*Judgment Sheet*

# IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-123 of 2021

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| Applicants | : | Ali Gohar s/o Muhammad Ismail &<br>Anjum Gohar s/o Ali Gohar,<br>through Mr. Safdar Ali Kanasro,<br>Advocate |
| Respondent No.1 | : | Mst. Bhaun Bhen d/o Muhammad Yousif,<br>Through Mr. Munawar Hussain Memon,<br>Advocate |
| Respondents No.2 to5 | : | Province of Sindh and others<br>Through Mr. Ahmed Ali Shahani, AAG |
| Date of hearing | : | 27.10. 2023 |
| Date of Decision | : | 27.11.2023 |

## JUDGMENT

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 (**"the Code"**), the applicants have impugned Judgment and Decree dated 05.10.2021, passed by Additional District Judge, Gambat (**"the appellate Court"**) in Civil Appeal No.40 of 2019, whereby, the Judgment dated 26.01.2019 and Decree dated 29.1.2019, passed by Senior Civil Judge, Gambat (**"the trial Court"**) in F.C. Suit No.03 of 2012, through which the suit of the Respondent No.1 was decreed has been maintained by dismissing the Appeal.

2. The facts of the case can be briefly summarized as follows: The Respondent No.1/ plaintiff filed a suit seeking declaration, cancellation of a registered sale deed, possession, mesne profit and permanent injunction. She claimed ownership over the portion of land bearing Survey No.409 (0-02) Acres, 617 (00-29) Acres in Deh Agra of Tapo Sial Pathan, Taluka Gambat, which she had inherited from her father, Muhammad Yousif. This ownership was recorded in

her favour on 24.10.1983 with mutation entry No.115. Since then, she has been peacefully possessing the land. In the year, 1984 she sold out a portion of the land to Fayaz Ali son of Ameer Bux Mallah and Ali Bux son of Allah Jurriyo Markhand, through registered sale deeds. She also sold a portion to Hamz Ali son of Yousif Kalhoro, through an *Iqrarnama*. Additionally, a part of the land was acquired by the Government for road construction. As a result, she sold a total area of 00-15 Ghunta and remained in peaceful possession of the remaining 00-14 Ghunta. Later, through a registered sale deed, she sold out an area of 00-07 Ghunta to a relative of the applicant/defendant No.1 while retaining peaceful possession of the remaining land measuring 00-07 Ghunta (**"the suit land"**). In July 2011, the applicant/defendant No.1 forcefully occupied the suit land with the help of local outlaws, claiming to have obtained a decree in his favour from the Court. The plaintiff was shocked to discover that the applicant/defendant No.1 had filed a Civil Suit No.61 of 2010 against the Irrigation Department and obtained a collusive decree based on a compromise, falsely presenting himself as the owner of the suit land through a sale deed. The plaintiff then filed an application under Section 12(2) of the Code, which was dismissed, leading her to file the current suit.

3. The defendants No.1 and 6 (“the applicants herein”) submitted their written statements and refuted the claim made by the plaintiff by stating that the plaintiff sold a portion of land measuring 00-19 Ghunta to applicant No.1 through a registered Sale Deed dated 27.3.1984, out of the total area of 00-29 Ghunta, for consideration of Rs.60,000/-. Applicant No.1 constructed his house on 00-07 Ghunta, while the remaining area remained vacant. Later on, various individuals, including the Irrigation Authorities, encroached upon the vacant area of land purchased by applicant No.1. As a result, applicant No.1 filed a lawsuit (No.61/2010) against the Irrigation Authorities, who admitted during the trial that they were in illegal possession of 04-Ghunta of applicant No.1's land. Consequently, they agreed to

surrender the said 04-Ghunta and a compromised decree was passed on 11.01.2011. Subsequently, the plaintiff filed an application under Section 12(2) of the Code in the aforementioned suit, which was dismissed by the trial Court on 10.10.2011. However, plaintiff No.1 did not challenge that dismissal and instead filed the present suit with malicious intent despite lacking any valid cause of action.

4. On the divergent pleadings of the parties, the learned trial court framed the following eight issues: -

i. *Whether suit is not maintainable and barred by law?*

ii. *Whether plaintiff is lawful owner of the suit property and she is entitled to retain peaceful possession of the suit property?*

iii. *Whether the registered Sale Deed dated 27.3.1984 is fake, forged and manipulated document and also registered Sale Deed dated 18.10.2011, executed by defendant No.1 in favour of defendant No.6 is illegal, null and void and both registered Sale Deeds dated 27.3.1984 and 18.10.2011 are liable to be cancelled?*

iv. *Whether possession of defendant No.1 and 6 over the suit property is illegal and without lawful authority and plaintiff is entitled to get peaceful vacant possession of suit property and also plaintiff is entitled to receive Mesne Profit at the rate of Rs.5,000/- per month since July, 2011, till the delivery of possession to the plaintiff?*

v. *Whether the plaintiff voluntarily and legally sold out the suit property through a registered Sale Deed dated 27.3.1984 and said registered Sale Deed is a valid and legal document and validity of such sale deed dated 27.3.1984, the plaintiff has admitted in her application under Section 12(2) CPC filed by her before this Court?*

vi. *Whether the defendant filed F.C Suit No.61/2010, before this Court in respect of suit property which was dispose of through compromise decree dated 11.01.2011 and on the basis of compromise decree entry No.3 kept on record and also sale deed dated 18.10.2011, executed and such sale deed and entry are valid, legal and same not liable to be cancelled?*

vii. *Whether the plaintiff is entitled for the relief claimed?*

viii. *What should the Decree be?*

5. In support of their claim, Respondent No.1 produced five witnesses and recorded their statements through her attorney. Attorneys of Respondent No.1 recorded his statements and produced relevant documents in their evidence. In rebuttal, the applicants recorded their statements and those of two witnesses. On completion of the case, the trial court vide Judgment dated 26.01.2019 and Decree dated 29.01.2019 decreed the suit filed by Respondent No.1, which was challenged through Civil Appeal No.40 of 2019; the appellate Court dismissed the Appeal vide Judgment and Decree dated 05.10.2021 and maintained the Judgment and Decree of trial Court.

6. At the outset, learned Counsel representing the applicants submits that learned lower Courts have seriously erred by passing impugned judgments and decrees without considering material irregularities and have hypothetically decided the matter; that there is severe misreading and non-reading of evidence available on record; that Respondent No.1 did not assail the order passed the trial Court on an application under Section 12(2) CPC filed by her and malafidely file a new suit, which fact has also not been considered; that issues have not been appropriately framed as per pleadings; that Respondent No.1 never remained in possession of the suit property; that concurrent findings recorded by learned lower Courts are not in consonance of facts and law as well by ignoring the legal position. In the end, learned Counsel for the Applicants has prayed that instant revision application may be allowed by setting aside impugned judgments and decrees passed by both lower Courts. In support of his contention, learned Counsel has relied on the case laws reported as 2016 MLD 2050 and 2016 YLR 2627.

7. Conversely, learned Counsel representing Respondent No.1 contended that the learned trial Court has rightly decreed the suit of Respondent No.1, which was maintained by learned Appellate Court, that there is no gross or material irregularity or illegality committed by both

Courts below; that cause of action arose from the date of dismissal of application under Section 12(2) CPC; that applicant No.1 in collusion with irrigation authorities got consent decree; that Respondent No.1 only sold out 07 ghuntas instead of 19 ghuntas; besides there is no any misreading or non-reading of evidence and on the basis of technicalities, decree holder cannot be deprived from the fruits of Decree. He prayed for the dismissal of the instant revision application. He placed reliance on the case reported as **2017 YLR 399**.

8. Learned A.A.G, in his arguments, admitted such fact that the irrigation authority was not competent to enter into a compromise in the suit. He argued that in these proceedings, the irrigation department is not a party; besides, the record of Sub-Registrar Gambat was burnt in the year 2001; therefore, it would be sufficient to note that the applicant managed a sale deed. Ultimately, he supports the impugned judgments and decrees passed by learned lower Courts below.

9. 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, including the case law relied upon. I have also scrutinized the exactness and meticulousness of the judgments and decrees of both the lower Courts with a fair opportunity of the audience to the learned Counsel for the applicants to satisfy me as to what has acted by the Courts below in the exercise of their jurisdiction either illegally or with material irregularity.

10. Before delving further into the merits of the case, I would like to point out that the Revisional jurisdiction of this Court is limited, especially when there are concurrent findings of trial and appellate courts. There are numerous case laws on this point; however, if any, can be made to the case of **Mst. FAHEEMAN BEGUM (DECEASED) THROUGH L.RS AND OTHERS VS. ISLAM-UD-DIN (DECEASED) THROUGH L.RS AND OTHERS**, reported in **2023 SCMR 1402**, in which Apex Court has held as under: -

> *"If the concurrent findings recorded by the lower fora are found to be in violation of law, or based on misreading or non-reading of evidence, then they cannot be treated as being so sacrosanct or sanctified that cannot be reversed by the High Court in revisional jurisdiction which is pre-eminently corrective and supervisory in nature. In fact, the Court in its revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908 ("C.P.C."), can even exercise its suo motu jurisdiction to correct any jurisdictive errors committed by a subordinate Court to ensure strict adherence to the safe administration of justice. The jurisdiction vested in the High Court under section 115, C.P.C. is to satisfy and reassure that the order is within its jurisdiction; the case is not one in which the Court ought to exercise jurisdiction and, in abstaining from exercising jurisdiction, the Court has not acted illegally or in breach of some provision of law, or with material irregularity, or by committing some error of procedure in the course of the trial which affected the ultimate decision. The scope of revisional jurisdiction is restricted to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality in the Judgment of the nature which may have a material effect on the result of the case, or if the conclusion drawn therein is perverse or conflicting to the law."*
>
> *[Emphasis supplied]*

In the case of **<u>Khudadad v. Ghazanfar Ali Shah alias S. Inaam Hussain and others</u> (2022 SCMR 933),** it was observed by the Apex Court that -

> *"The High Court has a narrow and limited jurisdiction to interfere in the concurrent rulings arrived at by the courts below while exercising power under section 115, C.P.C. These powers have been entrusted and consigned to the High Court in order to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities which cannot be invoked against conclusion of law or fact which do not in any way affect the jurisdiction of the Court but confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the Judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law, but interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction, therefore, the scope of the appellate and revisional jurisdiction must not be mixed up or bewildered. The interference in the revisional jurisdiction can be made only in the cases in which the order passed or a*

> *judgment rendered by a subordinate Court is found to be perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law."*
> *[Emphasis supplied]*

Similarly, in the case of **HAJI WAJDAD V. PROVINCIAL GOVERNMENT THROUGH SECRETARY BOARD OF REVENUE GOVERNMENT OF BALOCHISTAN, QUETTA AND OTHERS (2020 SCMR 2046)**, it was held by the Apex Court that:

> *"There is no cavil to the principle that the Revisional Court, while exercising its jurisdiction under section 115 of the Civil Procedure Code, 1908 ("C.P.C."), as a rule is not to upset the concurrent findings of fact recorded by the two courts below. This principle is essentially premised on the touchstone that the appellate Court is the last Court of deciding disputed questions of facts. However, the above principle is not absolute, and there may be circumstances warranting exception to the above rule, as provided under section 115, C.P.C. gross misreading or non-reading of evidence on the record; or when the courts below had acted in exercise of its jurisdiction illegally or with material irregularity".*
> *[Emphasis supplied]*

11. The learned Counsel representing the applicants objected to the suit's maintainability. He argued that respondent No.1/plaintiff had previously challenged the Decree passed in F.C Suit No.61 of 2010 through an application under Section 12(2) of the Code. When this application was dismissed, respondent No.1 filed the present suit, which is not permissible since a decree already exists. I disagree with the argument put forth by the applicants' Counsel. Firstly, respondent No.1/plaintiff was not a party in the previous proceeding or the Decree mentioned by the Counsel. Additionally, the Decree in question was a consent decree, which means it does not legally bind the present respondent No.1/plaintiff in the light of the case of **Muhammad Iqbal and others vs Khair Din through L.Rs and others(2014 SCMR 33),** wherein August Court has held as under: -

> *"A consent decree is a kind of agreement/contract between two parties with a superadded command of the court but it would not bind a third party who was not party to the said suit."*
>
> *[Emphasis supplied]*

12. The Respondent No.1/plaintiff was not obligated to challenge the Decree by submitting an application under Section 12(2) of the Code, even if it was challenged as in the present case and the application was subsequently dismissed. This dismissal did not prevent the respondent No.1/plaintiff from filing the lawsuit. Even otherwise, I am of the view that before challenging a judgment and decree, respondent No.1/plaintiff is required to establish her right and locus *standi* to challenge that Decree in such eventuality party can file a suit for declaration of his title or interest in the property subject matter of the Decree which was previously passed by the civil Court and in that suit the Decree can be challenged because the intention of the legislature for legislating subsection (2) of Section 12 of the Code is to curtail the litigation and not to enhance the same. If in this eventuality, it is held that first, the party may establish his right or locus *standi* to challenge that Decree through a declaratory suit and, after getting that Decree, then file an application under Section 12(2) of the Code, in my view, it is not the intention of the legislature, nor it is required, therefore, when a person challenges the validity of the Judgment and Decree after establishing his right or interest and the locus *standi* in a suit the Decree can be challenged in that suit. In these circumstances, I do not agree with the contention of learned Counsel for the applicants that a decree previously passed in the proceeding is a hurdle in the way of respondent No.1/plaintiff. Previous litigation was about encroachment over the property by the Irrigation Department, who, during proceedings, surrendered the encroached area and the suit was disposed of by way of compromised/consent decree and the respondent No.1/plaintiff was not a party to those

proceedings, therefore, it is not binding upon her in the light of Section 43 of the Specific Relief Act, 1877, which provide that a declaration made under Chapter VI of the Specific Relief Act is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

13. Referring to the merits of the case, the plaintiff/respondent No.1 filed a lawsuit seeking the cancellation of a registered Sale Deed according to Section 39 of the Specific Relief Act, 1877. However, the pleading of respondent No.1/plaintiff is unclear. It does not explicitly state whether the prayer is for the cancellation of the whole Sale Deed due to the denial of execution or only for a specific area, as the plaintiff, through her attorney, admitted to having sold out an area of 00-07 Ghunta to the applicant No.1 through same registered Sale Deed dated 27.3.1984, wherein a total area of 00-19 Ghunta under sale has been shown by tampering the figure from 00-07 to 00-19. In this regard, both the Courts below inspected the registered Sale Deed as required under Article 72 of the Qanun-e-Shahdat Order, 1984. It would be imperative to reproduce the findings of the appellate Court hereunder: -

> *"14/- Importantly, careful scrutiny of registered sale deed No.250 at Ex.30/E shows that on its first page, area under sale has been shown in figures as '19' but its close view shall reveal that actually the digit '9' was '7' which had been subsequently changed from to '9' and digit '1' had been supplied on left side of it. It further appears that amount of sale consideration of Rs.60,000/- in figure on that page has overwriting in the four zeros. It further appears that the endorsement of the sub-treasurer for issuing stamp paper appearing on page No.3 and page 05 of that document in the typewritten text is bigger than the similar endorsement on other pages of the document. It is also noteworthy that thumb impression of executant Mst. Bhaun Bhen is only appearing on the last page of the document and not on*

> *the each page of document. It is also visible from the record that the handwriting on each page of the document is not the same, while the entire document is plastic coated, yet it bears oil stains. Interestingly, the shape of oil stains on leaves No.2 and 3 (page No.3,4,5,6) is different from the rest of pages of the document. These observations as to condition of document coupled with the admission of respondent No.1/plaintiff that she had sold out only seven ghunta land to appellant/defendant No.1, clearly prove that taking the advantage of known fact that the record of Sub-Registrar Gambat was destroyed in the year 2001, this document has been tampered with and its leaves No.2 and 3 have been replaced apparently to incorporate rest of land of respondent No.1/plaintiff.*
>
> *14/- The above proposition is further confirmed by the statement of official witness Tapedar, who had brought a record of entry No.168 of DK Register, and there was overwriting on the original entry in column nine where the area under sale is shown, and it appeared that the digit seven had been changed to nineteen. Further confirmation of the above proposition is made by the report of the commissioner who had visited the site on the application of respondent No.1/plaintiff. According to this report appellant/defendant No.1 had constructed his house on 07-10 ghunta area of survey No.617 while four ghunta area of said survey number was lying vacant and two other persons who also respondent No.1/plaintiff had sold some land were occupying excessive area approximately making total of about three ghuntas. Thus, even if vacant area of land is added to the area of 07-10 acres where house of appellant/defendant was standing yet his possession was short of claimed nineteen ghuntas."*
>
> [Emphasis added]

14. There is a distinction between the execution of the document and proof of contents of the document. According to law, the execution of a document refers to the process of signing, affixing a thumb impression, or otherwise authenticating a document by the person who is bound by it. The execution of a document is to be demonstrated by permissible evidence, which can include oral testimony, the document itself, or other evidence that is admissible

under the law. On the other hand, the proof of the contents of a document refers to the process of demonstrating the truth of the facts stated in the document. The legal position is that the mere production and marking of a document as an exhibit by the Court cannot be held to be due to proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue". The contents of a document can be proved by primary evidence, which is the document itself, or by secondary evidence, which is evidence that is admissible in the absence of primary evidence.

15. In the present case, the attorney of respondent No.1/plaintiff and her witness, Imdad Ali (plaintiff's husband), have not denied the execution of the registered Sale Deed dated 27.3.1984. Now, there is a question regarding whether applicant No.1 has proven the contents of the Sale Deed in relation to either 00-19 Ghunta or 00-07 Ghunta. At first, it was the responsibility of respondent No.1 to prove, and she examined her attorney, who denied the contents of the registered Sale Deed particularly the area. Afterwards, the burden was shifted to applicant No.1 to prove that he purchased 00-19 Ghunta and not 00-07 Ghunta as stated in the registered Sale Deed. It is settled law that the execution of a document and its contents are distinct. The burden to prove the contents of a document, in addition to proving the execution thereof, is on the beneficiary of such a document. The beneficiary is required to provide reliable, cogent and confidence-inspiring evidence to prove its contents even though its execution may not be in dispute. It is a mandatory provision of law that any document/instrument which creates a right has to be reduced into writing in the presence of at least two witnesses. The mandate of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, which are reproduced here for ready reference:-

> *"**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 Qur'an 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."*
>
> ***"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 given evidence:*
>
> *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 provisions 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."*

16. In Case of Bilal Hussain Shah and another v. Dilawar Shah (PLD 2018 Supreme Court 698), it was held by the Apex Court that:

> *"In this case the plaint states that the Gift Deeds have not been executed by Syed Maqbool Shah, as they have been fraudulently procured and executed on his behalf by appellant No. 1. Admittedly two attesting witnesses to the Gift Deeds were not produced. The argument of the learned counsel for the appellants that the proviso to Article 79 of the Order applies to the present case, because the Gift Deeds are registered documents and there is no specific denial to the execution of the document by the executant, does not hold ground for the above reasons. The execution of the document, therefore, required the evidence of two attesting witnesses".*

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".*

17. The ordained of ***Allah Almighty*** in verse No.282 of Sura Al-Baqra, the translation whereof is given below:-

> ***"O ye who believe!***
> *when ye deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing.*
>
> *Let a scribe write down faithfully as between the parties:*
>
> *Let not the scribe refuse to write, as Allah has taught him, so let him write.*
>
> *Let him who incurs the liability dictate, but let him fear his Lord Allah, and not diminish aught of what he owes.*
>
> *If the party liable is mentally deficient, or weak, or unable himself to dictate,*
> *Let his guardian dictate faithfully.*
>
> *And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her.*
>
> *The witnesses should not refuse when they are called on (for evidence).*
>
> *Disdain not to reduce to writing (your contract) for a future period, whether it be small or big:*
>
> *It is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves;*
> *but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing.*
> *But take witnesses whenever ye make a commercial contract;*
> *and let neither scribe nor witness suffer harm.*

*If ye do (such harm), it would be wickedness in you. So fear Allah;*

*for it is Allah that teaches you. And Allah is well acquainted with all things."*

18. Applicant No.1 failed to produce one of the attesting witnesses, Moula Bux, the scribe and the Stamp Vendor, before the trial court to prove the contents of the document. These witnesses were available to applicant No.1, but he withheld the best evidence for the reasons best known to him. Inference can be made under Article 129 Illustration (g) of Qanun-e-Shahadat Order, 1984, which provides that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it, is to be drawn against the applicant No.1 with the impression that if he produced such witnesses, then he would not support his version. In the case of **Abdul Ghafoor and others vs Mukhtar Ahmad Khan and others (2006 SCMR 1144)**, the August Court has held as under: -

*"(5). There is no cavil to the proposition that a presumption of truth is attached to registration of a document but if its contents are challenged then the onus shifts on the beneficiary to prove its contents. It was for the petitioners/defendants to prove that Gul Muhammad had validly gifted the suit property in terms of impugned gift-deed but neither any marginal witnesses of said gift-deed nor scribe and even the person who identified Gul Muhammad were produced. The petitioners/defendants miserably failed to prove their case."*

[Emphasis supplied]

In Case of **Farid Bakhsh v. Jind Wadda and others (2015 SCMR 1044)**, it was held by the Apex Court that:

*"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".*

19. On examination of the Judgment of the trial Court, it shows that the trial Court has declared the Sale Deed dated 27.3.1984 and its entry No.168 dated 18.02.1998 liable to be cancelled as a whole. Notwithstanding, it would be conducive to refer Section 40 of the Specific Relief Act, 1877, which reads as under: -

> *"**40. What instruments may be partially cancelled.** Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue."*

20. A plain reading of Section 40 ibid would show that when an instrument embodies more than one separate and distinct right or obligation, and one is separable from the other, the Court, in an

appropriate case, may cancel the instrument in part i.e. in respect of some rights or obligations and allow it to stand for the residue. Therefore, I am not persuaded by the findings of the trial Court regarding the cancellation of the Sale Deed as a whole, as in the present case, execution of the said Sale Deed is not denied by Respondent No.1; however, its contents are denied to the extent of an area from 00-07 Ghunta being tampered to 00-19 Ghunta as discussed by both the Courts below. In the given circumstances, the Sale Deed dated 27.3.1984 and its entry No. 168 dated 18.02.1998 are liable to be partially cancelled to the extent of an area by treating it for an area of 00-07 Ghunta instead of 00-19 Ghunta. Otherwise, both Courts below have properly appreciated the record and correctly decreed the suit and dismissed the Appeal and the concurrent findings of the Courts below are based on valid reasons, and no misreading or non-reading of evidence is pointed out by the learned Counsel for the applicant's warranting interference by this Court.

21. For the foregoing reasons, the instant Revision application is disposed of with the above modification. Parties are left to bear costs.

JUDGE

Faisal Mumtaz/PS