# IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

**High Court Appeal No. 98 of 2022**
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| **Appellants** | **Mst. Nasreen Muslim & others through M/s. Salahuddin Ahmed and Muhammad Basim Raza, Advocates** |
| **Respondents** | **Mst. Saeeda Sultana & others through M/s. Mayhar Kazi and Zahid Ali Sahito, Advocates for respondent No.1** |
| Dates of hearing: | 21.02.2024, 23.02.2024, 20.03.2024, 28.03.2024, 01.04.2024, 02.04.2024 and 03.04.2024 |
| Date of Judgment: | 28.06.2024 |

## JUDGMENT

**OMAR SIAL, J.**: This case presents a unique set of circumstances regarding the ownership of the property with the following details: House No. 65/III, Phase V, Khayaban-e-Shaheen, DHA, Karachi, measuring 650 square yards. ("Subject Land"). Ms. Saeeda Sultana ("Ms. Saeeda"), through Suit No. 1127/1997, sought a declaration of the ownership of the Subject Land based on a Form A Lease (issued by DHA). In contrast, Mst Nasreen and Mst Rukhsana had sought specific performance of an unregistered sale agreement allegedly executed by Ms. Saeeda in their favour on 06.08.1995 via a counter Suit no. 744/1998. Both suits were consolidated and disposed of via a common judgment dated 20.10.2021, now under appeal.

2. While intriguing, the convoluted circumstances and background of the case are not the crux of the matter. In our view, the central dispute revolves around the title documentation and the relevant law; therefore, we focus on these key legal issues.

3. It is undisputed that the title documents of the Subject Land are in the name of Ms. Saeeda. It is also established that a sale agreement is not a title document. Ms. Nasreen and Ms. Rukhsana claim to have "purchased" the Subject Land via a Sale Agreement dated 06.08.1995 ("the Sale Agreement") from Ms. Saeeda against a sale consideration of Rs. 2,600,000. The Sale Agreement, however, merely records the sale purchase and payment of sale consideration without stipulating any further steps to formally transfer the title to Mst. Rukhsana and Mst Nasreen. Equally significant is the fact that, despite the lapse of approximately three years, the two ladies made no written request to Ms. Saeeda for the Subject Land to be transferred in their name through a legal and valid conveyance instrument. Furthermore, no effort was made to have the utility bills issued in the name of the alleged new owners, with the bills continuing to be issued in the name of Ms. Saeeda.

4. Ms. Saeeda has categorically denied the execution of the Sale Agreement. The Sale Agreement, by Article 17 of the Qanun-e-Shahadat Order 1981 ("**Order**"), was required to be attested, for it pertains to the financial obligations of the two ladies towards Ms. Saeeda against the alleged sale of land. In the presence of Ms. Saeeda's denial of executing the Sale Agreement, Article 81 of the Order becomes redundant. Article 79 of the Order mandates that wherever a document is required in law to be attested, it shall not be used in evidence unless the party relying on it brings forth two attesting witnesses. The two ladies have not met this mandatory test. During evidence, they brought forth only one attesting witness, Mr. Sagheer Ahmed. The other attesting witness, Mr. Abdul Rauf, has denied the execution of the agreement and has come forth as an attorney and witness of Ms. Saeeda. Having failed to meet that test, the bar of the law is complete[1] unless Ms. Rukhsana and Ms. Nasreen

[1] Sheikh Muhammad Muneer v. Mst Feezan PLD 2021 SC 538 "The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested it has to be proved by two attesting witness 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 the

had taken advantage of Article 82 of the Order. Article 82 states, "*If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.*" The phrase "*other evidence*" was interpreted by the Supreme Court in the case of **Muhammad Khan v. Mst Rasul Bibi (PLD 2003 SC 676)** to include other witnesses. The other witness, Muhammad Muslim, brought forth by Ms. Rukhsana and Ms. Nasreen, is the husband of one of the two ladies. He testified at trial that "*...the suit property was handed over to me as a tenant as I was present when the tenancy agreement Exhibit D/3 was executed…at the time of Execution of Ex/ D/3, Mr. Rauf Ahmed, Mr. Saghir Ahmed, the plaintiff and her husband were present…it is correct to say that I am not attesting witness of Exh D/4 sale agreement. I was present when Exh. D/4 was executed…The Exh D/4 was executed in the morning hours, but I do not remember the correct time; the sale consideration of Rs. 26,00,000/ was paid in cash…*". Conversely, the attesting witness, Mr. Saghir Ahmed, in relation to the execution of D/4, the alleged sale agreement deposed that, "*...I gave Rs. 26,00,000/- to the plaintiff against says that Mr. Muhammad Muslim paid Rs. 16,00,000/- to the plaintiff…The Sale Agreement Exhibit D/4 was witnesseth by myself, Rauf Ahmed, as executing witnesses…*". He did not mention who else was present at the time of the execution of the agreement and, in fact, was unsure who had paid Ms. Saeeda how much of the sale consideration. Additionally, Muhammad Muslim claims to have taken over the Subject Land as the tenant when, in fact, the alleged Tenancy Agreement was executed between Ms. Saeeda and Mr. Saghir Ahmed. Hence, it remained unclear what role Mr. Muhammad Muslim played, if any. Further, he mentions that

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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 mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court no document which is required by law to be attested can be used in evidence until such witness has been called the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document…And for the purpose of proof of such a document the attesting witnesses have to be compulsorily examined as per the requirement of Article 79 otherwise it shall not be considered and taken as proved and used in evidence…"

everyone mentioned above was present at the time of the execution of the Tenancy Agreement as well. However, none has put on their signatures as executing witnesses on this document. A holistic reading of the above, along with the contradictions of the oral testimony with the record, does not inspire confidence in the testimony of the witnesses that stands negated by the record.

5. To rebut the case of Ms. Saeeda, the Appellants did not even bring forth any handwriting expert to prove the contrary. Since they stood to benefit from the Sale Agreement and wanted the same to stand the test of trial, it was their burden of proof (Article 117) to bring forth a handwriting expert. However, none was brought forth. Hence, the said Sale Agreement cannot be used in evidence, let alone to prove any right of Ms. Nasreen and Ms. Rukhsana in the Subject Land. Furthermore, the two ladies have brought no proof of consideration supporting this alleged sale agreement. Neither is there uniformity in the attesting witnesses' testimony concerning the payment of the sale consideration. For instance, the attesting witness says, "*I gave Rs. 26,00,000/- to the plaintiff again says that Mr. Muhammad Muslim paid Rs. 16,00,000/-.*" In addition, as mentioned above, the utility bills continue to be issued in the name of Ms. Saeeda. Despite the lapse of almost three years (the counter-suit was filed in 1998), Ms. Rukhsana and Ms. Nasreen never tendered a legal notice or requested the formal transfer of the title in accordance with all the legal formalities.

6. The only ambiguity in the case is that Ms. Rukhsana and Ms. Nasreen is that they had the original Form-A lease. However, Ms. Saeeda has brought forth an explanation for that, too: owing to the good terms between the families, i.e. Abdul Rauf (her brother-in-law) and a friend of Ms. Rukhsana's husband had given the title documents to him to facilitate the admission of his children. However, despite their requests, the original title documents were not returned. Since Ms. Rukhsana and Ms. Nasreen had failed to discharge their burden of proof about the validity of the Sale

Agreement, the mere possession of the title document, as unusual as that might be, does not give them any legal protection. As it still stands, the title continues to be in the name of Ms. Saeeda, the registered owner of the Subject Land. We believe that, based on a preponderance of the evidence, Ms. Rukhsana and Ms. Nasreen failed to establish that they were the owners of the Subject Land. The cumulative effect of the overall evidence weighs far more in favour of the respondent.

7. Given the preceding, we find no reason to interfere in the Impugned Judgment, which is as per the law.

JUDGE

JUDGE