

Stereo. HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

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Civil Revision No.257/2020

Abdul Rasheed

Versus

Mehboob-ul-Hassan & another.

JUDGMENT

Date of hearing: **22.04.2024.**

Appellant by: Mian Mansoor Ahmad Sheikh,
Advocate.

Respondents by: M/s Khadim Hussain Khan
Khashkhali, Muhammad Rashid
Khan Balouch, Muwahid Azeem
and Abdul Basit Balouch, Advocate
for respondent No.1.

Mr. Waheed-ud-Din Khan, Legal
Advisor ZTBL/Bank respondent
No.2.

ASIM HAFEEZ, J. Instant Civil Revision is directed
against concurrent decisions, in terms whereof, suit for
specific performance instituted by respondent No.1, was
decreed by the trial court and affirmed by first appellate court.

2. Facts, essential for adjudication of matter-in-issue, are
that respondent No.1 claimed entering in agreement to sell
dated 10.06.2009 regarding land in question - details of
subject matter land are not in dispute – against claimed
consideration of Rs.720,000/-, out of which allegedly a sum of

Rs.200,000/- was paid as earnest money and balance was payable by 15.02.2010. It is claimed that petitioner showed reluctance in discharging contractual obligations, thereupon respondent No.1 was constrained to bring suit, seeking enforcement of alleged agreement of 10.06.2009. It is claimed that *pendente lite* proceedings, parties reached compromise, allegedly mediated by PW-7 [Mian Imtiaz Ahmad], and reduced in writing, identified as Panchayati faisla dated 10.06.2012 (for the purposes of this decision is referred as “mediated agreement”). In terms of mediated agreement certain terms and conditions of previous agreement were changed, one of which being that cut-off date for performance was extended till 15.12.2012. In wake of the compromise, statements of the counsels were recorded on 20.07.2012, based on the application submitted, signed by the lawyers’ representing parties, and mediated agreement was brought on record, identified as Mark-A. Trial Court dismissed the suit as withdrawn on 20.07.2012. Respondent No.1 brought fresh suit in December 2012, claiming enforcement of mediated agreement, being a novated contract. Petitioner contested the suit, wherein, largely, cause of action to bring suit, on *inter alia* various grounds, was denied. Issues were framed and evidence was recorded, where-after trial court proceeded to decree the suit with direction to pay balance consideration of Rs.520,000/-.

Petitioner remained unsuccessful before the first appellate court. Hence, this Civil Revision.

3. Learned counsel for the petitioner contends that original copy of mediated agreement was not produced and copy otherwise produced was inadmissible. Adds that no novation took place and upon withdrawal of earlier suit, without permission to re-file it, subsequent suit was not proceedable by virtue of bar contained in Order II rule (2) of Code of Civil Procedure 1908 ('CPC'). Submits that respondent No.1 failed to prove factum of alleged compromise, when neither the attesting witnesses and nor the scribe of alleged mediated agreement were produced as witnesses. In support, relies upon following decisions, reported as "SIKANDAR HAYAT and 4 others.

Vs. MASTER FAZAL KARIM." (**PLD 1971 SC 730**), "MUHAMMAD YAQOOB. VS. HAKIM ALI." (**2003 MLD 833**), "MUHAMMAD HUSSAIN and others. Vs. MST. HANAF ILAHI and others." (**2005 SCMR 1121**), "ALI AKBAR. VS. MUHAMMAD ASLAM KHAN, ETC." (**2008 CLJ 171**), "ALI MUHAMMAD. Vs. MUHAMMAD BASHIR AND ANOTHER." (**2012 PSC 1446**), "MEHAR ALI. VS. KARIM BAKHSH (DECEASED) through L.Rs. and others." (**2021 CLC 42**), "MUHAMMAD IQBAL and others. Vs. MST. BASEERAT and others." (**2017 SCMR 367**), "MUKHTAR AHMAD. VS. PROVINCE OF PUNJAB, etc." (**PLJ 2020 Lahore 76**) and "MUHAMMAD AFAQ SHAMSI and 8 others. Vs. NATIONAL ACCOUNTABILITY BUREAU through its Chairman, NAB Head Quarters, Islamabad and 4 others." (**2011 C.L.R. 714**)

4. Conversely, learned counsel for respondent No.1 submits that certified copy of mediated agreement was produced, which was part of the judicial record and exhibited - Exh.P-3 – without objection. Adds that document was marked as Mark-A, which found mention in the joint application and referred in the statements recorded on 20.07.2012. Hence, certified copy thereof, being a public document, is *per se* admissible. Submits that execution of mediated agreement was proved by producing the mediator, Imtiaz Ahmad [PW-7], Hasnain Ahmad [PW.5] and one other witness of mediated agreement appeared as DW.2, who acknowledged execution thereof. Adds that respondent No.1 was not under any obligation to prove mediated agreement when factum of execution was not denied in the written statement, which absence of denial constitute an admission in terms of Order VIII rule (5) CPC. Relies upon following decisions, reported as “SOURENDRA ANTH MITRA and others. Vs. TARUBALA DASI.” (A.I.R. 1930 Privy Council 158), MESSRS BENGAL FRIENDS & Co., DACCA. VS. MESSRS GOUR BENODE SARA & Co. CALCUTTA AND THE DEPUTY REGISTRAR OF TRADE MARKS, CHITTAGONG.” (PLD 1969 SC 477), “ABDUR RASHID. VS. PAKISTAN AND OTHERS.” (1969 SCMR 141), “DR. ANSAR HASSAN RIZVI. VS. SYED MAZAHIR HUSSAIN ZAIDI and 3 others.” (1971 SCMR 634) “KHAN MUHAMMAD YUSUF KHAN KHATTAK. VS. S.M. AYUB AND 2 OTHERS.” (PLD 1973 SC 160), “MUHAMMAD BASHIR. VS. ELECTION TRIBUNAL K12ARIAN and others.” (PLD 1992 Lahore 432), “SYED MUHAMMAD SALEEM. VS. ASHFAQ AHMAD KHAND

and others.” (1989 CLC 1883), “INAM NAQSHBAND. VS. HAJI SHAIKH IJAZ AHMAD.” (PLD 1995 SC 314), “MUHAMMAD SHARIF. VS. MST. FAJJI ALIAS PHAJI BEGUM through Legal Heirs and another.” (1998 SCMR 2485), “ANSW ENTERPRISES, and 2 others. Vs. ASKARI COMMERCIAL BANK LTD., LAHORE.” (PLD 2000 Lahore 154), “NOOR UD DIN AND OTHERS. VS. MST. AMIRAN BIBI AND OTHERS.” (2000 CLJ 281), “HAMID ALI KHAN. Vs. KHALID MUMKTAZ.” (2003 AC 231), “MUHAMMAD HUSSAIN. VS. KHUSHI MUHAMMAD through L.Rs. and 5 others.” (2003 CLC 478), “SH. SALEEM ALI. VS. SH. AKHTAR ALI and 7 others.” (PLD 2004 Lahore 404), “KHAN and others. Vs. PROVINCE OF PUNJAB through District Collector, Okara and others.” (2005 SCMR 1135), “MST. SHARIF BIBI and another. vS. SYED MUHAMMAD NAWAZ SHAH and others.” (2008 SCMR 1702), “MUHAMMAD TUFAIL. VS. GHULAM HUSSAIN and others.” (2008 YLR 921), “MUHAMMAD IDREES and others. Vs. MUHAMMAD PERVAIZ and others.” (2010 SCMR 5), “Muhammad amin AND 4 others. Vs. PAIRA.” (2010 MLD 261), “SH. FAZAL UR REHMAN through L.Rs. VS. WAZIR MUHAMMAD KHAN through L.Rs.” (2013 YLR 2194), “CANTONMENT BOARD through Executive Officer, Cantt. Board, Rawalpindi. Vs. IKHLAQ AHMED and others.” (2014 SCMR 161), “MUHAMMAD IQBAL. VS. MEHBOOB ALAM.” (2015 SCMR 21), “SAJJAD AHMED. VS. CHAIRMAN, CAPITAL DEVELOPMENT AUTHORITY and others.” (2016 CLC 896), “MUHAMMAD FARID KHAN. VS. MUHAMMAD IBRAHIM ETC.” (2017 SCMR 679), “MST. HAMEEDAN BIBI and another. Vs. MUHAMMAD SHARIF.” (2016 C.L.R. 798), “MUHAMMAD SHAFIQUE and 4 others. Vs. MUHAMMAD RAFIQUE and another.” (2012 YLR 2801), “PEER DIL & OTHERS. Vs. DAD MUHAMMAD.” (2010 SCJ 551), “FARYAD ALI. VS. REHMAT ALI.” (PLD 2015 Lahore 75), “BASHIR AHMAD and others. Vs. MUHAMMAD BAKHSH

through Legal Heir.” (PLD 2016 Lahore 130), “HAJI BAZ MUHAMMAD KHAN and another. Vs. NOOR ALI and another.” (2018 SCMR 1586) and “SYED MUNIR SYED. VS. SARDAR MUHAMMAD KAMAL KHAN and 2 others.” (2019 YLR 209), “SHAHBAZ GUL and others. Vs. MUHAMMAD YOUNAS KHAN and others.” (2020 SCMR 867), “KHUDADAD. VS. SYED GHAZANFAR ALI SHAH ALIAS S. INAAM HUSSAIN and others.” (2022 SCMR 933) “SALAMAT ALI and others. Vs. MUHAMMAD DIN and others.” (PLD 2022 SC 353) and “MST. NASEEM AKHTAR and 3 others. Vs. NASIR JAVED and 7 others.” (2005 CLC 658)

5. Heard. Record perused.
6. Fundamentally two material issues need to be examined and analyzed in context of concurrently passed adverse decisions. Firstly, whether mediated agreement was proved or at all required to be proved, in wake of claim of absence of conspicuous denial in the written statement. And secondly, whether subsequent suit could be decreed based on previous agreement to sell when claim of novation of contract was pleaded by respondent No.1, though not proved, without dealing with the question of limitation and bar contained in Order II Rule (2) CPC.
7. Before embarking upon determination of determinable issues, it is appropriate to discuss the objection regarding inadmissibility of mediated agreement [Exh.P-3]. Question of admissibility of mediated agreement and proof thereof are mutually exclusive concepts, each having independent effect and significance under the principles of evidence. There is no

denial that mediated agreement was part of the application, alleging compromise, and it was referred as Mark-A in accompanying order of the Court – this brings it within the ambit of clause (3) of Article 85 of Qanun-e-Shahadat Order 1984 ('Order 1984') . In view of this, mediated agreement passed test of admissibility. Notwithstanding sorting of objection of admissibility, the execution of mediated agreement has had to be proved. Learned counsel for respondent No.1 emphasized that in wake of admission qua execution of mediated agreement in the written statement, hence, there was no need to prove admitted facts, hence, Article 113 and Article 81 of the Order 1984 are attracted. Argument is misconceived and manifest lack of proper appreciation of contents of the written statement, which had to be read in wholesome manner, instead of referring to few paragraphs and otherwise drawing erroneous inferences. Contents of written statement are examined, wherein not only the cause of action was denied but facts alleged in paragraph 6 of the plaint were emphatically denied. Petitioner even attributed falsity to the facts alleged in paragraph 6 of the plaint. Even otherwise, written statement *per se* has no evidentiary value, and anything stated therein cannot *per se* be treated as piece of evidence, unless proved upon meeting requirements of confrontation – principles enshrined in Article 140 of the Order 1984. No suggestion was put to the petitioner

in the witness box regarding alleged admission qua execution of mediated agreement in the written statement, by confronting him with contents thereof. In view of this, no admission in the pleadings could be conjectured or assumed. Now, I take up an issue that whether mediated agreement was proved.

8. Respondent was required to prove factum of compromise reached and execution of Exh.P-3, if at all it deserves treatment of a novated agreement. Case pleaded by respondent No.1 was that earlier suit was withdrawn in wake of compromise reached. It is nobody's case that petitioner in person had appeared before the court on 20.07.2012 – when alleged statement regarding compromise was recorded. Petitioner was represented through legal counsel, who was not produced as witness by the respondent. It is evident that joint application, representing compromise, was signed and submitted by legal counsels, and in these circumstances, testimony of the counsel for petitioner, in proceedings claimed to be culminated based on compromise, was vital and failure would lead to drawing of adverse inference. Lawyer, who represented petitioner, on 12.07.2012, was not produced, without any explanation. Petitioner had denied availability of cause of action. Mere production of certified copy of the application / statements, signed by the lawyers on behalf of their respective clients, cannot be treated as alternate for the

requirement to prove factum of compromise reached, and mediated agreement. And respondent failed on this count. Admissibility and proof of execution of documents are different concepts.

9. Now evidentiary weightage of Exh.P-3 needs consideration. Exh.P-3 was mediated under the supervision / direction of Pw-7, who, as witness, admitted that mediated agreement was drafted by Shahzad Ashraf Mahandara. Scribe of Exh.P-3 was not produced without any plausible explanation for such inability. This constitutes non-compliance of Article 78 of Order 1984, which requires that handwriting of the author of the document had to be proved. Failure of respondent No.1 to produce material witnesses fortifies presumption that if those witnesses are produced, they are likely to prejudice the case of respondent – this attracts principle of adverse inference in terms of Article 129 of Qanun-e-Shahadat, 1984. When factum of alleged compromise and execution of Exh.P-3 remained disproved, plea of novation of contract fails. If there is no novation, no question of protection from rigours of Order II Rule (2) of CPC could be claimed. Since respondent No.1 had pleaded novation, who cannot, upon failing to prove novation, seek decree of specific performance on previous contract – which otherwise became unenforceable by virtue of limitation, by the time subsequent suit was instituted. Learned counsel for

respondent No.1 misconstrued evidence of DW-2, who stated that neither petitioner was present nor had signed mediated agreement, who further distanced petitioner from the effect of mediated agreement by emphasizing that mediated agreement manifest settlement of disputes qua other transaction, relating to different property. I note with concern that both the courts had not considered, let alone adverted to too fundamental principles of evidence and concept of novation of contract, envisaged in Section 62 of the Contract, 1872. I hold that courts had failed to appreciate the evidence, deficiencies, going to the root of the matter, and conspicuous failure of the respondent No.1 to prove entitlement for grant of decree of specific performance, based on novated agreement.

10. Judgments referred by the learned counsel may contain authorities but in the context of the facts of each case, which decisions extends no binding precedent, applicable to the facts and circumstances of the case at hand. Assistance rendered is appreciated but proximity of the ratio settled in context of present case is missing.

11. Civil Revision is allowed and concurrent decisions of both the courts below are set aside and consequently the suit of the respondent No.1 is, hereby, dismissed. No order as to costs.

**(ASIM HAFEEZ)
JUDGE**

Approved for reporting.

Intiaz Nasir