

Stereo. HCJDA 38
Judgment Sheet

**IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT**

R.S.A. No.67 of 2013

Mst. Rajan Bibi etc.
Versus
Muhammad Saddique etc.

JUDGMENT

Date of Hearing:	24.01.2023.
Appellants by:-	Mr. Nauman Qureshi, Advocate.
Respondents No.1 to 3 by:-	Mr. Aurangzeb Mirza & Muhammad Irfan Hanjra, Advocates.
Legal heirs of Respondent No.4 (i) to (vi) by:-	Ex-parte vide order dated 23.06.2014.

CH. MUHAMMAD IQBAL, J:- This Regular Second Appeal under Section 100 CPC is directed against the judgment & decree dated 18.10.2010 passed by the learned Civil Judge, Chunian, District Kasur who decreed the suits for possession through specific performance filed by respondents No.1 to 3 and also assailed consolidated judgment & decree dated 16.04.2013 passed by the learned Additional District Judge, Chunian, District Kasur who dismissed the appeal of the appellants.

2. Brief facts of the case are that respondents No.1 to 3 / plaintiffs (hereinafter may be referred as respondent/plaintiff) instituted a suit for possession through specific performance on the basis of written agreement to sell dated 06.07.1987

against the appellants and respondent No.4/ defendants alleging therein that Muhammad Asghar predecessor-in-interest of the appellants /defendant No.1 agreed to sell his mortgaged land measuring 177-Kanals 05-Marlas fully described in Paragraph No.1 of the plaint (suit property) against consideration of Rs.27,500/- per acre, out of which, he received Rs.2,00,000/- as earnest money and handed over possession of the land to respondents No.1 to 3/plaintiffs. It was settled between the parties that after redemption of land till 06.01.1988 from agricultural bank and attestation of mutation of inheritance of his mother Mst. Janat Bibi, the vendor (Muhammad Asghar-defendant No.1 predecessor in interest of the appellants) would get registered a sale deed in favour of respondents No.1 to 3/plaintiffs. On 13.01.1988, respondents No.1 to 3/ plaintiffs sent a notice in the name of appellants predecessor/ defendant No.1 asking him to perform his part of agreement but he did not honour the agreement rather in derogation of the above agreement, he ultimately sold land to his brother-in-law namely Noor Muhammad /respondent No.4 /defendant No.2 through receipt dated 10.06.1987 by preparing an agreement to sell dated 04.07.1987.

Respondent No.4/ Noor Muhammad also filed a suit for possession through specific performance titled Noor Muhammad Vs. Muhammad Shafi etc., in which defendant No.1 filed a consenting written statement, whereas

respondents No.1 to 3 / plaintiffs filed an application under Order 1 Rule 10 CPC for their impleadment as defendants in the said suit.

On 25.06.1988, respondents No.1 to 3/ plaintiffs again sent a notice to defendant No.1 for performance of agreement to sell in their favour but he refused. During the pendency of the suit, defendant No.1/appellants predecessor Muhammad Asghar and respondent No.4/defendant No.2 Noor Muhammad died and their legal heirs were impleaded as defendants. Appellants predecessor and respondent No.4/defendants filed contesting written statement whereas defendants conceded the claim of legal heirs of Noor Muhammad (respondent No.4/defendant No.2) and asserted that the agreement to sell dated 06.07.1987 in favour of respondents No.1 to 3/ plaintiffs is a forged and fictitious document. That appellants predecessor /defendant No.1 neither sold the suit property to respondents No.1 to 3 nor received any earnest money. Respondents No.1 to 3 / plaintiffs Muhammad Saddique etc. also filed another suit titled as Muhammad Saddique etc. Vs. Muhammad Shafi etc. and a suit titled as Noor Muhammad Vs. Muhammad Shafi etc. was also filed. All three suits were consolidated. As per respective divergent pleadings of the parties, the following issues were framed:

ISSUES:

- 1) Whether the defendants No.1 to 5 agreed to sell the suit land to plaintiff, Noor Muhammad as alleged in Para No.2 of the plaint? OPP
- 2) Whether the defendant, Muhammad Shafi agreed to sell land measuring 177-Kanals 5-Marlas to plaintiff of suit No.385/1 vide agreement to sell dated 16.07.1987? OPD. 6 to 8.
- 3) Whether the defendant Asghar Ali agreed to sell land measuring 177 Kanals 6-Marlas to plaintiffs of suit No. 384/1 vide agreement to sell dated 6.7.1987? (Amended vide order dated 16.5.92) OPD 6 to 8.
- 4) Whether the suit of Noor Muhammad is collusive? OPD 6 to 8.
- 5) Whether the suit land has not been properly described in the plaint of Suit No.385/1? If so, its effect? OPD. 1
- 6) Which of the defendant is entitled to costs U/S 35-A of C.P.C.? OPD
- 6-A) Whether the plaintiff or defendants No.6 to 8 are entitled to decree of specific performance of the agreement? If so, on what terms? OPP and OPD 6 to 8
- 7) Relief.

The parties at discord led their pro and contra oral as well as documentary evidence. The learned trial court vide consolidated judgment & decree dated 16.05.1992 dismissed the suit of respondent No.4 titled as Noor Muhammad Vs. Muhammad Shafi etc. and decreed the suits of respondents No.1 to 3 titled as "Muhammad Saddique etc. Vs. Muhammad Shafi etc." and "Muhammad Saddique etc. Vs. Muhammad Asghar etc." Against the said consolidated judgment & decree, following three appeals were filed:

1. RFA No.212/1992
(Muhammad Asghar etc. Vs. Muhammad Siddique etc.)
2. RFA No.213 /1992
(Muhammad Shafi etc. Vs. Muhammad Siddique etc.)
3. RFA No.135 of 1992
(Noor Muhammad Vs. Muhammad Shafi etc.)

This Court accepted the above appeals vide judgment dated 24.10.1995 and by setting aside the impugned judgment & decree remanded the cases to the learned trial court for

decision afresh in accordance with law after affording reasonable opportunity to the parties to produce evidence in support of their respective averments. Against the above said judgment [dated 24.10.1995] of this Court, respondents No.1 to 3 Muhammad Saddique etc. and appellants predecessor filed Civil Appeal Nos.1401 to 1403 of 1995 which were dismissed by the Hon'ble Supreme Court of Pakistan vide order dated 19.09.2002.

3. In the post-remand proceedings, suit of Noor Muhammad Vs. Muhammad Shafi etc., was dismissed as withdrawn on 03.03.2007 whereafter the learned trial court on 23.05.2007 de-consolidated the remaining two suits titled as Muhammad Saddique etc. Vs. Muhammad Shafi etc. as well as Muhammad Saddique etc. Vs. Muhammad Asghar etc., and re-framed fresh issues in each suit. The issues framed in the instant suit are reproduced as under:-

“ISSUES.

1. Whether plaintiffs are entitled to get decree for possession through specific performance as prayed for? OPP.
2. Whether the defendant No.1 sold out the property in question to the plaintiffs through agreement to sell dated 06-07-1987 and Rs.2,00,000/- were received as advance and promised to hand over the possession after inheritance of Mst. Janat Bibi?OPP
3. Whether the agreement dated 06-07-1987 is based on fraud? OPD-2.
4. Whether the plaintiffs have got no cause of action to file this suit? OPD.
5. Whether the plaintiffs have filed the instant suit just to harass and pressurize the defendants? OPD.
6. Whether the defendants are entitled to get special cost u/s 35-A of CPC? OPD.
7. Whether the plaintiffs estopped by their words and conduct to file the present suit? OPD.

8. Whether the suit is not maintainable in its present form? OPD.
9. Relief?"

After framing of the above issues the plaintiffs were required to produce evidence in order to prove the case as well as to dislodge the burden of the issues, but instead of leading evidence, respondents No.1 to 3 / plaintiffs filed an application under Section 151 CPC for getting permission to submit certified copy of statements of their witnesses recorded in consolidated trial in the suit titled as Noor Muhammad Vs Muhammad Shafi etc. The said application was refused vide order dated 24.10.2007 but the learned trial court later on without recalling the aforementioned order granted permission on 27.06.2009 to place on record the earlier statements and the learned counsel for respondents No.1 to 3 got recorded his statement and also produced attested copy of evidence in the form of Exh.P1 to Exh.P14 and on the basis of said evidence, the learned trial court decreed the suit of respondents No.1 to 3 vide judgment & decree dated 18.10.2010. Against the said decision, the appeals of the appellants Mst. Rajan Bibi etc. and Muhammad Tufail etc. were also dismissed by the learned appellate court vide consolidated judgment & decree dated 16.04.2013. Hence, this appeal.

4. I have heard the learned counsels for the parties at full length and gone through the record with their able assistance.

5. The suit land is measuring 379-Kanals 13-Marlas (included both properties) whereas suit titled as Muhammad Saddique etc. Vs Muhammad Asghar etc. relates to land measuring 177-Kanals 05-Marlas. For ready reference, chart showing the properties of three suits is as under:-

Sr.No.	Total Property	Suit title
1	379K-13M	Noor Muhammad Vs. Muhammad Shafi etc.
2	177K-06M	Muhammad Saddique etc. Vs. Muhammad Asghar etc.
3	177K-05M	Muhammad Saddique etc. Vs. Muhammad Shafi etc.

Initially three suits for possession through specific performance of the agreement to sell were filed by the respective parties, out of which, two suits were filed by respondents No.1 to 3 titled as Muhammad Saddique etc. Vs. Muhammad Shafi etc. and Muhammad Saddique etc. Vs. Muhammad Asghar etc. whereas one suit was filed by respondent No.4 titled as Noor Muhammad Vs. Muhammad Shafi etc. The learned trial court dismissed the suit for possession through specific performance of agreement to sell filed by respondent No.4 Noor Muhammad whereas two suits for possession through specific performance of agreement to sell filed by respondents No.1 to 3 against appellants predecessor Muhammad Asghar/defendant No.1 and Muhammad Shafi etc. respectively were decreed. Against the said decision Muhammad Asghar etc., Muhammad Shafi etc. & Noor Muhammad filed the respective appeals [R.F.A No.212/1992, R.F.A. No.213/1992

& R.F.A.135/1992] and this court accepted the said appeals, set aside the impugned judgment & decree therein and remanded the cases to the learned trial court for decision afresh in accordance with law after affording reasonable opportunity to the parties to produce evidence in support of their respective averments. For ready reference, operative part of judgment dated 24.10.1995 is reproduced as under:-

“For the fore-going reasons, all the three appeals are accepted, impugned judgments and decrees are set aside and the case is remanded to the trial Court for decision afresh in accordance with law after affording reasonable opportunity to the parties to produce evidence in support of their respective averments.”

6. Feeling aggrieved with the above said judgment of this Court, respondents No.1 to 3 Muhammad Saddique etc. and defendant No.1/ appellants predecessor Muhammad Asghar filed Civil Appeal Nos.1401 to 1403 of 1995 which were dismissed by the Hon’ble Supreme Court of Pakistan vide order dated 19.09.2002 and remand order of this Court was maintained. For ready reference, operative part of order dated 19.09.2002 is reproduced as under:-

“4. We have heard learned counsel for the respondents and are of the considered view that the contentions raised by the learned counsel for the appellants have no force. The contention that issue No.3 which was substantial issue had been amended by shifting the onus of proof, therefore, it was incumbent upon the trial court to give opportunity to the parties to lead evidence if they wanted to do so. In these circumstances, there is no question of making any application before the High Court for permission to lead additional evidence, for the respondents’ case before the High Court was that they as a matter of right were entitled to be granted an opportunity to produce evidence on the said amended issue whereas grant or non-grant of permission to produce additional evidence is discretionary and not right of a party which application could be made even after availing of opportunity of production of evidence granted by law.

5. As to the argument about direction given by the learned District Judge to expedite the disposal of the suits, it may be mentioned here that the said direction did not have the effect of divesting the trial court of its powers under the Civil Procedure Code to grant adjournments in the cases where they were necessary to do justice. If the time granted by the learned District Judge was found to be not sufficient, the trial court could request for enlargement thereof rather than depriving the parties from their right of production of evidence. In these cases, the respondents were entitled to be given an opportunity as a matter of right to produce evidence after amendment of issue No.3 and they having been deprived of the same as such, the remand of the cases through the impugned judgment by the High Court was legally justified to which no exception can be taken.

6. For the foregoing reasons, we do not find any merits in these appeals which are accordingly dismissed leaving the parties to bear their own costs.”

7. In the first round of litigation, the evidence of all the parties was recorded in a suit filed by respondent No.4 titled as Noor Muhammad Vs Muhammad Shafi etc., whereas in post-remand proceedings, the above said suit was dismissed as withdrawn on 03.03.2007. According to the changed scenario of *lis*, the learned trial court on 23.05.2007 de-consolidated the remaining pending suits [titled as Muhammad Saddique etc. Vs Muhammad Asghar etc. and Muhammad Saddique etc. Vs Muhammad Shafi etc.] and framed as many as eight new issues in each case. After framing the new issues as mentioned in the paragraph No.3 of the instant judgment, the case was fixed for evidence of plaintiffs /respondents No.1 to 3 for 01.06.2007 but on the said date the evidence of plaintiffs /respondents No.1 to 3 was not present and on their request the case was adjourned for 09.06.2007, whereafter the plaintiffs/ respondents No.1 to 3 availed numerous opportunities but they did not produce

any fresh evidence, however, they filed an application under Section 151 CPC with the request that file of decided case titled Noor Muhammad Vs. Muhammad Shafi etc. should be requisitioned for decision of the suit. The said application was dismissed by the learned Civil Judge, Chunian vide order dated 24.10.2007 which is as under:-

"Brief contents of application u/s 161 CPC are that the present suit was consolidated with a suit titled Noor Muhammad Vs. Muhammad Shafi etc. and consolidated issues were framed, however, the suit title Noor Muhammad Vs. Muhammad Shafi etc. was dismissed as withdrawn and consolidated evidence was available on the record of that suit, therefore, this file is prayed to be summoned, so to be read in present files and suit shall be concluded.

On the other hand, learned counsel for the defendants opposed the application and prayed for its dismissal.

Arguments heard, file perused.

In my humble view as the suit has been dismissed and file has been consigned to record room, the evidence available on the file is a judicial record. As the plaintiff is always entitled to file attested copies of the same. As this is an old case and files are under inspection, if consigned record is summoned from Kasur, it would delay the proceedings, therefore, application is forceless is hereby dismissed. Now to come up for evidence of the plaintiff for 6.11.07. This would be treated as last opportunity for producing evidence."

After passing of the above order, despite caution of last opportunity for producing evidence, plaintiffs/ respondents did not produce any evidence and case was adjourned for 19.11.2007 with last and final opportunity with the caution of initiation of penal action but the evidence of plaintiff/ respondents was not present on 19.11.2007 and another

opportunity was granted with cost of Rs.100/- and case was adjourned to 21.11.2007 with the caution that if the evidence was not produced then their right to produce evidence would be closed. Even on 21.11.2007, the plaintiff/ respondents failed to adduce their evidence and another opportunity was granted for 28.11.2007 with the condition that if the evidence was not produce then penal action to close their right of evidence would be taken. On 28.11.2007, counsel of the appellant / defendant sought an adjournment and case was adjourned for evidence of plaintiff / respondents for 29.11.2007. On 29.11.2007, again on the request of the appellants/defendants case was adjourned for respondents evidence on 30.11.2007. On 01.12.2007, learned counsel for the appellants/ defendants stated that defendants were aggrieved with the order of the trial court and intended to assail the same before proper forum and case was adjourned for respondents/ plaintiffs evidence for 12.12.2007. On 12.12.2007, the case was adjourned for recording of evidence on 14.12.2007 with the direction to the defendants to cross examine the witnesses otherwise appropriate order would be passed. On 14.12.2007, learned counsel for the plaintiffs /respondents submitted that he had to record only his statement for producing the documentary evidence as such there was no need to adduce oral evidence as the already recorded evidence in consolidated suit was available with the

file of suits and that evidence would be sufficient for proof of the stance taken in the suits. The said statement is as under:-

"Learned counsel for the plaintiff submits that he had to only record his statement for adducing the documentary evidence and there is no need for calling oral evidence. He further submits that as the consolidation order is available on the record in three of the suits and thus as the proceedings were taken on in the suit which was subsequently withdrawn and evidence was recorded in that particular suit with consolidation order is sufficient for adducing evidence already recorded in this suit also."

After the above statements, the case was adjourned for appellants' evidence for 17.12.2007. On the said date, an application for initiation of legal proceedings against the plaintiff /respondents was filed by the appellants/ defendants and case was adjourned for 10.01.2008 for written reply and arguments. From 10.01.2008 to 10.06.2009, the case remained pending for arguments on said application. On 10.06.2009, the learned trial court observed that on 24.10.2007 the request of the respondents/ plaintiffs for producing the attested copies of statements of witnesses was turned down and successors of Muhammad Asghar /defendant No.1 filed revision petition which was decided by the learned Additional District Judge, Chunian on 29.04.2008 with the direction to decide the application of the respondents/ plaintiff and case was adjourned for 27.06.2009 for evidence of the respondents whereafter the case was adjourned for different times for evidence of the respondents. On 07.04.2010, the learned counsel for the plaintiff-

respondents in his own statement produced documentary evidence Exh.P1 to Exh.P14 whereafter the defendants filed an application for summoning of file of case titled as Noor Muhamamd Vs. Muhammad Shafi etc. which was accepted on 01.07.2010 and case file was ordered to be produced from the record room for 12.07.2010. On 21.09.2010, after requisitioning the file appellants/ defendants were directed to produce their evidence otherwise their right to produce evidence would be closed by invoking the powers under Order XVII Rule 3 CPC and case was adjourned for defendants evidence with last opportunity for 24.09.2010. On 24.09.2010 the evidence of the appellants/ defendants was not present and the case was adjourned to 27.09.2010 with last opportunity to the defendants. On 24.09.2010, the evidence of the defendants was not present and the case was adjourned for 27.09.2010 with last opportunity to the defendants to produce evidence. On 27.09.2010, the appellants/ defendants did not produce the evidence and their right to produce evidence was closed by the learned trial court and adjourned the case for arguments on 29.09.2010 and finally the impugned judgment & decree dated 18.10.2010 was passed by decreeing the suits filed by plaintiffs/ respondents No.1 to 3 Muhammad Saddique etc.

8. Admittedly after remand of the matter, in the post remand proceedings the suits were de-consolidated and fresh issues were also framed but the respondent/plaintiff did not

produce any witness to prove the issues whereas their learned counsel produced documents Ex.P1 to Ex.P14 in his own statement. The case of the respondent/plaintiff is of no evidence. It is settled law that the documents relied upon or on the basis of which the pleading (plaint or written statement) has been filed should be produced in the evidence by party itself and an opportunity should be given to the other party to cross-examine the same, as such the documents produced by the respondents-plaintiffs counsel cannot be relied upon as valid tender of evidence and such documents are liable to be excluded from consideration. Reliance is placed on the cases cited as Mst. Hameeda Begum & Others Vs. Mst. Irshad Begum & Others (2007 SCMR 996), Federation of Pakistan through Secretary Ministry of Defence & Another Vs. Jaffar Khan & Others (PLD 2010 SC 604), Province of the Punjab through Collector, Sheikhupura & Others Vs. Syed Ghazanfar Ali Shah & Others (2017 SCMR 172) and Mst. Akhtar Sultana Vs. Major Retd. Muzaffar Khan Malik through his legal heirs and others (PLD 2021 SC 715).

9. Moreover, under Article 47 of the Qanun-e-Shahadat Order, 1984, the evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which states that the witness

is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. For ready reference, Article 47 of Order ibid is reproduced as under:-

"47.Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided that;

the proceeding was between the same parties or their representatives-in-interest;
the adverse party in the first proceeding had the right and opportunity to cross-examine;
the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.”

Article 47 of Order ibid demonstrates that the following necessary conditions are to be complied with;

- (i) The earlier evidence was taken in a judicial proceedings.
- (ii) The first proceeding was between the same parties.
- (iii) The party against whom deposition is tendered had a right and full opportunity of cross examination the deponent when the deposition was taken.
- (iv) The issues involved are the same or substantially the same in both proceedings.
- (v) The witness is incapable of being called at the subsequent proceeding on account of death, or incapability of giving evidence or being kept out of way by the other side or an unreasonable amount of delay or expenses.

(emphasis supplied)

As initially three suits were filed wherein consolidated issues were framed and all the parties led their respective oral and documentary evidence but in the post-remand proceedings, the suit filed by respondent No.4 Noor Muhammad, regarding agreement qua land measuring 379-Kanals was dismissed as withdrawn whereas rest of two suits were de-consolidated and fresh issues were framed by the trial court and the suits were fixed for evidence of respondents / plaintiffs but no evidence was produced rather the learned counsel for the plaintiffs made his own solitary statement on 07.04.2010 and produced the attested copies of evidence as well as statements of the witnesses, which had already been recorded in earlier consolidated trial of suit of Noor Muhammad which suit was dismissed as withdrawn on 03.03.2007. In the said lis, the respondent / plaintiff and Noor Muhammad in their respective pleadings controverted the execution of agreement viz a viz each other on which basis the said suits were consolidated, accordingly issues were framed and parties led their respective pro and contra evidence. But In post-remand proceedings fresh issues were framed by the learned trial court whereafter plaintiffs/ respondents under Order XVIII CPC as well as Article 117, 118 and 127 of Qanun-i-Shahadat Order, 1984 were under obligation to prove the agreement to sell by producing both marginal witnesses through affirmative, trustworthy, corroborative and solid evidence. Moreover, in Article 47 of

the Order ibid, the parameters are prescribed but no reason has been brought on record by the respondents/ plaintiffs that the witnesses are incapable or they have dead or incapability of the witnesses as settled in a case titled as Ali Akbar Vs. The State (PLD 1997 Karachi 146) wherein it is held as under:-

"14. The first point to be considered is whether or not the evidence of the complainant could be considered by the trial Court. It appears that by consent his evidence was brought on record and subsequently it was relied upon, Section 353, Cr.P.C., lays down that all evidence taken, under Chapters XX, XXI, XXII and XXI-A of Cr.P.C., shall be taken in presence of accused or when his personal attendance is dispensed with, in presence of his pleader, Article 47 of the Qanun-e-Shahadat, 1984 prescribes the conditions under which secondary evidence of the testimony of a witness in the former proceeding, civil or criminal, is admissible in subsequent proceeding or in a later stage of the same proceeding where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence. Before such evidence could be made admissible, the following conditions are necessary to be complied with:

(i) That the earlier evidence was taken in judicial proceedings.

(ii) That the first proceeding was between the same parties.

(iii) That the party against whom deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken.

(iv) That the issues involved are the same or substantially the same in both proceedings.

(v) That the witness is incapable of being called at the subsequent proceeding on account of death, or incapability of giving evidence or being kept out of the way by the other side or an unreasonable amount of delay or expenses."

(emphasis supplied)

Thus the parameter of relevancy of the evidence of one case to other as per Article 47 of the Order ibid have not been fulfilled by respondents / plaintiffs. When in post remand proceedings after de-consolidation of suit, fresh issues were framed regarding divergent assertion/pleading of the adverse parties in respect of land measuring 177-Kanals 05-Marlas

than plaintiffs were placed under onus to prove their case through affirmative, corroborative & trustworthy evidence as per law, but they only produced evidence already recorded in another suit which cannot be considered as a relevant piece of evidence in the instant case. Reliance in this regard is placed on cases cited as *State through Advocate-General Sindh, Karachi Vs. Farman Hussain and others (PLD 1995 SC 1)* and *Ahmad Ali Vs. Ebrar Khan and another (2021 PCr.L.J 1878)*.

The learned courts below have neither followed the procedure prescribed under article 47 of Order ibid for consideration of evidence of one case to another nor consent was given by the appellants/defendants for transfer of the same. Even otherwise plaintiffs/ Respondents filed suit for possession through specific performance on the basis of alleged agreement to sell but they did not produce both the marginal witnesses of the agreement. Under Article 17 read with Article 79 of the Qanun-e-Shahadat Order 1984, it is the duty of the beneficiaries plaintiffs/ / respondents to prove the alleged agreement to sell by producing both the marginal witnesses but they did not produce the marginal witness of the alleged agreement to sell which is non-compliance of the aforesaid mandatory provisions of law and this flaw is considered fatal for the case of the plaintiffs / respondents.

Reliance is placed on cases cited as *Hafiz Tassaduq Hussain VS*

Muhammad Din through legal heirs and others (PLD 2011 SC 241), Farzand Ali and another Vs Khuda Bakhsh and others (PLD 2015 SC 187) and Farid Bakhsh Vs. Jind Wadda & Others (2015 SCMR 1044).

10. Further, respondents / plaintiffs have neither produced both marginal witnesses of the alleged agreement to sell in their evidence nor any convincing reason has been expounded in this regard without any just exception which amounts to withholding of the material evidence and it would be legally presumed that had the said witness produced in the evidence, they would have deposed against respondents / plaintiffs, as such, presumption under Article 129 (g) of Qanun-e-Shahadat Order, 1984 clearly operates against them. Reliance is placed on the cases titled as Sughran Bibi Vs. Mst. Aziz Begum & 4 Others (1996 SCMR 137) & Jehangir Vs Mst. Shams Sultana & Others (2022 SCMR 309).

11. In view of above, it can conveniently be observed that the case of the respondents/plaintiffs is of no evidence. The respondents No.1 to 3/plaintiffs have miserably failed to prove their case through any trustworthy, corroborative, reliable and convincing evidence which material facts have not been taken into consideration by the two courts below who by committing misreading and non-reading of the evidence illegally decided the case in favour of respondents

No.1 to 3/plaintiffs, as such the findings of the learned Courts below are liable to be reversed.

12. As discussed above, the decisions of the learned Courts below suffer from blatant misreading and non-reading of the evidence as well as mis-application of law, as such the same are not sustainable in the eyes of law and are liable to be set-aside and this Court is well within jurisdiction to reverse the illegal and perverse concurrent findings. Reliance is placed on the cases titled as Nazim-ud-Din & Others Vs. Sheikh Zia-Ul-Qamar & Others (2016 SCMR 24).

13. Resultantly, this Regular Second Appeal is allowed. Judgment & decree dated 18.10.2010 passed by the learned Civil Judge, Chunian, District Kasur and consolidated judgment & decree dated 16.04.2013 passed by the learned Additional District Judge, Chunian, District Kasur are hereby set aside and the suit for possession through specific performance filed by respondents No.1 to 3 / plaintiffs is hereby dismissed. No order as to costs.

**(CH. MUHAMMAD IQBAL)
JUDGE**

Approved for reporting.

JUDGE