

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

RFA No.267/2019

Nasir Ahmad *vs.* Amanullah Khan Durani Saduzai etc.

J U D G M E N T

Date of Hearing:	21.10.2024
Appellant by:	Mr. Muhammad Maalik Khan Langah, Advocate.
Respondents No.1 & 2 by:	Malik Javed Akhtar Wains, Advocate assisted by Ms. Aqsa Zahid, Advocate. Muhammad Asadullah Khan, Respondent No.2 in person.
Respondent No.6 by:	Mr. Mumtaz Fazal Mirza, Advocate.

Anwaar Hussain, J. Through this single judgment, the present as well as connected appeal, bearing RFA No.270/2019, are simultaneously being decided as both these appeals are directed against the same judgment and decree dated 09.11.2019 *vide* which the suit for declaration with permanent injunction instituted by the appellant in the present appeal (“**the appellant**”) was dismissed, whereas the suit for specific performance of contract instituted by respondents No.1 & 2 (“**the respondents**”) was decreed. The connected appeal has been preferred by respondent No.6, namely, Naseer Ahmed, who is step-brother of the appellant.

2. By way of factual background, it has been noted that the respondents purportedly entered into an agreement to sell dated 03.02.2014 (“**the agreement**”) with the appellant in respect of land, measuring 15 *kanal* 17 *marla*, situated in *Mauza Neel Kot Tehsil* City, Multan for which the suit for specific performance was instituted, whereas the appellant instituted the suit for declaration

with permanent injunction regarding the suit property with the averments that the agreement is result of fraud.

3. It is the case of the appellant that he had been residing abroad for approximately 45 years and respondent No.1, namely, Amanullah Khan Durrani Saduzai was his class-fellow and a close friend and on account of said cordial relationship, the appellant appointed respondent No.1 as his special attorney to pursue suit for declaration titled "Naseer Ahmed v. Nasir Ahmed", which was instituted by the appellant of the connected appeal, bearing RFA No.270/2019, and in the garb of execution of the said attorney, forged documents including the agreement were prepared, which are liable to be so declared and cancelled. Conversely, it is the case of the respondents that the appellant sold land measuring 86 *marla* @ Rs.600,000/- per *marla* to respondent No.1 and 09 kanal-14 *marla* at the rate of Rs.225,000/- per *marla* to the respondents (the total amount was to be calculated as per final measurement of the total land) and sum of Rs.5,000,000/- was paid at the time of execution of the agreement whereas for the purpose of payment of balance consideration amount, cut-off-date was fixed as 03.02.2015. The respondents claim that Rs.16,000,000/- (Exh.D2), Rs.15,500,000/- (Exh.D3) and Rs.14,000,000/- (Exh.D4) were paid on 04.02.2014, 30.01.2015 and 05.02.2014, respectively. Additionally, an amount of US \$ 42,000/- was also transferred in the bank account of the appellant and the respondents remained willing to clear the balance sale consideration, however, when the appellant did not receive the same, the suit for specific performance was instituted. Both the suits were consolidated, and issues were accordingly framed, whereafter the evidence was led and recorded. Admittedly, after the decree was passed in favour of the respondents, the balance sale consideration amounting to Rs.40,250,000/- has also been deposited by the respondents.

4. Learned counsel for the appellant contends that the agreement is forged and so are the payment receipts brought on record as

Exh.D2, Exh.D3 and Exh.D4, which could not be proved in accordance with the mandate of Article 17 read with Article 79 of the *Qanun-e-Shahadat Order*, 1984 (“QSO”).

5. Conversely, learned counsel for the respondents supported the impugned judgment and decree, however, states that even if the receipts, brought on record as Exh.D2, Exh.D3 and Exh.D4, could not be proved in accordance with mandate of Article 17 read with 79 of the QSO, the agreement stood proved and the respondents are always ready and willing to pay the aggregate amount forming part of the said receipts as the respondents have not only paid the earnest money but also transferred US \$ 42,000/-, which the appellant is utilizing for the last more than a decade and the balance sale consideration of Rs.40,250,000/- has also been deposited after passing of the impugned judgment and decree that constitute substantial performance of the agreement.

6. On behalf of respondent No.6 – the appellant in the connected appeal, it has been argued that the suit property is joint in nature and the decree can only operate to the extent of actual share of the appellant for which proper partition proceedings are required to be carried out in accordance with law.

7. Arguments heard. Record perused.

8. Out of the divergent pleadings of the parties, *vide* order dated 18.12.2018, following consolidated issues were framed by the Trial Court:

“1. Whether the plaintiff Nasir Ahmad is entitled to the decree for declaration of right with respect to the suit property as prayed for? OPP

2. If above issue is proved in affirmative, whether the plaintiff Nasir Ahmad is entitled to the decree for permanent injunction as prayed for? OPP

3. Whether the defendants Amanullah and Muhammad Asad Khan are entitled to a decree for specific performance of contract dated 03.02.2014, as prayed for? OPD1& 2

4. If issue No.3 is proved in affirmative, whether the defendants Amanullah and Muhammad Asad Khan are entitled to the decree for permanent injunction as prayed for? OPD1 & 2
5. Whether the defendants Amanullah and Muhammad Asad Khan are entitled to the decree for possession of ½ of the suit property as prayed for? OPD1 & 2
6. Whether the suit is not maintainable in its present form? OPD
7. Whether the plaintiff is stopped by his words and conduct? OPD
8. Whether the plaintiff has not approached the Court with clean hands, if so to what consequence? OPD
9. Whether the suit is undervalued for the purpose of Court fee and jurisdiction? OPD
10. Whether the suit is vexatious, therefore, the defendants are entitled to special costs under section 35-A CPC? OPD
11. Whether the plaintiff has got no legal authority to dispose of the suit property as the defendant No.6 is the co-sharer of it? OPD-6
12. Whether the plaintiff is not entitled to dispose of his share without getting the property legally partitioned? OPD-6”

The appellant himself appeared as PW.1 and produced Muhammad Kashif Saleem s/o Muhammad Saleem Shaheen as PW.2 and Rana Afsar Hameed s/o Rana Abdul Hameed as PW.3. He produced *jamabandi* for the year 2007-2008 as Exh.P1, Bank account statement as Exh.P2, attested copy of the plaint titled as “Naseer Ahmad v. Nasir Ahmad” as Exh.P3, attested copy of register of stamp vendor as Exh.P4, photocopy of special power of attorney dated 03.02.2014 as Mark-A, photocopy of passport of the appellant as Mark-B, photocopy of agreement as Mark-C and photocopy of CNIC of the appellant (Overseas Pakistani) as Mark-D. On the other hand, respondent No.1 appeared as DW.1 and produced Muhammad Maqbool s/o Shafi Muhammad as DW.2, Malik Khair Muhammad s/o Sohara as DW.3, Ch. Jameel Akhtar s/o Ch. Muhammad Ali as

DW.4, Muhammad Amjad s/o Muhammad Nawaz as DW.5, Rana Muhammad Tanveer Ahmad Khan, Advocate as DW.6, Malik Muhammad Asghar s/o Malik Muhammad Sharif as DW.7, Muhammad Mukhtiar Khan s/o Rasheed Ahmad as DW.8, Syed Zeshan Haider s/o Syed Muhammad Abbas as DW.9, Muhammad Faisal Siddique s/o Muhammad Siddique as DW.10, Syed Aun Hussain Notary Public as DW.11 and Saeed ul Hassan Clerk of Post Office as DW.12. In the secondary evidence, respondent No.1 appeared as DW.13, Allah Ditta as DW.14, Agha Zaheer Abbas Ex-Sub-Registrar Cantt., Multan as DW.15. In documentary evidence, the respondents produced the agreement as Exh.D1, receipt regarding payment of Rs.16,000,000/- as Exh.D2, receipt regarding payment of Rs.15,500,000/- as Exh.D3, receipt regarding payment of Rs.14,000,000/- as Exh.D4, application regarding their attendance as Exh.D5, statements of account as Exh.D8 & Exh.D9, online statement of account as Exh.D10 and Exh.D11, copy of cheque of Bank Al Habib Limited as Exh.D12, receipt of postal AD as Exh.D13, attested copy of plaint titled as “Naseer Ahmad v. Nasir Ahmad” as Exh.D14, attested copy of written statement filed in suit titled “Naseer Ahmad v. Nasir Ahmad” as Exh.D15, attested copy of application as Exh.D16, attested copy of order sheets as Exh.D17, attested copy of decree sheet in suit titled “Naseer Ahmad v. Nasir Ahmad” as Exh.D-18, attested copy of *Wakalatnama* of Nisar Ahmad Rana, Advocate as Exh.D19, attested copy of *Wakalatnama* of Malik Muhammad Aslam Arain Advocate as Exh.D20, attested copy of *Wakalatnama* of Syed Shahid Hussain Advocate as Exh.D21, attested copy of *Wakalatnama* of Ghulam Nabi Tahir Advocate as Exh.D22 and attested copy of *Wakalatnama* of Miss Rabia Akbar Advocate as Exh.D23.

9. In view of the arguments advanced before us, following are the core points of determination before this Court:

- (i) Whether the agreement was executed and proved in accordance with Article 17 read Article 79 of the QSO?

- (ii) If the agreement stood proved, whether the receipts were proved in accordance with law? If not, what are the consequences?

10. Insofar as first point of determination is concerned, it is imperative to note that the appellant took the stance that he wanted to appoint respondent No.1, namely, Amanullah Khan Durrani Saduzai as his special attorney for which stamp paper bearing No.8289 was obtained, and the said respondent must have cleverly obtained the signatures of the appellant on white papers, which were later on misused to prepare the agreement and the receipts. The averment and contention do not sit well with the record of the case, which reflects otherwise. It is also noted that the appellant in terms of order VI Rule 4 of the Code of Civil Procedure, 1908 has not given the particulars and details as to how the fraud was committed since only one stamp paper was statedly got issued by the appellant and the same was used for the purpose of appointing respondent No.1 as his special attorney. Therefore, it is unclear as to what persuaded the appellant to affix his signatures on the blank white papers. In fact, factum of allegation of procuring signatures on the blank papers was not pleaded in suit for declaration, instituted on 06.04.2015, but casually mentioned while filing written statement, filed on 18.04.2015, in suit for specific performance instituted by the respondents. Moreover, when the appellant appeared as PW.1, he further improved his stance by stating that the blank white papers were signed by the appellant for the purpose of opening of the bank account and also in respect of the litigation with NHA, however, nowhere in the pleadings or in the evidence, the appellant has referred to any litigation with the NHA etc., and this fact rightly persuaded the Trial Court to hold that the agreement was executed by the appellant. Even otherwise, the said aspect of the evidence is beyond pleadings and it is settled law that evidence beyond pleadings cannot be read and considered. Operative part of the impugned judgment reads as under:

“20. During the course of cross-examination PW-1 admitted that the defendant No.1 belong to a financial and strong sound family, the alleged agreement to sell i.e.

Ex.D-1 was shown to PW-1, at page No.2 of the cross examination PW-1 admits that in his written statement filed in the suit titled as “**Amanullah Khan vs Nasir Ahmad**” on 27.07.2016, the plaintiff has not denied his signatures or thumb impression in the Exh.D-1. He further admitted that the marginal witnesses namely Malik Muhammad Asghar is his friend. PW-1 further stated that on 03.02.2014, he never appeared before Muhammad Faisal Siddique stamp vendor bearing license No.20 Pak gate Multan. However, in the second line he himself admitted that on 03.02.2014 he appeared before Muhammad Faisal Siddique and purchased a stamp paper for appointment of special attorney **PW-1 is blowing hot and cold in the same breath.** At page No.5 of the cross-examination he states that on 03.02.2014 in garb of special attorney **stamp vendor and the defendant No.1 obtained his signatures at different papers.** He admitted it as correct that Exh.D-2 to Exh.D-4 bears his signature as Exh.D2/1 to Exh.D4/1 are his signatures but are a result of same conspiracy. In the same breath, PW-1 states that on 03.02.2014 he signed white the paper for the litigation with NHA and for bank account and for transfer of money.

21. Perusal of record reflects that nowhere in the pleadings or in the evidence, plaintiff has filed any litigation with the NHA.”

The fact that the agreement was executed gets further traction inasmuch as the suit for declaration was filed on 06.04.2015 much prior to the suit for specific performance of the agreement instituted by the respondents, which raises the question as to how the appellant came to know that some fraud had been committed with him in February, 2014, when the appellant only wanted to appoint respondent No.1 as his special attorney. The appellant, while filing suit for declaration on 06.04.2015, claimed having knowledge of the fraudulent agreement since January 2015, without disclosing details of alleged fraud practised by the respondents. Why the appellant was economical with the truth and had not disclosed factum of alleged fraud is another demerit of the case of the appellant. This lapse, coupled with other shortcomings, conspicuously discredits the plea of non-signing of the agreement. This tumble also reflects a strange case of pre-emption based on presumption on the part of the appellant that the respondents might have procured the agreement

fraudulently. Moreover, it is evident from the perusal of Exh.D16, which is copy of the application submitted for intimating factum of cancellation of special power of attorney, wherein factum of alleged fraud was not stated but plea of some personal disputes was raised, as the reason for cancellation. When confronted, there was no plausible explanation available with learned counsel for the appellant for such lapses in stance of the appellant. Therefore, we are of the opinion that the agreement was duly executed and proved, and denial on the part of the appellant is an unsubstantiated attempt to shirk away for performance of established contractual obligations.

11. Insofar as the second point of determination is concerned, it is imperative to state that the appeals were variously heard at length, by this Court, in the month of January 2024. One of the contested issues was that whether payment of part consideration amount, pursuant to the agreement, and claimed to have had paid by the respondents through Exh.D2, Exh.D3 & Exh.D4, stood proved. The appellant contested the claim of the receipt of part consideration. We, in exercise of powers under Order XLI Rule 25 of the Code of Civil Procedure 1908 and in order to ascertain genuineness of the receipts, had framed an additional issue and directed the Trial Court to refer the questioned documents to the Punjab Forensic Science Agency for verification of the signatures of the appellant, *inter alia*, by comparison with appellant's Passport/Identity Card for Overseas Pakistanis. We further directed the Trial Court to record expert evidence, enable parties to cross-examine witnesses, and record findings on the additional issue, for our consideration. For quick comprehension, the additional issue is reproduced hereunder:

Whether purported signatures of Nasir Ahmad on receipts, Exh.D-2, Exh.D-3 and Exh.D-4 are genuine? [Onus on the parties]

The Trial Court recorded the evidence and submitted the order with inconclusive findings, for the reasons stated. Paragraphs 8, 9, 10 and 11 of the order of the Trial Court dated 22.06.2024 are

reproduced hereunder, which have had relevance in the context of the conclusive findings recorded through the instant judgment:

- “8. CW-1/Forensic Scientist submitted her report and her observation was given on the report which is reproduced as under:-

Result(s) & Conclusion(s):

After careful examination and comparison of the Questioned Signatures of Nasir Ahmed Fiqia on items no.1.1 to 1.3 with routine signature of Nasir Ahmad Fiqia on item no.1.4, no conclusion could be drawn on the basis of provided evidence.

Additional Comments:

The term ‘no conclusion’ has been used in conclusion because only one routine signature of Nasir Ahmad Fiqia has been provided which is insufficient to establish natural range of variation (differences/variations in his own signature specimen).

9. This court was directed by the Hon’ble High Court, Multan Bench, Multan vide order dated 24.01.2024 to procure report from the Agency, invite objections, call expert for evidence and enable parties to cross examine said witness. Furthermore, direction was also issued by the Hon’ble High Court to get record findings and reasons thereof.

10. Instant case files were received to this court on 01.02.2024. On 06.02.2024, Malik Jamshed Akhtar Wains Advocate, appeared on behalf of defendants No.1 & 2, Mr. Mumtaz Fazal Mirza Advocate appeared on behalf of defendant No.6 and Miss Najma Aziz Advocate appeared and submitted her memo of attendance on behalf of plaintiff Nasir Ahmad. Approximately eight adjournments were availed by the learned counsel for the plaintiff (Nasir Ahmad) for submission of passport of Nasir Ahmad On 25.03.2024, passport of concerned Nasir Ahmad was submitted. Later on learned counsel for the defendants No.1 & 2 filed an application with the stance that concerned Nasir Ahmad plaintiff has submitted his passport which is already cancelled one. At the time of alleged disputed agreement to sell said passport was in filed. Furthermore, Nasir Ahmad never appeared before this court rather he appeared through his special attorney Miss Najma Aziz Advocate. CW-1 has got recorded her

statement that according to Standard Operating Procedures (SOPs) of Punjab Forensic Science Agency, she is unable to get comparison of signatures of Nasir Ahmad while relying upon only one document (passport). Report of Punjab Forensic Science Agency with no conclusion has been submitted. So, in the presence of report of no conclusion, this court is unable to get record any findings regarding genuineness of signatures of Nasir Ahmad on Exh.D-2, Exh.D-3 and Exh.D-4.

11. In the light of my findings and reasons, report of Forensic Scientist was submitted with no conclusion. So, both these files of above said cases with due respect be placed before the Hon'ble Lahore High Court, Multan Bench, Multan for further necessary direction through the office of Worthy District & Sessions Judge, Multan. Ahlmad of this court is directed to transmit the files after its due completion and compilation.”

Suffice to observe that we expressed our doubts *qua* the receipts, claiming payment of part consideration and extended opportunity to the parties to bring additional evidence to prove or disprove the factum of consideration, besides affording opportunity to the appellant to facilitate comparison of his signatures on questioned documents. Task assigned to the Punjab Forensic Science Agency remained incomplete because sufficient signatures of the appellant were not available, and an exercise for undertaking comparison between questioned documents with admitted signatures could not be carried out. It is apparent from the order dated 22.06.2024 of the Trial Court, in the context of the additional issue, that the appellant was represented through attorney, and he had not appeared before the Trial Court during the proceedings, which remained pending therefrom February 2024 to June 2024, to facilitate an exercise of comparison of the signatures. This lack of cooperation is contrary to the normal human conduct, in a like situation where the appellant is placed in context of the plea of denial of execution of the agreement and the receipts, and further suggests an adverse inference against the appellant. There is no cavil that presumption of fact is rebuttable, but in appropriate circumstances, it suggests an affirmative inference, when examined in the context of ordinary conduct of

human beings/ homo sapiens. Why would someone not step-forward/appear and facilitate an exercise for conducting comparison of signatures, especially when his valuable property is at stake in the legal proceedings and the dispute relates to the genuineness or otherwise of the signatures – *you can lead a horse to water but cannot make it drink*. Absence of the appellant to facilitate task of comparison of signatures provides sufficient reasons for inferring presumption of fact against appellant—conduct of the appellant is contrary to normal/ordinary human conduct.

12. Even otherwise, we have noticed that there were two witnesses of the receipt amounting to Rs.16,000,000/- (Exh.D2), namely, Malik Khair Muhammad and Muhammad Jameel Akhtar and out of them, Malik Khair Muhammad appeared before the Court in examination-in-chief but did not come in the witness box for cross-examination whereas the other witness, namely, Muhammad Jameel Akhtar appeared as DW.4. Same was the position with regard to witnesses of the receipt amounting to Rs.14,000,000/- (Exh.D4). As regards the receipt amounting to Rs.15,500,000/- (Exh.D3), there were two witnesses, namely, Allah Ditta and Muhammad Nadeem Khan Durrani and since Muhammad Nadeem Khan Durrani died, respondent No.1 himself appeared as DW.13 in secondary evidence. The Trial Court has erred in appreciating the fact that respondent No.1 himself appeared as DW.13 in secondary evidence to prove the signatures of deceased Muhammad Nadeem Khan Durrani on Exh.D3 by ignoring the fact that even though respondent No.1 was close relative of deceased Muhammad Nadeem Khan Durrani but he was not familiar with signatures of deceased Muhammad Nadeem Khan Durrani as they have neither worked together nor concluded any transaction between them. Therefore, we are of the opinion that the respondents were not able to prove the part payment of the balance sale consideration *per* Exh.D2, Exh.D3 and Exh.D4.

13. As regards amount of US\$ 42,000/-, the same has been deposited, partly through internal transfer and partly by way of deposit through instrument of cheque, in the bank account of the appellant, however, it is the case of the appellant that it was deposited without consent of the appellant which averment is misconceived and not persuasive inasmuch as the payments were made in February, 2014 whereafter the appellant has been operating the bank account for his benefit and has not raised any objection *qua* the said payments/entries at any relevant forum. Bank Statements of the accounts were produced showing corresponding credit entries in the accounts of the appellant. Payment of consideration is one of the critical fact-in-issue, and the appellant failed to bring compelling evidence to dispute existence of the beneficial entries in his account, and the benefits reaped. In the absence of any plausible explanation there is no alternative but to hold that the payment through US dollars formed part of the consideration of the agreement.

14. The above discussion on the second point of determination leads this Court to opine as to what is the effect if the agreement stood proved, however, the factum of payment of part of the balance sale consideration as claimed by the respondents could not be substantiated. In this regard, this Court is to keep insight the settled legal position that the jurisdiction of the Courts to issue a decree of specific performance is discretionary/equitable in nature and in terms of Section 22 of the Specific Relief Act, 1877 (“**the Act**”), which facilitates and provides statutory classification of the instances where exercise of discretion by the Court(s) was limited and cases where such discretion could be liberally exercised. Paragraph III of section 22 of the Act reads as under:

“22. Discretion as to decreeing specific performance.—The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

- I.
- II.
- III. *Where the plaintiff has done substantial acts*
or suffered losses in consequence of a contract
capable of specific performance.”

(Emphasis supplied)

In view of the narrative above, we opine that execution of the agreement stood proved, where part of the consideration, in shape of earnest money and US dollars, constitute substantial performance, hence, it is just and equitable to exercise discretion for ordering specific performance of the agreement as equity mandates that in a suit for specific performance, it is the duty of the Court to find out, which party has not performed and is trying to wriggle out of his contractual obligations. In exercise of such discretion, the Court may consider the conduct of the parties which becomes relevant in granting and/or refusing decree for specific performance being discretionary and based on principles of equity. In cases involving specific performance, the primary part of the contract is the consideration to be paid by the vendee for which he must exhibit his willingness and readiness, at all times. In present case, admittedly, the cut-off date for payment of the balance sale consideration was set as 03.02.2015. The respondents took the stance that they were always ready and willing to perform their part of agreement and get the sale deed executed in their favour on payment of remaining sale consideration and deposited the amount when the decree was passed in their favour. It has not been pleaded before us that the respondents were not willing and ready to pay the balance sale consideration. Even when this Court indicated that the receipts of part of the balance consideration could not persuade us, the respondents have shown their willingness to pay the said amount as oppose to the appellant side which remained adamant that the agreement was never executed. Moreover, a huge amount has admittedly been paid to the appellant (US\$ 42,000/- and earnest money amounting to Rs.5,000,000/-), which the appellant is utilizing since long.

15. For what has been discussed above, we hold that the Trial Court was justified in decreeing the suit of the respondents for specific performance of the agreement, however, the impugned judgment and decree is modified in the terms that the respondents are directed to deposit the amount of Rs.45,500,000/- (aggregate of the amount recorded in Exh.D2, Exh.D3 and Exh.D4) within two months from today with the Executing Court. Office to draw the decree sheet accordingly.

16. Insofar as the connected appeal is concerned, the same is disposed of with the observation that the impugned decree shall operate only to the extent of the share of the present appellant, i.e., the judgment debtor, which exercise is to be carried out by the Executing Court and in case, the measurement of the disputed property is found short, the same shall not affect the sale price of the suit property.

17. Both appeals are **disposed of** in above terms.

(ASIM HAFEEZ)
Judge

(ANWAAR HUSSAIN)
Judge

Akram

Approved for reporting

Judge

Judge