IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS
Civil Revision Application No.S-60 of 2024

Present:
Mr. Justice Dr. Syed Fiaz ul Hasan Shah

1. Khamiso S/o Raju,
Hindu, adult, Bheel by caste, R/o Village Bherio,
Taluka and District Umerkot.

2. Attaullah S/o Abdul Subhan,
Muslim, adult, Nohri by caste, R/o Umerkot Town, Taluka
& District Umeko.

….Applicants/Defendants No.1 & 6.

Versus

1. Mansigno S/o Petho Mal through his L.Rs:-

    1. Dewan Kumar S/o Mansingo,
    2. Lajpat S/o Mansingo,
    3. Smt. Roope Wd/o Mansingo.

    All Hindu, adult, Menghwar by caste, R/o: Ward No.311,
    Umerkot town, Taluka and District Umerkot.

2. The Mukhtiarkar, Revenue Umerkot.
3. The Sub-Registrar, Umerkot.
4. The Registrar, Mirpurkhas.
5. Province of Sindh, through Secretary Revenue,
Government of Sindh, Karachi.

…. Respondents.

Date of Hearing: 24.02.2025

Date of Decision: 06.03.2025

Mr. Khirpal Chetan Dev, advocate for applicants called absent.
Mr. Kanji Mal Meghwar, advocate for the respondent No.1.
Mr. Ayaz Ali Rajpar, Assistant A.A.G Sindh.

O R D E R

Dr. Syed Fiaz ul Hasan Shah, J: The Civil Revision Application under section 115 of Civil Procedure Code, is directed against the judgment dated 11.01.2024 and decree dated 17.01.2024 passed by learned Additional District Judge-II, Umerkot whereby the Civil Appeal No.45 of 2023, filed by the respondent No.1 has been allowed and set aside the

order dated 22.09.2023 passed by the learned Senior Civil Judge-II, Umerkot on application under Order VII, rule 11(d), C.P.C., in F.C Suit No.124 of 2022 whereby plaint has been rejected.

2. The respondent No.1, Mansingo through his L.Rs, filed suit in the Court of Senior Civil Judge, Umerkot-II against the applicants, asserting that the respondents No.1 and 2/plaintiffs had filed suit No.124/2022 for Specific Performance of Contract and Permanent Injunction against the applicant No.1/defendant No.1 disclosing the facts that their father had purchased the suit land on 17-07-1986 and such agreement was written in presence of witnesses and since then they are in possession of the suit land. It if further stated that father of respondents/plaintiffs during his life time approached the applicant No.1/defendant No.1 for execution of registered sale deed, but the applicants kept on false hopes on the pretext that soon he will execute the sale deed in his favour and such *faisla* was also taken place before *nekmards* of locality, where the applicants/defendants excused the delay on the ground of requirement of sale certificate which is pre requisite to execute the sale deed in his favour. Thereafter the applicants/defendants No.1 and 2 have clearly refused to execute the registered sale deed in favour of respondents/plaintiffs and on the contrary started issuing threats to dispossess the respondents/plaintiffs from the suit land. Moreover, the applicant/defendant No.1 has fraudulently sold out the suit property to applicant/defendant No.2 through registered sale deed. Therefore, the respondents/plaintiffs filed such suit with the following prayers:

a. Direct the defendant No.1, to execute the registered sale deed in respect of the suit in favour of the plaintiff and other legal heirs after receiving balance amount and in case of his failure the Nazir or any other official of this

Honourable Court may be directed to perform such act on behalf of the defendant No.1.

b. Grant permanent injunction against the defendant No.1 to restraining them from sale mortgage disposing, leasing or alienating the suit land to any body else in any manner excerpting the plaintiff over the suit land in any manner by themselves their men, agents, relatives or any other means indirectly.

c. Grant permanent injunction against the defendant No.2, restraining them from issuing clearance / sale certificate to the defendant No.1, in respect of suit land and also restrain the defendant No. 3 & 4, from registration the sale deed in respect of the suit land being presented before him by defendant No.1, or by any other persons on behalf of defendant No.1, in any manner directly or indirectly.

d. Costs of the suit be warranted to plaintiff.

e. Grant any other relief which this Honourable Court may deem fit and proper.

3. The applicant/defendant No.1 filed an application under Order VII, rule 11, C.P.C, which was contested by the respondents/plaintiffs and after hearing the learned counsel for parties; the learned trial court allowed the said application and rejected the plaint in F.C Suit No.124 of 2022, vide order dated 22.09.2023.

4. The respondent No.1 /plaintiff feeling aggrieved with the aforementioned order, had filed Civil Appeal No.45/2023 before the court of learned District Judge, Umerkot who after hearing the parties set aside the order passed by trial court and remanded back for proper adjudication in accordance with law. Consequently, the applicants/defendants has challenged the said order in this civil revision application.

5. Heard the learned counsel for the Respondent No.1 and AAG and perused the record and the impugned order with their assistance. The facts of the case are that a Suit No.124/2022 was filed by the Respondent No.1 seeking specific performance of contract. After service of summon, the Applicant/ Defendant had moved an application under Order VII Rule 11 CPC for rejection of plaint. The learned Trial Court has rejected the plaint by placing reliance on Article 79 of the Qanun-e-Shahadat Order, 1984 on the ground that Agreement filed with plaint is lacking at least two attesting witness and, on the Agreement, only one witness has attested it instead of at least two attested witnesses and according to trial Court, if the suit is try and parties are allowed to adduce evidence, still the agreement cannot be proved. The Respondent No.1/Plaintiff challenged said Order of trial Court, for rejection of plaint, before the Learned Additional District Judge–II, Umerkot. The Appellate Court set aside the Order of trial Court and directed the trial Court to proceed with the suit by holding that even if the agreement is attested by one witness, it can be proved through the scribe and other connected witnesses and requirement of Article 79 of ibid Order would be fulfilled.

6. The Applicant/Defendant being aggrieved with the order of Appellate Court, has preferred this Civil Revision Application under section 115 Civil Procedure Code, 1908. The only question arose before me is as to whether a suit can be dismissed without recording the evidence by invoking Article 17 or 79 of the Qanun-e-Shahadat Order 1984?

7. The difference between the dismissal of suit and rejection of plaint is settled law. At first instance, I would like to examine the Order passed

by the trial Court. The trial Court has invoked Order VII Rule 11 (d) CPC and rejected the plaint in suit No.124/2022 by holding that the plaint is barred under Article 79 of the Qanun-e-Shahadat Order, 1984 as the plaintiff has filed suit for specific performance of contract with one attesting witness only which led to the rejection of plaint. For understanding of legal position, I would refer Order VII Rule 11 CPC:

> **Order – VII 11. Rejection of Plaint:**
> The plaint shall be **rejected** in the following cases:
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> (a) Where it does not disclose a cause of action.
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> (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, falls to do so;
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> (c) Where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
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> (d) Where the suit appears **from the statement in the plaint** to be barred by any law.

8. Order VII Rule 11 CPC refer only words the ***"rejection of plaint in suit"*** which ought to be applied by trial court having power and jurisdiction to adjudicate the ***lis*** and whenever any of the basic ingredients mentioned at (a) to (d) in Order VII Rule 11 CPC are available on examination of plaint including documents attached thereto. In contrast, the ***"dismissal of suit"*** connotes that it is a final

determination of controversy between the parties. The power and jurisdiction to dismiss the suit can only apply by trial court when the parties have adduced evidence, produced documents on oath and undergone with the test of cross-examination by opposite party and finally fails to clear the test of ***"prove"***.

9. Another key difference between the ***"rejection of plaint in suit"*** and ***"dismissal of suit"*** is that the former keep opens the door for the plaintiff to re-try or re-file or re-institute a fresh suit or, in other words, the plaintiff cannot be precluded to file afresh suit on same cause of action or joinder of new cause of actions, against same parties or include other parties or on same subject-matter or with addition or subtraction of subject-matter where it is possible for him according to situation. In contrast, the later strictly prohibit the plaintiff to institute fresh suit. The plaintiff cannot file fresh suit (case) against the same parties (including legitimate successor in interest or successor in office) or in respect of same subject-matter. The legal position is further tighten on the point of cause of action. In former case, the cause of action may be kept same for the plaintiff or he may join more cause of action to re-agitate or institute suit whilst the later omit the point of cause of action and paved out another way to tackle the cases on examination of earlier subject matter decided either directly or indirectly in previous suit (case) and it can only be invoked when the evidence is recorded, the documents have produced on oath and such document could be read as admissible evidence by trial Court or otherwise while delivering the judgment. However, in both situations law provides statutory remedies against either Order of rejection of plaint in suit or dismissal of suit by way of Judgment.

10. The former is rule of conclusiveness which restrict plaintiff to re-agitate or institute fresh suit and is called as doctrine of res judicata emerged under section 11 Code of Civil Procedure, 1908. For the convenience, I refer provision, which provides:

> "11. No Court shall try suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
> Explanation I.- The expression "former suit" shall denote a Suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
> Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as a right of appeal from the decision of such Court.
> Explanation III.-The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly, or impliedly by the other.
> Explanation 1V.-Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue -in such suit.
> Explanation V.-Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.
> Explanation VI.-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating."

11**.** **Development of Res Judicata:** The doctrine of res judicata is based on the following three maxims:

i. 'Nemo debet bis vaxari pro una et eadem cansa' which means none should be vexed twice for the same cause.

ii. 'Interest reipublicae ut sit finis litium' which means that it is in the interest of the state that there should be an end to litigation.

iii. 'Res judicata pro veritate accipitur' which means that a judicial decision must be accepted as correct.

12**.** **Res Judicata—** Originally, this theoretical mode "res judicata" has its roots in Latin. The word "res" means "thing" and "judicata" means "already decided". Initially, the concept of ***"Res judicata pro veritate accipitur"*** which means, a decision of a judicial authority must be duly accepted as correct, is the full maxim which has, over the years, diminished to not more than "res judicata". This notion is called "res judicata" which is widely recognized in legal systems across the continent.

13. The Doctrine of res judicata prohibits the re-litigation of matters which is otherwise already decided by a court. It is a universally recognized legal principle which has emerged from the principles of Roman jurisprudence: ***"Nemo debet bis vexari pro una et eadem causa"***[1] (no one should be tried twice over for the same cause). The perennial debate and decision about nature of legal challenges and nurture of jurisprudence has potentially developed and shaper the jurisprudence of

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[1] **"Nemo debet bis vexari pro una et eadem causa", The Incorporated Council of Law Reporting for England and Wales, 2024**

rule of conclusiveness in judgements encapsulated in Section 11 of the Code of Civil procedure 1908. The theory of res judicata is the culmination of the public purpose embodied in the three maxims, and it applies to all judicial processes, civil or criminal. The Supreme Court of India observed that the theory of res judicata is based on justice, equity, and moral conscience.[2]

14. **Historical Evolution in Common Law:** Historically, there is general understanding amongst scholars that the rule of res judicata has originated from Roman law. However, the Duchess of Kingston is first instance of English Courts which have firstly accepted the rule of res judicata in the sphere of Common law in the case of Duchess of Kingston's case. It has recognized rule of res judicata by Sir William de Grey, C.J., in his decision: **"the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court."**[3]

15. This concept and its provision serves as a strong deterrent to re-try or re-agitate any lawsuits or disputes that were previously and conclusively resolved between the same parties under the same title or on same subject-matter. The main goal of "res judicata" is to provide court decisions a sense of finality and certainty in order to prevent protracted litigation and protect parties from being harassed. Furthermore, the "res judicata" has more connotations than just its literal translation. It is not limited to literally meanings but it is also used in modern legal discourse to refer to "claim preclusion", a robust and firm concept that guaranteeing that a judgment's binding or settled disputes

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[2] **"Lal Chand v. Radhakrishnan", 1 (1977) 2 SCC 88**

[3] **Duchess of Kingston Case (1776) 20 Howell's State Trials 355**

impact cannot be raised or re-agitate or re-hear again in subsequent or further proceedings. It can understand that the distinction between the dismissal of a suit and the rejection of a plaint is crucial in Code of Civil Procedure, 1908.

16. Turning towards the Order passed by trial Court, the only reason is that plaint has filed for enforcement of contractual obligation and such contract or agreement is attested by only one witness as such it is not fulfilling the requirement of Article 79 of the Qanun-e-Shahadat Order, 1984. To appreciate above excerpt, it would be appropriate to reproduce Article 17 & 79 of the Qanun-e-Shahadat, 1984 and Section 3 of Transfer of Property Act, 1882 hereunder:-

> **Article 79 of the Qanun-e-Shahadat, 1984:**
> 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.

17. In the matter related to the "attestation" by witnesses regarding financial or future obligation in respect of movable and immovable properties, the Transfer of Property Act, 1882 defines the word "attestation". The relevant provision is Section 3 of the Transfer of Property Act, 1882 which provides:

> **3. Interpretation clause.**
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> "attested", in relation to an instrument, means and shall be deemed always **to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument** in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature of mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

On perusal of the Agreement in question, admittedly, it has only signed by one witness. The question of the requisite number of witnesses to prove the execution of a document may be considered from the perspective of Article 17 of the Qanun-e-Shahadat, 1984 which is reproduced hereunder:

> **17.Competence and number of witnesses.**
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> (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:
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> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law: -
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> (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;
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> 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.

18. The expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is compulsory procedure framed by the legislature while putting prohibition to consider or use in evidence. The above reason can also be confirmed by various decision rendered by the august Supreme Court of Pakistan. In Nazir Ahmed's case[4] held, that in case of denial of execution of document, the party relying on such document must prove its execution in accordance with the modes of proof as laid down in Qanun-e-Shahadat Order, 1984 and the party is required to observe rule of production of best evidence. In Sheikh Muhammad Muneer's case[5] held that seller denied future obligation to transfer his immovable property and denial of execution of the agreement, it is imperative to upon buyer to prove as per requirement of Article 79 of the Qanun-e-Shahadat, 1984. Similarly, in the case of Farid Bakhsh[6] 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

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[4] **Nazir Ahmed v Muzaffar Hussain (2008 SCMR 1639)**

[5] **Sheikh Muhammad Muneer v. Mst. Feezan (PLD 2021 S.C. 538)**

[6] **Farid Bakhsh v. Jind Wadda (2015 SCMR 1044)**

> 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 reenacting 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.
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> (Emphasis is added)

19. The trial Court has adopted a preemptive measure and it has rejected the plaint which is contrary to the language of Article 79 of Qanun-e-Shahadat Order, 1984 which does not declare a suit will be barred or in other words it does not preclude the party from filing a suit and whenever a party file a suit while lacking attesting witnesses of the agreement, it cannot fall under Rule 11(d) CPC. Conversely, Article 79 of ibid Order declares that such agreement in the absence of attesting witnesses would be inadmissible evidence and it will not read over by a judge while handing down a Judgment. Another perspective of the very nature of Qanun-e-Shahadat Order, 1984 itself which is a law of evidence that states rules for determining facts in court and this is exactly difference kept by legislatures in their wisdom while comparing definition with Rule 11 (d) of the Order VII of the Code of Civil Procedure, 1908. It has completely backed by Article 2 & 3 of the ibid order. The Article 2 (b) refer to “document” and Article 2(c) refers to

"evidence" and are subject to the test of Article 3 of the ibid Order as held in Farman Hussain case[7], the relevant portion is reproduced under:

> "In this regard, it may be pertinent to observe that section 118 of the Evidence Act, 1872 (now Article 3 of the Qanun-e-Shahadat, 1984 which contains certain additions) (hereinafter referred to as the Act) deals with the question as to who may testify. It provides that all persons shall be competent to testify unless the Court considers that they were prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. The explanation to the above section lays down that a lunatic is competent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. In other words, the above provision of the Act makes all persons competent to testify unless the court considers it otherwise on account of above reasons."

20. The deeper understanding constrained me to reach at a conclusion that without arriving at evidence stage and without crossing the different stages of evidence, dependent upon the requirements of Articles 2 and 3 of the Qanun-e- Shahadat Order, 1984, the provision of Article 79 of ibid Order cannot be invoked. Article 3 of the Qanoon-e-Shahadat Order, 1984 imposes conditions to testify the persons in relation to matters of fact under inquiry or trial and only such persons are competent to testify, to whom the court considers that they can understand the questions put to them and are able to make rationale answer to such question and possess qualification prescribed by the injunctions of Islam as laid down in Holy Quran and Sunnah, but where such person is not forthcoming, the Court

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[7] **"State v. Farman Hussain" (PLD 1995 SC 1)**

may take evidence of any available witness. For guidance reliance can be placed on Supreme Court decision in case of Khan Mir Daud Khan.[8] It is not permissible for the trial Court to jump straightaway over Article 79 of the ibid Order while bypassing the whole scheme of Qanun-e-Shahadat Order, 1984 which lays down step by step procedure exclusively for recording evidence on facts and issues, interalia, by fixing duties of parties, qualified testimony and focusing on burdens of proofs and following rule of admissibility.

21. The last reason to repudiate the analogy given by the trial Court, in its Order for rejection of plaint, is Article 81 of the Qanun-e-Shahadat Order, 1984. The Article 81 is an exception to the general rule of Article 17 and 79 of ibid Order, that where a document is required by law to be attested, the same cannot be used in evidence unless two attesting witnesses are called for the purposes of proving its execution. For the convenience, I refer Article 81 of the ibid Order which state as:

> **"81. Admission of execution by party to attested document**- The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

The simple reading of Article 81 shows that where the execution of a document is admitted by the executant himself, the examination of attesting witness is not necessary. Hence, the approach of trial Court dealing with Application under Order VII Rule 11 CPC, to accept the pleading of simple denial by the Applicant /Defendant in his written statement is not enough to invoke Article 79 of the ibid Order at that particular stage of suit. There is equally possibility of admission by party

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[8] "Khan Mir Daud Khan and Others v. Mahrullah and Others" (PLD 2001 SC 67)

about execution of document when it comes into witness box on ***oath*** or under ***rule of confrontation***. Hence, the views of trial Court about the infirmity of agreement which led to decision to reject the plaint is based on surmises, assumptions and conjectures.

22. It is settled law that each case has to be decided on its own facts. The Court cannot force or knock out[9] someone suit having variegated style and nature of ***lis***. Simultaneously, it has to see and form opinion that whether specific performance of contract is possible or not, but this is something which could culminate into dismissal of suit and not rejection of plaint as the law requires that parties must provide equal opportunities to lead the evidence. For any guidance reliance can be placed on Sajjada Hussain's case[10] wherein Hon'ble Supreme Court of Pakistan held:

> "The provisions of Article 79 (Q.S.O.,1984), are applicable only in those cases where execution of a document is disputed between maker of document and the person in whose favour purportedly the same is executed. Here in this case, execution of the agreement Ex-PW-2/1, though has been denied and disputed by Respondent No.1 by filing his joint written statement but mere denial would not be sufficient in presence of plethora of overwhelming evidence on the record. Such an evidence cannot be discarded merely for non-production/appearance of second marginal witness. The prime and foremost requirement of Article 79 (Q.S.O.,1984) is to prove execution of a document in case of a denial of execution by producing two marginal witnesses. When the allegation goes un-rebutted that

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[9] Unless barred under Rule 11 (a) to (d) of Order VII CPC

[10] "Sajjad Ahmad Khan v. Mohammad Saleem Alvi & others" (Civil Petition No. 84/2016 On appeal from the judgment dated 26.10.2015 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat in C.R.No.902-M/2012).

> Respondent No.1 himself was the author/scribe of the document. When again un-rebutted fact is there on the record that the other witness being abroad was not capable of giving evidence, when the stance of Notary Public regarding attestation of agreement goes un-shattered, when PW-1, Hamayoon Shinwari not only confirms the execution rather gives each and every detail of the transaction between petitioner and Respondent No.1 and PW-4 is also the witness of execution and the entire evidence supported by the petitioner himself then in the given circumstances mere non-production of other attesting witness of Ex-PW-2/1 being not available would be nothing much less a hyper technicality and not the violation of Article 79 ibid. We may observe that concurrent findings of dismissal of suit by the three courts are a bitter and distressing example of misreading and non-reading of material evidence available on the record and misapplication of law."

23. Similar views are given by Hon'ble Supreme Court of Pakistan in several cases[11] that even the Defendant though in his written statement has alleged the agreement and his signatures over the same as fake and fictitious but has not specifically challenged the agreement in question either by way of criminal proceedings or through a civil suit. A simple denial of a document being fake and fictitious is not legally sufficient unless the same facts are proved and established on the record.

24. It is admitted position that the trial Court has passed order on application under Order VII Rule 11 of the Code of Civil Procedure, 1908. The proof of execution of document required by law to be attested which cannot be used as evidence until "two attesting witnesses" at least are

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[11] **"Muhammad Sattar v. Tariq Javaid" (2017 SCMR 98); "Abdul Hameed v. Jahangir Khan" (Civil Petition No.3097/2015 & Civil Appeal No.1074/2015)**

called for the purpose of proving its execution subject to the process of the court and capability to adduce evidence. The Article 79 corresponds to Section 68 of the Evidence Act, 1872 with the difference that the former provide at least one witness while the later provides at least two attesting witnesses to prove the document. It is also admitted position that the parties have not step-in into the witness box and the Agreement in question has not been produced by the plaintiff/ Respondent No.1 on oath, therefore, the stage as required under Article 79 of the Qanun-e-Shahadat Order, 1984 i.e. "**it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution"** have not arrived or in other words the trial Court has not afforded opportunity to the plaintiff to come into witness box, adduce evidence, produce document or agreement on oath, undergo the test of cross-examination and prove of the execution of agreement as per assertiveness and aspiration of doctrine of fair trial as embodied under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

25. It is universally settled principles of law enunciated from the Roman Law that ***"Expressio Unis Est Exclusio Alterius"*** that when law requires a thing to be done in particular manner then, it should be done in that manner and anything done in conflict of the command of law shall be unlawful being prohibited or not permissible. The Hon'ble Supreme Court in several cases[12] held that in the failure to follow, it would be non-

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[12] "The Collector of Sales Tax, Gujranwala v. Messrs Super Asia Mohammad Din and Sons" (2017 SCMR 1427) observed that "when a statute requires that a thing should be done in a particular manner or form, it has to be done in such manner".
"Zia ur Rehman v. Syed Ahmed Hussain" (2014 SCMR 1015) ruled: "If the law requires a particular thing to be done in a particular manner it has to be done accordingly, otherwise it would not be in compliance with the legislative intent.

compliance of legislative intent. The Honorable Supreme Court[13] laid down the principle as follows:

> "It is settled law that where the law requires something to be done in a particular manner, it must be done in that manner. Another important canon of law is that what cannot be done directly cannot be done indirectly"

26 To sum up the ***rejection of plaint*** in suit is procedural in nature, which mainly focusing on the sufficiency of the plaint itself on the barometer of rules 11 (a) to (d). It does not involve a determination of the merits of the case and for this reason the law permits the filer to repeat again by institution of fresh suit (case). In contrast, the criterion for ***Dismissal of Suit*** is substantive in nature, which solely involve a decision on the merits of the case. It finally concludes the matter or ***lis*** under the doctrine of res judicata as defined under section 11 of the Code. Certainly, the rejection of a plaint is a procedural action allowing for the possibility of refiling or re-agitate through institution of afresh suit, while dismissal of a suit is a substantive decision that finally concludes the matter on its merits.

27. It is indispensable and imperative sense of the duty of a Court in application of law and its interpreting to essentially delve into and realistically discover the intention of the legislature about the statute(s). It is not possible for trial Court to take departure from the amplitude of evidential rules by importing a particular rule in order to decide the matter summarily on the basis of an application under Order VII Rule 11, CPC. At this premature stage, the Trial Court can not presume or

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[13] **"Muhammad Hanif Abbasi v. Imran Khan Niazi and others" (PLD 2018 SC 189)**

anticipate the final outcome by brush aside the complete frame work of evidence prescribed in the Qanun-e-Shahadat Order, 1984. Therefore, the rejection of plaint vide Order dated 22.09.2023 passed by the trial Court is inappropriate, against intention of legislature and contrary to law in view of above legal position and it has rightly set aside by the learned District Judge through its Order impugned before me.

28. However, the reason as given by him about the availability of the scribe of the Agreement as an alternate replacement of deficient attesting witness to overcome the difficulty of the plaintiff to satisfy the requirement of two attesting witnesses, is not in accordance with the dictum of Hon'ble Supreme Court of Pakistan.[14] The Hon'ble Supreme Court of Pakistan had held that a scribe is not an attesting witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 though he has written the agreement or signed in some manners except as an attesting witness. The scribe of a document can only be a competent witness in terms of Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has put his signature as an attesting witness of the document and not otherwise. The signing of the document in the capacity of a writer or scribe does not fulfill and meet the mandatory requirement of attestation, however, he may be examined by the concerned party for the ***corroboration*** of the evidence of the marginal witnesses. Therefore, the evidence of the scribe is at best for the corroboration of the evidence of the marginal or attested witnesses and he cannot be termed as a substitute of attesting witnesses by departing from Article 79 of ibid Order. Therefore, a scribe and attesting witnesses cannot be acceptable as same and his

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[14] Hafiz Tassaduq Hussain vs. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241); N. Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 507); "Khudadad v. Syed Ghazanfar Ali Shah @ S. Inaam Hussain and others" (Civil Appeals No.39-K to 40-K of 2021)

testimony cannot meet the requirement of Article 79 of ibid Order. The relevant excerpt is reproduced where it is held that:

> " 7. … the provisions of Article 17(2)(a) encompasses in its scope twofold objects (i) regarding the validity of the instruments, meaning thereby, that if it is not attested by the required number of witnesses the instrument shall be invalid and therefore if not admitted by the executant or otherwise contested by him, it shall not be enforceable in law (ii) it is relatable to the proof of such instruments in term of mandatory spirit of Article 79 of The Order, 1984 when it is read with the later. Because the said Article in very clear terms prescribes "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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> 8. 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 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. 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. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise.
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> 9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute for the attesting witnesses … It may be held that if such witness is allowed to be considered as the attesting witness it shall be against the very concept, the purpose, object and the mandatory command of the law highlighted above."

29. Consequently, the Revision Application is dismissed and the Order dated 11.01.2024 passed by the learned Additional District Judge-II, Umerkot is maintained with above observations. The trial Court is directed to proceed with the Suit No.124 of 2022 by recording evidence of the parties on merits and in accordance with law.

30. Office is directed to forward the copies of this orders to the Trial Court and learned Additional District Judge-II, Umerkot.

JUDGE

**Faisal **