FORM No. HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

C.R. No.55854 of 2024

Farzana Begum, **Versus** Muhammad Nawaz

Sr. No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
	18.9.2024	Ch. Bashir Hussain Khalid, Advocate for petitioner.

This judgment decides a civil revision wherein judgment and decree dated 14.9.2021 and 28.6.2024 of the Courts below, dismissing the petitioner's suit for specific performance of agreement of sale and also the appeal there against, have been challenged.

2. Precise facts are that a suit for specific performance of agreement of sale was instituted by the petitioner alleging that on 20.6.2009 the respondent agreed to sell the suit land for a total consideration of Rs.8,00,000/- and received Rs.3,25,000/- as earnest money while the remaining consideration of sale i.e. Rs.4,75,000/- were payable till 19.10.2010 which she alleged to have paid on 29.9.2010 and that the possession was given in pursuance of sale agreement and that the respondent despite request did not perform his part nor executed the sale deed. Petitioner, therefore, sought indulgence of the court for enforcement of sale agreement.

3. Respondent in his written statement contested the suit and denied the existence or execution of sale agreement or any payment of earnest money or remaining payment as alleged by the petitioner. In respect of possession it was maintained that the same was under a lease arrangement and not under any sale agreement.

4. Issues were framed and evidence was recorded whereafter the learned Civil Judge, on in-depth scrutiny of evidence, concluded that the petitioner had failed to prove the existence of any bargain of sale or execution of any agreement or payment of any consideration and that agreement could not be proved in terms of Articles 17 and 79 of Qanun-e-Shahadat Order, 1984 and that the petitioner was not entitled to any relief. The reasoning prevailed upon by the court of first instance also found favour with the learned Addl. District Judge who after reappraising the entire evidence did not find any justification for interference and, in result, the appeal was also dismissed.

4. Heard.

5. On due consideration of the submissions made in the light of evidence on the file, it is observed that the petitioner could not make out any case for interference in the concurrent findings of fact recorded by the courts below and that the findings of the courts below are

based on correct analysis and appreciation of evidence on file. Perusal of the documents shows that in the plaint case set up was that on 20.6.2009 the respondent executed an agreement of sale in favour of the petitioner in respect of the suit land, received Rs.3,25,000/- as earnest money and the balance consideration of Rs.4,75,000/- was payable on 19.10.2010. It is also the stance of the petitioner that the remaining consideration was paid on 29.9.2010 and that both the payments were not confirmed by any separate acknowledgement or receipt but was reflected on the back of the stamp paper on which the agreement was allegedly drafted. Respondent had denied the existence of sale agreement and also the execution of document and the alleged claim of payment and it was his defence that neither any agreement was made nor payment was received. As required by law petitioner was expected to prove the existence of sale bargain between the parties and also the execution of the agreement of sale by following the procedure legally provided under Article 79 of Qanun-e-Shahadat Order, 1984, as in terms of law the agreement could be proved by production of two marginal/attesting witnesses of the document. Petitioner only produced Abdur Rehman as an attesting witness and did not produce any other

attesting witness although there were four witnesses of the document. There was no explanation for non-production of other three witnesses to the document. The statement of Abdur Rehman P.W.3 the attesting witness produced in evidence was disbelieved by the courts below and rightly so for the reason that in his cross-examination he admitted that he used to act as an attesting witness by getting money and that no payment in respect of agreement was made in his presence. As regards the other reliance of the petitioner on the statement of deed writer Muhammad Riaz P.W.2 the witness admitted that he did not produce the register of deed-writing to corroborate his statement and to confirm that he had acted as deed-writer. In any case his statement was inadmissible not being an attesting witness of the document nor having affixed his signature as attesting witness. It is a settled rule that testimony of the scribe could not be equated with that of an attesting witness as both of them had signed the document in different capacities and with a different state of mind and that scribe did not meet the requirement of Article 79 of Qanun-e-Shahadat Order, 1984. Reference may be made to the rule in Farid Baksh v. Jind Wadda and others (**2015 SCMR 1044**) and Hafiz Tassaduq Hussain v.

Muhammad Din through legal heirs and others (**PLD 2011 SC 241**). The petitioner was unable to prove the existence and execution of document and payment of consideration, the findings recorded by the courts below on the basis of evidence on record being correctly recorded and do not call for interference.

6. As to the contention that the request for summoning of finger-print expert in witness-box qua his report was incorrectly declined and that in the circumstances the court had power under Order XVI, Rule 14, C.P.C. to do the needful which was not exercised, the argument advanced is legally untenable. It is a matter of record that the petitioner did not move any application before the trial court for summoning of hand-writing expert to record his statement rather an application under Order XLI, Rule 27, C.P.C. for additional evidence was filed before the appellate court which was dismissed by the learned Addl. District Judge vide order dated 28.6.2024 observing that the report was submitted on 03.4.2021 and that thereafter the petitioner was allowed opportunity to produce evidence in rebuttal on 15.4.2021, however, she did not move any application before the trial court for production of hand-writing expert and that the matter remained pending before the court till 14.9.2021 by which date no

application was moved, therefore, the application for additional evidence at the appellate stage being an attempt to fill up lacuna in evidence could not be allowed. These facts noted by the learned Addl. District Judge could not be controverted by the learned counsel in his submissions. Be that as it may, it is settled rule that the opinion of an expert or the report submitted by him on its own cannot be made basis to disregard the direct evidence and that there is no need for the expert opinion which otherwise is nothing but confirmatory and explanatory to the direct evidence. Reference can be made to the observations made by the Supreme Court Of Pakistan in Mst. Saadat Sultan and others v. Muhammad Zahur Khan and others (**2006 SCMR 193**) to the effect that the opinion of hand-writing expert is very weak type of evidence and is not of a conclusive nature and that expert evidence is only confirmatory or explanatory of direct or circumstantial evidence and that confirmatory evidence cannot be given preference where confidence inspiring and worthy of credence evidence is available on file. It was observed that even if the opinion of the expert may be relevant it does not amount to conclusive proof and can be rebutted by independent evidence and it is always risky to base findings of

genuineness of writing on expert's opinion. Reference can also be made to Qazi Abdul Ali and others v. Khawaja Aftab Ahmad (**2015 SCMR 284**) and Farid Bakhsh's case supra in which it was observed to the effect that calling two attesting witnesses for the purpose of proving execution of the document is the bare minimum and nothing short of two attesting witnesses, if alive and capable of giving evidence, can even be imagined for proving the execution and that construing the requirement of Article 79 of Qanun-e-Shahadat Order, 1984 as being procedural rather than substantive and equating testimony of scribe with that of an attesting witness would not only defeat the letter and spirit of the said being mandatory must be construed and complied with as such and that failure to call one witness, in the absence of any plausible explanation, may also give rise to an adverse presumption under Article 129(g) of Qanun-e-Shahadat, 1984 against the person intending to prove the document.

7. In the instant case there were four witnesses to the document but only one attesting witness was produced who too was disbelieved by the courts below for well-recorded reasons while there was no feasible explanation for non-production of the other

marginal witnesses. The mandatory requirement of Articles 79 of Qanun-e-Shahadat Order, 1979 having not been met as such document could not be proved nor could the petitioner produce admissible or credible evidence to prove the existence of any bargain of sale between the parties or about the payment for consideration, therefore, the opinion of expert even if had been brought on record could not serve any purpose as a substitute for the mandatory requirements of law of evidence. The learned Addl. District Judge rightly declined the application for production of additional evidence in recorded circumstances.

8. For the reasons supra, there is no substance in this revision petition, which is accordingly **dismissed**.

(RASAAL HASAN SYED)
JUDGE

APPROVED FOR REPORTING

JUDGE

Rabbani