

Stereo. H C J D A 38

JUDGMENT SHEET
LAHORE HIGH COURT,
MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

C. R. No. 1053 / 2004

Ghulam Yasin etc.

Versus

Hussain Bakhsh etc.

JUDGMENT

Date of Hearing:	21.02.2023
Petitioners By:	Mr. Rafique Ahmad Malik, Advocate
Respondents By:	Mr. Ahsan Raza Hashmi, Advocate

ABID HUSSAIN CHATTHA, J: This Civil Revision is directed against the impugned Judgment and Decree dated 13.07.2004 passed by the Additional District Judge, Karor, District Layyah, whereby, the suit for declaration instituted by the Respondents / Plaintiffs against the Petitioners / Defendants was decreed by reversing the Judgment and Decree dated 17.12.2003 passed by the Civil Judge, Karor, District Layyah, whereby, the suit of the Respondents / Plaintiffs had been dismissed.

2. At the very outset, learned counsel for the Respondents raised an objection to the effect that the titled Civil Revision was barred by time based on a subsequent note put up by the Office on 06.11.2004. Although, he did not provide any assistance as to how this Petition was barred by time yet insisted to obtain the requisite report from the Office. Accordingly, the report was requisitioned, which reveals that the titled Civil Revision was filed vide Diary No. 1958 dated 19.10.2004 against the impugned Judgment and Decree dated 13.07.2004. On 23.10.2004, the Office raised certain objections including one pertaining to limitation by noting that the dates mentioned in the stamp of Copying Agency are

ambiguous and as such, period of limitation would be calculated after seeking due clarification. Thereafter, learned counsel for the Petitioners received back the case file and refiled the same vide Diary No. 1319 dated 30.10.2004. At this point, the office while calculating the period of limitation put up a note to the effect that the Petition was time barred by 04 days and required the Petitioner to file an application for condonation of delay. Accordingly, C. M. No. 1-C / 2004 was filed by the Petitioners on 06.11.2004. The Petition was fixed for hearing on 01.12.2004 when notices were issued to the Respondents on the main Petition as well as on all pending applications.

3. The Petition is under adjudication since 2004. It was formally admitted for hearing on 29.04.2009 for the main reason that the Judgments of the Courts below were at variance. There was no judicial determination in terms of Rule 9-A of Chapter 1, Volume-VII of the Rules & Orders of the Lahore High Court, Lahore in the light of law laid down in case titled, “Farman Ali v. Muhammad Ishaq and others” (PLD 2013 Supreme Court 392) with respect to office objections. Moreover, Section 115 of the Code of Civil Procedure, 1908 (the “CPC”) confers even *suo motu* jurisdiction upon this Court in exercise of revisional jurisdiction vested in it. Revisional jurisdiction is discretionary, pre-eminently corrective and supervisory, therefore, there is absolutely no harm if the Court seized of a Revision Petition exercises its *suo motu* jurisdiction to examine and correct errors of jurisdiction committed by a subordinate Court or otherwise condones delay by exercising the discretion vested in the Court. Since the Judgments of the Courts below are at variance, the delay of four days in filing the Civil Revision is hereby condoned by allowing C. M. No. 1-C / 2004, supported by an affidavit, for the reasons disclosed therein. For reference, see case titled, “Chief Executive, PESCO Department, Government of Khyber Pakhtunkhwa, Peshawar and others v. Afnan Khan and another” (2021 SCMR 2100).

4. For ease of reference, the Petitioners / Defendants and the Respondents / Plaintiffs in the titled Civil Revision shall hereinafter be referred to with respect to their respective description as arrayed in the suit.

5. The brief facts of the case as averred in the plaint are that Karam Hussain son of Ghulam Qamber Khan / Defendant No. 1 inherited land measuring 09 Kanals and 13 Marlas through inheritance mutation No. 902 dated 30.09.1954 situated in Mouza Siwag out of which he sold 06 Kanals & 09 Marlas land to Khuda Bakhsh / Defendant No. 6 vide mutation No. 905 dated 30.09.1954 leaving 03 Kanals and 04 Marlas with him. Ghulam Akbar Khan, an uncle of Defendant No. 1 also owned 09 Kanals and 13 Marlas of land who died issueless. Karam Hussain / Defendant No. 1 inherited 04 Kanals & 16 Marlas of land out of the estate of Ghulam Akbar vide mutation No. 1239 dated 15.03.1965 and accordingly, became owner of 08 Kanals of land in Chak No. 99 / TDA, Tehsil Karor, District Layyah (the “**suit property**”) which he sold out along with possession to the Plaintiffs vide registered sale deed No. 1580 dated 06.12.1957 (the “**First Sale Deed**”). It was incorporated in the First Sale Deed that inherited share of land of Karam Hussain / Defendant No. 1 received from the estate of Ghulam Akbar was included in the suit property. As such, the Plaintiffs were owners in possession of the suit property since then and had spent considerable resources to improve the suit property. Later, Mouza Siwag was divided into Chak No. 99 / TDA and 99-B / TDA. A few days before the institution of the suit, Muhammad Bakhsh / Defendant No. 5 filed an application for partition of land before the Revenue Officer regarding land in Chak No. 99 / TDA which prompted the Plaintiffs to scrutinize the revenue record. It transpired that Karam Hussain / Defendant No. 1 had sold out the suit property to Defendants No. 2 to 4 through registered sale deed No. 3116 dated 15.09.1975 (the “**Second Sale Deed**”) who had further sold it to Defendant No. 5 through Mutation No. 52 dated 31.10.1981 and to Defendant No. 6 vide mutation No. 159 dated 19.02.1988. Hence, the Second Sale Deed and subsequent mutations were unlawful and inoperative qua the rights of the Plaintiffs which were liable to be cancelled for the reason that the suit property constituted the entire holding of Karam Hussain / Defendant No. 1 who had already divested himself of the same through the First Sale Deed and as such, could not resell the suit property. It further transpired that through an order of adjustment, suit property measuring 08 Kanals was shown to

be situated to the extent of 04 Kanals and 16 Marlas in Chak No. 99 / TDA and 03 Kanals & 05-Marlas in Chak No. 99-B / TDA which was also against the law and facts and as such, the order of adjustment was liable to be set aside. However, notwithstanding the order of adjustment, the Plaintiffs were entitled to get possession of share of the suit property having fallen in Chak No. 99-B / TDA. At the same time, it was claimed that the original First Sale Deed had been misplaced and could not be found but being a 30 years old document, a certified copy thereof had been appended with the plaint. It was also stated that when the original First Sale Deed was being copied by the Clerk of Sub-Registrar, he mistakenly mentioned the name of Defendant No. 1 as Karam Hussain son of Ghulam Akbar Khan instead of Karam Hussain son of Ghulam Qamber Khan. Nevertheless, on the register of the Petition Writer and in the Registry Note of the Sub-Registrar, the name was correctly recorded as Karam Hussain son of Ghulam Qamber Khan. It was prayed that the suit for declaration be decreed to the effect that the Plaintiffs were owners in possession of the suit property on the basis of the First Sale Deed by cancelling the Second Sale Deed along with subsequent mutations.

6. The Defendants contested the suit by way of filing written statement. Apart from a number of preliminary objections, the claim of ownership and possession of the Petitioners qua the suit property was denied. It was alleged that Karam Hussain / Defendant No. 1 had never sold the suit property to the Plaintiffs, rather, it was sold out by him to Defendants No. 2 to 4. The Defendants were in possession of the suit property as owners. The First Sale Deed was fake, fictitious, without consideration and a fraudulently manufactured document. Conspicuously, written statement was also signed by Karam Hussain / Defendant No. 1.

7. The Trial Court framed the following issues arising out of the divergent pleadings of the parties:-

- “1. Whether the plaintiffs are owners in possession of the land in dispute vide registered sale deed No. 1580 dated 06.12.57? OPP
2. Whether the impugned sale deed No. 3116 dated 15.09.75 is illegal, wrong, against the facts, ineffective and inoperative on plaintiff's rights? OPP

3. Whether subsequent alienation of the disputed land under the impugned sale deed No. 3116 in favour of remaining defendants is wrong, illegal against the facts, ineffective and inoperative on plaintiff's rights? OPP
4. Whether the suit is time barred? OPD
5. Whether the suit is under-valued for the purpose of court fee and jurisdiction? If so, its effect and what is the correct valuation? OPD
6. Whether the description of suit land is incorrect? If so, what is the correct description? OPD
7. Whether the shape of the suit is wrong? OPD
8. Whether the suit is bad for non-joinder of necessary parties? OPD
9. Whether the plaintiffs are estopped to file this suit by their words and conduct? OPD
10. Whether the plaintiffs have got no cause of action? OPD
11. Relief.”

8. After recording of respective evidence of the parties, the Trial Court dismissed the suit of the Plaintiffs. However, the Appellate Court set aside the Judgment of the Trial Court and decreed the suit in favor of the Plaintiffs.

9. Arguments heard and record perused.

10. It is evident from the facts of the case that the success of the Plaintiffs hinges upon the validity and authenticity of the First Sale Deed. The onus to prove the First Sale Deed was placed upon the Plaintiffs. The certified copy of the First Sale Deed was exhibited as Ex. P-9 in the statement of counsel for the Plaintiffs subject to objection raised by learned counsel for the Defendants regarding its production, admissibility and proof. While claiming ownership and possession based upon the First Sale Deed, it was admitted by the Plaintiffs that the same was lost. However, at the same time, it was claimed that a certified copy thereof, was admissible being a thirty year's old document carrying the

presumption of truth. Importantly, existence, execution, validity and authenticity of the First Sale Deed was denied in the written statement.

11. The Qanun-e-Shahadat Order, 1984 (the “**QSO**”) currently regulates the law of evidence in Pakistan which repealed the Evidence Act, 1872 (the “**Evidence Act**”). The First Sale Deed was executed in 1957, therefore, the Plaintiffs were required to prove its admissibility, execution and validity in accordance with the applicable provisions of the Evidence Act at the relevant time. The First Sale Deed being a disputed document was admissible only subject to proof under Article 79 of the QSO (Section 68 of the Evidence Act) as it was not admissible *per se* under Article 88 of the QSO (Section 77 of the Evidence Act). It was imperative to establish the First Sale Deed as a relevant and admissible fact as an admissible piece of evidence by the Plaintiffs asserting the same in the manner provided under Articles 70-89 of the QSO (Sections 59-78 of the Evidence Act) in terms of primary or secondary evidence. As the Plaintiffs had conceded in the plaint that the original First Sale Deed had been lost, the primary evidence was not available and the only option to prove the same was through secondary evidence. Article 76(c) of the QSO (Section 65(c) of the Evidence Act) ordains that secondary evidence may be given of the existence, condition or contents of a document when the original has been destroyed or lost.

12. The principles of the law of evidence as to the relevancy of material facts, their admissibility, modes of proof and determination of evidentiary value thereof were exquisitely articulated in case titled, “Mst. Akhtar Sultana v. Major Retd. Muzaffar Khan Malik through his legal heirs and others” (**PLD 2021 Supreme Court 715**). It was observed by the Apex Court that generally, an objection as to the mode of proof regarding a document, its contents or its execution is required to be taken, when a particular mode of proof is adopted at the stage of recording of evidence. In contrast, an objection as to the admissibility of a document can be raised at any stage of trial, appeal or revision even if it has not been taken when the document is tendered in evidence. In the instant case, the objection regarding the proof of the First Sale Deed was taken at the time when it was tendered in evidence and the same was brought on record subject to

objection. As such, it was of no surprise for the Plaintiffs regarding their obligation under the applicable law to prove the First Sale Deed through permissible modes of proof especially when the Plaintiffs had earlier conceded the loss of original First Sale Deed since a judgment under the provisions of Article 161 of the QSO (Section 165 of the Evidence Act) must be based upon relevant facts duly proved as provided by the QSO. It, therefore, follows that a party may adopt any of the permissible mode to prove a document but when the QSO / the Evidence Act provides only one mode or more modes for proving a relevant fact and that mode or none of the permissible modes are adopted, the case falls within the purview of ‘absence of proof’ as distinguished from ‘mode of proof’ and objection thereto can be taken at any stage of trial, appeal or revision even it has not been taken at the stage of evidence. It is only when a fact qualifies the test of relevancy, admissibility and proof in terms of applicable principles of evidence that it can be said to have been admitted in terms of its evidentiary value to be adjudged by the Court. For reference, also see cases titled, “Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others” (2007 SCMR 1884); and “Syed Mansoor Ahmad v. Mst. Maqbool Begum and others” (1990 SCMR 1259).

13. The loss of the original First Sale Deed was admitted by the Plaintiffs in the plaint. The existence, contents and execution of the First Sale Deed were specifically denied by the Defendants in the Written Statement. Specific objection to the production of the certified copy of the First Sale Deed in evidence was also taken. Notwithstanding the above, the Plaintiffs did not adopt the permissible modes of proof to prove the execution, existence, validity and contents of the First Sale Deed. No application was filed to obtain the leave of the Court to produce secondary evidence. PW-1 while narrating the incident of loss of the original First Sale Deed deposed that it was handed over to the concerned Patwari for attestation of mutation who later informed the Plaintiffs that it was lost. However, the said Patwari was never produced as a witness to testify the loss of the original First Sale Deed. In the same breath, it was admitted that loss of the original First Sale Deed was never reported to the Police. The date, time and surrounding circumstances regarding the alleged loss of the

original First Sale Deed remained shrouded in mystery. As such, the loss of the original First Sale Deed was not established which was a condition precedent to produce secondary evidence, thus making it inadmissible. None of the marginal witnesses of the First Sale Deed were produced. No evidence was tendered to establish that the marginal witnesses had died or could not be found. Karam Hussain / Defendant No. 1 had signed and thumb marked the written statement. He was never produced in the witness box by the Plaintiffs. When confronted, learned counsel for the Plaintiffs submitted that he died during the pendency of the suit. If so, it was incumbent upon the Plaintiffs to establish the fact of his death, obtain permission to produce secondary evidence regarding his appearance before the Sub-Registrar, receipt of sale consideration and affixation of his signatures / thumb impressions on the First Sale Deed. No comparison of signature or thumb impression of Karam Hussain / Defendant No. 1 was made in terms of Article 84 of the QSO (Section 73 of the Evidence Act). Thus, no endeavor was made in this respect by the Plaintiffs, knowing well that he was the best evidence but was withheld in terms of illustration (g) of Article 129 of the QSO (Section 114(g) of the Evidence Act), thus entailing negative inference that the withheld evidence, if produced, would be unfavorable to the Plaintiffs. Further, the First Sale Deed was exhibited in the statement of the counsel which practice has been deprecated by the Apex Court as it deprives the other party from its right to cross-examine. For reference, see cases titled, “Manzoor Hussain (deceased) through L.Rs. v. Misri Khan” (PLD 2020 Supreme Court 749); and Akhtar Sultana case (supra).

14. It is an admitted fact that Karam Hussain / Defendant No. 1 was the son of Ghulam Qamber Khan. The Plaintiffs had alleged in the plaint that the father’s name of Karam Hussain / Defendant No. 1 was inadvertently copied in the First Sale Deed as Ghulam Akbar Khan by the Registration Clerk while in the note of Sub-Registrar and the extract of Register of the stamp vendor, the father’s name of Karam Hussain / Defendant No. 1 is correctly listed as Ghulam Qamber Khan. The discrepancy could not be established from the testimony of the Registration Clerk who did not produce the Register to verify note of Sub-

Registrar regarding the father's name of Karam Hussain / Defendant No. 1. PW-2, Sheikh Karam Hussain, Advocate son of the Petition Writer deposed without any proof of death of the Petition Writer. Notwithstanding the same, it transpires from the Extract of the Register of Petition Writer (Ex. P-2) that the name of Karam Hussain son of Ghulam Qamber Khan / Defendant No. 1 appears against Serial No. 2093 and thumb impression was appended against Serial No. 2090 which entry pertains to another transaction regarding Zainab Bibi. As such, the inadvertent mistakes alleged in the plaint with respect to father's name of Karam Hussain / Defendant No. 1 could not be established. PW-4 alleged *Lumberdar* candidly admitted that he was not the *Lumberdar* of Mouza Siwag and testified that he did not know the father's name of Karam Hussain / Defendant No. 1 and the witnesses of the First Sale Deed.

15. Importantly, as per the averments of the plaint, Karam Hussain / Defendant No. 1 had got portion of the suit property from the inheritance of Ghulam Akbar Khan on 15.03.1965. There was no conclusive proof regarding the date of death of Ghulam Akbar Khan or that the share of property received by Karam Hussain / Defendant No. 1 from his inheritance was included in the suit property. The Appellate Court based its conclusion to the effect that Ghulam Akbar Khan had died before registration of the First Sale Deed and the share of inheritance received from his estate by Karam Hussain / Defendant No. 1 was included in the suit property by relying upon the contents of the First Sale Deed. The finding is perverse as neither the admissibility nor the execution of the First Sale Deed was proved.

16. The Second Sale Deed was followed by attestation of mutation in the name of Defendants No. 2 to 4, whereafter, subsequent sale mutations had also been attested. The contention of learned counsel for the Plaintiffs that mutation in the name of the Plaintiffs pursuant to the First Sale Deed could not be entered in revenue record due to some ban on account of consolidation proceedings and as such, Karam Hussain / Defendant No. 1 taking advantage of revenue record existing in his name was able to execute the Second Sale Deed in favor of Defendants No. 2 to 4 is untenable as there was no concrete evidence to establish this fact.

Even otherwise, the fact is belied since inheritance mutation in favor of Karam Hussain / Defendant No. 1 regarding his share of inheritance devolved from the estate of Ghulam Akbar Khan was attested in 1965. This fact alone establishes that there was no impediment regarding the entry in the revenue record in the name of the Plaintiffs based on the First Sale Deed executed in the year 1957 and prior to the Second Sale Deed executed in the year 1975 in favor of Defendants No. 2 to 4. The Second Sale Deed registered in favor of Defendants No. 2 to 4 was not under challenge in terms of its authenticity. The only objection thereto was that the same could not have been executed and registered since Karam Hussain / Defendant No. 1 did not own the suit property at the time of its registration having already sold the same to the Plaintiffs through the First Sale Deed. The Plaintiffs having failed to establish the due execution, validity and authenticity of the First Sale Deed, the due execution and registration of Second Sale Deed was *ipso facto* established coupled with the deposition of DW-1 which was in line with the stance of the Defendants taken in the written statement.

17. Learned counsel for the Plaintiffs emphasized that the First Sale Deed being a certified copy of a registered public document was rightly and lawfully tendered in evidence in terms of Article 85(2) of the QSO (Section 74(2) of the Evidence Act) and could be proved as secondary evidence under Article 88 of the QSO (Section 77 of the Evidence Act). It was also contended that presumption of truth is attached to a thirty years old document as envisaged in Articles 100 and 101 of the QSO (Sections 90 & 90-A of the Evidence Act). The contentions are misconceived. Article 85(5) of the QSO (Section 74(5) of the Evidence Act) expressly excludes registered documents, the execution of which is disputed and as such, the protection accorded in Article 85(2) of the QSO (Section 74(2) of the Evidence Act) to public record of private documents was not applicable. Once the execution of the registered First Sale Deed was disputed, it became a private document which was required to be produced and proved after complying with the requirements of Article 76 of the QSO (Section 65 of the Evidence Act). Moreover, the rebuttable presumption encapsulated in Article 100 of the QSO (Section 90 of the

Evidence Act) mandates that the document must be produced from any custody which the Court in a particular case considers proper and in such an eventuality, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed or attested by the persons by whom it purports to be executed and attested. Article 101 extends the provisions of Article 100 of the QSO (Sections 90-A & 90 of the Evidence Act) to certified documents which are not less than 30 years old stipulating that such certified copy may be produced in proof of the contents of the document which it purports to be a copy. The First Sale Deed was never produced through proper custody and even otherwise, the presumption was rebutted in an effective manner as stated aforesaid. For reference see case titled, "Amirzada Khan and others v. Ahmad Noor and others" (PLD 2003 Supreme Court 410). Hence, it is safely concluded that the existence, admissibility, execution and contents of the First Sale Deed were not proved in accordance with the requirements of the QSO (the Evidence Act).

18. For the reasons recorded above, this Civil Revision is **allowed**, the impugned Judgment and Decree dated 13.07.2004 passed by the Additional District Judge, Karor, District Layyah is set aside and the Judgment and Decree dated 17.12.2003 passed by the Civil Judge, Karor, District Layyah is upheld. No order as to costs.

(Abid Hussain Chattha)
Judge

Approved for Reporting

Judge