

Stereo. H C J D A 38.
JUDGMENT SHEET
LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

C.R. No.241-D/2022

Nasir Ali **Versus** Mst. Raheela Mahdi

J U D G M E N T

Date of Hearing:	27.11.2024
Petitioner by:	Mr. Tasawar Iqbal Baryar, Advocate alongwith Raja Naseer Ahmed (elder brother of the petitioner).
Respondent by:	Mr. M. Ilyas Sheikh and M. Kashif, Advocates.

Anwaar Hussain, J. This Civil Revision, under Section 115 of the Code of Civil Procedure, 1908 (“CPC”) is directed against judgments and decrees dated 13.10.2020 and 08.02.2022. Through the former judgment and decree, passed by the Civil Judge, Jhelum, the suit of the respondent, based on an oral agreement to sell dated 02.06.2007, was decreed and through the latter judgment, passed by the Additional District Judge, Jhelum, former judgment has been upheld.

2. Learned counsel for the petitioner contends that neither the alleged oral sale transaction was perfectly pleaded in accordance with law nor proved, but both the Courts below while misreading the evidentiary resume of the case, passed the decree in favour of the respondent–plaintiff, which is not sustainable in the eye of law. To support his contention, learned counsel for the petitioner has placed reliance on case reported as “*Muhammad Nawaz through L.Rs. v Haji Muhammad Baran Khan through LRs and others*” (2013 SCMR 1300). Adds that the respondent herself never appeared as witness and her husband, who is advocate by profession, appeared as PW-1,

which was not permissible as held in case reported as “*Faridullah Khan v Masood Asghar Mian*” (**2017 CLC 1736**) and therefore, his statement has no evidentiary value in the eye of law. Further contends that there was no independent witness of the purported oral transaction inasmuch as PW-2 is real son of the respondent whereas PW-3 was her domestic servant, hence, their statements cannot be relied upon as held in case reported as “*Ameer and another v Mohabbata and another*” (**2006 SCMR 690**). Further contends that the plaint was amended by filing an application under Order VI Rule 17, CPC, and the entire description of the disputed property was changed i.e., from land measuring 05-Kanals comprising of *Khasra* No.3287 to land measuring 05-Kanals 09-Marlas comprising of *Khasra* Nos.2565 and 2566, which was not permissible; and that the suit was instituted after lapse of more than 12 years from the date of alleged oral agreement and these aspects of the case have not been appreciated by the Courts below.

3. Conversely, learned counsel for the respondent has supported the impugned findings with the averments that the application under Order VI Rule 17, CPC, was accepted with the consent of learned counsel for the petitioner who conducted the trial and therefore, challenge to this aspect of the matter cannot be taken at this stage of the proceedings. Adds that in terms of Order III Rule 1, CPC, a lawyer who happens to be the spouse of a litigant can always appear as special attorney/witness and there is no embargo in this regard, under the law. Further contends that the petitioner appeared as DW-1 and acknowledged that he never filed a complaint when he noted the raising of construction upon the disputed property, in the form of four-wall and installation of the tube-well, which clearly exhibits that the respondent is in possession of the suit property, with the consent of the petitioner.

4. Arguments heard. Record perused.

5. The nub of the matter is to examine whether the respondent was able to prove the execution of the oral agreement to sell in her favour.

6. It is settled principle of law that the parties can execute a lawful contract, orally or in writing, and such oral agreements are enforceable, provided legal requirements are fulfilled as envisaged under Section 2(b) read with Section 10 of the Contract Act, 1872 ("the Act, 1872"), which contemplate that all the agreements are valid and enforceable if entered into by parties who are competent to contract i.e., having age of majority and of sound mind in terms of Section 11 and 12 of the Act, 1872, for lawful object and consideration and is not expressly declared as void. However, suffice to observe that the oral agreements are more prone to the dishonest improvements by the parties in the evidence and/or pleadings in order to succeed and for this purpose, it is obligatory on part of the party claiming existence of the oral agreement to clearly specify the date, time, place and names of the witnesses in their pleadings to substantiate when, how and in whose presence, the oral agreement was concluded as held in case reported as "Muhammad Riaz and others v. Mst. Badshah Begum and others" (2021 SCMR 605). Hence, the onus to prove is on the party who is beneficiary of the oral agreement.

7. In present case, the respondent, who is admittedly sister-in-law and paternal cousin of the petitioner, averred as under:

2- یہ کہ مدعیہ اور مدعاویہ آپس میں چھڑا دیں جبکہ مدعاویہ مدعیہ کی ہمیشہ کے ساتھ شادی شدہ ہے جس کی وجہ سے مابین فریقین کافی قریبی تعلقات ہیں۔

3- یہ کہ مدعاویہ نے کہا کہ اس کو پیسوں کی اشد ضرورت ہے اور وہ اراضی متند عویہ فروخت کرنا چاہتا جس پر مدعیہ نے مدعاویہ کو مورخہ 02.06.2007 کو بوقت 10 بجے دن بمقام دارا پور رورو گواہان (1) مظہر حیات ولد محمد حیات (2) تیور آفریدی ولد انور آفریدی ساکنانے دار اپور رقم مبلغ 2 لاکھ روپے ادا کی اور قضاہ اراضی حاصل کر لیا۔"

(Emphasis supplied)

Perusal of above quoted paragraphs of the plaint of the suit of the respondent indicates that the date, time and names of witnesses are mentioned, however, exact place and time of the negotiations, which led to the conclusion of the oral agreement, is missing in the plaint. A vague reference to *Mouza Darapur* has been made, as place of the transaction, without clarifying as to whether it was the disputed property itself or someplace elsewhere, at *Mouza Darapur*, where the negotiations took place and the agreement was concluded. This aspect of the case involving performance of the oral agreement is crucial. Moreso when the respondent–plaintiff opted not to appear as witness in support of her claim and only her husband, who happens to be a member of the legal fraternity, pleaded the case and also appeared as special attorney (PW-1) and while being cross examined, stated as under:

"دعویٰ میں تحریر نہ ہے کہ سودا کھاں ہوا از خود کھامیرے گھر میں ہوا۔"

(Emphasis supplied)

Admittedly, the respondent resides at Civil Lines, Jehlum and not at *Mouza Darapur* whereas the place of conclusion of the oral agreement has been stated as *Mouza Darapur* in the plaint and house during the evidence, hence, there is glaring contradiction that brings the case of the respondent under the clutches of the maxim "Allegans Contraria Non Est Audiendus" (A person who alleges things contradictory to each other is not to be heard), disentitling the respondent to any relief and the said aspect of the matter has been completely ignored by the Courts below. The said glaring contradiction regarding the place of conclusion of oral agreement is more obvious when the statement of PW-3, namely, Mazhar Iqbal, is perused, who happens to be the employee of the respondent–plaintiff. PW-3, stated as under:

"-----یہ معاہدہ دارا پور میں مدعیہ کے ڈیرہ پر ہوا تھا۔--"

(Emphasis supplied)

8. Moreover, none of the witness stated that the special attorney of the respondent (her husband) was present at the time of conclusion of the oral agreement and he took the possession and therefore, to this extent an improvement was made by PW-3, which has been also ignored by the Courts below. PW-3 stated as under:

"----- اس وقت صبح دس بجے کا وقت تھا تاریخ 02.06.2007 تھی۔ موقع پر دو لاکھ روپے میری موجودگی میں ادا ہوئے۔ قبضہ مختار خاص مدعاہ، کرٹل آفریدی نے لیا۔---- جب کمیشن گیا تو میں موجود تھا اور لوگ بھی موجود تھے۔--"

(Emphasis supplied)

At this juncture, it is imperative to observe that the Special Power of Attorney by the respondent in favour of her husband was executed on 05.05.2020 i.e., 13 years after the conclusion of the purported oral agreement. Meaning thereby that the purported taking over of the possession by the husband of the respondent as special attorney of the respondent, pursuant to the oral agreement is improvement if not a concocted story. It is imperative to mention that in case of specific performance of the oral agreements, improvements beyond pleadings are to be discarded as held in case reported as "*Moiz Abbas v. Mrs. Latifa and others*" (**2019 SCMR 74**). The Supreme Court of Pakistan held as under:

"8. We are not impressed by this argument. **These improvements are clearly beyond the pleadings and constitute and attempt to improve the case of the Respondents as an afterthought. Such course of action is not permitted by law.** These requirements are sine qua non to prove an oral agreement to sell which have been settled by this Court in numerous judgments time and again. These are clearly missing in this case. Suits involving sales based on oral agreements are more susceptible to improvements made by parties in the evidence and pleadings in order to succeed. **It is imperative that all of these requirements spelt out by Courts with a view that only bona fide oral agreements lead to grant of decrees, need to be strictly enforced and Courts must insist that these be fulfilled at the earliest**

so as to ensure that an oral agreement is fully proved and the device of oral agreement is not abused by unscrupulous and devious litigants to get decrees by fraud, deceit, skillfully made improvements at different stages the trial.”

(Emphasis supplied)

9. The above analysis propels to examine the consequences of non-appearance of the respondent–plaintiff as witness. In civil dispute conduct of the parties is of significant importance. There is no cavil to the preposition that Order III, Rules 1 and 2, CPC empower the holder of power of attorney to “act” on behalf of the principal. Order III, Rules, 1 & 2, CPC read as under:

“ORDER III RECOGNIZED AGENTS AND PLEADERS

1. Appearances, etc. may be in person, by recognized agent or by pleader. – Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. Recognized agents. –The recognized agent of parties by whom such appearances, applications and acts may be made or done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearance, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only where no other agent is expressly authorized to make and do such appearances, applications and acts.”

This Court is of the view that the word “acts” employed in Order III, Rules 1 and 2, CPC, confines only in respect of “acts” done by the

attorney in exercise of power granted by the instrument and would not include depositing in place and instead of the principal i.e., the respondent in the present case. In other words, if the attorney has performed some “acts” in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit and only if the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. Similarly, if the attorney alone has personal knowledge of such acts and transactions and not the principal, the attorney shall be examined, if those acts and transactions have to be proved but the attorney cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge and the attorney was not associated with the same.

10. Having above legal position in sight, it will be imperative to point out that the plaint of the respondent’s suit is clear. She has not stated that her husband (special attorney who appeared as PW-1) was present at the time when statedly the petitioner asked for money and/or on 02.06.2007, when the oral sale transaction was concluded or possession was taken. In this manner, it was the respondent herself that was the best evidence of the terms and conditions of the agreement, but she opted not to appear, which was withheld and knowledge of the attorney cannot be taken as knowledge of the principal more particularly, when the said attorney, was not present at the time of the conclusion of oral agreement. Similarly, the attorney cannot depose for the principal in respect of the matter of which the

principal has personal knowledge and in respect of which the principal is required to be cross-examined. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct. The respondent set up a defence that the petitioner approached her for money and the suit property was sold to her by the petitioner without any involvement of the special attorney. In such eventuality, it was necessary for her to have appeared personally, more particularly when she did not come with the plea of being a *parda* observing lady, which might have prevented her from appearing in the Court. The respondent has withheld best evidence. From her conduct, it is apparent that it was a ploy to grab the property of the petitioner. Therefore, adverse inference is to be drawn.

11. Moreover, the Courts below have erred by relying upon the report of the local commission (CW-1) and the weakness in the statement of the petitioner to decree the suit of the respondent. The petitioner appeared as DW-1 and stated that despite having knowledge about the raising of some construction at the suit property, he did not object to the same. Insofar as the statement of the petitioner while being cross-examined, whereby he stated that he has not objected to the construction over the suit property is concerned, suffice to observe that it is settled principle of law that a party has to stand on his own legs and no benefit can be derived from the weakness of the opponent. Even otherwise, the said statement does not depict that the construction purportedly raised by the respondent was in furtherance of a lawfully executed oral agreement.

12. The status of the construction having been raised by the respondent becomes more doubtful when the report of the local commission is examined inasmuch as the local commission was appointed, in hasty manner on 05.03.2020, who inspected the site on

20.03.2020, took photographs and did not submit the report. In fact, an application was moved by the respondent for amendment of the pleadings whereby the plaint was amended to the effect that the respondent shifted her claim to the property situated in *Khasra* Nos.2565 and 2566 comprising of 05-*Kanals* and 09-*Marlas* in toto, from her original claim of property situated in *Khasra* No. 3287 measuring 05-*Kanals* and the matter remained pending till September, 2020, when the second visit was made by the local commission (CW-1) whereafter the report was submitted on 05.09.2020. No doubt the application under Order VI, Rule 17, CPC filed by the respondent was not opposed by learned counsel for the petitioner conducting the trial, however, the contradiction regarding the description of the suit property creates a paradoxical situation, which cannot be reconciled inasmuch as if the respondent obtained possession and raised construction on the suit property situated in *Khasra* No.3287 measuring 05-*Kanals* for which she purportedly paid sale price to the petitioner, it appears illogical and irrational that the property on the spot was more than the respondent's claim to have been purchased, i.e., 05-*Kanals* and 09-*Malras* and that too bearing different *khasra* numbers. Respondent side could not deny that the photographs appended with the report of the local commission were taken in March, 2020 clearly showing that the wheat crop was cultivated whereas no fresh photographs were taken when the second visit was made in September, 2020 after changing the description of the suit property whereafter the report was submitted in September, 2020.

13. Moreover, the visit of the suit property by the local commission (CW-1) is full of doubts inasmuch as visit in March, 2020 was followed by an application under Order VI Rule 17, CPC, which was readily conceded by the learned counsel appearing on behalf of the petitioner and then matter remained in *limbo* till

September 2020 for second inspection, by the local commission, followed by the submission of report. It is also imperative to mention that, on both occasions/visits, the petitioner was not present when the local commission visited the suit property. In this regard, local commission appended postal receipts with his report to substantiate that notices were issued to the petitioner but the latter opted not to appear, on both occasions/visits. Perusal of the said postal receipts indicates that the same were sent to the petitioner i.e., "Nasir Ali s/o Nasar Ullah Khan, Darapur", whereas admittedly, in her plaint, the respondent gave following address of the petitioner:

"ناصر علی ولد نصر اللہ خان ساکن داراپور حال مقیم محلہ پیر اغیب تحصیل وضلع جہلم۔"

(Emphasis supplied)

Moreover, son of the respondent appeared as PW-2 and stated as under:

"-----درست ہے کہ مدعالیہ سرگودھا اور پیر اغیب میں رہائش پذیر ہوا ہے داراپور میں ذاتی رہائش نہ ہے-----"

(Emphasis supplied)

The above factual analysis raises serious question regarding the credibility of the proceedings in general and the veracity of the report of local commission in particular, as the local commission did not endeavor to effect service of the petitioner at his present (حال مقیم) residential address given in the plaint of the suit of the respondent, more particularly, when admittedly, the petitioner has no personal residence in Mouza Darapur.

14. On the top of it is the fact that the oral agreement is stated to have been concluded on 02.06.2007 whereas the suit was instituted on 18.06.2019. The reason put forth was the close relationship between the parties on account of which the respondent statedly did not lay claim for registration of sale deed/sanction of mutation,

however, the attorney of the respondent clearly admitted that there had been prolonged litigation between the parties, *inter alia*, the suits for partition and pre-emption. PW-1 stated as under:

"----- درست ہے کہ مدعیہ اور مدعی علیہ کی بیوی کے مابین بقیہ جائیداد کی تقسیم کے مقدمات عرصہ پندرہ سال سے زیر ساخت ہیں۔-----"

Hence, the relations between the parties were not cordial. Although, in his written statement, no specific objection was taken by the petitioner that the suit of the respondent was time barred, however, under the peculiar facts and circumstances of the case, this Court cannot ignore this aspect as it belies logic that a person will deal with someone with whom there is pending litigation, let alone will pay the entire sale price and take over the possession of the property, under an oral agreement, but will not stress for the execution of proper registered sale deed and/or sanctioning of the sale mutation in her favour.

15. Furthermore, the two marginal witnesses of the transaction are also not independent, which fact has been completely ignored by the Courts below inasmuch as PW-2, namely, Taimoor Afridi, is real son of the respondent, whereas PW-3, namely, Mazhar Iqbal was her domestic servant who, however, asserted that he was not exclusive employee of the respondent but was available to the inhabitants of the village (i.e., Rajgan Clan) as and when required for the purpose of some job. Meaning thereby that at the time of recording of evidence, he was an interested person *qua* his past, current and prospective employment with the respondent and therefore, ratio laid down in case of *Ameer and another supra*, is fully applicable to the present case. Loyalty of PW-3 towards the respondent gets more traction when following portion of his statement is read in juxtaposition with the statement of the local commission (CW-1):

"----- جب کیشن گیا تو میں موجود تھا اور لوگ بھی موجود تھے۔-----"

Whereas local commission (CW-1) stated as under:

"----پر حاضری کے علاوہ بھی دیگر لوگ موقع پر موجود تھے۔ از خود کہا کہ موقع پر نذر حیات موجود تھا مظہر حیات موجود نہ تھا----"

(Emphasis supplied)

16. It is settled principle of law that the civil cases are to be decided on the basis of preponderance of evidence. The Courts are obligated to overall appreciate the evidence available on record. In the present case, report of the local commission (CW-1) and a minor weakness in the petitioner's statement have been made basis for rendering the impugned findings. I am of considered view that neither report of the local commission, which is full of irregularities, nor weaknesses of the defendant's case can be made basis of passing a decree in suit for specific performance of contract instituted on the basis of an oral agreement to sell, which agreement was not concluded in presence of any independent witness and the record clearly depicts glaring contradiction in statement of PWs *qua* the execution of said oral agreement.

17. From the above discussion, it is well evident that the concurrent findings of the Courts below are result of grave misreading and non-reading of evidence and incorrect application of settled principles of law governing grant of decree in suit for specific performance of the oral agreement. Therefore, the present petition merits acceptance and hence, **allowed**. As a natural corollary, the suit of the respondent is dismissed.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

Tahir Noor