

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

JUDGMENT

Case No. C.R. No.1953/2011

Muhammad Inayat
 Versus
Muhammad Inayat (deceased) through LR's.

Date of hearing: 07.06.2016.

Petitioner by: Qazi Zia Zahid, Advocate.
Respondents by: Mr. Umair Khan Niazi, Advocate.

Muhammad Ameer Bhatti, J. Through this petition, the petitioner has assailed the legality and validity of judgment and decree dated 18.03.2011 passed by the learned Addl. District Judge, Phalia, whereby the appeal filed by the petitioner was dismissed by maintaining the judgment and decree dated 22.04.2010 rendered by the learned Civil Judge, Phalia.

2. At the very out-set, learned counsel for petitioner when confronted that postman was not produced to prove the factum of *Talb-i-Ishhad*, which was sine qua non according to the law laid down by Hon'ble Supreme Court of Pakistan in a case reported as *Allah Ditta through L.Rs and others Vs Muhammad Anar (2013 SCMR 866)*, he tried to wriggle-out the situation by contending that the petitioner has tendered acknowledgement receipts in evidence, which are available on record as Exh.P.7 to Exh.P.9 and were exhibited without any objection from the other side, hence there was no need to produce the postman in order to prove the factum of *Talb-i-Ishhad*, as respondents have never objected qua admissibility of said documents nor they had challenged their signatures obtained by the postman delivering envelope carrying notice of *Talb-i-*

Ishhad. He further relied on the testimony of DW-1, where he admitted receiving of usual mails at the address mentioned/incorporated by the plaintiff in the acknowledgment due. Adds that petitioner took specific stand in Para No.4 of plaint qua performance of *Talb-i-Muwathibat* and *Talb-i-Ishhad*, which had not been denied in clear manner by respondents, hence in the light of above circumstances, there was no occasion with the plaintiff that he must have produced the postman to prove the service of respondents/defendants with regard to performance of *Talb-i-Ishhad*, which stood proved on account of implied admission of the respondents reflecting from their written statement as well as testimony, hence the petitioner could not be non-suited merely on the ground that he had not produced the postman for recording of his testimony to prove the factum of notice of *Talb-i-Ishhad*.

3. I have heard the learned counsel for the parties and examined the record as well with their able assistance. There is no substance in the argument of the learned counsel for the petitioner regarding the lapses committed by the respondent/defendant with regard to non-mentioning of specific denial of the service of the notice, even if it is accepted to be true yet it does not absolve the petitioner of his obligation, who in view of the verdict laid down by the apex Court, was bound to prove the factum of service of notice by leading affirmative evidence. Taking into account the significance of the word affirmative, no room is left for plaintiff in a pre-emption suit to take advantage of any deficiency/lapses occurred on the part of the defendant. It is expedient to reproduce the relevant portion of the case-law, referred supra, as under:-

“The argument of the respondent’s side that the attorney of the petitioner while appearing as D.W.1 has admitted the receipt of the notice and, therefore, the respondent-plaintiff was not obliged to prove the same, suffice it to say that the affirmative onus to prove *Talb-i-Ishhad* was on the plaintiff and as the petitioner had denied the factum in the written statement, therefore, notwithstanding any subsequent admission of the defendant’s attorney, it was obligatory on the plaintiff-pre-emptor to have proved the sending of the notice by leading affirmative evidence, which undoubtedly required the

evidence i.e. production of the postman for recording his testimony to prove the factum of service of notice of *Talb-i-Ishhad*, which was sine qua non as held by Hon'ble Supreme Court of Pakistan having the binding force in view of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, floating on the surface of record is suitably fatal for grant of decree in a suit for pre-emption. Thus the superior right of the petitioner stood extinguished. Resultantly, this petition has no merits and hereby **dismissed**. No order as to costs.

(Muhammad Ameer Bhatti)
Judge.

*Nadeem**