

Judgment Sheet

**IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH
JUDICIAL DEPARTMENT**

Civil Revision No. 328-A/2011.

JUDGMENT

Date of hearing.....**07.04.2017**.....

Petitioner (Muhammad Sabir) By Mr. Muhammad Wajid Khan, Advocate.

Respondents.(Sardar Ali & 03 others) By Mr. Nawaz Khan Jadoon, Advocate.

MUHAMMAD GHAZANFAR KHAN, J.- Aggrieved from the impugned judgments and decrees of the learned Civil Judge-III Battagram and learned District Judge Battagram dated 12.04.2010 and 01.04.2011 respectively whereby the suit as well as appeal of the petitioner was concurrently dismissed, the instant civil revision has been preferred.

2. Brief facts leading to the instant petition are that the petitioner / plaintiff filed a suit for pre-emption in respect of the land, detailed in the heading of the plaint, against the respondents, whereafter one Shamshair had also filed suit for possession in the disputed land, thus, consolidated issues were framed and the parties were directed to adduce their evidence, who produced their respective evidence and the learned trial court after recording pro and contra evidence of the parties dismissed the suit on 12.04.2010. Feeling dissatisfied from the judgment and decree of the learned trial court, the petitioner preferred an appeal which too met the same fate, hence, the instant civil revision.

3. Learned counsel for the petitioner mainly argued that the courts below have erred in law and facts while deciding the principle of waiver and estoppel against the petitioner; firstly, that the agreement relied upon by both the courts below have no legal sanctity as its execution was denied by the petitioner and contents whereof have not been proved through recording cogent and reliable evidence and; secondly, that the suit was filed in the year 2004 and principle of waiver can only be applied to any act or omission of the plaintiff which was prior to the institution of the suit. The compromise deed as is evident from the record was scribed in the year 2005 i.e. after institution of the suit. He solicited for setting aside the decrees of both the courts below.

4. On the contrary, the learned counsel for the respondents argued that after entering into a written compromise, duly proved through production of trustworthy evidence, the present petitioner is estopped legally to press hard the claim of pre-emption. Besides, the acts and omission of the present petitioner are covered by definition of principle of waiver.

5. I have heard the arguments of learned counsel for the parties and gone through the record.

6. The question of *Talabs* had already been adjudged by the courts below in favour of the present petitioner and as there is no appeal, revision or cross objection by the opposite side, so that findings of the court have become final. The only question before this court is that whether the compromise produced by

the respondents and relied by the courts below can be considered as a genuine compromise and according to law and secondly; that whether principle of waiver is attracted in the present case.

7. In order to reach at a just conclusion and to answer the above questions, it is necessary to go through the provision of Order 23 Rule 3 of the Code of Civil Procedure which is as under: -

Order XXIII Rule 3.- Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties] or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:”

8. While dealing with almost the same proposition, the Hon’ble Supreme Court of Pakistan in a case reported as **1993 SCMR 374** titled “*Umar Bakhsh & 02 others Vs. Azim Khan & 12 others*” has held as under: -

“Order XXIII, Rule 3, C.P.C. requires that the Court shall order compromise of suit to be recorded when it is proved to the satisfaction of the Court that a suit has been adjusted wholly

or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject-matter of the suit.”

9. Similarly, when the same question arose before this Hon’ble Court in the case reported as **1990 CLC 1614 (Peshawar)** titled “*Mst. Khurshid Begum Vs. Mir Muhammad & 08 others*” the following view has been taken: -

“Under Order XXIII, Rule 3 if it is proved to the satisfaction of the Court that the suit has been compromised, then it shall order such compromise to be recorded. This is not a mere formality but it is a mandatory provision of law, as such an order has been made appealable in terms of Order XLIII, Rule 1 Clause (m).”

10. Thus, from the above rulings it has been proved that the compromise would only be acted upon, if it is admitted by the parties and after that it has been reduced into writing.

11. Now while deciding the principle of waiver, it is necessary to quote Section 15 of the Pre-emption Act, 1987 which reads as under: -

S. 15. *The right of pre-emption shall be deemed to have been waived if the pre-emptor has acquiesced in the sale or has done any other act of omission or commission which amounts to waive of the right of preemption.”*

12. The above provision of law clearly indicates that any act or omission or acquiescence of the plaintiff at the time of sale

shall debar the pre-emptor from assailing the sale transaction through pre-emption.

13. This above view has been affirmed by the Hon'ble Supreme Court of Pakistan in a case reported as **1992 SCMR 786** titled "*Jam Pari Vs. Muhammad Abdullah*" by holding as under: -

"(i) Right of pre-emption arises on sale of the property in question. This is the general law.

(ii) Right of pre-emption, however, can be waived before the actual sale either by express refusal to purchase the property or by a clear conduct on the part of the plaintiff, showing that he is not interested in the purchase of the property. This is consistent with the principle of foreclosure of right of preemption as envisaged 'in section 19 of the said Act.

(iii) Mere participation in the auction for the sale of the property or failure to outbid the purchaser cannot be regarded as a waiver of the right of pre-emption."

14. The entire record is silent that whether this agreement was signed or ever consented to by the petitioner. Even otherwise, once the execution of a document relied upon by a party is denied by the other, onus to prove such document lies on the party which relies on such document.

15. Keeping in view the above discussion, the findings of both courts below are not only against the law and evidence on file but also against the dictum of the superior courts, thus, are

not tenable in the eyes of law. Hence, the instant civil revision is accepted and the impugned judgments and decrees of both the courts below are set-aside and the suit of the petitioner is decreed as prayed for with no order as to cost.

Announced:
07.04.2017.

J U D G E

*/*Saif*/*