

JUDGMENT SHEET

*IN THE PESHAWAR HIGH COURT
ABBOTTABAD BENCH
(Judicial Department)*

C. R No. 364-A/2012

Gul Zaman and others.

(Petitioner)

VS

Mukhtiar Ahmed and another.

(Respondent)

*Present: Mr. Sabtain Nisar Khan, Advocate, for
the petitioners.*

*Sardar Sajjad Mehmood Manal, Advocate,
for respondents.*

Dates of hearing: 22.05.2025

JUDGMENT

AURANGZEB, J.- Through the instant civil revision, petitioners have challenged the judgment and decree of learned Additional District Judge-I, Mansehra dated 21.05.2012, whereby, the appeal filed by the petitioners was dismissed and thereby maintained the judgment and decree of learned trial Court dated 10.12.2010 who vide the same had also dismissed the suit filed by the petitioners/plaintiffs.

2. Precisely, the facts of the case leading to the filing of the instant civil revision petition are that the petitioner/plaintiff namely Gul Zaman

being a pre-emptor brought a suit against the respondents for possession through enforcement of right of pre-emption in respect of suit property, detail of which is fully mentioned in the heading of the plaint which suit was duly contested by the present respondents/ defendants by filing their written statement. In view of the pleadings of the parties, the learned trial Court framed issues and thereafter the parties were asked to produce their respective evidence which they have accordingly led and after hearing the arguments, the learned trial Court dismissed the suit of petitioner/plaintiff vide the first impugned judgment and decree dated "10.12.2010". The petitioner/plaintiff being aggrieved of the aforesaid judgment and decree preferred an appeal, however, the same was also dismissed by learned Additional District Judge-I, Mansehra vide the second impugned judgment and decree dated "21.05.2012" which judgments and decree have now been challenged by the petitioners through the instant revision petition.

3. Arguments of learned counsel for the parties were heard in considerable detail and the record perused with their able assistance.

4. The record reflects that the plaintiff/pre-emptor first received information regarding the impugned sale transaction on 26.02.2008 at 04:00 PM, through his son namely Wali Muhammad, when he was present at Patian cum Phulra Tehsil & District Manshera. Upon receiving this information, the plaintiff immediately made an express declaration of his intention to exercise the right of pre-emption (Talb-i-Muwathibat). Subsequently, on 06.03.2008, the plaintiff issued a notice of Talb-i-Ishad to respondents, which was dispatched via registered post AD in the presence of witnesses.

 5. The record clearly reveals that the plaintiff was unable to appear before the Court to substantiate his claim due to his unfortunate demise during the pendency of the proceedings. Consequently, the primary burden of proving the essential procedural requirements of pre-emption, particularly the performance of *Talb-i-Muwathibat*, fell upon the remaining witnesses. However, the only person who deposed in this regard was the alleged informer, who merely stated that the plaintiff had made the declaration of intention to

pre-empt upon receiving knowledge of the sale. It is important to note that under Section 13 of the Khyber Pakhtunkhwa Pre-Emption Act, 1987, *Talb-i-Muwathibat* is the foundational and indispensable first step in the exercise of the right of pre-emption. It requires the pre-emptor to make an immediate and unequivocal declaration of his intent to assert the right of pre-emption as soon as he learns of the sale. This demand must be made without any delay and must be proved through cogent and reliable evidence. In the present case, the absence of the plaintiff meant that the Court was deprived of direct testimony as to whether or not the *Talb-i-Muwathibat* was made in a timely and sincere manner. The informer, who claims to have conveyed the information to the plaintiff and subsequently testified about the alleged oral declaration, does not fulfill the legal threshold required under Section 13. The informer himself was not the declarant nor a neutral and independent witness to the declaration. Jurisprudence laid down by the superior courts of Pakistan has consistently maintained that the requirement of *Talb-i-Muwathibat* must be strictly complied with and

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duly proved by the plaintiff or through legally admissible and trustworthy witnesses. In the absence of such proof, the pre-emption claim cannot succeed, regardless of the plaintiff's entitlement under substantive law. Accordingly, in the instant matter, due to the death of the plaintiff and the absence of any valid, independent, or credible evidence confirming the performance of *Talb-i-Muwathibat*, the mandatory requirement under Section 13 of the Khyber Pakhtunkhwa Pre-Emption Act remains unfulfilled. Hence, the pre-emption suit cannot be sustained on this ground alone.

 6. The record further reflects that PW-1, namely Wali Muhammad, when he appeared in the witness box, stated that he came to know about the sale of the disputed property through one Tailor Master Sultan. However, it is a matter of record that the said Sultan, who was the alleged source of this crucial information, did not appear before the Court to corroborate this claim or to testify on oath in support of the statement made by PW-1.

7. Furthermore, the postman who allegedly delivered the notice was not produced as

a witness. In such circumstances, where the postman was not summoned to confirm delivery, and no reasonable steps were taken to prove service, it becomes evident that the plaintiff did not fulfill the mandatory requirement of performing Talb-i-Ishad in the manner prescribed under Section 13 of the Khyber Pakhtunkhwa Pre-Emption Act, 1987. By now it is an established jurisprudence that the pre-emptor has not only to prove the sending of the notice but he has also to prove the service of the notice. In a case of “Allah Ditta v/s Muhammad Anar” reported as 2013 SCMR 866 it was held by the Apex Court 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*”. The same rational was followed by the Apex Court in the case of “Bashir Ahmad v/s Ghulam Rasool” reported as 2011 SCMR 762 whereby it was observed that “*under the circumstances, it was incumbent upon the respondent, being the plaintiff, to prove service of*

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notice upon the petitioner/defendant, more so, when there was no acknowledgment of the said notice available on record. It is true that the respondent through production of witnesses amply proved that notice of Talb-i-Ishhad was sent to the petitioner, but it is equally true that it was not proved on record that in- fact the same was served upon the former, inasmuch as, it was not brought on record that he refused to accept/receive the notice. In a case of "Basharat Ali Khan vs. Muhammad Akbar" reported as 2017 SCMR 309 it was held by the Apex Court that "the respondent/pre-emptor did not in terms of section 13(3) of the Punjab Pre-emption Act, 1991 ("Act, 1991") plead in his plaint the issuance of notice of Talb-i-Ishhad "by registered post acknowledgment due. Nor did the respondent bring any evidence on record regarding the service of the registered notice of Talb-i-Ishhad by the production of the acknowledgment due card or through the statement of the postman who may have delivered such notice". Likewise, in a case of "Muhammad Nazeef Khan vs. Gulbat Khan and others" reported as 2012 SCMR 235 the Hon'ble Apex

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Court has held that “pre-emptor was obliged to make the Talb, regardless of whether the conditions laid down for completion of sale had been fulfilled. Pre-emptor delayed making of Talb till attestation of sale mutation, thus his suit was rightly dismissed. Pre-emptor failed to make Talb-e-Muwathibat upon learning of sale, therefore, he failed to fulfill the requirement of S.13(1) and (2) of Khyber Pakhtunkhwa Pre-emption Act, 1987. Similarly, in a case of “Mir Muhammad Khan and 2 others vs. Haider and others” reported as PLD 2020 Supreme Court 233 it was held that “nothing on record proved the assertion of the pre-emptor that the notice was ever served on the vendee, who in his written statement before the courts below categorically denied service of the notice in question, therefore, it fell upon the pre-emptor in the case to prove that the notice had been delivered and by failing to prove the same or even producing the postman who allegedly delivered the notice, the pre-emptor failed to establish the sending or receipt of the notice for the performance of Talb-i-Ishhad and the suit for pre-emption was dismissed”.

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8. It is also relevant to mention here that if the pre-emptor fails to perform the performance of any of the Talabs in accordance with the requirement of law then even if he has performed the remaining Talabs then the same would be immaterial. In the case of “Sardar Muhammad (deceased) through LRs Vs Taj Muhammad (Deceased) through LRs and others” reported as 2023 SCMR 1113 the Hon’ble Apex Court has also held that if performance of a single Talab is skipped or not proved, the superstructure and edifice of the suit for possession through pre-emption falls on the ground.

9. It is well settled that the High Court's jurisdiction under Section 115 of the C.P.C. is limited in cases of concurrent findings by competent Courts. It can only intervene if there are serious legal flaws, such as insufficient evidence, misreading or ignoring material evidence, reliance on inadmissible evidence, abuse of jurisdiction, or perverse conclusions. Mere disagreement with factual findings or reappraisal of evidence does not justify interference unless there is gross misreading or overlooking of crucial evidence. In the case of “Aamir Afzal and another vs. S. Akmal”

(deceased) through L.Rs and 2 others” reported as

2024 SCMR 1649 the Hon’ble Apex Court has held

that;

“While exercising jurisdiction under Article 115 of the C.P.C. the High Court has to first satisfy itself: (i) that the order of the subordinate court is within its jurisdiction, (ii) that the case is one in which the court ought to exercise jurisdiction; and that in exercising jurisdiction that court has not acted illegally, that is, in breach of some provisions of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. Section 115 applies only to cases in which no appeal lies, and where the legislature has provided no right of appeal. The manifest intention of the legislature is that the order of the trial court, right or wrong, shall be final, except in specific circumstances. It is, therefore, obvious that unless the case is not covered under Section 115 of the C.P.C. and the High Court was satisfied in this regard, then in such a case no power could be exercised to interfere simply because it differs, however profoundly, with the conclusions of the subordinate court regarding questions of law and facts.

Kanwal Nain and others v. Fateh Khan and others PLD 1983 SC 53 and Umar Dad Khan and another v. Tila Muhammad Khan and others PLD 1970 SC 288 ref.

The scope of jurisdiction of the High Court under Section 115 of the C.P.C. is limited in relation to concurrent findings of the competent courts. The exceptions to this rule are when the findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, patent errors of law, consideration of inadmissible evidence, abuse of jurisdiction, and when the conclusions drawn are perverse and based on conjectural presumptions. The erroneous decisions of fact are ordinarily not revisable and the mere fact that the High Court may differ on a question of fact or mixed question of law and fact is not a valid ground for interfering with concurrent findings. Moreover, the concurrent findings recorded on the basis of evidence are not susceptible to further review to justify interference by the High Court in revisional jurisdiction. The interference by a High Court in

such jurisdiction would not be justified on the ground that reappraisal of evidence might suggest another view of the matter unless there has been a gross misreading of evidence and material evidence was ignored”.

10. In this case, the two Courts below have concurrently recorded their findings of facts and law, which this Court found them as perfectly in accordance with the available evidence of the parties and thus the same neither suffer from any misreading or non-reading of evidence nor the same suffer from any illegalities or material irregularities, so as to warrant the interference of this Court in a revisional jurisdiction under section 115 CPC. The scope, extent and domain of revisional jurisdiction of this Court has elaborately been dilated upon by the Hon'ble Apex Court in the case of “Nasir Ali vs. Muhammad Asghar” reported as 2022 SCMR 1054 that *section 115, C.P.C empowers and mete out the High Court to satisfy and reassure itself that the order of the subordinate Court is within its jurisdiction; the case is one in which the Court ought to exercise jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that*

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*aforesaid principles have not been unheeded or disregarded by the Courts below, it has no power to interfere in the conclusion of the subordinate Court upon questions of fact or law. The scope of revisional jurisdiction is limited to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or if the conclusion drawn therein is perverse or conflicting to the law. Furthermore, the High Court has very limited jurisdiction to interfere in the concurrent conclusions arrived at by the courts below while exercising power under section 115, C.P.C. Similarly, in the case of **“Salamat Ali and others vs. Muhammad Din and others”** reported as **PLD 2022 Supreme Court 353**, it was also held that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below. Similar view also reiterated by the Hon’ble Apex Court in the case of **“Muhammad***

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Sarwar and others vs. Hashmal Khan and others

PLD 2022 Supreme Court 13, where in para-6 it was held that *it is well settled exposition of law, deducible from plethora of dictums laid down by superior Courts that section 115, C.P.C. empowers and meted out the High Court to satisfy and reassure itself that the order of the subordinate court is within its jurisdiction; the case is one in which the Court ought to exercise jurisdiction and in exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law or with material irregularity or by committing some error of procedure in the course of the trial which affected the ultimate decision. If the High Court is satisfied that aforesaid principles have not been unheeded or disregarded by the Courts below, it has no power to interfere in the conclusion of the subordinate Court upon questions of fact or law.*

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11. In view of the above discussion, the impugned judgments and decree of the two Courts below respectively dated 21.05.2012 and 10.12.2010 are neither the result of misreading and non-reading of evidence nor the petitioner could point out any material irregularity nor jurisdictional defect in the same, therefore, the same are upheld and maintained

and consequently the instant revision petition is
dismissed.

Announced
22.05.2025
Tahir Saleem


JUDGE