SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE SHAHID WAHEED

Civil Appeal No.795 of 2017

(On appeal against the judgment dated 10.04.2017 passed by the Peshawar High Court, Peshawar in C.R.No.67 of 2010)

Kashmali Khan & others ... Appellants

VERSUS

Mst. Malala

... Respondent(s)

For the Appellants : Mr. Abdul Samad Khan, Sr.ASC
(via video link from Peshawar)

For the Respondent : Mr. Zia-ur-Rehman Khan, ASC
Syed Rifaqat Hussain Shah, AOR

Date of Hearing : 18.05.2023

JUDGMENT

Shahid Waheed, J. The suit out of which this appeal arises is one for pre-emption under the Khyber Pakhtunkhwa Pre-emption Act, 1987. The Court of first instance and, on appeal, the lower Appellate Court had held the plaintiffs, who are now appellants, to be entitled to the right of pre-emption claimed and had given them a decree, but on an application for revision by the defendant, respondent herein, the High Court dismissed the claim, and reversed the decree drawn by the subordinate Courts.

2. The facts are set forth in the judgments of the Courts below. It is unnecessary to recapitulate them. It is, however, sufficient for the disposal of this appeal to state that the plaintiffs' right to pre-empt sale was not questioned; the only matter in dispute was whether they had made, in accordance with the law, the "demands" or "T*albs*", which

are a condition precedent to the exercise of the rights of pre-emption.

3. The land in dispute is 100 kanals and 19 marlas and is situated in Mouza Hisra Barani Payan, Tehsil Tongi. This land was purchased by the defendant for Rs.500,000/- and the sale was incorporated in the revenue record on 1st of March, 2000 under Mutation No.1534 (Ex.PW 4/2). The plaintiffs asserted that although the sale was kept a secret from them, nonetheless, on 5th of June, 2000 they received intelligence about it at 8 a.m. from Ghaffar Ali (PW.5) at their house, and thereupon, they immediately declared their intention to exercise the right of pre-emption, and as such, made *Talb-i-Muwathibat*. After perusing the evidence brought on record, all three Courts are of one mind that the plaintiffs have made and proved *Talb-i-Muwathibat*. Given the circumstances, we do not consider it necessary to examine the matter further and we agree with the findings of the lower Courts to the extent of *Talb-i-Muwathibat*.

4. This brings us to consider that whether the formalities essential for making *Talb-i-Ishhad* were duly observed by the plaintiffs. Before going into that, it is important to mention here that by *Talb-i-Ishhad*, or demand by establishing evidence,[1] is meant the calling of two witnesses by the pre-emptor to attest his making of the first demand (*Talb-i-Muwathibat*) to strengthen his claim for pre-emption. The calling of witnesses is not necessary for the validity of his claim for pre-emption, it is on the other hand, intended to provide the pre-emptor with proof when the vendee denies the demand (*Talb*).[2] This position of law unequivocally suggests that proving the presence of witnesses is one of the material facts, within the contemplation of Order VI CPC, which establishes that the

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[1] Explanation (ii) to sub-Section (1) of Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987

[2] The Muslim Law of Pre-emption with original Arabic text and translation from Kitab-al-Shifa of Fatwa-i-Alamgiri and Fatwa-i-Kazee Khan: By Al-Haj Mahmoed Ullah ibn S. Jung, Law Publishing Company, Lahore, Page 121 & Sarjug Singh and another v. Jagmohan Singh and others [AIR 1919 Patna 496]

essential formalities for making *Talb-i-Ishhad* were observed by the pre-emptor. As such, it was mandatory for the plaintiffs to first state the names of the witnesses for *Talb-i-Ishhad* in their plaint and then prove their attestation by producing them in Court.[3] Keeping this legal obligation in mind, we examined the contents of the plaint to ascertain whether the names of the witnesses of *Talb-i-Ishhad* had been disclosed therein. On perusal, it was found that the plaintiffs had omitted to mention the names of such witnesses in the plaint. The right of pre-emption is but a feeble right. As it disseizes another who has acquired a property in *bona fide* manner for good value, it entails that the ritual of the *Talbs* must be observed to the letters, and any departure, howsoever slight it may be, defeats the right of pre-emption. We, therefore, hold that the aforesaid omission is fatal to the claim proffered by the plaintiffs.

5. On perusal of the record, it is found that the plaintiffs have made some other omissions while making *Talb-i-Ishhad*. According to Islamic jurisprudence, in making the *Talb-i-Ishhad* before witnesses, it is necessary to refer expressly to the fact of the *Talb-i-Muwathibat* having been duly made. Along the same lines, Section 13(3) of the Khyber Pakhtunkhwa Pre-emption Act, 1987 makes it mandatory that pre-emptor while making *Talb-i-Ishhad* by sending a notice in writing attested by two truthful witnesses, under registered cover acknowledgment due to the vendee, shall confirm his intention to exercise the right of pre-emption. It is for this reason that this Court in Muhammad Zahid vs. Muhammad Ali[4] has held that mere signing and sending a notice to the vendee without confirming the intention to exercise the right of pre-emption is not sufficient to found *Talb-i-Ishhad*.

6. Mindful of these requirements of law, we have examined the evidence brought on record. One of the plaintiffs, Kashmali Khan appeared before the Court as

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[3] Dr. Pir Muhammad Khan v. Khuda Buksh [2015 SCMR 1243]
[4] Muhammad Zahid v. Dr. Muhammad Ali [PLD 2014 SC 488]

PW.4. He said in his statement that after making the first demand, he got further information about the disputed sale and on the next day went to Patwar Circle to get a certified copy of mutation (Ex.PW 4/2), where after getting the copy, he went to a lawyer for advice, who asked to bring two witnesses, and then he took the two witnesses with him, and that the lawyer wrote the notice on his instructions. The notice referred to in this statement is not valid, and we will advert to it in the next paragraph, however, it is important to note here that this statement is devoid of material fact and does not expressly state that the plaintiffs had confirmed their intention to exercise their right of pre-emption while sending notices. The same is the status of the statement of both the witnesses. One of the two witnesses of the notice was an informer, namely, Ghaffar Ali (PW.5), and the other was Asrar Ali (PW.6). The statement of both witnesses do not show that the plaintiffs had confirmed their intention to exercise their right of pre-emption while sending the notice of *Talb-i-Ishhad*. Such omission creates doubt as to the making of *Talb-i-Ishhad* and thus the benefit thereof must go to the vendee, and we hold accordingly.[5]

7. We now turn our attention to the notice (Ex.PW 4/3) that the plaintiffs sent to the vendee, ostensibly to satisfy the essential requirements of Section 13 of the Khyber Pakhtunkhwa Pre-emption Act, 1987. The High Court did not hold this notice valid and observed that the absence of the signature of the plaintiffs on it would mean that none of the plaintiffs were present at the time of its writing and thus, making the *Talb-i-Ishhad* doubtful. Is this correct? We are here confronted with this question. We thus examined the notice to verify this fact and, on perusal, it is clear to us that it does not bear the signature or thumb impression of any of the plaintiffs, but the signatures of both the witnesses (i.e. PW.5 and PW.6) and the counsel for the plaintiffs are there. This was something unusual, so we

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[5] Mehmood Alam v. Mushtaq Ahmed and 5 others [2017 Law Notes 238 = 2017 CLC Note 110]

sought an explanation from the learned counsel for the plaintiffs. He referred to Section 14 of the Khyber Pakhtunkhwa Pre-emption Act, 1987 and argued that since the law provides that when a person cannot make a demand himself, then his agent can make the necessary demand on his behalf, and as such, the absence of plaintiffs' signature on notice cannot be construed fatal, and the notice will be treated as if the plaintiffs had made the *Talb-i-Ishhad* through their agent, that is, the lawyer. We are not in any way swayed by this argument.

8. It is true that *Talb-i-Ishhad* can be done by an agent, as provided in Section 14 of the Khyber Pakhtunkhwa Pre-emption Act, 1987. But the context shows that this is only an exception in the case of person who is unable to make the demand personally. The exception cannot supersede the general rule.[6] In the case before us the plaintiffs could not be allowed to avail themselves of this exception as it required them to prove two things: first, what was the disability which prevented them from making the demand themselves?[7] And second, was the agent specifically authorized to do so in explicit terms before making the demand.[8] The evidence brought on record shows that the plaintiffs were not suffering from any disability due to which they could not make a demand on their own. On the contrary, the statement of the plaintiff as PW.4 proves that he himself first made the *Talb-i-Muwathibat* and later he himself went to the lawyer and got written the notice. The same statement of the plaintiff also unfolds that no express authority was given to the lawyer before making the *Talb-i-Ishhad*. It is now well recognized that the right of pre-emption is *strictissimi juris* (strict rule of law) and the slightest deviation from the formalities required by law will prevent its accrual. Thus, the above-stated two deficiencies

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[6] Medni Proshad and others v. Suresh Chandra Tewari and others [AIR 1943 Patna 96]
[7] Abdul Qayyum v. Muhammad Sadiq [2007 SCMR 957]
[8] Unair Ali Khan v. Faiz Rasool [PLD 2013 SC 190]

are quite sufficient to frustrate the plaintiffs' attempt at pre-emption in the present case.

9. As a result, this appeal must fail and it is accordingly dismissed.

Judge

Judge

B-III
Islamabad, the
18.05.2023
"Approved for reporting".
Sarfraz Ahmad & Agha Furqan, L/C/-