

**From No:HCJD/C-121**  
**ORDER SHEET**  
**IN THE LAHORE HIGH COURT, RAWALPINDI BENCH, RAWALPINDI**  
**JUDICIAL DEPARTMENT**

**Case No.** Civil Revision No.94/2012.

Amir Khan

Muhammad Taj

<b>S. No. of order/ Proceeding</b>	<b>Date of order/ Proceeding</b>	<b>Order with signature of Judge, and that of Parties or Counsel, where necessary.</b>
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04.10.2016	Raja Maqbool Hussain, Advocate for the petitioner. Raja Muhammad Tariq Khan, Advocate for the respondents.
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This revision petition calls-in-question the concurrent findings of fact recorded by both the learned Courts below, whereby the suit and appeal, filed by the petitioner were dismissed vide judgments & decrees dated 30.09.2010 and 0.10.2011, respectively.

2. The facts relevant for disposal of this revision petition are that the petitioner instituted a suit for possession through pre-emption regarding land, described in the plaint, for a consideration of Rs.1,98,000/- through mutation No.404 dated 10.12.2004 with the assertion that he had a superior right and performed Talbs in accordance with law. The suit was contended by the respondent by filing written statement where he by alleging that the Talbs were not performed as required by law controverted the factual position of the case. Accordingly issues were framed and parties led their evidence on issues. The learned trial Court after recording evidence of the parties, dismissed petitioner's suit on the ground that the petitioner failed to prove his superior right whereas the finding on issue No.7 regarding Talbs is silent as he reached on the conclusion

that the issue has become redundant on account of deficiency in evidence qua superior right of the plaintiff. Consequently, the petitioner preferred appeal which stood dismissed not only on the ground that the petitioner had no preferential right but also on account of non-production of Postman so as to prove Talb-i-Ishhad; hence, this revision petition.

3. The learned counsel for the petitioner contends that during pendency of the suit, at the time of filing list of witnesses, he specifically incorporated Postman and Record Keeper alongwith record, to be summoned through Court and at initial stage of recording evidence, the learned trial Court on account of deposit of expenses incurred on summoning of official witnesses i.e. Postman and Record Keeper, issued summons to them and this fact is reflecting from the interim orders of the learned trial Court, however, during this process the petitioner also produced the other evidence and on its conclusion, his counsel made the statement for closing oral evidence. Adds that it was the prime duty of the learned trial Court where he submitted the list of witnesses, to summon the Postman and on account of whose absence, the petitioner could not be non-suited, and it is also matter of record that after making statement of closing evidence, the petitioner filed an application for summoning of witnesses mentioned in list of witnesses but the learned trial Court dismissed that application without any legal justification that after closing of evidence, the petitioner has no right to file this application. It is also added that the learned trial Court in the ultimate although dismissed the suit of the petitioner on the ground of lack of superior right but no finding was recorded on issue No.7 qua Talbs except declaring it redundant, therefore, the petitioner could not take any ground in the memo of appeal regarding rejection of his application for summoning of Postman and Record Keeper alongwith record whereas in appeal the learned first Appellate Court not only dismissed his suit on account of lack of superior

right but also declared the deficiency in evidence with regard to performance of *Talb-i-Ishhad* in accordance with law, as the Postman was not produced, which was essential to prove the factum of *Talb-i-Ishhad*. Therefore, he filed this revision petition taking all the grounds including seeking permission to produce the Postman to substantiate his contention regarding performance of said Talb.

On the other hand, learned counsel for the respondent contends that the petitioner has not taken any ground in memo of appeal before the learned District Judge regarding rejection of his application for production of additional evidence of Postman and Record Keeper, therefore, at this stage, he has no right to claim that his application for production-summoning of Postman and Record Keeper was dismissed without any legal justification and to this extent his right has become time barred which amounts to waive his right, thus, at this stage, he cannot be permitted to fill-up the lacunas. On merits, he submits that the learned Courts below had concurrently reached on the conclusion with regard to deficiency of evidence led by the petitioner to prove his superior right, therefore, the petitioner has no superior right to pre-empt the suit land purchased by the respondent.

4. I have heard the learned counsel for the parties and examined record of the case.

5. It is true that petitioner's application for summoning-production of Postman and Record Keeper alongwith record was dismissed without any legal justification by the learned trial Court despite the fact that the petitioner specifically incorporated the names of Postman and Record Keeper alongwith record in the list of witnesses, to be summoned through Court and on many occasions the Court ordered about their summoning but for unknown reasons the orders had not been complied with. Learned counsel after producing the other witnesses inadvertently made the statement for closing of

evidence. Even if it had been a mistake of the counsel, the Court had to perform its duty when specifically, in list of witnesses, the names of witnesses were incorporated, who had been summoned through the Court and for that purpose, the petitioner had deposited the expenses for service of those witnesses on direction of the Court. This mistake is clearly attributed to the Court and the petitioner alone is not the contributory, therefore, that application ought to have been allowed and the witnesses mentioned in the list of reliance through Court should have been summoned by the learned trial Court. This patent illegality and irregularity is floating on the surface of record. Although it was the duty of the petitioner to take a specific ground in the memo of appeal regarding rejection of his application for summoning of the official witnesses through Court but here on the issue of Talbs, no finding had been recorded by the learned trial Court, therefore, the petitioner had not attacked on this particular issue and generally mentioned in his grounds of appeal that judgment of the learned trial Court is illegal and unlawful.

In a case reported as Mst.Khurshid Begum and others vs. Ahmad Bakhsh and others (PLD 1985 Supreme Court 405) and Muhammad Bashir vs. Muhammad Hussain and 16 others (2009 SCMR 1256), it was held that it is not necessary to challenge every interim order in ground of appeal but entire case including interim orders are reopened at the time of hearing the appeal. In the latter judgment, it was held:-

“...”on the filing of an appeal the entire matter becomes re-open and sub judice and has to be decided in accordance with law prevalent”. In this view of the matter even if, a ground raised and not pressed which relates to fundamental question can be considered by the Court. Reference can conveniently be made to Abdul Hameed and others v. Muzamil Haq and others 2005 SCMR 895.”

In Mst. Khurshid Begum's case (PLD 1985 Supreme Court 405), it has been held that:

“When an appeal is filed against ultimate decision, whole case including all interim orders passed in the case get reopened and can be challenged before Court of appeal hearing the appeal filed against final decision whereby suit was ultimately disposed of.”

Even otherwise, Order XLI rule 33, C.P.C. empowers the Appellate Court to do complete justice while hearing the appeal. To sum-up, the Appellate Court has been given full authority to examine each and every interim order as well as all proceedings conducted by the learned trial Court, as it is settled law that appeal is continuation of suit. Probably, the learned lower Appellate Court, keeping in view said settled law, not only dismissed petitioner's appeal on the basis of lack of superior right but also reached on the conclusion that the petitioner failed to perform the Talbs in accordance with law, as the evidence of Postman is missing, which is necessary to prove the factum of *Talb-i-Ishhad* as held by the honourable Supreme Court in Allah Ditta through L.Rs. and others vs. Muhammad Anar (2013 SCMR 866) and Muhammad Bashir and others vs. Abbas Ali Shah (2007 SCMR 1105). Even otherwise, there was no other mechanism to examine the findings of the learned trial Court, which is silent on issue No.7 regarding Talbs. It is astonishing for this Court that the basic and essential question-issue was with regard to performance of Talbs. Even the pre-emptor, who could not succeed to prove his superior right failed to prove performance of Talbs. Before examining the record with regard to superior right, the performance of Talbs must have been determined first. If any pre-emptor failed to fulfill that requirement of law, there is no need to further go behind merits of the case as the plaint could have been rejected on account of non-incorporation of three essential ingredients of *Talb-i-Muwathibat*. Likewise, if *Talb-i-Ishhad* has not been proved on record to have been performed in accordance with law, same has

also been declared by the apex Court a sufficient ground for dismissal of the suit.

Adverting to the question in-hand, I am of the view that the learned first Appellate Court has to examine the case in this background and the decision taken by the learned trial Court with regard to additional evidence should have been adjudicated by the learned first Appellate Court. Therefore, I am of the convinced view that this glaring illegality and irregularity is sufficient to remand this case with permission to the petitioner to produce the Postman and Record Keeper alongwith record. However, since both the learned Courts below have dismissed the suit as well as appeal, therefore, even I deem it appropriate to examine this aspect of the case and the conclusion drawn by the learned Courts below, if found contrary to the record, then it would have been a futile exercise, as the petitioner could not get the relief in the shape of decreeing his suit. Accordingly I have examined the record with able assistance of learned counsel for the parties and do not find any illegality in the judgments of both the Courts below, as the petitioner has failed to refer to any evidence available on record, which established this fact that the petitioner was the owner of any inch of land in the same khasra number wherefrom the respondent had purchased the land and on the basis of this deficiency of evidence, the learned Courts below reached on the conclusion that the petitioner has no preferential right, therefore, instead of remanding this case for recording of evidence of Postman and Record Keeper, I **dismiss** it on account of deficiency of superior right of the petitioner. No order as to costs.

(MUHAMMAD AMEER BHATTI)  
JUDGE.

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