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

C.R No.866-M/2012

Mst. Zebun Nisa through legal heirs and another Vs. Ismail and others.

Present: *Mr. Ikram Ullah Khan, Advocate for petitioners.*

Mr. Khurshid Ali Khan, Advocate for Respondents.

Date of hearing: **01.02.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Through instant petition filed u/s 115 of the Code of Civil Procedure, 1908 (**C.P.C**), the petitioners have impugned the judgment and decree of the learned Additional District Judge, Swat at Kabal dated 25.09.2012, whereby their appeal against the judgment and decree of the learned Civil Judge-IX, Swat dated 31.03.2010 dismissing their suit, was dismissed.

2. Precisely, the facts of the instant petition are that Mst. Zebun Nisa alongwith her daughter namely Mst. Hurmat filed a suit for declaration claiming therein her share in the property bearing *Khasra* No.110 measuring 27-kanal & 18-marla given to her in lieu of her dower of 10 tola gold whereas her daughter namely Mst. Hurmat (plaintiff No.2) was seeking declaration to the effect that she is entitled for her legal and *shari* right in the property bearing *Khasra* No.102, 99, 107 & 109 of the revenue estate of *Sam Dewlai*, Tehsil Kabal, District Swat being based upon the legacy of her father Israil and hence the interference and alienation of the property by the defendants on the strength of mutations No.99 & 211 dated 14.11.2000 is against the law/ shariah which requires rectification as

such being against the law and facts are ineffective upon their rights. Suit was resisted by the defendants/ respondents through their written statement on different legal and factual objections. After completion of evidence and hearing of the parties, Mr. Muhammad Jamshed Khan Kundi, the then learned Civil Judge, Swat has dismissed the suit through judgment and decree dated 07.05.2002, against which, appeal of the petitioners was allowed by learned Additional District Judge, Swat on 26.11.2002 by setting aide of the judgment and decree of the learned trial Court but remanded the matter to the learned trial Court for a fresh decision with an additional issue that how much was the total dower of plaintiff No.1 and whether the same was paid and if not then against the gold, how much property was allotted to her? . After remand, the learned trial Court recorded the evidence and through its judgment and decree dated 16.12.2003 dismissed the suit of plaintiff No.1 whereas decreed it to the extent of plaintiff No.2, against which, Civil Appeal No.14/13 of 2004 of the respondents was allowed by the learned Additional District Judge-I, Swat on 22.05.20004, consequently the judgment and decree of the learned trial Court was set aside and once again remanded the matter to the learned trial Court for a fresh decision with further additional issue that whether the defendant No.1 has gift the property in his lifetime in favour of defendant No.2 alongwith its possession? Thereafter, evidence of the parties was recorded and after hearing the arguments, the suit of the petitioners was dismissed by the learned trial Court through its judgment and decree dated 31.03.2010, against which, the petitioners filed Civil

Appeal No.7/13 of 2011 but same was dismissed by the learned Additional District Judge, Swat at Kabal through judgment and decree dated 25.09.2012, hence, this petition.

3. Arguments heard and record perused.

4. It is an admitted fact that Muhammad Sherin had two sons namely Ismail and Israil. Israil was the husband of plaintiff No.1 Mst. Zebun Nisa and father of plaintiff No.2 Mst. Hurmat, however, Israil predeceased his father Muhammad Sherin, leaving behind a widow and daughter (the plaintiffs). Insofar as the claim of plaintiff No.1 in respect of her share in the property against the dower is concerned, during pendency of the suit, an application was moved by Fazal Muhammad, the special attorney of petitioners/ plaintiffs before the learned trial Court that the matter may be decided on the basis of oath on Holy Quran. It was contended that if defendant No.1 takes oath on the Holy that the property bearing *Khasra* No.110 was not given to the plaintiff No.1 in lieu of her dower, she would relinquish her right and would withdraw from the suit. In this respect, statement of Fazal Muhammad, the special attorney of plaintiffs was recorded on 27.09.2003 and the offer was accepted by defendant No.1, whose statement was recorded on the same date and the defendant No.2 Muhammad Ismail Khan took oath on his behalf as well as on behalf defendant No.1 as per the offer of the plaintiff No.1. Thus, the learned trial Court has rightly held that since the offer of plaintiff No.1 was accepted by defendants in terms of her statement and viewing that, her suit was rightly dismissed. Once the plaintiff No.1 has opted and elected a mode for decision of her suit and as per her

choice, which was accepted by defendants, hence, plaintiff No.1 was estopped to press her plea for her alleged right to the extent of the *Khasra* No.110. Law is settled that one cannot be allowed to blow hot and cold in the same breath on the principle of approbate and reprobate. Moreover, the doctrine of election is fully attracted that once the plea of plaintiff No.1 was accepted by defendant No.1, who appeared before the Court and has taken oath on Holy Quran that no property from *Khasra* No.110 was ever given to the plaintiff No.1 in lieu of dower, thereafter the plaintiff No.1 could not be allowed to make a U-turn as held by the apex Court in the case of "***Mir Mujib-ur-Rehman Muhammad Hassani Vs. Returning Officer, PB-41 Washuk and others***" **(PLD 2020 Supreme Court 718)** that "*once a litigant had made the choice of pursuing a certain course of action available to him or had abandoned a certain plea/action, then he was not allowed to reopen the same matter only because he had received unfavourable results as a result of his first choice.*" Reliance may also be placed on the cases of "***Silver Star Insurance Company Limited Lahore through Chief Executive Vs. Messrs Kamal Pipes Industries, Lahore and another***" **(2023 CLD 1342, Lahore)**, "***Trading Corporation of Pakistan Vs. Devan Sugar Mills Limited and others***" **(PLD 2018 Supreme Court 828)** and "***Lucky Cement Ltd. through Authorized attorney Vs. Federation of Pakistan through Secretary, Revenue Division and 03 others***" **(2021 PTD 835)**. Likewise, 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 observed: -

> **"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."**

Both the learned Courts below have rightly discarded the plea of the plaintiff No.1 on the basis of the mode adopted by her for seeking her redressal against defendant No.1, which has attained finality.

5. Turning to another legal aspect to the extent of claim of plaintiff No.2 Mst. Hurmat, who was claiming her legal/*shari* shares in the property, being the daughter of Israil who was the son of Muhammad Sherin (defendant No.1) but has predeceased his father. It is worth to mention that the suit was filed by the plaintiffs on 30.01.2001 when Muhammad Sherin s/o Umar Shah (the paternal grandfather of plaintiff No.2) was alive. Muhammad Sherin was the owner of the property and this fact has not been disputed, however, at the time of institution of the suit, he was alive and has submitted his written statement along with his other son in whose favour he has allegedly gifted the property and in his written statement he has categorically taken the plea that he has rightly transferred it in favour of his son (defendant No.2). A Muslim owner may alienate his property through any mode in favour of anyone by excluding any of his legal heirs and no clog can be put on his such rights as held by the apex Court in the case of "***Ghulam Muhammad Vs. Mian***

Muhammad and another" (2007 SCMR 231) where the Curt has held that:

> **It is well-settled by now that "the powers of a Muslim to dispose of the property by way of gift are unfettered. A gift cannot be invalidated only because the heirs are deprived of their shares.**

The institution of the suit in the lifetime of Muhammad Sherin by the plaintiffs especially the plaintiff No.2 was not at all competent as no cause of action has ever accrued to plaintiff No.2 to seek declaration for the shares in the property of her grandfather, the suit was premature, incompetent and without any locus standi of the plaintiff.

6. Another legal aspect of the matter is as to whether in the lifetime of Muhammad Sherin, the suit u/s 4 of the Muslim Family Laws Ordinance, 1961 could be filed by plaintiff No.2. Section 4 *ibid* protects the rights of sons and daughters of predeceased son in the property of their grandfather, to whom, the property is to be transferred, thus, at the time of institution of the suit, Muhammad Sherin was alive and as such his succession has not been opened, therefore, the suit of plaintiff No.2 in view of section 4 of the Ordinance of 1961 was incompetent. Had the suit been brought by plaintiff No.2 (Mst. Huramat) after the death of her grandfather Muhammad Sherin, the factum of shifting of the onus and to prove the legal aspect of the gift would have been determined by the Court in the light of the evidence recorded by the parties, however, it is not the case before this Court and was not before the learned trial Court. It is also reflected from the record, which was placed on record through **C.M No.2514-M of 2023** that the parties have locked their horns through suit titled "***Mst. Bakht Mian and others Vs.***

Muhammad Ismail Khan and others". The plaintiffs of that suit namely Mst. Bakht Mina alongwith her two sisters were the daughters of Muhammad Sherin and were seeking declaration of their legal and *shari* shares in the property of their father against Muhammad Ismail Khan (son of Muhammad Sherin) alongwith others. In said suit, notices were issued to the defendants and same is still *sub judice* before the Court. Both the claims either in respect of *Khasra* No.110 by the plaintiff No.1, on the basis of her alleged outstanding dower, and by plaintiff No.2 claiming her *shari* share in the lifetime of her grandfather in view of section 4 of the MFLO, 1961, could not be proved by the plaintiffs. Thus, suit of the plaintiff No.1 was rightly dismissed and her claim was discarded in view of her offer to the defendants whereas the suit of plaintiff No.2 was incompetent/ premature as she, on the date of the institution of the suit, had got no *locus standi* to file the suit in the lifetime of her grandfather namely Muhammad Sherin, the father of Israil who was father of plaintiff No.2. Concurrent findings of the Court below are not open to interference as the learned counsel for the petitioners has not been able to point out any illegality, irregularity or jurisdictional defect whereby the controversy has rightly been laid to rest.

7. Thus, for the reasons discussed above, the instant petition, being devoid of merits, is hereby dismissed, with no order as to cost.

Announced.
01.02.2024.

JUDGE

Office
2/2/2024

Sabz Ali/* (S.B) ***HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR***