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Judgment Sheet

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

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CIVIL REVISION NO.663-D of 2012

AKHTAR GUL (Deceased) Through his Legal Heirs

Versus

MUHAMMAD ASHIQ and 7 others

JUDGMENT

Date of hearing:	13.11.2024
Petitioners by:	Mr. Khalid Mehmood Shahzaib Awan, Advocate.
Respondents No.1 & 2 by:	Malik Tallat Rasheed, Advocate.
Respondents No.3 to 5 by:	Mr. Waqas Masood Khan, Advocate.
Respondents No.6 to 8 by:	Malik Abdul Hafeez, Advocate.

MIRZA VIQAS RAUF, J. The petitioners herein are the successors-in-interest of Akhtar Gul, who was owner of the property measuring 8 Kanal 11 Marla forming part of Khasra Nos.2818, 2819, 2826 & 2827 situated in the revenue estate of Sarwala Tehsil and District Attock (hereinafter referred to as "**suit property**"). The respondents No.3 to 5 instituted a suit for declaration and injunction averring therein that **suit property** was sold by the predecessor-in-interest of the petitioners to respondent No.1 (hereinafter referred to as "**respondent**") through an agreement to sell dated 4th February, 1999 with sale consideration of Rs.1,55,000/- and in furtherance thereof, he also executed a general power of attorney in favour of respondent No.2. It is asserted that **respondent** was since settled

abroad, so before leaving the country he executed a special power of attorney in favour of respondent No.2. As per averments contained in the plaint, respondents No.3 to 5 entered into a sale transaction with respondent No.2 in lieu of sale consideration of Rs.3,00,000/- to which effect agreement dated 10th May, 1999 was executed. It is asserted that as the sale consideration was paid entirely, so respondents No.3 to 5 when contacted respondent No.2 for execution of sale deed, it transpired that predecessor-in-interest of the petitioners has revoked the general power of attorney executed in favour of **respondent** and in this way registered sale deed could not be executed in their favour. Suit for specific performance was also instituted by **respondent** against predecessor-in-interest of the petitioners, seeking enforcement of terms and conditions of the agreement to sell dated 4th February, 1999 alongwith injunction. Both the suits were contested by predecessor-in-interest of the petitioners, who submitted his written statement controverting the assertions contained in the plaints. From the divergent pleadings of the parties, necessary issues were framed whereafter evidence of both the sides was recorded separately in both the suits. Suits were, however, finally consolidated and through consolidated judgment dated 19th April, 2011 same were decreed. Feeling dissatisfied the petitioners preferred an appeal before the learned Additional District Judge, Attock but of no avail, as their appeal was dismissed vide judgment and decree dated 20th June, 2012, hence this petition under Section 115 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "**C.P.C.**").

2. Learned counsel for the petitioners contended that both the suits were tried separately, however, at the time of pronouncement of judgment, suits were consolidated in an illegal and unlawful manner. It is argued with vehemence that execution of agreement to sell was specifically denied by predecessor-in-interest of the petitioners and as such **respondent** was bound to prove the same. Learned counsel contended that attesting witnesses of the agreement to sell were not produced. It is further contended that suit for specific performance

was thus decreed in an illegal and unlawful manner. Learned counsel emphasized that the claim of respondents No.3 to 5 rested upon agreement to sell purportedly executed in favour of the **respondent**. He added that when **respondent** failed to prove the execution of agreement to sell, the claim of respondents No.3 to 5 would automatically crumble down. Learned counsel contended that though a deed of attorney was executed by predecessor-in-interest of the petitioners in favour of the **respondent** but it was revoked even prior to the institution of the suit and as such suit instituted by the **respondent** through attorney was not proceedable at all. Learned counsel emphatically argued that findings of the two courts are though concurrent but are tainted with material irregularities.

3. Conversely, learned counsel for respondents No.1 & 2 submitted that predecessor-in-interest of the petitioners initially executed a general attorney in favour of the **respondent**, which followed the agreement to sell. It is contended that as agreement to sell was coupled with attorney, so deed of attorney became irrevocable. Learned counsel argued that the suit was rightly decreed and concurrent findings are unexceptionable.

4. On the other hand, learned counsel for respondents No.3 to 5 submitted that they purchased **suit property** from respondent No.2, who was special attorney on behalf of the **respondent**. It is contended that respondents No.3 to 5 have led ample evidence to prove their case. Learned counsel submitted that findings of the two courts are rested upon proper appraisal of evidence and this petition is not maintainable.

5. Heard. Record perused.

6. It is an admitted fact that **suit property** is originally owned by Akhtar Gul, predecessor-in-interest of the petitioners. In that capacity, the predecessor-in-interest executed general attorney (Exhibit-P2) in favour of the **respondent**, who statedly was real estate agent, on his assurance that he would sell the **suit property** at a better rate but it could only be done when he would be holding a

deed of attorney on behalf of actual owner. As per stance of predecessor-in-interest of the petitioners, deed of attorney was executed in favour of **respondent** on his assurance that he will not misuse the deed of attorney and whenever he succeeded to get the reasonable buyer, he would settle the deal in presence of principal but on betraying by the agent (**respondent**), the general attorney was cancelled on 10th May, 1999, which fact is also not in dispute interse parties.

7. The whole edifice of the respective claims of the respondents is rested upon agreement to sell dated 4th February, 1999 (Exhibit-P1) purportedly executed by predecessor-in-interest of the petitioners in favour of the **respondent**. Perusal whereof reveals that it was attested by Javed Iqbal and Inayat Hussain but none of them was produced by the **respondent** to prove the genuineness of the agreement to sell. In terms of Article 79 of the Qanun-e-Shahadat Order, 1984 if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive and subject to the process of the Court and capable of giving evidence. The respondent thus in view of Article 79 *ibid* was bound to examine two marginal witnesses of the agreement in order to prove the same. There can be thus no second opinion that agreement to sell (Exhibit-P1) was not proved at all by the respondents. Reference in this respect, if needed can be made to *FARZAND ALI and another versus KHUDA BAKHSH and others* **(PLD 2015 Supreme Court 187)** wherein it was held as under :-

> **"**10. Considering the proposition if the agreement of the appellants was required to be proved by the examination of two attesting witnesses, it is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is *sine qua non* for the validity of the agreement. For the purposes of proof of such agreement it is mandatory that two attesting witnesses must be examined by the party to the *lis* as per Article 79 of the Order *ibid*. In this case, the respondent had unequivocally denied the execution of the said agreement and it is on account of the above that issue No.11 was also framed requiring, the appellants to prove their agreement; the appellants never objected to the issue or sought to get it struck

> off; thus for all intents and purposes they accepted the responsibility of proving the same, despite the fact that according to their stance now the said agreement was admitted by the vendors in their written statement. However, the appellants for this purpose produced P.W.1 who is the scribe of the document, but admittedly is not the attesting witness and in number of judgments of this court it has been clearly held, that a scribe of an agreement to sell immovable property is not a substitute for an attesting witness, and does not legally qualify to be so, therefore, his evidence may have a supportive value, but is neither in line with the mandate of law nor does it meet the test of Article 79 *ibid.* The only attesting witness examined by the appellants is D.W.2, namely, Muhammad Hanif, whereas the other attesting witness, Aftab has not been examined, and no explanation has been given by the appellants for this vital omission which was essential for proving their agreement to sell. This is fatal to the case of the appellants as per the law laid down in *Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others (PLD 2011 SC 241).*"

8. It is though one of the contentions of learned counsel for the **respondent** that as the power of attorney was coupled with agreement to sell, so it becomes irrevocable but to this effect neither any claim was made by either of the respondents in their respective plaints nor they have called in question the validity of the deed of cancellation resulting into cancellation of general power of attorney. Even otherwise when the **respondent** failed to prove the very agreement to sell (Exhibit-P1) he is precluded to assert that the general attorney was irrevocable.

9. So far respondents No.3 to 5 are concerned, as per their stance they purchased the **suit property** from respondent No.2, being the special attorney on behalf of the **respondent**. Though they have produced one of the attesting witnesses of the agreement to sell (Exhibit-P1) namely Javed Iqbal in support of their claim but this would not be sufficient enough to pave wave for their claim. The respondent No.2 was appointed as special attorney by the **respondent** on the basis of general power of attorney (Exhibit-P2) but with the cancellation of that, respondent No.2 would be left with no right or authority to alienate the **suit property** in favour of respondents No.3 to 5. As per stance of respondents No.3 to 5 in their plaint, they entered into sale transaction with respondent No.2 on 10th May, 1999, which leaves no doubt that the alleged sale

transaction took place on the date when the general power of attorney was cancelled by predecessor-in-interest of the petitioners. Even otherwise when the **respondent** failed to prove the agreement to sell in his favour, respondents No.3 to 5 would be precluded to claim any right or interest in the **suit property** on the basis of any transaction, which is an offshoot of such agreement to sell or the deed of attorney, which was no more in field at the relevant time.

10. There is yet another important aspect that suit for specific performance was instituted by the **respondent** through his attorney (respondent No.2) on 13th May, 1999 whereas the general power of attorney was already cancelled on 10th May, 1999, so in that eventuality special power of attorney on the basis of which respondent No.2 instituted the suit was no more in field as such suit was not proceedable at all but this important aspect has not been taken into consideration by either of the courts, while decreeing the suit.

11. It is quite strange that though initially suits were proceeded independently but at the time of announcement of judgment both were consolidated and through a common judgment while intermingling the evidence recorded in both the suits these were decreed. There are though concurrent findings of facts recorded by two courts but in view of discussion recorded hereinabove these are clearly the outcome of gross misreading and non-reading of evidence. The scope of revisional jurisdiction is hedged in Section 115 of the **C.P.C.** and though ordinarily concurrent findings of facts are not disturbed but such findings are neither sacrosanct nor it is an inflexible rule that despite observing material flaws, the revisional court will abdicate to exercise its jurisdiction. The judgments passed by the courts below are not based on proper appraisal of evidence and the learned Civil Judge, while decreeing the suits of the respondents has grossly misread the evidence as already noted hereinabove. The appellate court in the circumstances, while upholding the judgment and decree of trial court thus committed a material irregularity. This Court under Section 115 of the **C.P.C.** is

thus obliged and fully competent to correct such error in exercise of its revisional jurisdiction. Needless to observe that when once it is established on the record that concurrent findings are fraught with legal infirmities, it becomes the bounden duty of court exercising revisional powers to curb and stifle such illegalities and material irregularities. Reference in this respect, if needed, can be made to *Malik MUHAMMAD KHAQAN versus TRUSTEES OF THE PORT OF KARACHI (KPT) and another* **(2008 SCMR 428)** and *IMAM DIN and 4 others versus BASHIR AHMED and 10 others* **(PLD 2005 Supreme Court 418)**.

12. For the foregoing reasons, the instant petition is **allowed,** impugned judgments and decrees are set aside, as a result thereof, suits instituted by the respondents shall stand **dismissed** with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE

Shahbaz Ali*