

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Qazi Faez Isa  
Mr. Justice Yahya Afridi

**CIVIL PETITIONS NO. 289-P AND 290-P OF 2015**

*(Against the judgment dated 25.03.2015 of the Peshawar High Court, Peshawar passed in Civil Revision Nos. 900-P and 901-P of 2014 a/w C.M. No. 261-P/2015)*

***Haji Muhammad Nawaz and others.***

*... Petitioners  
(in both cases)*

Versus

***Aminullah (decd) thr. L.Rs and others.***

*... Respondents  
(in both cases)*

For the Petitioners: Mr. Abdul Latif Afridi, ASC.  
Haji M. Zahir Shah, AOR (**absent**).

For the Respondents: Mr. Abdul Sattar Khan, ASC.  
Mr. M. Zahoor Qureshi, AOR (**absent**)

Date of Hearing: 19.04.2019.

**J U D G M E N T**

**Qazi Faez Isa, J.** These two petitions assail the judgment dated 25<sup>th</sup> March, 2015 of a learned Judge of the Peshawar High Court, Peshawar, who dismissed the revision petitions filed by the petitioners and upheld the judgment dated 6<sup>th</sup> September, 2014 of the learned Additional District Judge and judgment dated 29<sup>th</sup> June, 2011 of the learned Civil Judge Peshawar.

2. The petitioners' learned senior counsel, Mr. Abdul Latif Afridi, states that the petitioners' father, namely Abdul Azam, and Aminullah executed a sale agreement on 7<sup>th</sup> January, 1978 ("**the sale agreement**") through which Abdul Azam bought 153 *kanals* and 9 *marlas* of land situated in village Panam Dheri, District Peshawar ("**the said land**") from Aminullah and paid the entire sale consideration. After the death of Abdul Azam (it is not known when

he died) his legal heirs filed Suit No. 290/1 of 1997 on 12<sup>th</sup> January, 1997 seeking a declaration that they be declared to be the owners of the said land. Aminullah, who was then alive, denied the agreement and filed a suit seeking a declaration with regard to his ownership and a further declaration that the sale agreement was forged/fake. Both the suits were consolidated by the learned Civil Judge and the suit filed by the legal heirs of Abdul Azam was dismissed whereas the suit filed by Aminullah was decreed. Aminullah died in the year 2000 (when the suits were pending) and his legal heirs were brought on record pursuant to an order of the learned Civil Judge.

3. Mr. Abdul Latif Afridi, the learned senior counsel, submits that the petitioners were in possession of the said land and filed a suit when their ownership was denied. The learned counsel relies upon Article 126 of the Qanun-e-Shahdat Order, 1984 ("**Qanun-e-Shahadat**") and section 53A of the Transfer of Property Act, 1882 ("**the Act**") to contend that the sale agreement had been part performed and since the petitioners were in possession of the said land the burden to prove that they were not the owners thereof lay upon Aminullah. He further states that the son of Aminullah, namely Arshad Khan (DW-3), had acknowledged that the suit land was in possession of the petitioners; that the scribe of the sale agreement, namely Haji Muhammad Saeed Durrani (PW-3), confirmed its execution; and, the sale agreement was over thirty years old therefore the petitioners are entitled to the benefit of Article 100 of the Qanun-e-Shahadat.

4. On the other hand, Mr. Abdul Sattar, the learned counsel for the respondents, supports the impugned judgment and states that there are three concurrent judgments against the petitioners and the petitioners have not been able to show that the judgments suffer from any material illegality or even irregularity. He submits that the purported seller, Aminullah, denied the sale agreement and had alleged that it was a forged/fake document; that no effort was made to establish his purported signature thereon; that neither of the two witnesses thereto, namely Zaiwar Khan and Haji Juma Khan, were produced; that whilst it was alleged that Zaiwar Khan had died the

other witness Haji Juma Khan was alive but was not produced; that Haji Muhammad Saeed Durrani (PW-3) was not the scribe of the document but his employee and did not hold the requisite licence. The learned counsel states that the suit filed by the petitioners which sought a mere declaration was not maintainable under section 42 of the Specific Relief Act, 1877 ("**the Specific Relief Act**") without first seeking the specific performance of the sale agreement. As regards possession of the said land the learned counsel submits that the petitioners were in possession as tenants of a portion thereof. Concluding his submissions the learned counsel states that the appeals preferred by the petitioners before the Appellate Court were not maintainable as the petitioners had arrayed Aminullah as the respondent, whose death was in their knowledge and it was also in the knowledge of the petitioners that his legal heirs had been brought on record, reliance in this regard is placed upon the case of *Rehmat Din v Nasir Abbas* (2007 SCMR 1560).

5. We have heard the learned counsel and with their assistance examined the documents on record. Attending first to the question, whether a suit for declaration was maintainable under section 42 of the Specific Relief Act, it would be appropriate to reproduce the relevant portion thereof:

*42. Discretion of Court as to the declaration of status or right.* Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief;

*Bar to such declaration.* Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

The suit filed by the legal heirs of Abdul Azam acknowledges Aminullah's ownership of the said land but relies upon the sale agreement. The sale agreement is not a title document, however, specific performance of the sale agreement was not sought under Chapter II of the Specific Relief Act. In the case of *Dr. Faqir Muhammad v. Major Amir Muhammad* (1983 Law Notes (S.C.) 30, 33)

a somewhat similar declaratory suit was filed under section 42 of the Specific Relief Act and this Court had held, that:

We also agree with the observation made by the learned Judge in Chamber that in a suit under section 42 of the Specific Relief Act the petitioner was required under law to ask for all other reliefs which were open to him. The relevant prayer for consequential relief in the present case, as rightly pointed out by the learned High Court Judge, would have been for specific performance of the agreement. But the petitioner had not asked for it.

Therefore, in effect the petitioners wanted two declarations; firstly, that their predecessor (Abdul Azam) was the owner and, secondly, that upon his death they became owners of the suit land. The suit of the petitioners thus fails on the ground that they did not ask for the specific performance of the sale agreement, and these petitions merit dismissal. However, as the learned counsel for the petitioners assiduously persevered with the other grounds raised by him, we proceed to consider them, too.

6. The learned Mr. Abdul Latif Afridi categorized the sale agreement dated 7<sup>th</sup> January, 1978 as a thirty years old document, however, when the suit was filed on 12<sup>th</sup> January, 1997 it was only nineteen years old document. The presumption with regard to documents thirty years old, stipulated under Article 100 of the Qanun-e-Shahadat, would therefore not be attracted. The sale agreement was also not proved. Aminullah, the purported seller, had specifically denied the execution of the sale agreement and no effort was made to establish his signature thereon. And since Abdul Azam, the purported buyer and the other party to the sale agreement, was dead, therefore, needless to state he could not assert its execution. The two persons stated to be the witnesses of the sale agreement were not produced even though it was admitted that one of them, Haji Juma Khan, was alive. The purported scribe was not the person who had actually written the sale agreement. We are mindful that the sale agreement is dated before the enactment of the Qanun-e-Shahdat however the same is also not proved in terms of section 68 of the Evidence Act, 1872 (the applicable law at the date of the sale

agreement). Since the sale agreement was not proved therefore the benefit of section 53A of the Transfer of Property Act would also not accrue. Aminullah and his successors stated that the petitioners were in possession of a portion of the land as their tenants, and not pursuant to the sale agreement, and the petitioners were not able to establish that they had come into possession as a consequence of the sale agreement. Significantly, Abdul Azam also did not file a suit in his lifetime and it took the petitioners nineteen years to file the suit, which on the face of it was hopelessly time-barred.

7. The petitioners admitted that Aminullah was the owner of the said land therefore it was not a case of two contending claims where Aminullah had no title/ownership to the said land. In such circumstances mere possession by the petitioners would not be the determinative factor in terms of Article 126 of the Qanun-e-Shahadat. In the case of *Secretary of State v Chimanlal Jamnadas* (AIR 1942 Bombay 161) Divatia and Macklin, JJ considered section 110 of the Evidence Act, 1872 (which section is identical to Article 126 of the Qanun-e-Shahadat) and held, that, "*The presumption under S. 110 would apply only if two conditions are satisfied, viz., that the possession of the plaintiff is not prima facie wrongful, and, secondly, the title of the defendant is not proved.*" The title of the defendant (Aminullah) was acknowledged by the petitioners and stood proved therefore Article 126 of the Qanun-e-Shahadat would not assist the petitioners.

8. The examination of the record also reveals, as pointed out by the learned counsel for the respondents, that the petitioners had filed two appeals against the Trial Court's judgment. In Appeal No. 61/13 of 2011, the petitioners had arrayed Aminullah as the only respondent despite the fact that Aminullah was dead and this fact was known to them as his legal heirs had been brought on record by the Trial Court. This appeal was therefore not maintainable as already held by a three-member Bench of this Court in the case of *Rehmat Din v Nasir Abbas* (2007 SCMR 1560). In Appeal No. 62/13 of 2011 the petitioners had arrayed Aminullah and his legal heirs, which was initially dismissed by the learned Additional District Judge

on 5<sup>th</sup> May, 2012 but upon its remand by the High Court *vide* order dated 15<sup>th</sup> May, 2012 it was dismissed by the learned Additional District Judge on merits.

9. In view of the aforesaid there is no reason for us to take a view different from the one taken concurrently by three courts. Leave to appeal is therefore declined and these petitions are dismissed. On the last date of hearing the learned senior counsel for the petitioners, Mr. Abdul Latif Afridi, had sought an adjournment and these petitions were adjourned subject to payment of cost of one hundred thousand rupees to the respondents and the cost imposed was deposited with the cashier of this Court. However, since Mr. Abdul Sattar, the respondents' learned counsel, has gracefully declined to receive the said costs therefore the same be returned to the petitioners.

Judge

Judge

*Bench-V*  
Islamabad:  
19.04.2019

Approved for Reporting  
(M. Tauseef)