

**PESHAWAR HIGH COURT, PESHAWAR**

**ORDER SHEET**

<b>Date of Order of Proceedings</b>	<b>Order or other Proceedings with Signature of Judge.</b>
1	2
05.05.2017	<p data-bbox="573 612 1105 653"><b><u>W.P. No.1510-P/2017 with I.R.</u></b></p> <p data-bbox="573 701 1485 787">Present: Mr. Muhammad Amin Khattak Lachi, Advocate for the petitioners.</p> <p data-bbox="1003 881 1052 903" style="text-align: center;">***</p> <p data-bbox="573 970 1485 1365"><b><u>MUHAMMAD GHAZANFAR KHAN, J.-</u></b> Through the instant writ petition, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners Alam Sher, Naseer and Wali-Ullah, have made the following prayer: -</p> <p data-bbox="784 1413 1421 1534" style="padding-left: 40px;">"It is humbly prayed that this Hon'ble Court may graciously be pleased to :</p> <p data-bbox="784 1583 1421 1870" style="padding-left: 40px;"><b>Set Aside</b>, the impugned orders dated 06.04.2016 of learned trial Court/Civil Judge-VI, Swabi and dated 14.02.2017 of learned District Judge, Swabi.</p> <p data-bbox="784 1919 1295 1959" style="padding-left: 40px;"><b>Reject</b> the plaint/dismiss the suit.</p> <p data-bbox="784 2007 1421 2206" style="padding-left: 40px;"><b>Any</b> other relief deemed appropriate in the circumstances, not specifically for, may also be given to the petitioners".</p> <p data-bbox="573 2255 1485 2376">2. Brief facts of the case are that respondent No.1 filed a suit for possession through right of pre-</p>

emption against the petitioners before the learned Civil Judge, Swabi. The petitioners appeared before the trial Court and submitted application under Order VII Rule 11 CPC, which was contested by the pre-emptor by filing written reply. During pendency, the pre-emptor died after his death, the petitioners in addition to application under Order VII Rule 11 CPC filed another application by informing that the pre-emptor has died and the proceedings in the suit would be wastage of time. After hearing both the parties over maintainability of suit in the event of death of pre-emptor, the learned trial Court dismissed the application filed by the petitioners vide order dated 06.04.2016. The said order was assailed by the petitioners before the learned District Judge, Swabi through a Civil Revision, but the same was also dismissed vide order dated 14.02.2017. Hence this writ petition.

3. Learned counsel for the petitioner was heard at length and record perused with his valuable assistance.

4. The learned counsel for the petitioner argued that as it has been held in numerous rulings by the apex Court and Hon'ble High Courts that the right of pre-emption is not a heritable right. That both the

Courts below passed the judgment without adherence to the question formulated and decided by the apex Court and the High Court. He relied upon case laws reported in 2012 SCMR 1185, PLD 1988 SC 384, 2007 SCMR 1478, 1989 SCMR 69, PLD 2010 SC 1048, PLD 1990 SC 1043 and 2015 MLD 1589 on the basis of above judgments of the apex Court and High Courts, he solicited for acceptance of his application moved by him before the learned trial Court for rejection of plaint under Order 7 Rule 11 Civil Procedure Code 1908 ( Act V of 1908) as his case was covered under the dictum laid down in the above said rulings.

5. I have gone through the record and have perused the law on the subject carefully.

6. The controversy between the parties is that whether the right of pre-emption is a heritable right or otherwise to resolve this question, I will seek guidance from the law promulgated for the purpose i.e. NWFP Pre-emption Act 1987 (now Khyber Pakhtunkhwa Pre-emption Act 1987). Section 16 of the Act *ibid* reads **“DEATH OF PRE-EMPTOR. Where a pre-emptor has died after making any of demands under Section 13, his right of pre-emption shall stand transferred to his legal heirs”**. This Section of Law clearly indicates that if a pre-emptor dies after making any of the demands mentioned

under Section 13 of Khyber Pakhtunkhwa Pre-emption Act, 1987, his right of pre-emption shall stand transferred/devolved to his Legal heirs.

7. In the instant case, according to the mandate of Section 13, the pre-emptor after performing the 3<sup>rd</sup> Talab i.e. Talab Muwatibat has died. So his right of pre-emption according to mandate of Section 16 ibid has rightly been devolved upon his Legal heirs.

8. The learned counsel for the petitioner has firstly relied upon, 2012 SCMR 1185 para No.6 of which reads **“we have considered the submissions of the learned counsel for the parties and have gone through the record as well as the law referred to above. It is admitted at all ends that the suit in hand having been filed on 05.12.1978, was squarely covered by the provisions of the Punjab Pre-emption Act, 1913 and that such Act did not contain any specific provision providing for the succession of the right of pre-emption during the pendency of the pre-emption suit by the legal heirs of deceased pre-emptor and that a provision to this effect was for the first time introduced by virtue of Section 16 in the Punjab Pre-emption Act, 1991 and such provision in the present case has no application. In view of such statutory law on the subject, we necessarily have to answer the question by referring to the cases relied by the parties and which have been referred to above”**.

9. Perusal of above referred para clearly indicates that the suit in the above referred case was instituted under Punjab Pre-emption Act, 1913 where no specific provisions was available in that Act regarding fate of a pre-emption suit, during pendency of which the pre-emptor dies.

10. Now coming to the very first judgment relied upon by the learned counsel for the petitioner i.e. PLD 1988 SC 384, this judgment was rendered under NWFP Pre-emption Act (XIV of 1950). Definitely, there was no provision in the Act ibid like Section 16 of the present Pre-emption Act. Similar is the position of the case reported in 1989 SCMR 69 wherein the reliance was placed upon PLD 1988 SC 384 in none of the above judgments, Section 16 of the Act ibid was either discussed or decided. PLD 1990 SC 1043 deals with a different preposition as according to their lordships view any question regarding succession, inheritance, pre-emption etc in Balochistan has to be decided in accordance with the Muslim Law where the parties are muslims. Definitely even today there is no law regarding pre-emption in the province of Balochistan and cases over there regarding pre-emption, succession and inheritance are decided in accord with Customs and Mohammedan Law, so the

mandate of this judgment seldom attracts in the present case.

11. Case law, reported in 2007 SCMR 1478 and PLD 2010 SC-1047 have also decided the cases relating to the Punjab Pre-emption Act, 1913.

12. Now coming to the judgment of this Court, passed in 2015 MLD 1589. Perusal of this judgment shows that this judgment was passed while relying upon the judgment passed by apex Court in above referred cases, so this judgment seems to be result of unqualitative assistance as in this Judgment Section 5 and 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987 was discussed but the controversy between the parties squarely was about Section 16 of the Khyber Pakhtunkhwa Pre-emption Act, 1987, which finds no mention in above said judgment.

13. I am afraid that an agreement with the submission made by the learned counsel for the petitioner at the bar would be a clear deviation from the codified law and it is not the mandate of judiciary to amend the law rather duty of the judiciary is to interpret and explain the law.

14. The Judgments passed by the Courts below are well within the frame work of law and they have properly appreciated and have properly

interpreted the mandate of Section 16 of Khyber Pakhtunkhwa Pre-emption Act, 1987.

15. Consequent upon what has been discussed above, this petition is bereft of any merit, is dismissed in limine.

**Announced.  
05.05.2017.**

**J U D G E**