Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Revision Application No. 39 of 2007

Dates of hearing : 08.03.2013 and 19.03.2013.

Applicant : Nasim Hayat through
Mr. Jhamat Jethanand Advocate.

Respondents : Mrs. Naseem Akhtar and another
through Mr. Irfan Ahmed Qureshi Advocate.

J U D G M E N T

NADEEM AKHTAR, J.- **Respondent No.1 filed F.C. Suit No.234/1997 against the applicant and respondent No.2 for specific performance of contract, cancellation of document and permanent injunction, before the Senior Civil Judge, Hyderabad, which was consolidated**

with IInd.C. Suit No.108/1998 filed by Rao Qamar Ali and others against the present respondents. Both the suits were dismissed by a common judgment delivered on 01.02.2005 by the IVth Senior Civil Judge, Hyderabad. Against the said judgment and decree, respondent No.1 filed Civil Appeal No.77/2005, which had been allowed by the VIIth Additional District Judge, Hyderabad, through the impugned judgment and decree dated 11.12.2006 and 18.12.2006, respectively. Being aggrieved with the judgment and decree of the lower appellate court, the applicant has preferred this revision application.

2. The relevant facts of this case are that one Rao Muhammad Khursheed Ali **(the deceased)** was the owner of Survey Nos. 355, 356 and 357, measuring 4,380 sq. ft, situated in Deh Notki, Tappo Tando Jam, Taluka and District Hyderabad, consisting of shops at the front and a residential house at the back. The deceased passed away on 06.03.1996, leaving behind him nine (09) surviving legal heirs, out of whom six (06) were sons, including the present applicant, respondent No.2 and one Laiq Ali, and three (03) were daughters. Respondent No.1 filed F.C. Suit No.234/1996 before the Senior Civil Judge, Hyderabad, against the present applicant and respondent No.2, for specific performance of contract, cancellation of document and permanent injunction. It was the case of respondent No.1 / plaintiff that respondent No.2 executed an Agreement of Sale on 28.05.1994 **(the agreement)** in her favour, whereby respondent No.2 agreed to sell to her two plots at the rate of Rs.110.00 per sq. ft. out of the total area of 4,380 sq. ft of the said Survey Nos. 355, 356 and 357 ; one plot measuring 730 sq. ft. (10 ft X 73 ft) owned by respondent No.2 / vendor, and the other measuring 736 sq. ft. (16 ft X 46 ft.) admittedly owned by the respondent No.2's real brother Laiq Ali. It was averred by respondent No.1 in her suit that respondent No.2 undertook to sell

and convey to her the said second plot measuring 736 sq. ft. (16 ft X 46 ft) admittedly owned by his real brother Laiq Ali **(the suit property)** as soon as the suit property was sold by Laiq Ali to respondent No.2 and was mutated in his favour.

3. It was stated by respondent No.1 that she paid a sum of Rs.80,300.00 to respondent No.2, and in consideration thereof, respondent No.2 executed a registered sale deed of the plot measuring 730 sq. ft. (10 ft X 73 ft) owned by him in favour of respondent No.1. It was claimed by respondent No.1 that possession of both the plots, including the suit property, was handed over to her by respondent No.2 at the time of the agreement. It was averred by respondent No.1 in her suit that she paid a sum of Rs.50,000.00 to respondent No.2 in advance towards the agreed sale consideration of the suit property. According to respondent No.1, Laiq Ali sold the suit property to respondent No.2 through a registered sale deed in October 1994, whereafter the same was mutated in favour of respondent No.2. It was alleged by respondent No.1 that she reminded respondent No.2 to receive from her the balance sale consideration of Rs.30,300.00, and to complete the sale of the suit property by executing the registered sale deed in her favour, but respondent No.2 did not perform his agreed part of the contract. It was further alleged by respondent No.1 that respondent No.2 sold and transferred the suit property in October 1994 through a registered sale deed in favour of the present applicant, who is also the real brother of respondent No.2. In the above background, F.C. Suit No.234/1996 was filed by respondent No.1 praying that respondent No.2 be directed to execute a registered sale deed in her favour, the registered sale deed in respect of the suit property executed by respondent No.2 in favour of the applicant be cancelled, and respondent No.2 and the applicant be restrained from selling, mortgaging or alienating the

suit property, from interfering in her possession in respect thereof, and from dispossessing her therefrom.

4. The applicant filed his detailed written statement in respondent No.1's Suit. The entire claim of respondent No.1 and the averments and allegations made by her in the plaint, were strongly denied by the applicant. Additionally, it was asserted by the applicant that the entire property of 4,380 sq. ft., including the suit property, was inherited by all the nine legal heirs of the deceased, including the applicant, respondent No.2 and Laiq Ali. It was averred by the applicant that respondent No.1 managed a false and bogus statement dated 12.05.1994 showing the alleged gift of the property by the deceased in favour of the applicant, respondent No.2 and Laiq Ali, and in collusion with the Revenue Authorities, mutation to this effect was effected in the Record of Rights. Although the applicant himself was a beneficiary of the alleged gift, but he strongly disputed the same as void by asserting that none of the alleged donees, including himself, had accepted the alleged gift or signed the same, nor was the possession of the property taken over by them as donees. It was also asserted by the applicant that respondent No.1 came into possession of the suit property as she was a tenant of the deceased. According to the applicant, the only purpose of filing the suit was to usurp the suit property by depriving the legal heirs of the deceased of their valuable vested rights therein. It was specifically pleaded by the applicant in his written statement that the plot / portion sold to him by respondent No.2 through a registered sale deed, and the suit property, were two separate and distinct properties. Lastly, it was pleaded by the applicant that the sale of the suit property in his favour by respondent No.2 was valid and legal, and that the same was not liable to be cancelled.

5. Meanwhile, the aforementioned IInd.C. Suit No.108/1998 was filed against the present respondents by all the legal heirs of the deceased, except the present respondent No.2, praying *inter alia* that they as well as respondent No.2 / defendant No.2 be declared as the co-owners of their ancestral property of 4,380 sq. ft., having inherited the same from the deceased ; the gift and sale of different portions of their ancestral property managed by respondent No.2 / defendant No.2 be declared as fraudulent, illegal and void, and the registered sale deeds executed by respondent No.2 in respect thereof be cancelled ; accounts of the rent paid by respondent No.1 to respondent No.2 be taken ; and respondent No.1 be restrained from creating any type of charge on the property. The said IInd.C. Suit No. 108/1998 was consolidated by the trial court with F.C. Suit No.234/1996 filed by respondent No.1, which was the leading Suit. On the basis of pleadings of the parties, the six following consolidated Issues were framed by the trial court :-

"*1. Whether property bearing S. Nos. 355, 356, 357 deh Hotki, Tando Jam was ever gifted by late Khurshid Ali and accepted by his sons alleged donees. If not what is its effect ?*

2. Whether property in question was ever partitioned and distributed between heirs of late Khurshid Ali. If not what is its effect ?

3. Whether defendant No.1 or other heirs of late Khurshid Ali agreed or received any consideration for sale of property in question. If not what is its effect ?

4. *Whether the agreement of sale dated 28.5.1994 was executed between plaintiff (s. no. 234/96) and defendant No.1 and any consideration was given to defendant No.1. If not what is its effect?*

5. *Whether the agreement and sale deeds are collusive and colourful between plaintiff (s. no. 234/96) and defendant No.1. If so whether those transactions are binding on defendant No.2 and other heirs of late Khurshid Ali ?*

6. *What should the decree be ? "*

6. Respondent No.1 examined five witnesses, including herself, and the applicant examined himself and his real brother Laiq Ali. The trial court decided the first issue regarding the gift by the deceased as not proved, but while deciding the second issue, a conflicting finding was given that the property was gifted by the deceased. Issues 3 and 4 were decided by holding that the suit property was not sold to respondent No.1, nor did respondent No.2 receive any sale consideration from her. Issue No.5 was decided by holding that respondent No.2 had sold out only one plot of 730 sq. ft. to respondent No.1, and executed the sale deed in respect thereof, in favour of respondent No.1. The finding on Issue No.6 was that the plaintiffs in both the Suits were not entitled to the relief claimed by them in their respective Suits. Accordingly, both the suits were dismissed by the trial court by a common judgment 01.02.2005.

7. Civil Appeal No.77/2005 filed by respondent No.1 against the aforesaid common judgment and decree was allowed by the lower appellate court through the impugned judgment and decree,

meaning thereby that the respondent No.1's F.C. Suit No.234/1996 has been decreed by the appellate court. It was stated at the bar by both the learned counsel that the appeal filed by the legal heirs of the deceased against the dismissal of their IInd.C. Suit No.108/1998 was *subjudice* before the appellate court when the impugned judgment and decree were passed, but the said appeal was not heard or decided by the appellate court although the judgment and decree of the trial court impugned in both the appeals, was common. With the consent of the learned counsel for the parties, it was ordered on 14.11.2008 and then again on 08.03.2013 that this matter may be heard and finally decided at the stage of *katcha peshi.*

8. Mr. Jhamat Jethanand, the learned counsel for the applicant, submitted that the alleged agreement dated 22.05.1994 was void in view of the stipulation contained therein that the suit property will be sold to respondent No.1 by respondent No.2 after the same was sold to him by his brother Laiq Ali. He submitted that, as per the respondent No.1's own case and the terms and conditions of the alleged agreement, respondent No.2 was admittedly not the owner of the suit property at the time of the alleged agreement, therefore, respondent No.2 had no right or authority to sell the suit property to respondent No.1. He further submitted that the alleged agreement was void also on the ground that it was without any consideration, as no consideration whatsoever was agreed or mentioned therein in respect of the suit property. Without prejudice to his above submissions, it was urged by the learned counsel that there was no occasion or justification for respondent No.2 to agree on 28.05.1994 to sell the suit property to respondent No.1 after it was sold to him by his brother Laiq Ali, as his brother Laiq Ali had already sold and conveyed his property to him on 17.05.1994, that is, prior to 28.05.1994, through a registered sale deed, whereafter Laiq Ali

ceased to be the owner of the same. It was urged that this fact alone was sufficient to establish that the alleged agreement was a fictitious, bogus, concocted and forged document. The learned counsel pointed out that, after purchasing the property of Laiq Ali, respondent No.2 sold and conveyed the same to the present applicant on 08.08.1996 through a registered sale deed. It was specifically emphasized by the learned counsel that if it is assumed for the sake of argument that the applicant had no defense and all the pleas urged by him are rejected, even then the suit filed by respondent No.1 was liable to be dismissed as the alleged agreement was unenforceable and void for lack of consideration, and also as according to respondent No.1 herself, the property mentioned in the alleged agreement was owned by Laiq Ali, and not by the purported vendor / respondent No.2.

9. The second leg of the arguments of the learned counsel for the applicant was that the suit property claimed by respondent No.1 and the property purchased by the applicant from his brother Laiq Ali, were two separate and distinct properties. In this context, he submitted that the boundaries and the area of the property described by respondent No.1 in her plaint and those of the property described in the registered sale deed dated 08.08.1996 executed by Laiq Ali in favour of the applicant, are completely different. Mr. Jethanand submitted that a decree could be passed in favour of respondent No.1 only in respect of the property described in paragraph 1 of her plaint, but since both the properties were separate and distinct and no decree was sought in respect of the property of Laiq Ali, neither respondent No.1 had any right to claim specific performance of the property of Laiq Ali, nor could any such decree be passed in her favour. He contended that respondent No.1's suit was liable to be dismissed on this ground alone.

10. The next submission of the applicant's learned counsel was that the alleged agreement was purportedly attested by two witnesses, but respondent No.1 examined only one witness. He relied upon Article 17 of the Qanoon-e-Shahadat Order, 1984, which provides that evidence of two witnesses is mandatory to prove matters pertaining to financial or future obligations if the obligations are reduced to writing. He also relied upon Article 79 of the Order of 1984 (ibid), which provides that if a document is required by law to be attested, it shall not be used as evidence until at least two attesting witnesses have been called for the purpose of proving its execution, if they are alive and are capable of giving evidence. The learned counsel submitted that only one attesting witness was examined by respondent No.1, and regarding the second attesting witness, her entire evidence was completely silent as to whether he was dead or alive. It was urged that the burden was on respondent No.1 to prove not only the alleged agreement, but also the signature of the purported vendor / respondent No.2 thereon, which could be proved either through the two attesting witnesses or through the Notary Public who had attested the alleged agreement. The said Notary Public was also not examined by respondent No.1. It was further urged that, in the absence of the fulfillment of the mandatory requirements of Articles 17 and 79 (ibid) by respondent No.1, the alleged agreement was not proved nor could it be treated as a piece of evidence, and as such a decree for specific performance of the alleged agreement could not be passed in the respondent No.1's suit by the lower appellate court. In support of this submission, he relied upon (1) *Mst. Rasheeda Begum and others V/S Muhammad Yousaf*, ***2002 SCMR 1089* and (2) *Sanaullah and another V/S Muhammad Manzoor and another*, ***PLD 1996 Supreme Court 256.***

11. It was then submitted by the learned counsel for the applicant that, if it is assumed for the sake of argument that there was a valid agreement between respondents No.1 and 2, which has all along been seriously disputed by the applicant, even then respondent No.1 had no case in view of the agreement dated 28.03.1995 produced by her in her own evidence as Exhibit 109. Through the said Exhibit 109 executed by respondents No.1 and 2, the purported vendor / respondent No.2 undertook that in case of his failure in transferring three properties measuring 730 sq. yds., 730 sq. yds., and 460 sq. yds. in Survey Nos. 355, 356 and 357 to respondent No.1 by 31.09.1995, he was liable to pay a sum of Rs.242,000.00 along with profit thereon to respondent No.1. The learned counsel submitted that, by virtue of Exhibit 109 produced by respondent No.1 herself, she was entitled to the aforementioned amount from respondent No.2 at best, and not the property claimed by her. It was further contended that the alleged agreement stood revoked in view of Exhibit 109 because of the respondent No.2's admitted breach, and as such the alleged agreement could not be specifically enforced.

12. In the end, the learned counsel for the applicant submitted that there was nothing on record to prove that Laiq Ali owned any plot having such dimensions and area which were mentioned as those of his plot in the alleged agreement ; there was no evidence on record to show that Laiq Ali sold any such plot to respondent No.2 which was mentioned in the alleged agreement ; and, there was no agreement at all in respect of the plot of Laiq Ali, which was sold and conveyed to the applicant by respondent No.2 after acquiring from Laiq Ali. It was urged that no evidence could be considered if it is beyond the pleadings, and in this context, the learned counsel relied upon (1) *Khalil Ahmed V/S Settlement Authorities through Settlement Commissioner (Land) Multan*

Division, Multan and others, ***1968 SCMR 801*** and (2) *Binyameen and 3 others V/S Chaudhry Hakim and another* ,***1996 SCMR 336***. He also relied upon Articles 102 and 103 of the Order of 1984 (ibid), which *inter alia* provide that when a contract is in writing, oral evidence will be excluded.

13. On the other hand, Mr. Irfan Ahmed Qureshi, the learned counsel for respondent No.1, contended that respondent No.2 sold three plots to respondent No.1, one owned by himself, the second after purchasing from his brother Nasim Hayat / applicant, and the third after purchasing from his brother Laiq Ali. He submitted that all the said three plots were mentioned in the agreement dated 28.05.1994 (the alleged agreement disputed by the applicant). He further submitted that two plots were duly mutated in the name of respondent No.1 ; namely, the plot owned by respondent No.1, and the plot sold by him after purchasing from his brother Nasim Hayat / applicant. Regarding the third plot / the suit property, it was contended that respondent No.2 was obliged to complete the sale of the same in favour of respondent No.1, but he committed a breach of the agreement. He asserted that the agreement was not void for lack of consideration, and pointed out that respondent No.1 as well as her witness Ghulam Mustafa had deposed in their evidence that respondent No.1 had paid Rs.50,000.00 as advance payment to respondent No.1, and that possession of the suit property had been handed over to respondent No.1 by respondent No.2. He referred to an undated *Iqrarnama* (Exhibit 112) executed by respondent No.2, wherein he had stated that he had sold to respondent No.1 two plots of 730 sq. ft. each, one owned by him and the other purchased by him from his brother Nasim Hayat / applicant ; the allegations made against him by his brother Laiq Ali were false ; and his brothers were creating problems for respondent No.1.

14. The learned counsel for respondent No.1 denied that respondent No.2 had no authority on 28.05.1994 to sell the plot of Laiq Ali. He contended that the agreement was executed with the concurrence of Laiq Ali. It was urged that if the argument of Mr. Jethanand is accepted that Laiq Ali had already sold and conveyed his plot to respondent No.2 on 17.05.1994, respondent No.2 being the owner was entitled to enter into the agreement on 28.05.1994, and for all the more reason, was bound to sell the suit property under the agreement to respondent No.1. It was further urged that the breach of the agreement was the result of the malafide and collusive acts of all three brothers, that is, respondent No.2, Laiq Ali and the applicant, and for this reason, respondent No.2 never came forward to defend the suit filed by respondent No.1. Regarding the second attesting witness, the learned counsel submitted that he had died and was not available for evidence. Mr. Qureshi submitted that, for all legal intent and purposes, the agreement was a concluded and binding contract, there was sufficient material on record to prove the case of respondent No.1, and she had successfully discharged the burden to prove her case. As such, the respondent No.1's suit was rightly decreed by the lower appellate court.

15. The learned counsel for respondent No.1 further submitted that respondent No.1 was entitled to the relief of specific performance against respondent No.2 in view of Section 27(b) of the Specific Relief Act, 1877, as the applicant is claiming title of the suit property from respondent No.2. In support of this submission, he relied upon (1) *Abdul Haque and others V/S Shaukat Ali and 2 others*, *2003 SCMR 74* and (2) *Muhammad Bashir and others V/S Chiragh Din through Legal Heirs and others*, *2003 SCMR 774*.

16. Mr. Jhamat Jethanand, the learned counsel for the applicant, rebutted the arguments advanced by the learned counsel for respondent No.1, by submitting that, out of the two plots mentioned in the alleged agreement, respondent No.2 sold out and conveyed his own plot to respondent No.1 through a sale deed registered on the same day, that is on 28.05.1994, and received from respondent No.1 Rs.80,300.00 mentioned in the alleged agreement as the sale consideration of his own plot. He contended that the said registered sale deed was produced twice by respondent No.1 in her evidence as Exhibits 113 and 156/B to create confusion and to mislead the court. The learned counsel reiterated that there was no occasion or justification for the alleged agreement on 28.05.1994, when respondent No.2 sold out and conveyed his own plot to respondent No.1 on the same day, and he was not the owner of Laiq Ali's plot according to respondent No.1.

17. This matter appeared to be a complicated one in view of the facts summarized above, the lengthy evidence on record, and the conflicting findings of the two courts below, but both the learned counsel rendered unsurpassed assistance by making tireless submissions in a meticulous manner. Since both the courts below have given conflicting findings and I have two divergent views before me, it has become necessary for me to minutely examine and evaluate the evidence that resulted into completely opposite and contrary findings.

18. As observed earlier, the trial court had given conflicting findings on the first two Issues by first holding that the gift was not proven, and then held that the property was gifted by the deceased.

The common judgment and decree of the trial court, whereby both the Suits were dismissed, was reversed by the appellate court in the appeal filed by respondent No.1 by decreeing her Suit. The connected appeal filed against the said common judgment and decree by the legal heirs of the deceased challenging the gift, was not heard or decided by the appellate court along with the respondent No.1's appeal. It was urged by the learned counsel for the applicant that the appellate court erred by not hearing and deciding both the appeals together, which were against the common judgment and decree. After this matter was heard and reserved by me for announcement of judgment, a copy of the order passed in Civil Appeal No.51/2005 was received by me through courier service from the learned counsel for respondent No.1, which has been placed in the Court file. The said order reflects that the appeal filed by the legal heirs of the deceased was dismissed on 19.09.2010 for non-prosecution, and the application filed for its restoration was also dismissed on 26.05.2012. It may be noted that respondent No.1's Suit, that was decreed, was a Suit for specific performance, cancellation of the registered sale deed executed in favour of the applicant by respondent No.2, and permanent injunction. There was no prayer in respondent No.1's Suit in relation to the gift by the deceased. Therefore, I am of the view that the question, as to whether or not the property was gifted by the deceased, is not relevant for the purpose of deciding this Revision, as respondent No.1 was required to prove the agreement in any case ; whether respondent No.2 had agreed to sell to her the Suit property as the owner thereof, or as the donee thereof. The dismissal of the appeal filed by the legal heirs of the deceased is also of no consequence relevant in view of the reason stated above.

19. In order to resolve the controversy, the main questions that are to be dealt with and decided are, whether on the date of the

agreement dated 28.05.1994, respondent No.2 was the owner of the Suit property, or if the same was owned by his brother Laiq Ali ; whether or not any sale consideration in respect of the Suit property was ever agreed by respondents 1 and 2, or was mentioned in the agreement, or was ever paid by respondent No.1 ; whether or not the agreement dated 28.05.1994 between respondents 1 and 2 was a binding and enforceable contract ; and, whether the Suit property described in the agreement and in the respondent No.1's plaint, and the property sold out and conveyed by respondent No.2 to the applicant, were the same. These important questions, which go to the root of this case, are examined and discussed separately.

20. In paragraph 1 of her plaint, respondent No.1 described the Suit property having the boundaries on the North by "*Street Pir Jahom*", on the South by "*Street & House Dr. Nasim*", on the East by "*House of Abdullah Ansari*", and on the West by "*Open Plot of Kamar Ali & others*". Whereas, in the registered sale deed dated 08.08.1996 (Exhibit 156/E), for which cancellation was sought by respondent No.1, the property purchased by the applicant from respondent No.2 was described with the boundaries shown in Sindhi language as, on the North by "*Small Street*", on the South by "*Pakistan Chowk Gali*", on the East by "*Residence of Muhammad Sharif*", and on the West by "*Remaining Plot of Rao Muhammad Khurshid Ali*". In the registered sale deed dated 17.05.1994, the property sold by Laiq Ali to respondent No.2 was described with the same boundaries as shown in Exhibit 156/E. Moreover, the Suit property described by respondent No.1 in paragraph 1 of her plaint comprised of an area of 730 (73 X 10) sq. ft., but in the disputed agreement dated 28.05.1994 (Exhibit 110), the area of the property

of Laiq Ali was mentioned as 736 (16 X 46) sq. ft. The above shows not only that the property purchased by respondent No.2 from Laiq Ali on 17.05.1994 and the property sold out and conveyed by him to the applicant on 08.08.1996, were the same, but also that the Suit property claimed by respondent No.1 was completely different. This important and basic difference in the property claimed by respondent No.1 and the property purchased by the applicant was not noticed by the appellate court below.

21. It was the case of respondent No.1 that, through the disputed agreement dated 28.05.1994 (Exhibit 110), respondent No.2 had agreed to sell to her in future the property of his brother Laiq Ali, when the same was sold to him by Laiq Ali and was mutated in his name. Therefore, it was the respondent No.1's own case that respondent No.2 was not the owner of the Suit property at the time of the agreement, and Laiq Ali was the actual owner. Despite this admitted position, Laiq Ali was not joined by her as the defendant in her Suit, nor was he summoned by her to give evidence in relation to the disputed agreement. On the contrary, the applicant produced Laiq Ali as his witness, who categorically denied any sort of agreement or arrangement for the sale of his property in favour of respondent No.1. Laiq Ali stated that respondent No.2 had acted contrary to the interest of the legal heirs of the deceased in collusion with respondent No.1, and had executed a sale deed in favour of respondent No.1 only in respect of property measuring 730 sq. ft., which was not the property of Laiq Ali. It is important to note that Laiq Ali was not confronted by respondent No.1 with the registered sale deed dated 17.05.1994, whereby he sold out and conveyed his property to respondent No.2. He was also not confronted with the registered sale deed dated 08.08.1996,

whereby Laiq Ali's said property, after purchasing from him, was sold by respondent No.2 to the applicant. Although Laiq Ali was not a party to the sale deed dated 08.08.1996, but he ought to have been confronted with the same in order to identify the property allegedly purchased by respondent No.1, as she had sought cancellation of the said sale deed dated 08.08.1996. Both the above registered sale deeds in respect of Laiq Ali's property, especially the latter which was in favour of the applicant, remained un-rebutted. The above aspects in the evidence were not appreciated by the lower appellate court.

22. In his evidence, the applicant strongly refuted the claim of respondent No.1, and his evidence could not be dislodged or shaken in his cross examination by respondent No.1. It is worth mentioning that, although respondent No.1 had prayed for the cancellation of the registered sale deed dated 08.08.1996 executed by respondent No.2 in favour of the applicant, the applicant was not confronted at all with the said sale deed. No question, or even a suggestion, was put to the applicant by respondent No.1, that respondent No.2 had executed the said sale deed illegally, or that the applicant had not acquired any right, title or interest in the property purchased by him. Once again, the registered sale deed dated 08.08.1996 executed by respondent No.2 in favour of the applicant, remained un-rebutted. This aspect of the evidence was also not appreciated by the lower appellate court.

23. As noted earlier, it was claimed by respondent No.1 in her plaint that the area of the Suit property was 730 sq. ft. There was a contradiction in her deposition, wherein she (PW-1) deposed that

the area of the Suit property was 400 sq. ft. No effort was made by her either to clarify this contradiction by re-examining herself, or by filing an application for correction of her said statement. A more serious contradictory and damaging statement was made by PW-2 in his deposition. The case set up by respondent No.1 was that respondent No.2 had agreed to sell to her in future the property of his brother Laiq Ali, when the same was sold to him by Laiq Ali and was mutated in his name, and admittedly, respondent No.2 was not the owner of the Suit property at the time of the agreement, and Laiq Ali was the actual owner. The respondent No.1's own witness Ghulam Mustafa (PW-2), who was the father-in-law of the respondent No.1's son, took a completely opposite stance in his deposition by stating that since respondent No.2 had claimed to have purchased the Suit property from Laiq Ali through a registered sale deed, he (PW-2) came to Hyderabad and made inquiries from the record on behalf of respondent No.1 prior to the execution of the disputed agreement, and after having been fully satisfied about the respondent No.2's title in relation to the Suit property, he (PW-2) reported his satisfaction to respondent No.1. The importance of this contradiction was that, if respondent No.1 had verified the title of respondent No.2 prior to the alleged agreement and if she was fully satisfied with such verification, there was no need for the stipulation that respondent No.2 will sell the Suit property to her in future when the same was sold to him by Laiq Ali. The above statement made by PW-2 completely belied the case set up by respondent No.1. This vital contradiction by the respondent No.1's own witness was completely ignored by the lower appellate court.

24. The disputed agreement (Exhibit 110) was purportedly attested by two witnesses ; namely, Ghulam Mustafa and Ishtiaq. As

noted above, respondent No.1 produced / examined only one attesting witness Ghulam Mustafa ; the second attesting witness Ishtiaq was not produced / examined ; and the entire evidence of respondent No.1 was completely silent as to whether the second attesting witness was dead or alive. Articles 17 and 79 of the Qanoon-e-Shahadat Order, 1984, relied upon by the learned counsel for the applicant, were fully applicable in this case, as the disputed agreement was admittedly a matter pertaining to financial or future obligations, and was purportedly executed after promulgation of the Qanoon-e-Shahadat Order, 1984. Under Article 17 (ibid), evidence of two witnesses was mandatory to prove matters pertaining to financial or future obligations if the obligations are reduced to writing. Article 79 of the Order of 1984 (ibid), provides that until the evidence of at least two attesting witnesses has been called for the purpose of proving its execution, a document which is required by law to be attested, shall not be used as evidence, provided such witnesses are alive and are capable of giving evidence. Regarding the fulfillment of the mandatory requirement of Article 17 (ibid), only PW-1 and PW-2 gave evidence in relation to the disputed agreement, and there were serious and fatal contradictions in their evidence as highlighted in the preceding paragraphs. Thus, respondent No.1 was unable to prove the alleged agreement as mandated by Article 17 (ibid). The other witnesses produced by respondent No.1 gave evidence only in respect of the gift said to have been made by the deceased.

25. It is matter of record that respondent No.1 also did not comply with the mandatory requirement of Article 79 (ibid), as she did not produce / examine at least two attesting witnesses to prove the execution of the disputed agreement. In the case of ***Mst.***

Rasheeda Begum **(supra), it was held *inter alia* by the Hon'ble Supreme Court that an agreement to sell involves future obligations, therefore, if reduced to writing and executed after coming into force of the Qanoon-e-Shahdat Order, 1984, it is required by sub-Article 2(a) of Article 17 thereof to be attested by two male or one male and two female witnesses, as the case may be ; the execution of such an agreement to sell is to be proved in accordance with the provisions of Article 79 of the Qanoon-e-Shahdat Order, 1984 ; the agreement to sell in the Civil Appeal before the Hon'ble Supreme Court, which was executed on 18-3-1991 and was attested by two witnesses, having been executed after promulgation of the Qanoon-e-Shahdat Order, 1984, its execution ought to have been proven in accordance with Article 79 (ibid), but the evidence on record consisted of only one attesting witness ; payment of the earnest money had also not been proved ; the evidence produced by the appellant in the said appeal did not meet the requirements of Article 79 of the Qanoon-e-Shahdat Order, 1984, therefore, the appeal was liable to be dismissed. In the case of *Sana Ullah* (supra), the Hon'ble Supreme Court was pleased to hold *inter alia* that the execution of a document could be proved only by calling the two attesting witnesses in whose presence the document was signed ; both the attesting witnesses were alive and were available, but they were not produced in evidence ; therefore, the courts below could not hold on the basis of the evidence on record that execution of the document was proved. In the instant case, only one attesting witness was produced by respondent No.1, and nothing at all was said by her in her evidence that the second attesting witness had died or was not available. In such circumstances, it ought to have presumed that the second attesting witness was available, but was not produced by respondent No.1.**

26. The burden to prove the disputed agreement and the execution thereof was indeed on respondent No.1. The above assessment and examination of the evidence on record shows that respondent No.1 had failed to discharge her burden, and because of such failure on her part, the burden never shifted on any of the defendants in her Suit, that is, the applicant and respondent No.2. Therefore, there was no question of passing the decree in her favour either for specific performance, or for the cancellation of the registered sale deed executed in favour of the applicant by respondent No.2, or for permanent injunction. The impugned judgment and decree passed by the lower appellate court are against the law laid down by the Hon'ble Supreme Court.

27. It has been held that the disputed agreement was not proven by respondent No.1. However, if the disputed agreement is evaluated without being influenced with the above finding, even then the same was void and unenforceable. If the case set up by respondent No.1 is believed, then admittedly on the date of the agreement respondent No.2 was not the owner of the Suit property, nor was he holding a power of attorney in his favour from Laiq Ali. In such an event, respondent No.1 was not competent to enter into the alleged agreement, or to sell the property of Laiq Ali to respondent No.1. Moreover, the alleged agreement provided sale consideration of Rs.80,300.00 for only one plot, that was owned by respondent No.2 and was conveyed by him to respondent No.1 on the same day (28.05.1994) through a registered sale deed. No sale consideration was mentioned at all in the alleged agreement in respect of the Suit property. The alleged agreement was void and unenforceable on both the above grounds. On the other hand, if the

factual position is accepted as per the evidence on record, then the alleged agreement was meaningless and redundant as respondent No.2 had already become the owner of the property of Laiq Ali on 17.05.1994 (prior to the alleged agreement dated 28.05.1994) when the same was conveyed to him by Laiq Ali through a registered sale deed, which remained un-rebutted as observed earlier. In this scenario, the alleged agreement was clearly a concocted and bogus document. Therefore, in either case, the alleged agreement was unenforceable and void.

28. There was one more aspect of this case which was not appreciated by the lower appellate court. Respondent No.1 produced in her own evidence an agreement dated 28.03.1995 (Exhibit 109) executed by respondents No.1 and 2, whereby the purported vendor / respondent No.2 undertook that in case of his failure in transferring three properties measuring 730 sq. yds., 730 sq. yds., and 460 sq. yds. in Survey Nos. 355, 356 and 357 to respondent No.1 by 31.09.1995, he was liable to pay a sum of Rs.242,000.00 along with profit thereon to respondent No.1. Exhibit 109 gave rise to a new contract between the parties under the principle of *novatio* in terms of Section 62 of the Contract Act, 1872, and as such the rights and obligations of the parties were to be governed under the said new contract. By virtue of Exhibit 109 produced by respondent No.1 herself, at best she was entitled to the aforementioned amount from respondent No.2, and not the property claimed by her. The alleged agreement also stood revoked in view of the stipulation contained in Exhibit 109 because of the respondent No.2's admitted breach, and as such the alleged agreement could not be specifically enforced.

29. The submission of the learned counsel for respondent No.1 that respondent No.1 was entitled to the specific performance of the alleged agreement in view of Section 27(b) of the Specific Relief Act, 1877, has no force, in view of my above findings. Accordingly, the law cited at the bar by the learned counsel in this context, is not applicable. The contention of the learned counsel for respondent No.1 that three plots were mentioned in the disputed agreement, does not appear to be correct, as only two plots were mentioned therein, one owned by respondent No.2, and the other owned by Laiq Ali. Admittedly, respondent No.2 sold out and conveyed his own plot to respondent No.1 on the same day (28.05.1994). Regarding the second plot admittedly owned by Laiq Ali, the disputed agreement was void and unenforceable in view of the above the above findings.

30. In *Karim Bakhsh through L.Rs and others V/S Jindwadda Shah and others*, *2005 SCMR 1518*, it was held by the Hon'ble Supreme Court that when findings of two courts below were at variance, the High Court was justified in appreciating the evidence to arrive at the conclusion as to which of the decisions was in accord with the evidence on record. In *Abdul Rashid V/S Muhammad Yasin and another*, *2010 SCMR 1871,* the Hon'ble Supreme Court was pleased to hold that where two courts below, while giving their findings on question of law, had committed material irregularity or acted to read evidence on point which resulted in miscarriage of justice, High Court had the occasion to re-examine the question and to give its findings on that question in exercise of revisional jurisdiction, and High Court was obliged to

interfere in findings recorded by courts below while exercising power under Section 115 C.P.C.

31. In addition to the above authorities, it is a well-established principle that if the findings of the two courts are at variance, the conflict would be seen to assess the comparative merits of such findings in the light of the facts of the case and reasons in support of two different findings given by two courts on a question of fact ; and if findings of the appellate court are not supported by evidence on record and the same are found to be without logical reasons or are found arbitrary or capricious, same can be interfered with in Revision. After giving due consideration to the submissions made by the learned counsel and examining and evaluating the evidence with their able assistance, I am of the considered opinion that this is clearly a case of misreading and non-reading of the evidence, and ignoring material evidence on record by the lower appellate court ; the findings of the trial court were in accord with the evidence on record, and those of the lower appellate court were contrary to the admitted facts and the evidence on record. Further, the appellate court was duty-bound to frame the points for determination under Order XLI Rule 31 CPC, but the same were not framed, and no reasons were given in the impugned judgment by the lower appellate court for disagreeing with the findings of the trial court. The impugned judgment and decree are contrary to the law laid down by the Superior Courts, and thus, not being sustainable in law, cannot be allowed to remain in the field.

The upshot of the above discussion is that this Revision is allowed with no order as to costs. The impugned judgment and decree passed in the respondent No.1's Civil Appeal No. 77 of 2005 are set aside, and the judgment and decree passed by the trial

court in the respondent No.1's F.C. Suit No. 234 of 1996 dismissing the same, are maintained.

J U D G E

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