e-Shahadat Order, 1984), but Nazir was not produced as a witness. Consequently, an important and relevant fact was not proved by the respondent and on this ground alone the suit merited dismissal as Talb-i-Muwathibat is required to be made immediately upon learning of the sale."

8. Placing reliance and driving guidance from the judgments (supra) of the august apex Court, I am firm in my view to hold that respondent has failed to prove Talb-i-Muwathibat in accordance with law.

9. As regards Talb-i-Ishhad, respondent in his plaint has alleged that after making Talb-i-Muwathibat on 16.05.2011, on the very next date i.e. 17.05.2011, he sent notice of Talb-e-Ishaad duly signed/attested by witnesses, to petitioner through registered post along with AD Card and thereby fulfilled the requirement of second mandatory Talab. It is evident from the statement of Aziz ur Rehman Postman (PW.2), that notice Talb-i-Ishhad had not been personally served upon petitioner rather the same had been allegedly handed over to the cousin of the petitioner. To substantiate the plea of effecting service of notice Talb-e-Ishhad upon the petitioner, the Postman has produced receipt No.1525, however, admitted that the said receipt does not bear the name of cousin of the petitioner. A look over aforesaid receipt reveals that it bears a signature in English, but without mentioning any name, parentage and CNIC of the receiver. Who was the receiver of notice Talb-e-Ishhad remained a shrouded mystery as neither the alleged cousin has been produced in the witness box by the respondent nor an iota of evidence has been led to prove the said signature to be that of the cousin of the petitioner. Besides, although the receipt No.1525 bears the date as

17.05 but does not contain any year. On thorough analysis of the stamp affixed on the receipt would depict that the same has been stamped in the year 2010, while the notice Talb-i-Ishhad, has been allegedly sent in the year 2011. In this way, the said receipt contradicts the stance of the respondent. The statement of Sher Ali Khan pre-emptor will create further doubt regarding the genuineness of receipt No.1525, as according to him, he after scribing the notice Talb-i-Ishhad through Petition-writer, wrapped it in an envelop and took it to the Post-Office Manki, where he was directed to post the same from a Post-Office in Tehsil Nabi. Consequently, he proceeded there and handed over the notice to one Subedar, the Incharge of the said Post Office. In addition to above, the alleged AD Card neither bears any stamp or any Post-Office nor the name of the recipient. For the sake of arguments, if the service of notice Talb-i-Ishaad upon the petitioner is admitted, even then it bears Khata Nos. 546/541, 547/542, Khasra No.1395/1 and 1396/1, which are different from the one mentioned in the plaint, as according to the plaint a sale of 19 Marla land has been shown in Khata Nos.346/840, 547/841, bearing Khasra Nos.1395/1, and 1356. No explanation has been furnished by the respondent in this regard either in the plaint or in his statement. In this view of the matter, the notice Talb-i-Ishhad pertaining to different Khata and Khasra numbers, would not be sufficient to prove the

second talab rather would nullify the performance of Talb-e-Khasumat.

10. It is settled law that for exercise of right of pre-emption, the proof of superior right of pre-emption, performance of Talb-e-Muwathibat and then Talb-e-Ishhad, in their respective chronological order, are sine quan none. If the case of the pre-emptor is deficient of any one of these legal requirements, his suit is bound to fail. As per the dictum laid down by the Hon'ble Supreme Court in **Mian Pir Muhammad's case (PLD 2007 SC 302),** mere mentioning of details of Talabs in the plaint would not be sufficient unless the same are proved through cogent and confidence inspiring evidence during trial. Since, the respondent has failed to prove the mandatory talabs, therefore, even if he has proved the superior right of pre-emption, the same would not entitle him to a decree for possession through pre-emption. In this view of the matter, there is no need to dilate upon the superior right of pre-emption in light of the evidence available on record.

11. For what has been discussed above, the learned Appellate Court has squarely over looked the evidence and the law on the subject and thereby landed in the field of error by decreeing the suit of the respondent. Accordingly, this revision petition is allowed. The impugned judgment of the learned Appellate Court dated 19.11.2014 is hereby set aside and that of the learned Trial Court dated 28.03.2014 is

restored. Resultantly, the suit of the respondent/ pre-emptor is dismissed. No order as to costs.

Announced:
30.10.2017
Siraj Afridi P.S.

JUDGE

S.B. *Mr. Justice Rooh-ul-Amin Khan.*