JUDGMENT SHEET

IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.

JUDICIAL DEPARTMENT.

Civil Rivision No.159-D of 2006

Muhammad Ramzan deceased through his legal heirs. **Vs.** **Atta Muhammad etc.**

JUDGMENT.

Date of Hearing	08.03.2017.
Petitioner by	Mr. Ghias Ul Haque, Advocate
Respondents by	Malik Muhammad Naeem Iqbal, Advocate

HABIB ULLAH AMIR, J:- Feeling aggrieved, Muhammad Ramzan, the predecessor-in-interest of petitioners has assailed judgment and decree dated 26.01.2006, of learned Additional District Judge, D.G. Khan, whereby appeal of respondents Atta Muhammad etc. was accepted and by setting aside judgment and decree of learned Civil Judge, D.G. Khan dated 29.09.2005 suit for possession through pre-emption of respondents has been decreed.

2. Succinctly, facts giving rise to instant civil revision are that respondents instituted suit for possession through pre-emption in respect to property vividly described in caption of suit in the Court of learned Civil Judge, D.G. Khan which was controverted by Muhammad Ramzan predecessor-in-interest of petitioners and the learned Civil Judge after framing issues directed parties to lead evidence and after hearing parties dismissed the suit. Feeling aggrieved, respondents preferred appeal which was heard by learned Additional District Judge, D.G. Khan who accepted the same while setting aside judgment

and decree of learned Civil Judge and decreed suit for possession through pre-emption. Hence, this civil revision.

3. Learned counsel for petitioners has vehemently argued that judgment and decree of the learned Additional District Judge is against law and facts of case and he did not apply sagacious independent judicious mind towards actual and factual aspects of case and it has failed to appreciate that plaintiffs had failed to produce evidence to prove requirements of requisite Talbs including registry clerk, scribe of notice of Talb-e-Ishhad as well as postman who were not produced in trial before the learned Civil Judge, hence finding of learned Additional District Judge are outcome of misreading and non-reading of evidence which has caused grave injustice and prayed for acceptance of this civil revision.

4. On the other hand, this civil revision is controverted by learned counsel for respondents.

5. Arguments of learned counsel for parties have been heard at length and available record has minutely been scanned.

6. The plaintiffs Atta Muhammad and Yar Muhammad have averred in suit that property in dispute was purchased by Muhammad Ramzan, defendant from Jan Muhammad etc. without knowledge of plaintiffs in consideration Rs:1,00,000/- but fictitious price i.e. Rs:2,00,000/- was mentioned in mutation No.1561 attested on 21.06.2002, however, no notice in respect to sale was given to plaintiffs despite the fact that they are Shafi-e-Shareek, and Shafi-e-Jar having preferential right of pre-emption while on 25.06.2002 at 07:00 A.M. they came into

knowledge of sale at their house situated at Mauza Kot Daud from Muhammad Asghar and on coming into knowledge of sale they exercised their right of pre-emption, whereafter notice of Talb-e-Ishhad, duly attested by witnesses, was dispatched to defendant on 27.06.2002; that defendant was time and again requested to receive Rs:1,00,000/- and to transfer property in their favour but he refused and thus, they were constrained to institute suit. The suit was controverted by defendant on different grounds including that property in dispute was purchased by him for Rs:2,00,000/- and in addition he had to bear Rs:18,000/-, moreover, he did not receive any notice from the side of plaintiffs while plaintiffs were well in knowledge of transaction being close relatives of sellers. Whereafter, out of divergent pleadings of the parties, following issues were framed by the learned Civil Judge, D.G. Khan:-

ISSUES.

1. ***Whether the plaintiff has no cause of action to file this suit and the estopped by word and conduct? OPD***
2. ***Whether the suit is insufficiently stamped for the purpose of court fees and jurisdiction? OPD***
3. ***Whether the plaintiff has fulfilled the requirement of Talabs according to section 13 of Punjab Pre-emption Act, 1991? OPP***
4. ***Whether the plaintiff has superior right of pre-emption qua the defendant? OPP***
5. ***Whether the actual sale price of the suit property is one lac instead of two lacs? OPP***
6. ***Whether the plaintiff is entitled to get the decree of possession through pre-emption as prayed for ? OPP***
7. ***Relief.***

7. According to Section 2 (c) of Punjab Pre-emption Act, 1991 right of pre-emption means a right to acquire by

purchase of immoveable property in preference to other persons by reason of such right and Section 13 of the Act Ibid has provided that the right of pre-emption of a person shall be extinguished unless such person makes demands of pre-emption in following orders, namely:-

(a) Talb-i-Muwathibat;
(b) Talb-i-Ishhad; and
(c) Talb-i-Khasumat;

8. Section 13 of Punjab Pre-emption Act, 1991 provides that Talb-i-Muwathibat means immediate demand by a pre-emptor in the sitting or meeting *(Majlis)* in which he has come to know of the sale, declaring his intention to exercise the right of pre-emption. When fact of sale comes within knowledge of pre-emptor through any source he should make Talb-i-Muwathibat and it is bounden duty of plaintiff to give proper detail in respect to the time, date, place and the names of witnesses in whose presence he comes into knowledge the transaction of sale and the averments of suit of plaintiffs have minutely been perused wherein it has been averred that on 25.06.2002 at 07:00 A.M. when the plaintiffs were at their house situated at Mouza Kot Daud they received information about sale through Muhammad Asghar, however, no name of any witness has been mentioned in the plaint in whose presence plaintiffs made jumping demand and once members of same *Majlis* appears in witness box and depose that in their presence, the plaintiffs made jumping demand, their names would have been mentioned by plaintiffs in suit.

9. Talb-i-Muwathibat is first demand through which a pre-emptor on coming to know about sale immediately declares his intention to exercise right of pre-emption and Talb-i-Muwathibat being jumping talab should be made right at that moment when plaintiffs comes to know of sale transaction which he intends to pre-empt. In this case, in support of the version of plaintiffs that on 25.06.2002 at about 07:00 A.M. plaintiffs received information about sale of land in dispute and that they performed requirements of Talabs as PW-1 Atta Muhammad has deposed that on 25.06.2002 at about 07:00 A.M. he was sitting at his Bethak alongwith Haji Yar Muhammad and Wahid Bakhsh, where Muhammad Asghar came and informed that the property in dispute was sold for consideration of Rs:1,00,000/- and on hearing this, in presence of witnesses, he made jumping demand and alongwith him Haji Yar Muhammad also made jumping demand and in his support PW-2 Muhammad Asghar has deposed that on 25.06.2002 he received information about sale transaction from a person at Fajar time at workshop whereafter, he went to plaintiffs where Atta Muhammad and Yar Muhammad were present alongwith Wahid Bakhsh and he informed them about sale transaction and on hearing this both the plaintiffs stood up and they made jumping demand while PW-3 has deposed that on 25.06.2002 they were sitting at the place of Haji Atta Muhammad and Yar Muhammad at 07:00 A.M. where Muhammad Asghar came and informed about the sale of property in dispute and on hearing this, plaintiffs made jumping demand. PW-1 Atta Muhammad has

thoroughly been cross examined by the learned counsel for defendant and he has stated that he alongwith Yar Muhammad made jumping demand together at one time, whereas in examination in chief, he has deposed that firstly he made jumping demand whereafter both the plaintiffs made jumping demand collectively. Informer Muhammad Asghar has not given the detail of place where he informed the plaintiffs about the sale transaction, however, generally he has stated that he went to Atta Muhammad and the plaintiffs were sitting on cots and they were in the compound outside Bethak while in contradiction to this Atta Muhammad PW-1 has stated that he was sitting in his Bethak alongwith witnesses.

10. It has been laid down in judgment reported as ***"Allah Ditta through L.Rs and others Vs. Muhammad Anar"*** **(2013 SCMR 866)** that discrepancy in respect to place where plaintiffs received information about sale transaction is fatal to the plaintiffs and the relevant paragraph of judgment is reproduced as under;-

> ***"---S. 13---Suit for pre-emption---Talb-i-Muwathibat, witnesses of---"Material discrepancy" in statements of witnesses regarding place where pre-emptor got knowledge of sale of suit land---Effect---Witnesses appearing on behalf of pre-emptor stated that disclosure of sale of suit land was made when pre-emptor was sitting inside a shop, whereas the informer (son of pre-emptor) stated in his evidence that they were sitting outside the shop---Such discrepancy was a "material discrepancy"---Appeal was allowed and suit for pre-emption stood dismissed in circumstances."***

11. In this case there is discrepancy in the evidence of plaintiffs in respect to the place where the plaintiffs received

information as the informer has not mentioned the place where he gave information to the plaintiffs in respect to sale transaction and similarly, PW-1 has deposed that he was sitting in Bethak alongwith witnesses when he received information and at the same time it is deposed by PW-3 that plaintiffs were sitting in Bethak of his house. Muhammad Asghar is informer of this case who has appeared in the witness box as PW-2 and he has deposed that he was in workshop where one Ghulam Farid brought into his knowledge sale transaction, whereafter he went to Atta Muhammad and gave him information about sale transaction. In this regard, reliance has been placed in case law reported as **"*Subhanuddin and others Vs. Pir Ghulam"* (PLD 2015 Supreme Court 69)** wherein it has been held as under:-

> ***"Burden of proof---Person conveying information of sale and price not produced as witness---Effect---Initial burden of proof with regard to conveying of the information of sale and price lay upon the pre-emptor, who failed to discharge the same---Person who had conveyed information of sale and price to brother of pre-emptor, who in turn passed it onto the pre-emptor, was not produced as a witness---Elements of Talb-i-Muwathibat were thus no proved---Appeal was allowed accordingly and suit for pre-emption was dismissed"***

12. The plaintiffs could not produce Ghulam Farid as witness, who conveyed the information about sale and price of land in dispute to the informer. In regard to this point, evidence of Wahid Bakhsh, PW-3 is also of much importance, who, in cross examination has not denied that he alongwith Yar Muhammad and Atta Muhammad, plaintiffs was sitting in Bethak and that in one or two minutes, the plaintiffs made jumping demand and this piece of evidence is in contradiction to

the stance of plaintiffs that they made jumping demand soon after coming into knowledge of sale transaction.

13. It has been provided in Section 13(3) of Punjab Pre-emption Act, 1991 that where a pre-emptor has made Talb-i-Muwathibat under sub-section 2 of Section 13 of the Act Ibid he shall as soon thereafter as possible but not later than two weeks from the date of knowledge 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. The plaintiffs in suit have averred that on 27.06.2002 they dispatched notice of Talb-i-Ishhad to the defendant which was duly attested by truthful witnesses, however under the law mere sending of notice of Talb-i-Ishhad by pre-emptor is not sufficient and acknowledgment due slip must be signed by the vendee and not any other person and it is now the settled principle of law laid down through case law reported as ***"Allah Ditta through L.Rs and others Vs. Muhammad Anar"*** **(2013 SCMR 866)** that:-

> ***"Affirmative onus to prove the receipt of notice of Talb-i-Ishhad was on the pre-emptor, therefore, notwithstanding any admission of the attorney of the vendee, it was obligatory on the pre-emptor to have proved the sending of notice by leading affirmative evidence, which undoubtedly required the production and examination of the postman"***

14. The law undoubtedly requires production and examination of postman, however, in this case postman has not been produced by the plaintiffs to prove the factum of sending of notice to defendant and its receipt, moreover, the defendant in this case has seriously controverted that he had received notice

of Talb-i-Ishahd and non-production of postman alongwith record is fatal for plaintiffs. Reliance is placed on case law reported as ***"Khan Muhammad and another Vs. Muhammad Aam through L.Rs. and others"*** **(2014 CLC 438),** ***"Muhammad Bashir and others Vs. Abbas Ali Shah"*** **(2007 SCMR 1105),** ***"Muhammad Yousaf Khan Vs Khan Sardar and others"*** **(PLD 2001 Peshawar 40) and** ***"Muhammad Ramzan Vs. Muhammad Tariq"*** **(2016 CLC 1236).**

15. In this case no affirmative evidence has been produced by the plaintiffs to establish that notice of Talb-i-Ishhad was dispatched to the defendant or received by him. Moreover, no acknowledgment due or receipt with such envelope is available on record. This all depicts that no notice of Talb-i-Ishhad was given by the plaintiffs to the defendant.

16. The PW-1 has deposed that on 26.06.2002 he went to office of Sardar Yousaf Khan, Advocate alongwith Yar Muhammad, Muhammad Asghar and Wahid Bakhsh and notice Exh.P-1 was signed by him and PW-1 has also deposed that notice was written by Advocate and again said that he did not remember that notices were got signed or thumb marked by the Advocate or his clerk whereas in contradiction to this, PW-2 Muhammad Asghar has deposed that notice was written by clerk of Advocate and it has also been noted that scribe of notice has not been produced in witness box and PW-1 has himself conceded that the notice was dispatched to the defendant, by clerk of Advocate meaning thereby, plaintiffs had not seen the clerk of counsel while dispatching notice, in such a situation the scribe of notice was necessary to be produced in witness box but he has not been produced in trial. It has been laid down in case

law reported as ***"Muhammad Rafique Vs. Muhammad Shafique and others"*** **(2013 YLR 145)** wherein it has been held as under:-

> ***"The clerk who had written notice of Talb-i-Ishhad was not produced as witness in case, therefore, pre-emptor had not successfully proved Talabs in accordance with law".***

17. Neither the plaintiffs nor their witnesses deposed to the effect that at time of making Talb-i-Ishhad they referred Talb-e-Muwathibat and such omission at the time of performing Talb-i-Ishhad is fatal to the claim of pre-emptors. In respect to this, reliance is placed on judgment reported as ***"Gohar Rasheed and 2 others Vs Abdul Ghanni"*** **(2013 MLD 1252)**, wherein it has been held as under:-

> ***"Pre-emptor had neither referred to his first demand at the time of sending notices for Talb-e-Ishhad to the defendants nor his witnesses to the said notices deposed before the Court that the pre-emptor did refer to his Talb-e-Muwathibat at the time when said notices were scribed in their presence---Pre-emptor thus had not confirmed his Talb-e-Ishhad in accordance with law"***

18. In this case none of witnesses by appearing in the witness box has deposed that at time when notice of Talb-i-Ishhad was being reduced into writing the plaintiff referred to his Talb-i-Muwathibat and similarly none of them deposed before the Court that pre-emptors had referred to their Talb-i-Muwathibat at the time when notice was scribed in their presence by the Advocate or clerk and such omission on the part of plaintiffs is fatal for them. The notice Exh.P-1 has been produced on record which is admittedly a photocopy and though Atta Muhammad has appeared in the witness box but he has simply stated that the plaintiffs were not present at time of sale

and they had no knowledge about sale transaction which was done in consideration of Rs:1,00,000/-. Copy of notice has been brought on record as Exh.P-1 and same was produced under objection, however, in this regard, no application of production of secondary evidence was made by plaintiffs.

19. It has been observed in case law reported as ***"Razia Begum Vs. Abdul Aziz"*** **(2006 CLC 772)** which is as under:-

> ***"Photostat copy was tendered in evidence---Such a private document had to be proved by producing its original and photostat copy was not admissible in evidence---Without bringing on record, original documents and without seeking permission for secondary evidence, notice of Talb-i-Ishhad would not be considered to have been proved, in accordance with law---Defendant having denied the receipt of notice, it was the duty of plaintiff/pre-emptor to prove performance of Talbs which, in absence of proof, could not be presumed true on account of non-raising of objection by defendant to admissibility of photostat copy of notice of Talb-i-Ishhad"***

20. Reliance is placed on case law reported as ***"Munawar Hussain Vs. Sultan Ahmad and another"*** **(2008 SCMR 34)**

21. As discussed above, pre-emptors are not only required to prove the requirements of Talb-i-Muwathibat but also that they are bound to establish requirement of Talb-i-Ishhad by sending a notice in writing attested by two truthful witnesses under registered cover acknowledgment due to the vendee confirming their intention to exercise the right of pre-emption but the evidence produced by plaintiffs has been found with material contradictions and the plaintiffs despite burdened to prove the requirements of Talb-i-Muwathibat and Talb-i-Ishhad have failed to prove the same and once the plaintiffs fail to prove performance of Talbs in accordance with law no decree

for possession through pre-emption can be passed in their favour, however, learned Appellate Court erred in law by decreeing suit in favour of respondents and in view of discussion made above, the instant civil revision is accepted, impugned judgment and decree dated 26.01.2006 passed by learned Additional District Judge is hereby set aside and the judgment and decree dated 29.09.2005 passed by learned Civil Judge by virtue of which suit for possession through pre-emption instituted by respondents was dismissed is restored by leaving parties to bear their own costs.

(Habib Ullah Amir)
Judge

Sadheer