IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE EJAZ AFZAL KHAN.
MR. JUSTICE UMAR ATA BANDIAL.

C. A. No. 1797 of 2005.
(On appeal from the judgment dated 26.09.2005 passed by the Lahore High Court, Lahore in C.R. No. 641 of 1991).

Farid Bakhsh. ...Appellant.

Versus

Jind Wadda and others. ...Respondents

For the appellant: Ch. Mushtaq Ahmed Khan, Sr. ASC
Mr. M.S. Khattak, AOR

For the respondents: (1-a,2,3) Mian Asif Mumtaz, ASC

Date of hearing: 30.03.2015.

J U D G M E N T

EJAZ AFZAL KHAN, J.- This appeal has arisen out of the judgment dated 26.09.2005 of the Lahore High Court, Multan Bench whereby the learned Judge in its chambers allowed the revision petition filed by the appellants, set aside the judgment and decree dated 03.09.1991 of the learned Additional District Judge, Rajan Pur and restored the judgment and decree dated 12.02.1990 of the learned Civil Judge.

2. Facts forming the background of this case have been narrated in para-1 of the impugned judgment which read as under :-

> *"On 22.4.1988 the respondent filed a suit against the petitioner. In the plaint it was stated that Muhammad alias Bhoori agreed to sell 99 kanals of land to the respondent for a consideration of Rs.90000/-. He received the entire amount of consideration and executed an agreement dated 28.11.1986. The executant died before the said date. Later records were checked and it was found that the deceased owned only 48 kanals 6 marlas and also the price comes to*

Rs.44500/-. The petitioners are the heirs of the deceased who has died issueless. He had earlier filed a suit for declaration which was withdrawn with permission to file afresh on 24.9.1988. The land stands mutated in favour of the petitioners. With these averments he sought a decree for specific performance of the said agreement. The petitioners in their written statement denied the said facts."

3. The learned ASC appearing on behalf of the appellant contended that where the appellant proved the document by producing positive evidence, which also enjoyed the virtue of being preponderant, it was for the respondents to prove that the document was forged and fabricated. The learned ASC to support his contention placed reliance on the case of **Dil Murad and others. Vs. Akbar Shah (1986 SCMR 306), Nazir Ahmed v. Muhammad Rafiq (1993 CLC 257) and Jagannath Khan and others v. Bajrang Das Agarwala and others (AIR 1921 Calcutta 208)**. Failure to examine the other attesting witnesses, the learned ASC submitted, cannot furnish a justification for non-suiting the appellant when the scribe of the document also supported the testimony of one of the attesting witnesses. Such failure, the learned ASC maintained, being procedural in nature cannot be construed as substantive so as to make it a basis for non-suiting the appellant. The learned ASC to support his contention placed reliance on the cases of **Imtiaz Ahmed. Vs. Ghulam Ali and others (PLD 1963 SC 382), Jameel Ahmed. Vs. Late Saifuddin through Legal Representatives (1997 SCMR 260).** Though the appellant, the learned ASC went on to argue, admitted that the executant suffered from a disease which resulted in his death but such admission appears to have been made without understanding the implications of the death-bed-transaction, therefore, no finding could based thereon. The learned ASC next

contended that where two Courts below were at variance, the High Court in exercise of its revisional jurisdiction could not have interfered with the finding of the First Court of Appeal which was also the final court of fact. The learned ASC by placing reliance on the cases of **S.A.K. Rehmani. Vs. The State (2005 SCMR 364), Muhammad Akram and another. Vs. Mst. Farida Bibi and others (2007 SCMR 1719) and Qadir Baksh (Deceased) through L.Rs. Vs. Allah Dewaya and another (2011 SCMR 1162),** contended that no fault could be found with a document at a latter stage when it was admitted in evidence without any objection. The learned ASC lastly argued that where revision petition of the respondents was dismissed for non-prosecution, its restoration could not be made without hearing the appellant that too when application moved in this behalf besides being time barred did not disclose sufficient cause.

4. The learned ASC appearing on behalf of the respondents contended that where appellant being beneficiary of the document failed to prove it in accordance with the requirements of Article 79 of Qanoon-e-Shahadat Order [hereinafter referred to as "the Order"], the High Court was well within its turf to doubt its genuineness and discard it as such. The learned ASC next contended that where according to the appellant the executant received the amount and handed over possession of the property, what restrained him to get the deed registered. The whole story of the execution of the agreement to sell, the learned ASC added, appears to be a yarn spun to grab the property left by the deceased. While responding to the argument as to the restoration of the revision petition of the respondents dismissed for non-prosecution, the learned ASC contended that a revision petition admitted for

regular hearing could be dismissed for non prosecution and that in case it was dismissed it could well be restored within a period of three years as was done in this case. The learned ASC by concluding his arguments contended that where the appellant himself admitted that the executant so called was suffering from a disease resulting in his death, he cannot turn around now to challenge the effect of such admission.

5. We have gone through the entire record carefully and considered the submissions of the learned ASCs for the parties.

6. The record reveals that the executant so called being a diabetic was living with the appellant. According to the appellant the executant so-called agreed to sell his landed property and that on receipt of sale consideration he executed the document which is Ex.P-1 on the record. But what happened to the executant so called during his stay with the appellant which called for the sale of his property? Alright, every human being with a free will could act in a manner he liked and even unpredictably but why didn't appellant insist on registration of the sale when he paid the entire sum and there was no impediment in the way, is yet another question begging aloud for an answer. But when no answer much less convincing comes to the fore, it can well be gathered that things have not happened the way they have been portrayed in the plaint and the evidence examined by the appellant.

7. The deed witnessing the agreement appears to have been signed by two attesting witnesses but appellant examined only one. He to cover up the lapse, in the first instance, sought to construe the requirements of Article 79 as being procedural rather than substantive, and then sought to equate the testimony of the Scribe

with that of an attesting witness. But we cannot appreciate any of these arguments unless we know the nature of the document and requirements of law for proving it.

8. There is no denying the fact that a deed witnessing an agreement to sell being a document involving financial obligation has to be proved in accordance with the requirements of Article 79 of the Qanoon-e-Shahadat Order. What are its requirements for proving a document of this type can well be known by reading it which runs as under:-

> *"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:*
>
> *Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act, 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."*

This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The words "shall not be used as evidence" unmistakably show that such document shall be proved in such and no other manner. The words "two attesting witnesses at least" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving evidence can even be imagined for proving its execution. Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an

attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce. We, thus, have no doubt in our mind that this Article being mandatory has to be construed and complied with as such. The judgments rendered in the cases of **Imtiaz Ahmed v. Ghulam Ali and others** and **Jameel Ahmed v. Late Safiuddin through Legal Representatives** (*supra*) have therefore no relevance to the case in hand. Reference to the judgment rendered in the case of **Nazir Ahmed v. Muhammad Rafiq (1993 CLC 257)** (*supra*) cannot help the appellant when it being against the terms and meanings of the Article is *per incuriam*. The case of **Jagannath Khan and others v. Bajrang Das Agarwala and others** (*supra*) too will not help the appellant when production of two attesting witnesses was not a requirement of the law then in force. The argument addressed on the strength of the judgment rendered in the case of **Dil Murad and others v. Akbar Shah** (*supra*) has not moved us a bit when the appellant failing to call the other attesting witness failed to prove the deed in accordance with the requirements of law. Such failure, in the absence of any plausible explanation, would also give rise to an adverse presumption against the appellant under Article 129(g) of the Order. In the case of **Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (PLD 2011 SC 241)**, this Court after defining the meanings of the word "attesting" in the light of Black's Law Dictionary and other classical books and case law held that a document shall not be considered, taken as proved or used in evidence, if not proved in accordance with the requirements of Article 79 of the Order.

9. Another reason for not equating the testimony of a Scribe with that of an attesting witness is that both of them sign the document in a different capacity and with a different state of mind. They, as such, do not meet the requirements of Article 79 of the Qanoon-e-Shahadat Order. Scribe, however, could be examined by the party for corroboration of the evidence of the attesting witnesses but not as a substitute therefor. This aspect was also highlighted in the case of **Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs** (*supra*) in the paragraph which reads as under:-

> *"To the same effect are the judgments reported as Qasim Ali v. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter v. Abdul Kadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfil and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."*\

10. Transaction in this case, could not *prima facie* be given a colour of death-bed-transaction, if viewed in the light of the dicta rendered in the cases of **Shamshad Ali Shah and others. Vs. Syed Hassan Shah and others (PLD 1964 SC 143), Mst. Chanan Bibi and 4 others. Vs. Muhammad Shafi and 3 others (PLD 1977 SC 28), Noor Muhammad Khan and 3 others. Vs. Habibullah Khan and 27 others (PLD 1994 SC 650), Rehmat Ali deceased through L.Rs. Vs. Mst. Karam Bibi and others (2006 SCMR 940),** as nothing has been brought on the record by the respondents to show that the executant so called at

the time of executing the agreement to sell suffered from a disease which became the immediate cause of his death; that the disease he suffered from was of a nature which could induce imminent apprehension of death and that the disease he suffered from incapacitated him from pursuing his ordinary activities. But where the appellant himself, despite having been given to understand what does the expression death-bed-transaction stand for, admitted that the executant so called suffered, at the relevant time, from a disease having all the attributes listed above, he cannot make a somersault at this stage.

11. The argument that no fault can be found with a document at the later stage when it was admitted in evidence without any objection is ornamental rather than legal as the counsel cross-examining the witness producing and exhibiting the document, can not foresee or anticipate that the other attesting witness is not going to be called. Therefore, the judgments rendered in the cases of **S.A.K. Rehmani. Vs. The State (2005 SCMR 364), Muhammad Akram and another. Vs. Mst. Farida Bibi and others and Qadir Baksh (Deceased) through L.Rs. Vs. Allah Dewaya and another** (supra) have no relevance to the case in hand.

12. The argument about restoration of revision petition in the absence of the appellant cannot be overplayed when a revision petition admitted for regular hearing could not be dismissed for non prosecution and in case it was, it could be restored when an application in this behalf was moved well within time. The argument that where two Courts below were at variance, the High Court in exercise of its revisional jurisdiction could not have interfered with the finding of the First Court of Appeal, which is also the Final Court of

Fact, is also without substance when the latter handed down the finding without considering material parts of evidence on the record and the relevant law in this behalf. We, therefore, hold that the impugned judgment being based on correct appreciation of evidence and the relevant law, is unexceptionable on all accounts.

13. For the reasons discussed above, this appeal is dismissed, with no order as to cost.