IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.446-L OF 2014
(Against Judgment dated 11.02.2014 passed by the Lahore High Court, Lahore in R.S.A.No.177/2005)

Muhammad Riaz ...Petitioner

Versus

Muhammad Ramzan and others ...Respondents

For the Appellant : Mr. Zafar Iqbal Klasoon, ASC
(thr. Video Link from Lahore)

For the Respondents : N.R.

Date of Hearing : 04.05.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- This Civil Petition for leave to appeal is directed against the Judgment dated 11.02.2014 passed by the Lahore High Court, Lahore in R.S.A.No.177/2005 whereby the regular second appeal filed by the petitioner was dismissed.

2. Succinctly stated, the facts of the case are that the petitioner filed a suit for possession through pre-emption in relation to the property measuring 132 *Kanals* and 8 *Marlas*, situated in Village Khopra, Tehsil Daska, District Sialkot and further contended that the said property was purchased by the respondents consequent to a decree for specific performance dated 18.04.2000, thereafter, the property was mutated *vide* Mutation No.1458 dated 23.09.2000 but, in order to defeat the petitioner's superior right of pre-emption as a *Shafi Sharik* (co-sharer in suit property) and *Shafi Khalit* (participator in special rights attached to the suit land i.e. right of irrigation and transportation), the respondents fraudulently mentioned the sale consideration as Rs.33,00,000/-, whereas they had actually purchased the property in the sum of Rs.23,41,000/-, The petitioner further contended that he first came to know about the sale of the

property through Said Khan on 28.09.2000 at 6:00 pm and upon receiving the information, he immediately made the demand of pre-emption i.e. *Talb-i-Muwathibat* and expressed his intention to assert his right. In order to fulfill the second requirement of *Talb-i-Ishhad* (demand by establishing evidence), the petitioner sent a notice on 02.10.2000 to all three respondents in the presence of two witnesses (i.e. Said Khan and Inayat Ali) and, after the making of *Talb-i-Muwathibat*, he, along with Said Khan and Inayat Ali, visited the respondents' houses and reaffirmed *Talb-i-Muwathibat* in their presence and demanded them to accept the petitioner's right of pre-emption which they refused to do.

3. The learned counsel for the petitioner, argued that that the High Court has erred in holding that the Decree dated 10.01.2001 was hit by the principles of partial pre-emption as the petitioner had filed the suit with respect to the entire suit property. It is further averred that the High Court has incorrectly held that the respondent No.1 could not effect a compromise to the extent of his share in the suit property, especially when the respondent No.1 had received the consideration for his share, and that the respondents No. 2 and 3 has no *locus standi* to challenge the same as it had no impact on their rights. He further argued that the High Court erroneously held that the petitioner failed to perform the requirements of "*Talbs"*.

4. Heard the arguments. The record reflects that the respondent No.1 appeared before the learned Trial Court on the first date of hearing and submitted a written statement wherein he admitted the petitioner's superior right of pre-emption and conceded to the decree of the suit in favour of the petitioner to the extent of his share in the property. Accordingly, the petitioner was directed to deposit a sum of Rs.11,00,000/- as *Zar-e-Soam* (portion of sale price) to establish good faith and upon the respondent No.1's submission that he had received the aforesaid amount, the suit was decreed in favour of the petitioner to the extent of respondent No.1 *vide* Decree dated 10.01.2001. The respondents No. 2 and 3 contested the suit by filing written statements wherein it was averred that the petitioner was estopped by his conduct because the decree dated 18.04.2000, that enabled the respondents to purchase the suit property was passed with the consent of the petitioner therefore, the decree dated 10.01.2001 was a result of collusion between the petitioner and the

respondent No.1. The petitioner had the knowledge of sale since 02.03.1994 and was also aware of the mutation. According to the respondents No. 2 and 3 they had purchased the property for a sale consideration of Rs.33,00,000/-, which was in fact the market value of the property.

5. The learned Trial Court settled the various issues but the Issue No.11 was particularly related to the niceties of the application moved under Section 12 (2), CPC. After recording evidence, the learned Trial Court decided Issue No. 11 in favour of the respondents No. 2 and 3 and set aside the decree dated 10.01.2001 passed in favour of the petitioner and also dismissed the suit *vide* judgment dated 01.06.2004. The petitioner preferred an appeal before the learned Additional District Judge, Daska which was also dismissed *vide* Judgment dated 03.10.2005, thereafter, the petitioner filed R.S.A. No.177/2005 which met the same fate *vide* impugned Judgment dated 11.02.2014.

6. We have carefully examined and scrutinized the record, including the three concurrent findings and reached the conclusion that the all the courts below have appropriately and appositely skimmed through the evidence adduced by the parties with proper application of mind. For ease of reference, the relevant passages of the impugned judgment are reproduced as under:-

> “5. The conduct of the plaintiff and defendant No.1 subsequent to the appearance has been discussed in detail by the courts below which resulted into the findings on issue No.11. Even otherwise, in view of case titled 'Muhammad Aslam and others versus Saleem-ud-Din and others' (2006 CLC 1911), in a pre-emption suit no partial decree is possible and further the fact of payment of Zar-e-Soyem by the plaintiff to defendant No.1 and receipt thereof by the said defendant would also create no right to the pre-emptor as has been held in Aurangzeb versus Massan and 13 others' (1993 CLC 1020). The findings of the courts below with regard to the application under Section 12(2) C.P.C. are thus justified, legal and are not liable to be interfered with.
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> 6 As regard the merits of pre-emption suit it may be added that the decree in a suit for specific performance on the strength of which the suit sale mutation was sanctioned was passed on the statement of present appellant and thus the courts below are right in deciding issue No.6, regarding estoppel as against the appellant. Further it is a fact to be noted that PW-2 and PW-3 have been produced in order to prove the making of Talb-1-Muwathibat by the plaintiff but both these witnesses while in witness box never deposed as to any date of making Talb-i-Muwathibat by the plaintiff. It is also a fact that neither in the

> pleadings nor in evidence, the plaintiff has asserted that notice in compliance of making Talb-i-Ishhad was sent along with a receipt of acknowledgement due and as such there is no such evidence available on record showing that the notice of Talb-i-Ishhad was sent by the plaintiff through registered post with acknowledgement due."

7. It is a well-settled legal precept that no partial decree is possible in a pre-emption suit as the right of pre-emption is one of substitution, even in the case of pre-emption under statute law, unless the statute itself has made a departure in this regard to any extent. From the doctrine that the right of pre-emption is one of substitution it follows that, unless the statute conferring the right of pre-emption otherwise provides, the pre-emptor must take over the whole bargain, that is to say, the pre-emptor must seek pre-emption of the whole of the subject-matter of the sale and pay the entire price paid by the vendee as consideration. This, however, is subject to certain limitations which, at any rate, do not include the vendor's defective or want of title. Suffice it to say by way of example that a pre-emptor is not bound to seek pre-emption of the whole of the property sold and pay the full sale price if his right of pre-emption extends over only a portion of the property sold or if a portion of the property is capable of pre-emption and the other is not. In case of any such limitation, partial pre-emption on payment of proportionate price may be permitted as of necessity and not because the pre-emptor wants it [Ref: Mst. Bashiran and others v. Abdul Ghani and others (**1995 SCMR 1833**) and Malik Hussain and others v. Lala Ram Chand and others (**PLD 1970 SC 299**)]. In the instant case the decretal amount of Rs.33,00,000/- was paid jointly by the respondents, thus the share of the respondent No.1 could not be separated from the whole and the decree dated 10.01.2001 was not sustainable in law, hence it was rightly set aside by the learned Trial Court. Moreover, as per the record the petitioner was ordered to deposit one-third of the sale price i.e. Rs11,00,000/- as *zar-e-soam*, however he only deposited Rs.7,06,000/-, thereby failing to comply with the mandatory provision of Section 24 of the Punjab Pre-emption Act, 1991.

8. As far as the crucial question *vis-à-vis* the petitioner's conduct and deportment is concerned, the Trial Court has rendered its detailed findings in this respect in Issues No. 6 and 7 of the judgment and decree dated 01.06.2004 that the petitioner was a co-vendor in the

sale agreements for the suit property (Ex.D-1, Ex.D-2 and Ex.D-3) along with Muhammad Akram and Muhammad Nawaz and nowhere in the pleadings did the petitioner deny the factum of sale, as such, the petitioner had full knowledge of the sale from the outset. Further, the petitioner had submitted Mark C1/Ex.D-4 which was an application for effecting a compromise which the petitioner had signed (Ex.D-4/1) and had recorded his statement as Ex.D-5 wherein he had consented to the compromise, and it was on this basis that the suit was decreed *vide* judgment and decree dated 18.04.2000. At no point during the proceedings in the suit for specific performance did the petitioner state that he would exercise his right of pre-emption or that his right of pre-emption was being affected. The conduct of the petitioner was hit by the principle of estoppel and the principle of approbation and reprobation. In the case of Sardar Ali Khan v. State Bank of Pakistan and others (**2022 SCMR 1454**), this Court stated that Article 114 of the Qanun-e-Shahadat Order, 1984 incorporates the doctrine of estoppel under which when a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. This principle is founded on equity and justness with straightforward objective to prevent fraud and ensure justice, and though it is described as a rule of evidence, it may have the effect of constituting substantive rights as it impedes someone from averring a truth that is defined as contradictory to an already established truth. The catchphrase “Estoppel” is derived from the French word “*estoupe*” from which the word estopped in English language emerged. “A man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (Lord Coke in Co. Litt 352 (a) as cited in the case of B.L. Sreedhar v. K.M. Munireddy (2003) 2 SCC 355 at 365). Further, the maxim *qui approbat non-reprobat* (one who approbates cannot reprobate) is also firmly embodied in English common law. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. Ref: Shyam

Telelink Ltd. v. Union of India reported in 2010 (10) SCC 165. These principles were also addressed by this Court in the case of Haji Ghulam Rasool and others v. The Chief Administrator of Auqaf, West Pakistan (**PLD 1971 SC 376**) wherein it was stated that the doctrine of estoppel is not confined to the matters dealt with under Section 115 of the Evidence Act, for, as pointed out by Garth, C. J. in the case of *Ganges Manufacturing Co. v. Sourajmull* (I L R 5 Cal. 669) "estoppels in the sense in which the term is used in the English legal phraseology are matters of infinite variety and are by no means confined to the subjects dealt within Chapter VIII of the Evidence Act". It has been defined in Halsbury's Laws of England (2nd Edn.), Vol. 13, "as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability". It is in this sense that it has often been held that even as a rule of evidence or pleading a party should not be allowed to approbate and reprobate.

9. The petitioner had also produced PW-2 and PW-3 before the learned Trial Court to establish *Talb-i-Muwathibat*, however neither of the two witnesses was deposed regarding the date on which the petitioner made *Talb-i-Muwathibat* during their examination. PW-2 also deposed that he was not aware of the other witnesses/signatories to the notice of *Talb-i-Ishhad*, and merely speculated as to who they could be, and was unaware of the contents of the notice and its recipients. Moreover, neither PW-2 nor PW-3 deposed any specific date on which *Talb-i-Ishhad* was made. No receipt of acknowledgement due was produced in evidence, nor was any evidence or witness brought to show that the respondents had refused to be served with the notice. This Court, in the case of Mst. Bibi Fatima v. Muhammad Sarwar (**2022 SCMR 870**) addressed this matter and stated that, “in terms of Article 129 of the Qanun-e-Shahadat, 1984 read with Section 27 of the General Clauses Act, 1897, a presumption of service does arise if a notice sent through registered post with acknowledgement due is received back with the endorsement of "refused" by the postal authorities but if the addressee appears in Court and makes a statement on oath disowning receipt of notice, the presumption under the said provision shall stand rebutted and the onus is on the party which is relying on such an endorsement to prove the same by producing the postman

who made the endorsement". Thus, it was for the petitioner to produce the postman during the evidence stage in order to establish the factum of *Talb-i-Ishhad*, which he failed to do.

10. In the wake of the above discussion, the learned counsel for the petitioner was unable to point out any error, perversity, or legal or jurisdictional defect in the impugned judgment calling for interference by this Court. Accordingly, this petition is dismissed and leave is declined.

JUDGE

JUDGE

Islamabad
04.05.2023
Faaiza/Khalid
Approved for reporting.