Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No.S-22 of 2017
Civil Revision No.S-23 of 2017

Applicant through Legal heirs in CRA No.22/17	:	Qalandar Bux (deceased) through M/s. Muhammad Asim Malik and Asadullah Ghambir, Advocates
Applicant in Civil Revision Application No.S-23 of 2017	:	Sajid Ali Mangi Through Mr. Asadullah Gambhir, Advocate
Respondent No.4 in both Revision Applications	:	Jan Muhammad through Mr. Tariq Ali G. Hanif Mangi, Advocate
Respondents No.1, 2, 6 to 9 In both revision applications:		Through Mr. Ghulam Abbas Kuber, Assistant Advocate General
Date of hearing	:	04.09.2023
Date of Decision	:	25.09.2023

J U D G M E N T

ARBAB ALI HAKRO, J: This Judgment shall dispose of instant Civil Revision Application No.S-22 of 2017 and connected Civil Revision Application No.S-23 of 2017, as both captioned Civil Revisions have been filed by parties regarding the same property.

2. Succinct facts leading to captioned Civil Revision Applications are that Respondent No.4 filed a Suit No.177 of 2010 before learned 1st Senior Civil Judge, Khairpur ('**the trial Court**') for Specific Performance, Declaration and Permanent Injunction against the Applicant Qalandar Bux (deceased) through legal heirs and other Respondents. It is narrated that Respondent No.4 had purchased the plot admeasuring 1000 ft ('**suit plot')** from Applicant Qalandar Bux, in the sum of Rs.500,000/- through a sale agreement dated

04.01.2010 along with its possession, where Respondent No.4 had installed a hut and running the business of wood. It is alleged that Respondent No.4 approached the Applicant's father, namely Qalandar Bux, for registration of the suit plot, but he kept him in false hopes. Subsequently, Respondent No.2 (S.H.O. P.S Khairpur) called Respondent No.4 at Police Station, where he threatened Respondent No.4 to hand over the possession of the suit plot to the Applicant. It is further alleged that during the pendency of the suit, Respondent No.4 came to know that the Applicant had transferred the suit land to one Sajid Ali against sale consideration of Rs.300,000/- through registered sale deed dated 11.08.2010 and subsequently plaint of Respondent No.4 was amended with certain prayer clauses.

3. After service, the Applicant filed his amended written statement while Respondents (*defendants*) failed to file their written statements within the stipulated time and were declared *exparte* vide Order dated 09.08.2011. Furthermore, Applicant, in his written statement, denied the case of Respondent No.4 and stated that the Applicant has neither sold out nor received any sale consideration of the suit plot from Respondent No.4 nor executed or signed the alleged agreement to sell and the same was managed by the Respondent No.4 with intention to usurp the suit plot. It is narrated that in 2010, the Applicant rented out the suit plot to the plaintiff for business purposes at Rs.5000/- per month but failed to pay the rent and to vacate the same inspite of frequent requests. Therefore, the Applicant has tried to take possession of the suit plot from the plaintiff through the legal process of law, but he failed to do so.

4. After framing of issues, all parties led their evidence and trial court decreed the suit of Respondent No.4 vide impugned judgment dated 17.02.2014 and decree dated 22.02.2014 against which Applicant through LRs preferred a Civil Appeal No.28/2014 before learned Additional District Judge-IV,

Khairpur, the same was dismissed vide judgment and decree dated 09.01.2017, hence these revisions.

5. At the outset, learned Counsel for the Applicant submits that both the Courts below have failed to render substantial justice because of the admitted facts and legal points involved in the matter. It is argued that the learned trial Court has wrongly observed that Respondent No.4 has examined both attesting witnesses of the sale agreement; however, it is a matter of record that Respondent No.4 has failed to produce his second attesting witness; therefore, it is a clear violation of the mandatory provision of Article 79 of the Qanun-e-Shahadat Order, 1984; besides no any documentary or oral evidence come on record to prove that Applicant had sold out the suit plot to the Respondent No.4 through registered sale deed during pendency of suit or before filing of suit. It is further argued that the learned trial Court recorded its findings with regard to issue No.5 in negative without looking into the document of the registered sale deed executed by Applicant in favour of Respondent No.5 will remain in the field and still intact, the sale agreement dated 04.01.2010 became infructuous and there is case of non-reading and misreading of oral as well as documentary evidence; besides learned Appellate Court while maintaining the impugned Judgment passed by learned Appellate Court did not frame the points for determination, which is clear violation of Order 41 Rule 31 C.P.C., hence committed gross illegality and irregularity, hence these applications.

6. Conversely, learned Counsel representing Respondent No.4 in both Revision Applications contended that Applicant Qalandar Bux sold out the suit plot to Respondent No.4 through an agreement to sell with the consideration of Rs.500,000/- on 04.01.2010; however, Applicant failed to perform his part of the contract as such Respondent No.4 filed suit before the trial Court, which was decreed as prayed for. He further submitted that during cross-examination, the

Applicant admitted that the sale agreement dated 04.01.2010 bears his signature, and both the judgments and decrees passed by learned lower Courts are speaking one and based on cogent and sound reasons. He lastly argued that instant revisions applications are liable to be dismissed.

7. The arguments have been heard at length, and the available record has been carefully evaluated with the able assistance of the learned Counsel for the parties.

8. First, I would like to address the submission of learned Counsel for the Applicant that the Judgment of the appellate Court did not fulfil the requirement of Order XLI Rule 31 of the CodeCivil Procedure 1908 (**the Code**) whereby it should have discussed each issue separately. But it has been held by the Apex Court in the case of **Muhammad Iftikhar v. Nazakat Ali(2010 SCMR 1868)** that where the appellate Court does not reverse the findings of the trial court, a decision on each issue may not be distinctly recorded as long as the provision of Order XLI Rule 31 of the Code is complied with in substance. In the case of **Roshi v. Fateh(1982 SCMR 542)**, it was held that it is substantial compliance with Order XLI Rule 31 of the Code if the finding on a question of fact had been arrived on proper and legal evidence.

9. Nevertheless, in the present case, the findings of facts recorded by the trial Court on the issues were maintained by the appellate Court; therefore, the argument that the matter calls for a remand merely for the reason that the appellate Court did not formally list points for determination, carries no weight when the appellate Court had reappraised the evidence, applied itself to the case and had given reasons for its decision before concurring with the trial court.

10. Now reverting to the merits of the case, upon perusing the verdict of both the Courts below, it is evident that both the Courts below firstly relied upon the admission of applicant /defendant Qalandar Bux **(DW-1)** that he has admitted in his cross-examination that *"the sale agreement*

bears his signature". However, both the Courts below, without considering documents and discussing evidence produced by the parties, minutely have proceeded to pass a decree in favour of the respondent No.4/plaintiff because it has come on record that the parties have made improvements in the evidence. However, both the Courts below have adopted a pick-and-choose methodology, which is not warranted under law because evidence as a whole is to be considered and dilated upon. Evidence in totality is to be accepted or rejected, but the position is otherwise here In the entire evidence, the applicant/defendant has denied the execution of the agreement to sell, and the signature appearing on it is forged. The applicant/defendant has also denied execution of an alleged agreement to sell in his written statement. However, such a fact has not been considered by both the Courts and simply relies on one sentence of cross-examination of the applicant/defendant that he has admitted that the agreement to sell bears his signature. In the case of **Haji Din Muhammad through Legal Heirs v. Mst. Hajra Bibi and others(PLD 2002 Peshawar 21)**, a learned Division Bench has held as under:-

> *"Picking and choosing of such minor contradictions giving on meaning on presumption and conjecture not amounting to pragmatic and positive inference and approach. Reliance is place on (PLD 1994 Supreme Court 162) and (1986 CLC Page 2958). The Judge is suppose to draw a conclusion keeping in view the entire evidence and the substance of whole statement one sentence cannot be torn out of context. Party shall not be penalised for slip of tongue imprudent/utterance. Judge should visualized and evaluate the veracity, capacity and mental level of witnesses. Judge should not test and expect from a lay-man to improvise, compose extempore answers who as a matter of fact not used to face lawyer's the Presiding Officer should apply his mind with great care and caution. In the case in hand, the Courts below picked and carved the minor omission and commission of the witnesses which the defendant-respondents should have met in the cross-examination in an adequate manner. Parties shall not be non-suited for such petty and trivial drawbacks*

> *not fatal on material facts. Courts are supposed to concentrate on theme, pith and substance of a statement and not to chalk out a selective piece of evidence."*
>
> [emphasis supplied]

11. Secondly, the trial Court treated one Muhammad Hashim (**PW-3**) as an attesting witness and held that *"The plaintiff also examined his witnesses, namely Ali Muhammad and Muhammad Hashim, they both are attesting witnesses of the sale agreement dated 04.01.2010...."*However, perusal of the Agreement to Sell (**Exh.42/A**) shows that the witness Ali Ahmed and one Ali Gohar are the attesting witnesses, and the name of **PW-3** is not shown to be the attesting witness. The appellate Court has also relied upon the evidence of **PW-3.** It would be conducive to reproduce such findings of the appellate Court as under: -

> *"Learned advocate for appellants also argued that as per article 79 of Qanoon-e-Shahdat Order, 1984, the execution of the documents is to be proved through evidence of at least two attesting witnesses and same is lacking in the present case, as one of the attesting witness namely Ali Gohar has not been examined by respondent/plaintiff before the learned trial Court. In the presence, in order to prove the execution of the agreement to sell, the respondent/plaintiff, beside himself, has adduced the evidence of P.W.s, namely Ali Ahmed, one of the attesting witnesses and another witness, Muhammad Hashim Siyal, who deposed as under: -*
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> > *"I know the plaintiff. In my presence sale agreement was executed in between the plaintiff and defendant No.3 in respect of the suit plot on 05.01.2010. It was agreed by the parties that for the rate of Rs.500/- per Sq. Feet and plaintiff had paid Rs.500,000/- (Five lac) as part payment/advanceto him. Five packets of Rs.500,000/- containing Rs.1000/- currency notes were paid by the plaintiff to the defendant3……"*
>
> *The evidence of PW Muhammad Hashim reveals that he was present at the time of the sale agreement between respondent/plaintiff and appellant Qalandar Bux. He even disclosed the denomination of the currency notes the respondent/plaintiff paid to the appellant, Qalandar Bux. The*

minimum requirement of examining two witnesses is fulfilled in Article 79 of the Qanoon-e-Shahdat Order, 1984."

12. As discussed above, Ali Gohar and Ali Ahmed were the two attesting witnesses in the instant case. And mere production of one, i.e. Muhammad Hashim (**PW-3**) in evidence, will not discharge the burden upon the respondent/plaintiff to prove the agreement to sell when its execution was specifically denied by the applicant/defendant. Interestingly, neither in the agreement to sell (**Exh.42/A**) nor in the plaint name of Muhammad Hashim was mentioned in any capacity. He admitted, *"I see Exh.42/A and say that my signature was not available on it. Ex.42/A was signed by plaintiff, defendant No.3 and two attesting witnesses, namely Ali Ahmed and Ali Gohar"*. He has also stated in his evidence that he does not remember the date of purchase of stamp paper; however, it was written by him and on the contrary, the respondent No.4/plaintiff Jan Muhammad (**PW-1**) has stated in his evidence that *I myself has written the Exh.42/A* at the suit plot. In contrast, both the witnesses (**PW-2 & 3)** have stated in their evidence that Exh.42/A was reduced in writing at the Otaq of respondent/plaintiff Jan Muhammad.

13. A witness can only be introduced to prove a document if his name exists on the document or, was referred by any of the witnesses in their statements or was named as such in the plaint. I am afraid that even the statement of Muhammad Hashim **(PW-3)** cannot support the respondent No.4 as he does not qualify to be a witness based on the above-said criteria. If this tendency is allowed to prevail, any person at any time will come forward to be considered as a witness to prove any document which will be against the spirit of law relating to the proof of a document. In this context, I am fortified by the Judgment of Apex Court in the case of **Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others(PLD 2011 SC 241)**, where it was held under:-

> *"…… Therefore, in my considered view* ***a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise****; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."*
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> [emphasis supplied]

14. In view of the above discussion, it becomes evident and admitted position the Exh.42/A, the alleged agreement to sell was executed in presence of Ali Gohar and Ali Ahmed as two attesting witnesses. The non-production of Ali Gohar was neither explained by the respondent/plaintiff nor any serious effort was made to produce him before the Court through the process of law. Legally speaking, a document is required to be proved under Article 79 of the Qanun-e-Shahadat Order, 1984 ('**QSO, 1984')**, which is reproduced as under:-

> ***"79. Proof of execution of document required by law to be attested.*** *If a document is required by law to be attested,* ***it shall not be used as evidence until two attesting witnesses [at] least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence****:*
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> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."*

The competency of a witness has been laid down in Article 17 of QSO, 1984, which is also reproduced as under:-

> ***"17. Competence and number of witnesses.-(1)*** *The competence of a person to testify, and the number of*

> *witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.*
>
> ***(2)*** *Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,*
>
> ***(a)*** *in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and*
>
> ***(b)*** *in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant."*

15. A perusal of the two provisions mentioned above of the QSO, 1984, clearly demonstrates that except for a will, no document can be used in evidence until it is proved by two attesting witnesses. In the case of **Farid Bakhsh v. Jind Wadda (2015 SCMR 1044),** the Apex Court has held as under: -

> *"This Article in clear and unambiguous words provides that* ***a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution****. The words "****shall not be used as evidence"*** *unmistakably show that such document shall be proved in such and no other manner. The words "****two attesting witnesses at least****" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving evidence can even be imagined for proving its execution.* ***Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce****. We, thus, have no doubt in our mind that this Article being mandatory has to be construed and complied with as such. The judgments rendered in the cases of Imtiaz Ahmed v. Ghulam Ali and others and Jameel Ahmed v. Late Safiuddin through Legal Representatives (supra) have therefore no relevance to the case in hand. Reference to the Judgment rendered in the case of Nazir Ahmed v. Muhammad Rafiq (1993 CLC 257) (supra) cannot help the appellant*

when it being against the terms and meanings of the Article is per incuriam. The case of Jagannath Khan and others v. Bajranq Das Agarwala and others (supra) too will not help the appellant when production of two attesting witnesses was not a requirement of the law then in force. The argument addressed on the strength of the Judgment rendered in the case of Dil Murad and others v. Akbar Shah (supra) has not moved us a bit when the appellant failing to call the other attesting witness failed to prove the deed in accordance with the requirements of law. Such failure, in the absence of any plausible explanation, would also give rise to an adverse presumption against the appellant under Article 129(g) of the Order. In the case of Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (PLD 2011 SC 241), this Court after defining the meanings of the word "attesting" in the light of Black's Law Dictionary and other classical books and case law held that a document shall not be considered, taken as proved or used in evidence, if not proved in accordance with the requirements of Article 79 of the Order."

[emphasis supplied]

16. However, nothing has been placed on record to show that the second witness of the sale agreement namely Ali Gohar was not alive, not traceable or not capable of giving evidence. The Respondent No.4 has also not applied for summoning the witness subject to process of the Court. In such circumstances, the contents of the Sale Agreement have not been proved in accordance with the law. In Case of **Sheikh Muhammad Muneer v. Mst. Feezan (PLD 2021 Supreme Court 538)**, it has been held by the Apex Court as under:-

"The petitioner presumably was not able to locate a witness (Allah Ditta). The burden to produce or summon him lay upon the petitioner, which is not alleviated merely by saying he could not be found. Article 80 of the Qanun-e-Shahadat provides, that:

80. Proof where no attesting witness found. If no such attesting witness can be found, it must be proved that the witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so.

The Article states that it must be proved that the witness had

> *either died or could not be found. Simply alleging that a witness cannot be found did not assuage the burden to locate and produce him. The petitioner did not lead evidence either to establish his death or disappearance, let alone seek permission to lead secondary evidence".*
>
> [emphasis supplied]

17. Moreover, no receipt regarding payment of advance/ part payment of sale consideration of Rs.500,000/- has been brought on record, and mere oral assertions have been put that the alleged part payment was made in cash, which does not appeal to the prudent mind. Therefore, the sale consideration, being a prime factor, has not been proved.

18. Besides**,** Section 53A of the Transfer of Property Act 1882 defines the question of possession based on contract. For ready reference, said Section is reproduced as under: -

> *"**53A. Part performance**. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
>
> *Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."*

19. Since the Agreement to Sell was not proved, the benefit of Section 53A of the Transfer of Property Act, 1882

would not accrue. Even the fact of handing over possession to the respondent/plaintiff has not been mentioned in the alleged Agreement to Sell. Thus, it is not proved that in the instant case, the plaintiff/respondent was inducted into possession of the property under the impugned sale by the applicant/defendant. In Case of **Syed Athar Hussain Shah v. Haji Muhammad Riaz and another (2022 SCMR 778)**, it was held by the Apex Court that:-

> *"It is true that section 53-A of the Transfer of Property Act cannot be utilized by a person in possession of immovable property under an unregistered document which is compulsorily registrable under the Registration Act, as a weapon of offence to assert his title over the property.... The linking or combining of section 53-A of the Transfer of Property Act with the petitioner's suit will not benefit him by extending the period of limitation and save the third suit".*
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> [emphasis supplied]

In the case of **Haji Muhammad Nawaz and others vs Aminullah (deceased) through L.R.sL.R.s and others(2019 S C M R 974),** the Apex Court has held as under: -

> *"In such circumstances mere possession by the petitioners would not be the determinative factor in terms of Article 126 of the Qanun-e-Shahadat. In the case of Secretary of State v. Chimanlal Jamnadas (A.I.R. 1942 Bombay 161) Divatia and Macklin, JJ considered section 110 of the Evidence Act, 1872 (which Section is identical to Article 126 of the Qanun-e-Shahadat) and held, that, "The presumption under section 110 would apply only if two conditions are satisfied, viz., that the possession of the plaintiff is not prima facie wrongful, and, secondly, the title of the defendant is not proved." The title of the defendant (Aminullah) was acknowledged by the petitioners and stood proved therefore Article 126 of the Qanun-e-Shahadat would not assist the petitioners."*
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> [emphasis supplied]

Similarly, in the case of **Muhammad Nawaz and 4 others vs Ramzan and 2 others(2002 S C M R 1983),** the Apex Court has held as under: -

> *"We have gone through the impugned Judgment which in our opinion is based on proper reasoning. The learned Single*

> *Judge in Chambers has discussed the evidence adduced by both the parties in detail and has also considered the aspect of the oral sale agreement properly, the learned Counsel for the petitioners has not been able to show us. even a single receipt in support of the sale consideration as also any proof that the possession was delivered to them and are in its possession by this time. No revenue receipt is produced to substantiate that they are in possession of the land and cultivating the same."*
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> [emphasis supplied]

20. Notwithstanding, Section 22 of the Specific Relief Act, 1877 clarifies that the jurisdiction to decree specific performance is discretionary. The Court is not bound to grant such relief merely because it is lawful. However, the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. In this context, I am fortified with the recent Judgment of Apex Court rendered in the case of **Muhammad Ghaffar (deceased) through L.R.S and others vs Arif Muhammad(2023 S C M R 344)**, wherein it has been held as under: -

> *"It is axiomatic principle of law that for the grant of a decree for specific performance on the basis of an agreement to sell it is a discretionary relief and the court, for just and equitable reasons, can withhold the same even if the agreement is proved."*
>
> [emphasis supplied]

21. So far, Civil Revision No.23 of 2017 of Applicant Sajid Ali Mangi ('**subsequent purchaser**') is concerned. However, he was impleaded in array of defendants. However, he has neither filed his written statement nor produced a registered Sale Deed in respect of the suit plot, as the applicant/respondent has only to prove execution of the Agreement to Sell and ingredients in terms of Section 54 of the Transfer of Property Act, 1882 such question regarding alienation of suit plot during pendency of suit in terms of Section 27(b) of the Specific Relief Act, 1877 is secondary one.

22. Pursuant to the above discussion, it is observed that both the Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject in a judicious manner; therefore, both the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in cases of **Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).**

23. For the foregoing reasons and discussion while placing reliance on the judgments supra, the Revision Application No.22 of 2017 is allowed, impugned judgments and decrees passed by both the Courts below are set aside, and in consequence thereof, the suit, instituted by the respondent/plaintiff is dismissed. As a result, Civil Revision No.23 of 2017 is also disposed of accordingly, as the it is filed against the same Judgment and decree. Parties are left to bear their costs.

JUDGE

Faisal Mumtaz/P.S