

Judgment Sheet
IN THE LAHORE HIGH COURT, BAHAWALPUR
BENCH BAHAWALPUR.
(JUDICIAL DEPARTMENT)

....

Civil Revision No.441-D of 2018.

Shabbir Hussain

Versus.

Muhammad Shabbir Naveed (deceased) through L.R
Namely Mian Rasheed Ahmad Qamar Qadri.

J U D G M E N T

Date of hearing	<u>13.03.2025.</u>
Petitioner by:	Mr. Shabbir Ahmad Awan, Advocate.
Respondent by:	Mirza Muhammad Asif Nadeem, Advocate.

AHMAD NADEEM ARSHAD, J. This Civil Revision is directed against the judgments and decrees of learned Courts below whereby the petitioner's suit for specific performance was dismissed concurrently.

2. Facts in brevity are that the petitioner/plaintiff (*hereinafter referred to as **the petitioner***) instituted a suit for specific performance of an agreement to sell executed on a stamp paper bearing No.216 dated 22.01.2013, which was in continuation of previous agreement to sell executed on a stamp paper bearing No.3106 dated 03.07.2012, whereby, the respondent/defendant namely Muhammad Shabbir Naveed, substituted through legal heir after his demise (*hereinafter referred to as **the respondent***) agreed to sell Plot Nos.1 & 2, measuring 05 *marlas* each bearing *Khewat*

No.151/154, *khatoni* No.316, situated at Chak No.62/F, Tehsil Hasilpur District Bahawalpur as per record of rights for the years 2009-10 for a consideration of Rs.600,000/- with the contention that the respondent was owner in possession of land measuring 03 *kanals* and 05 *marlas* in a joint *khata* consisted upon 21 *kanals* 04 *marlas*; that the respondent was selling the property referred supra by making residential plots with proper site plan; that he purchased land measuring 10 *marlas* in shape of two plots bearing Plot Nos.1 & 2 through agreement to sell dated 03.07.2012 for a consideration of Rs.600,000/- and paid Rs.100,000/- as an earnest money in presence of the witnesses and got the possession of the same; that thereafter as per agreement he paid first instalment of Rs.200,000/- on 07.07.2012 in presence of the witnesses and got its receipt; that as per terms and conditions of said agreement to sell he contacted the respondent for transfer of the suit property in his name but he avoided to do so on the excuse of being busy; that the respondent told him that there are some hurdles with regard to the transfer of said plots and executed another agreement to sell on 22.01.2013 in pursuance of the previous agreement to sell by maintaining that his land is situated in a joint *khatta*, which is yet to be partitioned with the other share holders and in this regard a suit for partition is pending adjudication before the Court, therefore, he cannot perform the agreement by receiving the remaining consideration amount; that however, he bounded himself that after partition of the *khewat* he will inform him and will also transfer the suit property by receiving remaining consideration amount; that he also undertook to give statement before the

concerned Revenue Officer for transfer of the suit property; that the respondent received further consideration amount of Rs.25,000/- in presence of the witnesses and executed a receipt in his favour; that suit for partition tilted as “Shabeer Ahmad etc. versus Kashif Nazeer, etc.” was pending before the learned Civil Court; that he contacted the respondent time and again and persisted for transfer of the suit property, made excuse of pending suit, but finally refused to do so, one week prior to the institution of the suit and prayed for decree of the suit. The respondent did not appear before the Court despite issuance of notices, therefore, he was proceeded against *ex-parte* and said proceedings remained intact till final disposal of the suit. The petitioner produced his *ex-parte* oral as well as documentary evidence in support of his version. The learned trial Court after providing opportunity of hearing declined to grant decree of specific performance, however, decreed the suit with regard to return of the earnest money vide judgment and decree dated 19.09.2016. Feeling aggrieved, the petitioner preferred an appeal which was dismissed by the learned appellate Court vide judgment and decree dated 12.02.2018. Being dis-satisfied, the petitioner approached this Court through filing the instant civil revision. During the pendency of this Civil Revision, the respondent has been died and his legal heir was brought on record.

3. I have heard learned counsel for the parties at full length and perused the record with their able assistance.

4. Perusal of record, it appears that the respondent agreed to sell his two plots bearing Plot Nos.1 & 2 measuring 05 *marlas*

each for a consideration of Rs.600,000/- to the petitioner and after receipt of Rs.100,000/- as an earnest money executed an agreement to sell on 03.07.2012. In the said agreement, it was settled that first instalment of Rs.200,000/- will be paid on 08.07.2012 and the remaining consideration amount will be paid on 03.09.2012. The petitioner brought on record said agreement to sell qua his counsel's statement as Exh.P-2. Perusal of said document it appears that said agreement was executed on a stamp paper bearing No.3106 issued on 03.07.2012 in favour of Muhammad Shabbir Naveed (respondent). Said stamp paper was issued by Syed Zafar Hussain, Stamp Vendor, and scribed by the said Syed Zafar Hussain as *Wasiqa-Navees*. The petitioner produced said Stamp Vendor and *Wasiqa-Navees* as PW-1. The marginal witnesses of said agreement to sell namely Muhammad Bilal was produced as PW-8 and Muhammad Nawaz as PW-6. Said agreement was attested by Notary Public namely Munawar Hussain Cheema Advocate who got recorded his statement as PW-2. The petitioner examined himself as PW-5. As per said agreement to sell (Exh.P-2) the first instalment of Rs.200,000/- was to be paid on 08.07.2012 and the petitioner paid said amount on 07.07.2023 through receipt in presence of the witnesses. The petitioner produced said receipt as Exh.P-3 and produced its marginal witnesses namely Syed Zameer Hussain as PW-4, Muhammad Bilal as PW-8 and its scribe Syed Zafar Hussain as PW-1.

5. Later on, in continuation of the agreement to sell dated 03.07.2012, (Exh.P-2) a fresh agreement to sell was executed on 22.01.2013 with some modifications. Said agreement to sell was also

brought on record by the petitioner's counsel in his statement as Exh.P-1. Perusal of said agreement to sell it appears that it was written on a stamp paper bearing No.216 issued by Syed Zafar Hussain Stamp Vendor on 22.01.2013. Said agreement was also written by said Syed Zafar Hussain *Wasiqa-Navees*. The petitioner produced stamp vendor/*Wasiqa-Navees* namely Syed Zafar Hussain as PW-1 and one of the attesting witnesses namely Muhammad Bilal son of Yousaf Ali as PW-8. As the respondent was proceeded against *ex-parte*, therefore, all the said witnesses had not been cross-examined and their statements were remained un-rebutted.

6. The petitioner did not produce the second marginal witness namely Ghulam Murtaza Gill son of Abdul Latif of the agreement to sell (Exh.P-1). He was bound to produce said marginal witness/attesting witness in order to fulfil the requirements of Article 79 of the Qanun-e-Shahadat Order, 1984.

7. The learned counsel for the petitioner argued that the scribe also attained the status of attesting witness as in his presence the agreement was executed and the parties put their signatures and the earnest money was paid.

8. No doubt the agreement to sell (Exh.P-1) was executed in presence of Syed Zafar Hussain *Wasiqa-Navees* as he maintained said fact while recording his statement being PW-1 but he could not be attained status of marginal witness. A scribe of a document can only be a competent witness if he has put his signature as an attesting witness of the document and not otherwise. In the instant case, the name of Syed Zafar Hussain is written as scribe and did not sign the

agreement as an attesting witness rather put his signature as *Wasiqa Navees*. Therefore, he (Syed Zafar Hussain *Wasiqa Navees*) could not be qualified as a marginal witness. In this regard reliance can safely be placed upon the case titled “Hafiz TASSADUQ HUSSAIN versus MUHAMAMD DIN through Legal Heirs and others” (PLD 2011 Supreme Court 241) wherein it was held as under: -

“Scribe of a document could only be competent witnesses in terms of Articles 17 & 79 of Qanun-e-Shahdat Order, 1984, if he had fixed his signature as an attesting witness of the document and not otherwise. Signing of documents in the capacity of a writer did not fulfill and meet mandatory requirement of attestation by him separately. Scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Article 79 of Qanun-e-Shahadat, Order, 1984, itself not as a substitute. Mandatory provision of law had to be complied with.”

9. The petitioner explained the reason behind non-production of said second marginal witness by maintaining that he was residing in Dubai in connection with earning his livelihood.

10. It is settled law that so long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses. If execution of a document is specifically denied the best course is to call the attesting witnesses to prove the execution. Non-compliance of said requirement will render the document inadmissible in evidence.

11. Neither due process of law was adopted to procure attendance of the second marginal witness, nor any evidence was produced to establish that he was residing in Dubai. In this way, the petitioner who basically sought performance of said agreement to

sell (Exh.P-1), failed to comply with the stringent condition mentioned in the Article 79 of the Qanun-e-Shahadat Order, 1984.

In a case cited as “KHUDADAD versus Syed GHAZANFAR ALI SHAH alias S.INAM HUSSAIN and others” (2022 SCMR 933),

the apex Court held as under: -

“The attestation and execution both have distinct characteristics. The execution of document attributes signing in presence of attesting witnesses including all requisite formalities which may be necessary to render the document valid. While the fundamental and elemental condition of valid attestation is that two or more witnesses signed the instrument and each of them has signed the instruments in presence of the executants. This stringent condition mentioned in Article 79 is uncompromising. So long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses. The provision of this Article is mandatory and noncompliance will render the document inadmissible in evidence. If execution of a document is specifically denied, the best course is to call the attesting witnesses to prove the execution. When the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage.”

12. Although the petitioner failed to produce second marginal witness of the agreement to sell dated 22.01.2013 (Exh.P-1) but as the said agreement was executed in pursuance of previous agreement to sell dated 03.07.2012 (Exh.P-2), which was duly proved and the execution of Exh.P-1 was not specifically denied by the respondent and it remained un-rebutted, therefore, it can be used in evidence.

13. Section 21 of the Specific Relief Act, 1877 describes the contracts which are not specifically enforceable. For reference Section 21 is reproduced as under:-

“21. Contracts not specifically enforceable. The following contracts cannot be specifically enforced:

- (a) a contract for the non-performance of which compensation in money is an adequate relief;*
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;*
- (c) a contract the terms of which the Court cannot find with reasonable certainty;*
- (d) a contract which is in its nature revocable;*
- (e) a contract made by trustees either in excess of their powers or in breach of their trust;*
- (f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its power.*
- (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;*
- (h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has before it has been made, ceased to exist.”*

14. Clause ‘c’ (referred supra) describes that where the Court cannot find with reasonable certainty the terms of the contract, then said contract is not enforceable.

15. It is matter of record that the respondent initially agreed to sell land measuring 10 marlas in shape of two plots bearing Plot Nos.1 & 2 as per plan (Mark-A) but subsequently with mutual consent of the parties a second agreement to sell (Exh. P-1) was reduced into writing on 22.01.2013, wherein it was described that the suit property is situated in a joint *khata* which is yet to be partitioned, therefore, he (respondent) cannot perform the agreement. The petitioner explained said situation in para No.5 of the plaint as under:

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"یہ کہ مدعی کی طرف سے بقیہ زر بیع وصول کر کے رقبہ مدعی کے نام منتقل کرنے کے بار بار مطالبہ پر مدعا علیہ نے کہا کہ ابھی منتقلی رقبہ میں کچھ رکاوٹیں ہیں اور مدعا علیہ نے مورخہ 2013-1-22 کو پہلے معاہدہ کی تجدید و تائید کرتے ہوئے ایک اقرار نامہ معاہدہ بیع ثانی برائے پیپر نمبر 216 بحق مدعی لکھ دیا کہ جائیداد مبیعہ مشترکہ کھاتہ میں ہے جس کی تقسیم دیگر کھاتہ داران کے ساتھ کرائی جانی مطلوب ہے جس مقصد کی خاطر ہمارا دعویٰ تقسیم جائیداد عدالت میں چل رہا ہے اس لیے مدعا علیہ ازاں مدعی بقیہ زر بیع وصول کر کے تکمیل اقرار نامہ معاہدہ بیع بحق مدعی نہ کروا سکتا ہے۔ مدعا علیہ اس امر کا پابند ہے کہ تقسیم کھاتہ کروانے کے فوراً بعد مدعی کو تکمیل معاہدہ بیع کیلئے اطلاع دے گا اور روبرو ریونیو آفیسر بیان منتقلی جائیداد متدعویہ سے کر بقیہ زر بیع تین لاکھ روپے مدعی سے وصول کرے گا۔"

For better understanding it is advantageous to reproduce relevant para of agreement to sell dated 22.01.2013 (Exh.P-1, which reads as under: -

"بقیہ زر بیع 3 لاکھ روپے (-/300000) بذمہ مشتری مذکور واجب الادا ہیں۔ بیع شدہ جائیداد کھاتہ مشترکہ میں ہیں جس کی تقسیم دیگر کھاتہ حصہ داران سے کرائی جانی مطلوب ہے مقرر اس لیے ازاں مشتری بقیہ زر بیع وصول کر کے تکمیل اقرار نامہ معاہدہ بیع بحق مشتری ناکروا سکتا ہے مقرر اس امر کا پابند ہے کہ تقسیم کھاتہ کروانے کے فوراً بعد مشتری مذکور کو تکمیل معاہدہ بیع کے لیے اطلاع دے گا اور روبرو ریونیو آفیسر پیش ہو کر بیان منتقلی دیگر بقیہ زر بیع مبلغ تین لاکھ روپے ازاں مشتری وصول کرے گا اگر مقرر نے بعد تقسیم کھاتہ تکمیل معاہدہ بیع بحق مشتری سے انحراف کیا یا معاہدہ بیع اول سے منحرف ہوا تو اس صورت میں مشتری مذکور قانونی چارہ جوئی کر کے تکمیل معاہدہ بیع بحق خود کرانے کا مجاز ہو گا۔"

The petitioner while recording his statement as PW-5 endorsed said settlement in the following manner: -

"مدعا علیہ نے تابع شرائط EX-P2 پلاٹ متدعویہ میرے نام منتقل نہ کروایا اور کہا کہ ہمارا تقسیم کھاتہ کا دعویٰ ہمراہ دیگر فریقین مشترکہ کھاتہ سول کورٹ میں زیر سماعت ہے ابھی دعویٰ تقسیم کا فیصلہ نہ ہوا ہے میں پلاٹ متدعویہ آپ کے نام تقسیم دعویٰ کا فیصلہ ہونے کے بعد منتقل کروانے کا پابند ہوں لیکن میں آپ کے ساتھ تجدید معاہدہ کر لیتا ہوں اس سلسلہ میں مدعا علیہ نے مورخہ 22.01.2013 کو احاطہ کچہری حاصل پور میں سید ظفر حسین وثیقہ نویس کے پاس جا کر پلاٹ بیع متدعویہ کی بابت دستاویز اقرار نامہ معاہدہ بیع ثانی اسٹامپ پیپر نمبری 216 جاری شدہ مورخہ 22.01.2013 تحریر و تکمیل کروایا جس میں اس / مدعا علیہ نے میرے ساتھ معاہدہ بیع بابت پلاٹ متدعویہ مورخہ 03.07.2012 محررہ برائے اسٹامپ پیپر نمبری 3106 کی تصدیق کی اور لکھ دیا کہ ابھی ہمارا کھاتہ مشترکہ ہے اور اسکی تقسیم ہمراہ دیگر حصہ داران کرائی جانی مطلوب ہے جس کی بابت سول کورٹ میں دعویٰ زیر سماعت ہے کھاتہ تقسیم کرانے کے فوری بعد میں تمہیں اطلاع دوں گا اور بقیہ زر بیع وصول کر کے

پلاٹ متدعو یہ تمہارے نام منتقل کرا دوں گا اگر میں معاہدہ بیع سے انحراف کروں تو مشتری قانونی چارہ جوئی کر کے مکمل معاہدہ بیع بحق خود کرانے کا مجاز ہے اور میں مبلغ چھ لاکھ روپے بطور ہرجانہ مدعی کو پابند ہوں لیکن مدعی نے آج تک معاہدہ بیع کی تکمیل نہ کی ہے۔"

16. The petitioner brought on record *Parcha Malikiyat* (Exh.P-5) extract of record of rights for the years 2009-10 issued by the Patwari on 03.07.2012 for execution of the agreement to sell (Exh.P-2), which shows that the respondent was owner of land measuring 10 *marlas* situated in a joint *khata* consisting upon 21 *kanals* 04 *marlas* with the other co-owners. Meaning thereby at the time of execution of first agreement to sell the suit property was still situated in a joint *khata* with no identification.

17. From the above discussion it is evident that the suit property was unidentifiable from the contents of the agreement to sell dated 22.01.2013 (Exh.P-1) and entitlement of specific portion was yet to be decided after partition.

18. The particulars with regard to identity of the suit property in the agreement (Exh.P-1) lack certainty and it cannot be identified with reasonable certainty, therefore, said agreement is not enforceable in view of the principle enshrined under Section 21 (c) of the Specific Relief Act, 1877 and a decree for specific performance cannot be issued. Reliance in this regard can safely be placed upon "*Mian MUHAMMAD SALEEM and others vs. Mst. HAMEEDA BEGUM and others*" (1987 SCMR 624) "*Mst. SAEEDA AKHTAR and others versus LAL DIN and others*" (PLD 1981 Lahore 623), and "*FIDA HUSSAIN vs. JALAL KHAN*" (2002 CLC 1339).

19. From perusal of the contents of agreement to sell (Exh.P-1) it appears that performance of the agreement was postponed till partition of the *khata*.

20. It is matter of record that till institution of the suit for specific performance, the partition of the joint *khata* was not materialized as evident from para No.7 of the plaint, which is reproduced as under: -

"یہ کہ مدعا علیہ نے اقرار نامہ معاہدہ بیع ثانی مورخہ 22.01.2013 اور اقرار نامہ معاہدہ بیع محررہ مورخہ 03.07.2012 کی تجدید کرتے ہوئے منتقلی جائیداد کو دیگر مشترکہ کھاتہ داران کے ساتھ جائیداد کی باضابطہ تقسیم کے ساتھ مشروط کیا تھا مدعی کی دیگر مشترکہ کھاتہ داران کا دعویٰ تقسیم باعنوان شبیر احمد بنام کاشف نذیر ابھی تک فاضل عدالت جناب سلمان طارق صاحب سول جج درجہ اول حاصل پور میں زیر سماعت ہے"

21. The petitioner brought on record a copy of order dated 21.01.2016 as Exh.P-6. Perusal of said copy it appears that a suit for declaration titled as "Shabeer Ahmad etc. versus Kashif Nazeer, etc." challenging the inheritance mutation No.4383 dated 26.02.2009, and mutation No.510 dated 15.04.2009 is pending before the learned Civil Court and adjourned to 04.02.2016 for evidence of the defendants of said case.

22. As per clause (g) of Section 21 of the Act *ibid* a contract enforcement of which involves the performance of a continuous duty extending over a longer period than three years from its date cannot be specifically enforced. The principle involved in this Section is that where under a contract the obligation is cast upon a person to perform continuously particular duty for a period longer than three years from the date of the agreement, the same cannot be specifically enforced.

23. The agreement to sell dated 22.01.2013 (Exh.P-1) is also not capable of performance by virtue of Section 21(g) of the Specific Relief Act, 1877 as the decision of the pending litigation with regard to partition of the suit property is extended for a period longer than three years from its date. The said agreement was executed on 22.01.2013 and till institution of the suit i.e. 02.02.2016 the suit for partition was pending and not decided as evident from para-7 of the plaint, therefore, the same is un-enforceable and decree for specific performance cannot be awarded.

The august Supreme Court of Pakistan in a case titled “HAMEED ULLAH and 9 others versus HEADMISTRESS, GOVERNMENT GIRLS SCHOOL, CHOKARA, DISTRICT KARK and 5 others” (1997 SCMR 855) held as under: -

“The principle involved in this section is that where under a contract the obligation is cast upon a person to perform continuously a particular duty for a period longer than three years from the date of the agreement, the same cannot be specifically enforced. In the present case the agreement seems to be in perpetuity for all times to come, generation after generation. It casts an obligation on respondents Nos.1 to 4 to appoint the appellant or his nominee against a class IV post and this process shall continue till such time the school is in existence. Such an agreement which has cast a duty of performance for a period longer than three years cannot, therefore, specifically be enforced.”

A Division Bench of this Court in case titled “Malik TANVEER ALI and another versus Sardar ALI IMAM” (2010 YLR 1799) while deciding the question of legality and enforceability of such type of agreements also held as under:-

“We will, now advert to the question of legality and enforceability of the agreement to sell. It is found that the agreement is unenforceable, it will disentitle the appellants to decree, even if the other issues are decided in their favour. The agreement contains a condition that in case of litigation or defective title, the period for completion of the contract will

stand extended, till the time the title of the respondents is clear. If the above condition is applied to the litigation which was pending in Hon'ble Supreme Court, it will extend the performance of agreement from the date of execution of agreement till decision of the Apex Court. The performance of the agreement would thus extend to a longer period than three years. Clause (g) of Section 21 of the specific Relief Act provides that such contract cannot be specifically enforced. The suit on the basis of unenforceable agreement does not lie and the agreement to sell (Exh.P-1) cannot be specifically performed."

24. The learned Courts below in the light of evidence led by the petitioner declined to grant decree of specific performance of the agreement to sell on the grounds that the suit *khata* is still joint between the co-owners and without partition of the same with metes and bounds a decree for specific performance qua specific portion cannot be granted. However, the Court safeguarded his interest by declaring him entitled to recover the paid amount of Rs.325,000/- from the respondent.

25. Learned counsel for the petitioner failed to point out any mis-reading, non-reading, illegality and jurisdictional defect in the impugned judgments and decrees of learned Courts below.

26. Even otherwise this Court has a narrow and limited scope to interfere in the concurrent findings arrived at by the learned Courts below while exercising powers under section 115, CPC. Said power has been entrusted and assigned to the Court in order to secure effective exercise of its superintendence. Such power cannot be invoked against conclusion of law and fact which does not in any way affect the jurisdiction of the Court but it is confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality 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. 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.

27. I have seen no illegality, irregularity and mis-reading or non-reading of evidence on the part of learned Courts below while passing the impugned judgments and decrees. There are concurrent findings of facts in the matter recorded by learned Courts below and the Courts below while passing the impugned judgments and decrees have considered every piece of evidence, oral as well as documentary, produced before it and nothing is shown to have been overlooked from their judicious consideration. The findings of the learned Courts below on question of facts and law having based upon proper appreciation of oral as well as documentary evidence produced in the suit, are not liable to be reviewed or substituted by this Court while exercising jurisdiction under Section 115 of the CPC.

28. For what has been discussed above, the instant Civil Revision is without any merits, hence, the same is hereby **dismissed** with no order as to costs.

(AHMAD NADEEM ARSHAD)
JUDGE

Approved for reporting.

JUDGE.