

**IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD**

**Revision Application No.193 of 2000**

Applicants Syed Gul Hassan Shah through his legal representatives & another through Mr. Sundardas, Advocate.

Respondents Allah Warrayo & 4 others through Mr. Murtaza A. Arab, Advocate.

Date of hearing **14.02.2022 & 28.02.2022**

Date of order 11.03.2022

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**ORDER**

**SHAMSUDDIN ABBASI, J:-** This Revision Application under Section 115, CPC, arises from the concurrent findings of two Courts below, whereby the suit filed by the applicants was dismissed and appeal preferred against such dismissal met the same fate.

2. Facts relevant for the purpose of deciding this Revision Application are that an agricultural land bearing Survey Nos. 90/1 to 4, 98/2, 98/3, 99/2 and 100/1, measuring 23-36 acres, situated at Deh Shaikh Bhirkio, Taluka Tando Muhammad Khan, (hereinafter referred to as the "suit land") was originally owned by one Waledino son of Daulat Khan and after his death the same was inherited to respondent/defendant No.1, who through his attorney Muhammad Ramzan sold out the same to the applicants/plaintiffs through their father Haji Shah Nawaz Shah vide sale agreement dated 09.02.1961 and agreed to first get the suit land mutated in his name in the record of rights and then execute sale deed. The respondent/defendant No.1 despite receiving sale consideration of Rs.1000/- and Rs.3000/- and transferring the suit land in his name in the record of rights failed to execute sale deed in favour of applicants/plaintiffs, who on failure of respondent/defendant No.1 to perform his part of contract approached the relevant authorities and got published a notice in daily "Ibrat" dated 09.05.1988. Instead of execution of sale deed in favour of applicants/plaintiffs, the respondent/defendant No.1 executed Power of Attorney in favour of respondent/defendant No.2 for execution of sale deed in his favour and in collusion with respondents/defendants No.3 to 5 extended threats for their forcible ousting from the suit land. The applicants/plaintiffs, therefore, filed Suit No.08 of 1989 seeking

specific performance of contract and permanent injunction praying as follows:-

1. *This honourable Court may be pleased to direct the defendant No.1 specially to perform the contract and execute the sale deed in favour of the plaintiff in respect of the suit land as per agreement dt: 09.02.1961.*
2. *This Honourable Court may be pleased to direct the defendants not to interfere with the peaceful possession and enjoyment of plaintiffs in the suit land directly or indirectly through themselves or their agents and assignees, representatives directly or indirectly in any manner whatsoever.*
3. *That defendant No.1 and 2 be directed and restrained by way of injunction not to dispose of the suit land by way of sale or mortgage to any other person till the decision of the suit.*
4. *The costs of the suit be born by the defendants.*
5. *Any other relief this Honourable Court deem fit be awarded to the plaintiff".*

3. The respondents/defendants No.1 and 2 contested the suit and filed their written statements denying the whole averments of the plaint and submitted that the suit land was sold out to one Roshan Khoso (defendant No.5) against sale consideration of Rs.2,28,780/-, who sold out the same to Qadir Bukhsh (defendant No.3) for a consideration of Rs.2,00,000/- and also delivered possession to him. The suit land was on lease with plaintiff No.1, who failed to pay lease money to the defendants No.1 and 2 and relinquished possession in their favour. The respondent/defendant No.3, on the other hand, filed his written statement and pleaded that the suit land was purchased by him from the defendant No.5 under a registered sale deed and the applicants/plaintiffs with malafide intention filed suit suppressing the true and actual facts.

4. The following issues were framed:-

1. *Whether agreement of sale regarding suit land dated 09.02.1961 is genuine document?*
2. *Whether father of the plaintiff had received possession of suit land on the basis of that agreement dated 09.02.1961?*
3. *Whether defendants No.1 & 2 are liable to perform final part of agreement?*
4. *Whether Muhammad Ramzan was actual attorney of Waledino?*

5. *Whether plaintiffs are entitled for the relief as prayed?*

6. *Whether suit is maintainable at law?*

7. *What should the decree be?*

5. The parties led their evidence. On behalf of applicants/ plaintiffs Gul Hassan Shah (plaintiff No.1) examined himself and closed his side. On the other hand, Qadir Bukhsh (defendant No.3) examined himself and produced Jam (DW.2) and Abdul Wahid (DW.3) in his defence and closed his side. The learned Senior Civil Judge, Tando Muhammad Khan, after hearing the parties' respective counsel and assessing the evidence and documents brought on record dismissed the suit of applicants/plaintiffs as being not maintainable and bereft of any merit vide judgment and decree dated 21.07.1994 and 28.07.1994 respectively.

6. Aggrieved by the judgment and decree passed by the learned trial Court, the applicants/appellants preferred appeal (Civil Appeal No.90 of 1994) mainly agitating that the respondents/defendants No.1 and 2 entered into sale agreement, received sale consideration and delivered possession of the suit land in terms of the sale agreement, but failed to perform their part of contract and refused to execute sale deed in their favour.

7. The appeal fails and the judgment and decree passed by the learned trial Court were maintained vide judgment and decree dated 08.04.2000 and 13.04.2000 respectively, penned down by the learned Additional District Judge-III, Hyderabad, hence necessitated the filing of this Revision Application.

8. It is contended on behalf of the applicants that the applicants are lawful purchaser of the suit land through sale agreement dated 09.02.1961 and they always ready and willing to perform their part of contract but the respondents No.1 and 2 did not fulfill their contractual obligation and sold out the suit land to defendant No.5 against valuable consideration. The learned trial Court as well as appellate Court failed to appreciate the evidence and documents adduced by the applicants and extended undue favour to the respondents. The impugned judgments and decrees are the result of misreading and non-reading of evidence and without application

of a judicial mind as well as ignoring the neutral appreciation of whole evidence, hence the same suffer from facts and law and liable to be set-aside and prayed for decree of the applicants' suit. The learned counsel for the applicants has placed reliance on the cases of *Sultan Muhammad and another v Muhammad Qasim and others* (2010 SCMR 1630) and *Siraj Din and others v Mst. Khurshid Begum and others* (2007 SCMR 1792).

9. The learned counsel for the respondents while controverting the submissions of learned counsel for the applicants has submitted that the suit for specific performance was barred by limitation and the applicants had failed to establish execution of sale agreement, which is not attested by two witnesses. The applicants neither filed any power of attorney nor examined Muhammad Ramzan, the alleged attorney of respondent No.1, nor produce any other witness to substantiate the execution of sale agreement. The findings recorded by the learned trial Court as well as the learned appellate Court are outcome of fair evaluation of evidence and documents brought on record, hence call for no interference by this Court. In support of his submissions, the learned counsel has relied upon the cases of *Hamood Mehmood v Mst. Shabana Ishaque and others* (2017 SCMR 2022), *Muhammad Khan v Muhammad Amin* (2008 SCMR 913), *United Bank Limited v Noor un Nisa and others* (2015 SCMR 380) and *Mir Sahib Jan v Janan* (2011 SCMR 27).

10. I have heard the learned counsel for parties, given my anxious consideration to their submissions and have also scanned the entire record carefully with their able assistance.

11. A keen look of the record reveals that applicants filed a suit for specific performance of contract and injunction in respect of a land bearing Surveys No.90/1 to 4, 98/2, 98/3, 99/2 and 100/1, measuring 23-36 acres, situated at Deh Shaikh Bhirkio, Taluka Tando Muhammad Khan, stating therein that the respondent No.1 having acquired the said land by way of inheritance from his brother Waledino entered into an agreement to sell dated 09.02.1961 through his attorney Muhammad Ramzan with their father Haji Shah Nawaz Shah and having received the sale consideration delivered possession of the land, but failed to perform his contractual obligation and instead of transferring the suit land in their favour by way of sale deed

executed Power of Attorney in favour of respondent No.2. The respondents contested the suit and filed their written statements raising legal as well as factual objections and repudiated the claim of the applicants. The learned trial Court dismissed the suit vide judgment and decree dated 21.07.1994 and 28.07.1994. The learned appellate Court too dismissed the appeal vide judgment and decree dated 08.04.2000 and 13.04.2000.

12. Before dilating upon the case on merits it would be appropriate to first take up the submission of learned counsel for the respondents with regard to the suit being barred by time. The limitation for filing of a suit for specific performance is governed by Article 113 of the Schedule-I to the Limitation Act, 1908, which says:-

<b>"113</b>	For Specific performance	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused
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13. Reviewing the above Article, it is noted that, in essence there are two categories viz where in the agreement the date was fixed for performance and where no date was fixed. In first case the period of three years commence from the date fixed in the agreement while in the second case the period would commence from the date when performance is refused. In the case in hand, the sale agreement alleged to have been executed on 13.02.1961 and the time fixed for execution of sale deed was December, 1963, hence limitation for filing of suit starts from December, 1963, but admittedly the applicants have suit in July, 1989 i.e. after more than 25 years of failure of respondents to perform their part of contract as agreed and undertaken in the agreement. Syed Gul Hassan Shah (applicant/plaintiff No.1) too in his cross-examination has admitted that as per agreement the deed was to be completed within three years upto December, 1963. He further admitted that from 1963 to 1988 neither he nor his father given any notice to the respondents for execution of sale deed. On such strength of evidence and the documents brought on record, I am of the view that the claim of the applicants/plaintiffs seeking specific performance was barred by limitation.

14. Adverting to the merits of the case, suffice to observe that the applicants claimed specific performance on the basis of sale agreement dated 09.02.1961. In terms of Article 117 of Qanun-e-Shahadat Order, 1984, the burden to prove an agreement rests on the party who claimed the same and not on the opposite party. Since the defendants have denied the execution of sale agreement, Article 78 of the Qanun-e-Shahadat Order requires the plaintiff to prove the execution of agreement as mandated by Article 79 of the Qanun-e-Shahadat, 1984, which provides that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts clear and unquestionable intention of the legislature barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. In the case in hand, neither the agreement is attested by two witnesses nor the applicants/plaintiffs have examined any witness at trial to substantiate that such an agreement was executed and signed in his presence. Admittedly, an agreement to sell relates to a financial obligation and required to be attested by two witness in terms of Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984. The plaintiff while recording his evidence too has admitted that the sale agreement does not bear the name and signature of any witness. This fact, thus, question marked the authenticity and genuineness of the sale agreement.

15. The scope of revisional jurisdiction of High Court is limited and confined to correction of jurisdictional defect, patent illegality or irregularity affecting the merit of the case and not for substantiating its own finding. This revision application impugns the findings of two Courts below, which have recorded concurrent findings of fact and refused to exercise their discretion in favour of the applicants/plaintiffs. It is settled

proposition of law that concurrent findings of fact cannot be interfered until and unless the same were based on misreading or non-reading of evidence. Reliance may well be made to the case of *Mst. Zaitoon Begum v Nazar Hussain* 2014 SCMR 1469, wherein it has been held as under:-

*"20. Even otherwise, this Court in the case of Kanwal Nain v. Fateh Khan (PLD 1983 SC 53) has held that concurrent findings of two Courts below are not open to interference in limited revisional jurisdiction of the High Court, albeit, it may be, to some extent, erroneous on point of fact and on point of law, both.*

*21. Keeping in view the above principle, the principles of reappraisal of evidence by the Supreme Court are more stringent, unless and until, it is established that the two Courts below, including the High Court, have grossly misread or non-read the material evidence and the impugned judgments and decrees are perverse, causing serious miscarriage of justice, the Supreme Court would exercise extra-ordinary restraints, to interfere in it so lightly, as was suggested at bar".*

16. The learned counsel for the applicants has not raised any question of law that may require consideration by this Court in exercise of its revisional jurisdiction. He has also not been able to convince me that there is any misreading or non-reading of evidence by the learned Courts below. As to the case law cited by the learned counsel for the applicants, in support of his submissions, in my humble view, the facts and circumstances of the said cases are distinct and different from the present case, therefore, none of the precedents cited by the learned counsel are helpful to the applicants.

17. For the foregoing reasons, I am of the view that the learned Judges of the two Courts below have correctly dismissed the suit for specific performance of contract holding that the applicants/plaintiffs has failed to establish that the said agreement to sell had been executed by the respondents/defendants and/or that they had agreed to sell the suit land to the applicants/plaintiffs. I find that the learned subordinate Courts have passed the impugned judgments and decrees after due application of mind and careful appreciation of oral and documentary evidence produced by the parties and applicable law. Hence, the impugned judgments and decrees passed by the two Courts below do not suffer from any illegality, infirmity or material irregularity that may require interference by this Court. This Revision Application is bereft of merit stands dismissed.