

JUDGMENT SHEET
PESHAWAR HIGH COURT ABBOTTABAD BENCH
JUDICIAL DEPARTMENT

C.R.No.265-A/2012.

JUDGMENT

Date of hearing 08.12.2017.

Appellant / petitioner (Rahim Khan & another) by
Mr. Muhammad Naeem Anwar, Advocate.

Respondent (Gul Bad Shah and others) by Syed Sajjad
Hassan Shah, Advocate.

SYED ARSHAD ALI, J.- Through the instant revision petition, petitioners have impugned the consolidated judgment and decree dated 07.05.2012 of learned Additional District Judge-V, Mansehra, whereby appeals filed by respondents were accepted and the judgment/order/decree dated 03.12.2010 passed by learned trial Court was set aside.

2. Brief but relevant facts of the case are that the respondent Gul Bad Shah initially filed suit No.133/1 on 18.11.2005 against the present petitioners before learned Senior Civil Judge, Mansehra for declaration to the effect that defendant Raheem Khan and Lal Bad Shah sons of Bahadur Hussain purchased land measuring 06 marlas through mutation No.12520 dated 29.6.2005 for sale consideration of Rs.2,30,000/-. However, out of total sale consideration defendants had given him only Rs.1,30,000/- in the presence of Jirga whereas had refused to pay Rs.1,00,000/- the remaining sale consideration and the action of defendants to carve a passage in the suit property is illegal and consequently mutation No.12520 attested

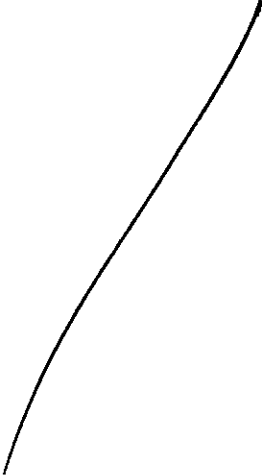
on 29.6.2005 was without consideration, hence, requested for cancellation of the same. The defendants contested the suit by filing their written statement by raising legal as well as factual objections. It was also stated in the written statement that plaintiff Gul Bad Shah had earlier filed a suit No.128/1 on 30.8.2005 in respect of the same cause of action, which he withdrew on 19.11.2005 without permission to file second suit.

Similarly, present petitioners instituted a suit bearing No.117/1 on 02.1.2006 against Gul Bad Shah for declaration that they had purchased the suit property measuring 06 marlas through mutation No.12580 attested on 29.6.2005 for the purpose of passage/thoroughfare and have




paid the entire sale consideration. They have also prayed for possession of the suit property in alternative. On being summoned defendant Gul Bad Shah contested the suit by filing his written statement, wherein he raised a preliminary objection to the maintainability of suit. In reply to Para 4 in his written statement defendant had admitted the execution of mutation for sale consideration of Rs.2,30,000/-. However, he has reiterated his earlier position regarding non-payment of the entire sale consideration.

The present petitioners filed another suit bearing No.118/1 on 17.08.2007 for perpetual injunction against Gul Bad Shah and three others, which was also contested by



the defendants by filing their written statement.

The learned trial Court consolidated all the three suits and framed consolidated issues. It is pertinent to note that all the parties are relative as Gul Bad is real uncle of the petitioners. The parties were given full opportunity to lead their respective evidence. During evidence, the plaintiff submitted an application on 14.10.2010 that impugned mutation No.12520 attested 29.6.2005 alongwith his thumb impression be sent to FSL for comparison and if the said thumb impression on the impugned mutation and that of plaintiff Gul Bad Shah are proved to be identical in the laboratory report, the suit of the plaintiff be dismissed and the other suits



filed by the present petitioners be decreed. Resultantly, the learned trial Court requisitioned the original mutation for sending it to the Expert. The thumb impressions of the plaintiff upon sample slip were taken in the Court and in this regard parties recorded their statement on 16.10.2010. Naib Office Kanongo, Mansehra produced the original mutation 26.10.2010. The original mutation and thumb impression of plaintiff obtained in the Court, were sent to the FSL Peshawar vide C.N.No.966152 dated 26.10.2010 of Deltex Courier Service. On 25.11.2010, the Finger Expert/Director FSL requested the Court for providing Bio-data of Gul Bad Shah, which was dispatched to Director, FSL, Peshawar. The learned trial Court received the Expert

opinion in Form No.3. The opinion of Expert is reproduced below:-

FORM NO.3.

We have compared the finger impressions on the documents mentioned in the margin received from the Mazhar Hussain, Civil Judge-XII, District Mansehra with his letter No.147 dated 26.11.2010 and are of the opinion that:-

1. An original Mutation Sheet No.12520 dated 29/06/2005 bearing an impression now marked as 'Q-I'.
2. A sample slip 'S' (induplicate) bearing the ten digit impression of Gul Bad Shah.

The impression on the Mutation Sheet No.12520 dated 29/06/2005, now marked as 'Q-I' is 'IDENTICAL' with the left thumb impression of Gul Bad Shah on his sample slip 'S' as per ridge characteristics points of identity dotted in one of the specimen print now marked as 'S/I'.

1. Signature Rank. (Faridullah Khan)
DSP, FPB, Peshawar.

2. Signature Rank. (Muhammad Aslam Khan)
Inspector F.P./EXPERT.


The opinion of the expert in the case Comparison of thumb impression of Gul Bad Shah in Suit No.133/1 is forwarded for information.

The documents mentioned in the margin are returned herewith.

*Officer-in-Charge
Finger Print Bureau,
N.W.F.P, Peshawar."*

Since the Expert has confirmed the thumb impression of Gul Bad Shah on the impugned mutation, therefore, the learned trial Court vide order dated 03.12.2010 dismissed suit No.133/1 filed by plaintiff and decreed suits bearing No.117/1 and 118/1 filed by the defendants.


3. Dissatisfied with the order dated 03.12.2010, the respondents filed three separate appeals before learned appellate Court, which were accepted by learned appellate Court vide judgment dated 07.05.2012. It prevailed before learned appellate Court that Expert evidence is non-conclusive evidence regarding the fact in issue,



therefore, cannot be based for a decree, hence, the instant revision petition.

4. Arguments heard and record perused.

5. It was on the application of plaintiff Gul Bad Shah that a particular mode was agreed between the parties to settle the issue by referring the disputed mutation for Expert opinion. Both the parties have specifically agreed that if Expert confirms the thumb impression of the plaintiff Gul Bad Shah on the disputed mutation then his suit be dismissed and in that eventuality the suit of the petitioners be decreed. It was not a case of mere the evidentiary value of the opinion of Expert, indeed both the parties with mutual consent had adopted a procedure for the



decision of their cases before a competent Court of law by referring the matter to the opinion of Expert and had agreed that opinion of the Expert would be binding on the parties and the suit shall be decided on the basis of the said opinion. Now this procedure is an express agreement between the parties which does not offend any law, therefore, on receipt of said opinion of the Expert the learned trial Court has rightly decreed the suits of the present petitioners and dismissed the suit of the respondent No.1. In this regard I am fortified with the judgment of Honourable Lahore Court in case **Hashim Ali Vs Asghar Ali (2014 YLR 2150 Lahore)**. It is unethical on behalf of the plaintiff/respondent to approbate and reprobate as under the

Sd/-

principle of estoppel enunciated under Article 114 of Qanun-e-Shahadat Order, 1984, the respondent/ plaintiff could not change his position after the Expert report had confirmed his thumb impression on the impugned mutation. On the principle of estoppel the august Supreme Court of Pakistan in case

Dr. Muhammad Javaid Shafi Vs Syed

Rashid Arshad and others (PLD 2015

Supreme Court 212) has laid:-

"In other words, where a person who is aggrieved of a fact, he has a right, rather a duty to object thereto for the safeguard of his right, and if such a person does not object, he shall be held to have waived his right to object and subsequently shall be estopped from raising such objection at a later stage. Such waiver or estoppel may arise from mere silence or inaction or even inconsistent conduct of a person."

6. The learned appellate Court has failed to appreciate this aspect of the case and

has only relied on the evidentiary value of the Expert opinion. In view of the above, the impugned judgment passed by learned appellate Court is not sustainable in the eyes of law, which is accordingly set aside. Resultantly by accepting this revision petition the judgment and decree dated 03.12.2010 is restored.

ANNOUNCED
08.12.2017.


JUDGE