

**JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**C.R No.42-M/2016**

**Shah Jehan Vs. Zainul Abidin through legal heirs and others.**

**Present:** Mr. Jauhar Ali, Advocate for petitioner.  
Nemo for Respondents (Ex-parte)

Date of hearing: **25.04.2024**

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR, J.-** Through instant petition filed u/s. 115 of the Code of Civil Procedure, 1908 (C.P.C), the petitioner has challenged the judgment and decree of the learned District Judge, Buner at Daggar dated 11.11.2015, whereby his appeal against the judgment and decree of the learned Civil Judge-I, Buner dated 28.01.2015 partially decreeing his suit for recovery through pre-emption to the extent of 1/4<sup>th</sup> share of the property, was dismissed.

**2.** Relevant facts of the instant petition are that Shah Jehan, the petitioner/ pre-emptor has filed a suit for recovery of possession through pre-emption bearing No.33/1 in respect of the property transferred by way of sale in favour of vendees Zainul Abidin, Israr-ul-Arifeen and Abdul Amin sons of Fazal Elahi through mutation No.5278 dated 29.04.2013 (Ex.PW3/1) from the property bearing Khata Khatoni No.970/1221 of the revenue estate of *Koga Tehsil Mandanr* District Buner. He also prayed for decree for perpetual injunction restraining the defendants/ vendees from further alienation of the property. It was averred in the plaint that he is the resident of *Koga* being *daftari/ pakhtoon* owner whereas, the vendees of the mutation are *malikan-e- qabza* (مالکان قبضہ) thus, he has got superior right as against them in the suit property. It was also alleged by him that on 03.05.2013 (Friday) at about 11:00 hours, he was sitting in his *hujra* situated at village

*Koga* alongwith Sarzamin Khan and Amir Zeb when his son Jehanzeb informed him about sale of the property and he, there and then in presence of witnesses and informer, pronounced his intention to pre-empt the property. Notice of Talb-i-Ishhad was sent to the vendees/ defendants under the cover of registered Acknowledgement Due (AD). Suit was resisted by vendee /defendant No.3 through his written statement on multiple legal and factual objections. On conclusion of the trial, the learned trial Court has held that both the pre-emptor and vendees have got equal rights being co-sharers in the property and that the pre-emptor/ petitioner has proved his case and thus held him entitled for recovery of possession of the transferred property in his favour to the extent of 1/4<sup>th</sup> share in lieu of total sale consideration amounting to Rs.1,60,000/-. The petitioner/ pre-emptor was also held entitled for withdrawal of the remaining deposited amount vide judgment and decree dated 28.01.2015, against which, **Civil Appeal No.10/13 of 2015** was filed by the petitioner but same was dismissed by the learned District Judge, Buner on 11.11.2015, hence, this petition.

**3.** It is significant to mention that after filing of this petition respondents No. 1 & 2 have been passed away, their legal heirs were brought on record, notices were issued to all the respondents but none appeared, as such, they have been proceeded ex-parte.

**4.** Learned counsel for the petitioner argued the instant petition on two grounds: *firstly* that the petitioner/ pre-emptor is original owner (اصل مالک) of *Shamilat Deh* (disputed property) whereas, the vendees/ defendants have purchased the property other than the impugned mutation after settlement as such, they are *malikan e qaba* (ادنی مالکان) and in such an eventuality, the pre-emptor has got superior right of pre-emption against the vendees/ defendants and he has proved his case, thus, he was entitled for the decree of the entire property, which was alienated in favour of the vendees/ defendants through mutation Ex.PW3/1 and *secondly*

that in case the first contention is not held by this Court to be in accordance with law then he is entitled for half (1/2) share of the property in view of sections 9 & 20 of the Khyber Pakhtunkhwa Pre-emption Act, 1987 (the Act of 1987). In support of his submissions, he placed reliance on the case of "Muhammad Wali Khan and another Vs. Gul Sarwar Khan and another" (PLD 2010 Supreme Court 965).

5. Arguments heard and record perused.

6. Insofar as the first contention of learned counsel for the petitioner/ pre-emptor that being original owner of the property he has got superior right against the vendees/ defendants is concerned, section 6 of the Act of 1987 deals with the superior rights that right of pre-emption vests firstly, in *Shafi Sharik*, secondly, *Shafi Khaleet* and thirdly, *Shafi Jaar* but the contention of petitioner/ pre-emptor does not fall in any of the categories of section 6 of the Act of 1987 because the legislature have never bifurcated the term *shafi sharik* in two different categories as '*adna malik*' and '*a'la malik*'. No doubt, the property wherefrom the shares were purchased by the vendees/ defendants is *shamilat* of the revenue estate of *Koga* but it is an admitted fact as per the entries of the revenue papers annexed with the instant petition that the petitioner as well as the vendees/ defendants have been shown to be owners of the property as mentioned in **Ex.PW1/2** (consisting upon ten leaves). The status of the vendees has been shown as that of co-sharer on the basis of mutation No.4987 attested much earlier to the mutation No. 5278 dated 29.04.2013, thus, at the time of purchase of the property, they were owners on the basis of mutation No.4987 and this fact has not been disputed by the petitioner/ pre-emptor, thus, both the pre-emptor and vendees have got equal right in the suit property. The status of the ownership as *adna* and *a'ala malik* is in respect of the entitlement pertaining to *shamilat* (joint ownership). The phraseology of *a'ala & adna milkayiat* may be relevant for determination of shares in

shamilat of particular estate as the *a'ala* owner is that who was recorded owner at the time of settlement and on the basis of his total proprietorship, he has got shares in *shamilat* as against the *adna malik* who becomes owner by purchase after the settlement and holds the specific shares purchased by him from his vendors at particular place in *shamilat*, because the entitlement of the original owner is based on حسب رسد کھیوٹ. Be that as it may, for the purpose of ownership which respect to his "shares" i.e. 4/35 to the extent of two *chithank* they were the owners in the *shamilat* at the time of purchase of disputed property but this distinction of '*adna*' and '*a'ala*' malik is not in conflict with section 6 (a) of the Act of 1987 and when the status of the owner as *shafi sharik*/ co-sharer either he is recorded owner during settlement or through purchase later on but before the disputed mutation, he shall be deemed to have got equal right. Hence, the first contention of learned counsel for the petitioner for decree for the entire property having superior right on the basis of the claim of *a'ala malkiat* stands nowhere in law and when a provision has not particularly defined or intended by the legislature, the Court could not add the meaning through any particular clause through *casus omissus*. Reliance is placed on the case of "*Deputy Director Finance and Administration FATA through Additional Chief Secretary FATA, Peshawar and others vs. Dr. LAL Marjan and others*" (2022 SCMR 566) thus, the first contention of the petitioner is misconceived.

7. Turning to the method and mode of distribution of the property in case where more than one person is equally entitled. Section 9 of the Act of 1987 deals with the method of distribution of the property where more than one person is found by the Court to be equally entitled to the right of pre-emption, the property shall be distributed amongst them in equal shares. This section 9 shall be read in juxtaposition with section 20 of the Act of 1987 that where the pre-emptor and the vendee fall within the same class of pre-emptors and have equal right of pre-emption, the property

shall be shared by them equally. In the instant case, the pre-emptor is one while vendees are three in number. The suit of the pre-emptor/ petitioner has been decreed by the learned trial Court against the vendees who have not preferred any appeal but the petitioner/ pre-emptor was held entitled for 1/4<sup>th</sup> share in view of the total number of the parties (one pre-emptor and three vendees) and said findings of the learned trial Court were upheld by the learned Appellate Court through impugned judgment and decree. The contention of learned counsel for the petitioner/ pre-emptor that the property shall be distributed equally amongst the pre-emptor and the vendees i.e., 1/2 share shall be decreed in favour of the petitioner/ pre-emptor while the remaining half share shall be shared by the vendees/ defendants equally. In the case of **Muhammad Tariq and 4 others vs. Asif Javed (2009 SCMR 240)**, judgement announced on 27<sup>th</sup> May, 2008 it was observed by the apex Court that:

“A bare reading of the text of above section clearly shows that the Legislature has divided the pre-emptor and the vendee into two distinct classes i.e. the pre-emptor and the vendee, and if the pre-emptor and the vendee have equal right of pre-emption the property would be shared by them equally notwithstanding the number of pre-emptors or the vendees. If we follow the other version of per capita basis then the whole sense of the section would altogether be damaged. Uptill this time, all the rulings of this Court are in favour of the division of the property in equal shares i.e. 50/50 or 1/2 each because the contesting parties are two different classes, so keeping in view this principle the impugned judgment of the High Court is plainly correct and needs no interference. Hence the appeal is dismissed.”

But thereafter in the case of **Khan Gul Khan and others vs. Daraz Khan and another (2010 SCMR 539)** announced on 23<sup>rd</sup> November, 2009 (both the judgements of two members Bech) while discussing the judgement in the case of **Muhammad Tariq and 4 others (supra)**, it was held by the Hon'ble Supreme Court that:

“13. It appears that the facts of all the referred cases as well as the principles settled therein escaped the attention of the Court while observing that "the case law favours the property to be divided in equal shares i.e. 1/2 each" or "up till this time, all the rulings of this Court are in favour of the division of the property in equal shares i.e. 50/50 or 1/2 each because the contesting parties are two different classes". It was an over simplified statement of the precedent law and the rule adjudged therein. We have analyzed and discussed all the above referred cases to obviate the possibility of an error or misinterpretation and have also recorded our opinions separately. We cannot subscribe to the view that "all the rulings of this Court are in favour of division of property in equal shares i.e. 50/50, 1/2 each because the contesting parties are two different classes .....". None of these observations arises from the case law referred to even in Muhammad Tariq's case or the principles of the Mohammedan Law recorded in various treaties and quoted in the case of Amir Hassan (ibid).

14. In view of the above, it is held that the appellants and the respondent are entitled to share the property equally pro rata on per capita basis. Appeal is thus accepted in terms of the above-recorded conclusion.”

8. Likewise, in the case of 'Faizullah Khan and others Vs. Haji Abdul Hakeem Khan' (2011 SCMR 1802), the view of equal distribution of the property was affirmed by the apex Court by holding that the appellants and respondent are equally entitled for the property on per capita basis i.e., 1/6<sup>th</sup> share each. The afore stated principle set out by the apex Court has been affirmed in the case of 'Sakhi Jan and another vs. Qamar Ali Khan (2022 SCMR 422) where it was held that:

“The area transferred by way of impugned mutation in Khasra Nos.2479 and 2481 be distributed between the two petitioners/vendees and pre-emptor/respondent in three equal shares on the principle of per capita. Pre-emption amount, if already deposited by the pre-emptor/respondent is in excess, can be withdrawn by the pre-emptor.”

Since, in that case there was sole pre-emptor against two vendees, thus, the contention of the appellants before the apex Court that the property was required to be distributed equally i.e., pre-emptor would be entitled to 1/3<sup>rd</sup> share was considered and the judgments

and decrees of all the learned Courts below were set aside and resultantly the appellants (vendees) and the respondent (pre-emptor) were held entitled to share in the pre-empted property equally.

**9.** Thus, in view of the case law referred to above, the petitioner/ pre-emptor Shah Jehan and three vendees namely Zainul Abidin, Israr-ul-Arifeen and Abdul Amin shall be given 1/4<sup>th</sup> share as held by the learned trial Court. Learned counsel for the petitioner has not been able to point out any legal error, misreading and non-reading of record or wrong interpretation of law i.e., sections 9 & 20 of the Act of 1987, as such, the impugned judgments and decrees of the learned Courts below are not open to any interference u/s 115 C.P.C. Disposed of accordingly.

**Announced**  
**25.04.2024**

  
**JUDGE**