

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A No. 89/2013

Abdul Latif

Versus

Biwi Jan Alias Bibi Jan and another.

APPELLANT BY:	Muhammad Ishtiaq Ahmad Raja, Advocate.
RESPONDENT NO. 1 BY:	Ch. Muhammad Ali Imran, Advocate.
RESPONDENT NO. 2 BY:	Mr. Mustasim Toor, Advocate.
DATE OF HEARING:	15.02.2016

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MOHSIN AKHTAR KAYANI, J. Through this Regular First Appeal, appellant has challenged the judgment and decree dated 30.03.2013 passed by the Civil Judge, 1st Class (East), Islamabad.

2. Brief facts of the suit are that appellant purchased plot No. 54, Model Village Chak Shahzad from respondent No. 1 against the total sale consideration of Rs. 8,25000/- through Oral Agreement, out of the total sale consideration a sum of Rs. 180,000/- was paid by the appellant and remaining amount of Rs. 6,45000/- was to be paid before transfer of suit plot from CDA, the same was transferred with the connivance of Raja Meharban on 15.04.1998.

3. Respondent No. 1 filed suit for declaration, possession, mandatory and permanent injunction against the appellant on 10.11.1998. Respondent No. 1 claimed that the plot in question was transferred with the connivance of Raja Meharban brother of Respondent No. 1. She also claimed that the original allotment letter was misplaced and police report was also lodged in P.S Secretariat, Islamabad on 13.12.1996 and affidavit was also submitted on 11.12.1996 to that effect. Thereafter Respondent No. 1 also submitted application for duplicate allotment letter of said plot to Respondent No. 2 CDA on 15.01.1997 and informed that original allotment letter has lost. She had also submitted affidavit alongwith police report.

4. Respondent No. 1 denied any execution of transfer application of said plot in the office of CDA dated 22.02.1997 as the said process was based upon fraud

and in connivance with appellant with the help of CDA officials, even she also denied her thumb impression on the said application of transfer in the office of CDA.

5. Respondent No. 1 consistently pursue the matter before the CDA Respondent No. 2 and also filed application dated 15.04.1998 addressed to Member Administration, CDA, application dated 18.04.1998 addressed to Chairman, CDA regarding unauthorized transfer of plot No. 54 measuring 30x70 Sq.Yds. Chak Shahzad Model Village, Islamabad.

6. After all such efforts Respondent No. 1 filed suit and during the proceedings of the suit, possession was also snatched by the appellant. Resultantly an application for amendment in plaint was filed to include the relief of possession, the same was allowed by the Civil Court and after the conclusion of trial, the same was decreed.

7. Learned Counsel for the appellant states that Respondent No. 1 admitted the factum of Oral Sale in her pleading and even admitted the receipt of part payment as Sale Consideration in such situation the only relief available to Respondent No. 1 is to claim the balance Sale Consideration through suit for recovery hence, the suit filed by the Respondent No. 1 in the present form is not maintainable.

8. Learned Counsel further argued that the Civil Court based its judgment only on the report of forensic expert and Civil Court committed error while document of transfer was never referred to the said expert.

9. Learned Counsel for appellant argued that learned Civil Court failed to appreciate that proper document through which the property was transferred was never produced before such expert and the opinion is fruitless in the present case. He further argued that respondent No. 1 was identified by her close relatives i.e. Sons and Brothers, therefore, the matter of substitution does not arise in the present case. He further argued that the original file of the case has never been summoned by the Civil Court in the case through which it could have been proved that any forgery or misrepresentation has ever been committed, even after the orders passed

by the learned Civil Court itself. He further argued that as per the mere observation of the disputed signatures, the similarity is proved but the learned Civil Court failed to discharge its own duty to examine the disputed signature and illegally based its judgment on the report of forensic expert. He further argued that the evidence of PW-6 is insufficient to resolve the controversy of the case. PW-6 malafidely gave opinion about the thumb impression but deliberately did not opine about the signatures of the persons who identified Respondent No. 1 on the same document. He further argued that the report of technical expert is also against the rules as no report or comparison could be made with the photocopy of any document but in the present suit same is done and is relied upon by the learned Civil Court. He further argued that an application for referring the thumb impression of PW-2 to PW-5 to FIA expert was moved but the same was turned down and the appellant was prevented to prove his case arbitrarily. He further argued that learned Civil Court misread the evidence and failed to examine the record.

10. Conversely, Learned Counsel for Respondent No. 1 argued that Respondent No. 1 appeared as PW-1 and also produced Arshad Mehmood as PW-2, Zamrud Ali PW-3, Khalid Hussain PW-4, Muhammad Irfan PW-5, Shoukat Ali PW-6. Appellant produced copy of application filed before Director, CDA as Ex.P-2, copy of affidavit as Ex.P1, copy of CNIC Ex.p-3, copy of Challan FIR No. 64 dated 06.05.2004, Ex.P-4, certified copy of Bail application alongwith order dated 19.06.2004 Ex.P-5 and other documents related to criminal case Ex.P-6, Ex.PW6/1 Ex.PW6/2, 3 and Ex.P-7.

11. Learned Counsel for Respondent No. 1 has taken the stance that all the PWs, plaintiff's/Respondent No. 1's witnesses remain consistent in their testimony and proper documentary evidence was submitted which is Ex.P-1 to Ex.P-7.

12. Learned Counsel further argued that Respondent No. 1 was dispossessed during the proceedings, therefore, application for amendment U/O 6

Rule 17 CPC was filed which was allowed and plaint was amended with the relief of possession.

13. Learned Counsel for Respondent No. 1 has vehemently argued that the document relating to transfer of plot was forged document which is evident from the report of FIA Expert, even the thumb impression was not proved in Forensic Laboratory FIA.

14. Arguments heard, record perused.

15. The learned Civil Court, out of the divergent pleadings of the parties framed the following issues:-

1. Whether the plaintiff is owner in possession of the plot and the transfer letter dated 15.04.1998, in favor of defendant No. 1 is void, illegal and fraudulent and is ineffective upon the rights of plaintiff? OPP
2. Whether the plaintiff is entitled to decree as prayed? OPP
3. Whether the suit is not maintainable in its present form? OPD
4. Whether the plaintiff has no local standi to file this suit? OPP
5. Whether the suit is false, frivolous and the defendants are entitled to special costs U/S 35-A of CPC? OPP
6. Relief.

16. From the perusal of entire record, it was admitted that Oral Sale was agreed between the parties which was mentioned in para 1 of the plaint, the Sale Consideration, part payment as Token was also admitted by the Respondent No. 1 on record.

17. The issues framed by the Court reveal that issue No. 1 deals with status of plaintiff as owner in possession and transfer letter dated 15.04.1998.

18. Respondent No. 1 submitted her affidavit as Ex.P-1, before the Court in which she categorically claimed that her transfer letter was misplaced, no question on the status of Ex.P-1 and Ex.P-2 was asked by the appellant in the cross examination, hence, the said fact goes un-rebutted, even the appellant stated that she is not aware of that the plot can be transferred in the office of CDA through transfer application.

19. Respondent No. 1 in order to discharge her onus to prove the factum of fraud and misrepresentation produced PW-2, Arshad Mehmood, PW-3 Zumard Ali, PW-4, Khalid Hussain, PW-5, Muhammad Irfan as all those witnesses are the real sons of the Respondent No. 1 who had signed the most important document of this case i.e. transfer application Mark CW-1, but surprisingly all four sons of Respondent No. 1 denied their signature and thumb impression upon the said transfer application, they remain consistent upon one common fact that appellant has not paid the balance Sale Consideration to the Respondent No. 1, they have no objection on the verification of their thumb impression and subject plot was sold through Raja Meharban, the real brother of Respondent No. 1.

Findings on Issues No. 1&2.

20. In the entire evidence Mark-CW-1, application of transfer Form CDA dated 18.05.1997 is the most important piece of evidence to prove the entire case. From careful examination of the said document by the Court, following facts have been surfaced:-

- a) The transfer application Form No. 10885 is copy of original document and it is not Original/primary document (placed on record on 30.04.2001 by Ghulam Murtaza, Assistant Director, CDA) by the order of the Court.
- b) The thumb impression of Mst. Bibi Jan (Respondent No. 1) is black in colour in column of signature of allottee which is in fact placed when the original was copied in Photostat machine and is not original.
- c) All columns were filled in black but the fact remains the same that original was filled and then photocopy document was used in the transfer process of CDA.
- d) Six signatures with blue ink thumb impression were made on the front side of Mark-CW-1 without mentioning of their names and there is only one column of witnesses on the front side of Transfer application form No. 10885 which was filled in the name of Bank Manager, ABL G-7 Markaz, Sitara Market, Islamabad.
- e) All six signatures were encircled in red ink with word **"son of allottee signature"**, witness brother of allottee and right thumb of allottee lady.
- f) At upper margin between headings of the title of application it was written with red ink 1st transfer identifier is brother of Lady allottee.

- g) The entire application was filled in three different colours original copy in black due to photocopy of original. Last column in reference of Bank Draft with blue ballpoint with detail of No. 4900881 dated 22.02.1997, MCB Rs. 3510/00. CDA and red ink column filled with Urdu stamp.
- h) The back side was thumb marked and signed by Abdul Latif in original with blue and photocopy in black.

21. In our estimation it has been proved that the appellant has not produced the original Transfer application in the office of the One Window Operation CDA at the time of submission of transfer Form No. 10885 rather used the photocopy of document after completion of original transfer application and then counter attested from 4 sons and one brother of the Respondent No. 1 but all those counter attesting witnesses were not required as there was no column on the said transfer application and the document in question cannot be used in the office of CDA by considering the same as original when it was a photocopy without the original thumb impression of Mst. Biwi Jan (Respondent No. 1).

22. In view of above, we have perused the report of FIA expert Ex.PW-6/1 which is reproduced below:-

"The examination of the documents in above mentioned case has revealed the following:-

The questioned thumb impressions now marked as A,B,C (WHORL) request for transfer application and questioned thumb impression now marked as D, E (LOOP) on Iqrar Nama are different from ten digit impressions of Mst. Bivi Jan w/o Mohammad Ashraf on her sample paper now marked as T/1, on the basis of different type, design and minor details.

Before finalizing the opinion on questioned signatures of Mohammad Irfan, Arshad Mehmood, Zumard Ali, and Talib Hussain, it is considered necessary to consult the previous admitted routine signatures would be available on their National Identity card forms, Personal Bank accounts, Registered Sale deed etc. The requisite material may please be procured and supplied to this office for examination and report."

23. The above mentioned report is an outcome of Respondent No. 1 C.M No. 568-S of 2009 wherein the Respondent No. 1 has prayed for summoning of Shoukat Ali, Inspector (Assistant Director promoted at the time of evidence as PW-6), handwriting /fingerprint expert as Court witness. The said C.M was allowed vide order dated 11.06.2009 by Islamabad High Court when the said Civil Suit was pending before this Court in its original jurisdiction. The order dated 11.06.2009 clearly discloses the fact that the report Ex.PW-6/1 cannot be read in evidence unless the said Shoukat Ali Inspector will not be examined as witness, the order has been complied with and Shoukat Ali, Inspector has been called as PW-6 and got recorded his testimony by the learned Trial Court and the counsel for appellant cross-examined him. Report Ex.PW-6/1 was admittedly prepared on the basis of request for transfer of application form (Capital Development Authority, Estate Management Directorate) (called as Mark-F by the FIA) which was thumb marked from the front and back in the relevant column identified as A,B & C, and thumb impression D & E available on Ex.D1 (Agreement dated 18.03.1997) called as Mark-G by the FIA. The perusal of these two documents reveals that these two documents allegedly contains the original thumb impression of Biwi Jan (Respondent No.1), the report Ex.PW-6/1 was absolutely clear in its findings to the extent of thumb impression of Biwi Jan are different from the thumb impression of Biwi Jan obtained on the sample paper Mark as T/1 **"on the basis of different type, designed and minor details"**. Even otherwise, the appellant has not cross-examined the witness on this qualified portion of the report rather the questions which were asked from the said PW-6 only refers to comparison of signatures to the extent of para 2 of the report which only deals with the signature of Muhammad Irfan, Arshad Mehmood, Zamurd Ali and Talib Hussain. Although, the controversy only revolves around the thumb impression of Biwi Jan (Respondent No.1). Hence, inference can safely be drawn that the application form issued for the purposes of issuance of transfer application of the suit plot as well as the agreement Ex.D1 dated 18.03.1997 do not contain the thumb mark of Mst. Biwi Jan /respondent No.1, hence both these

documents are considered to be forged documents and it is proved on record that these documents were prepared in connivance with Raja Meharban Khan, DW-2, who has identified Mst. Biwi Jan in capacity of her brother on the Mark-F (request for transfer of application). This aspect of the documentary evidence clearly proves the contention of Mst. Biwi Jan (Respondent No. 1) referred in para 4 of her plaint wherein she specifically denied the execution of transfer application and also denied the three specimens thumb mark. Moreover, when the dates of two documents i.e. :-

- i. agreement Ex.D1, (written in Urdu) Agreement to Sell **dated 18.03.1998** allegedly executed between Mst. Bibi Jan (Respondent No. 1) and Abdul Latif, appellant
- ii. transfer application form produced by the Ghulam Murtaza, Assistant Director, CDA before the Trial Court numbered as Form No. 10885 (comes on record as Mark CW-1) **dated 22.02.1997**.

Are compared it is proved that Ex.D1 Agreement to Sell was executed after the submission of transfer application before the Admitting Officer, CDA, hence the allegation of Respondent No. 1 Biwi Jan proves on record that all proceedings, execution of agreement, application for issuance of transfer, transfer of allotment form were not executed by the said respondent and hence rightly declared forged by the Trial Court in the impugned order.

24. Hence, we are of the confirmed view that the entire transaction was based upon fraud jointly committed by Brothers of Respondent No. 1, Raja Meharban DW-2, as he was witness of entire transaction signed all the documents and all four sons also signatory of the disputed document Mark CW-1 and Ex.D-1 but in the course of evidence they site as witness with their real mother and denied the due execution.

25. When the main evidence i.e. Transfer application Mark-CW-1 and Agreement to Sell (written in Urdu) Ex.D-1 were denied and report of FIA (Ex.P-6/1) and Ex.PW-6/3 dated 17.10.2001 confirms that the thumb impression are different then entire edifice made by the appellant crumble down.

26. From the perusal of the evidence of appellant as DW-1 and Raja Meharban, Raja Zulfiqar Ali DW-2 & DW-3, Real Brothers of Respondent No. 1, it transpires that they got recorded their testimony against their sister and stated that appellant paid Rs. 825,000/- in cash to the Respondent No. 1 in front of Admitting Officer whereas appellant DW-1 failed to produce any receipt of payment or proof of payment on record in his testimony. It is also admitted by DW-1/appellant that the Ex.D-1 dated 18.03.1997 was executed after one month of the transfer of subject plot, he never produced stamp vendor, Muhammad Aslam Malik Notary Public, who are independent witnesses, on record rather no effort was made except the testimony of DW-2, and DW-3, who are allegedly the mastermind of entire transaction of said fraud as claimed by the Respondent No. 1. As the onus was upon the appellant to prove particular facts, therefore, he was required to discharge the onus by proving due execution of all the events towards the sale/transfer of plot No.54 Model Village Chak Shahzad, Islamabad, However, he failed to do the same. In this regard we are fortified by the principle laid down by the Hon'ble Supreme Court of Pakistan in Judgment reported as (2015 SCMR 397) "Abdul Karim Nausherwani and another Versus The State through Chief Ehtesab Commissioner" wherein, it was held that:-

"Fact/circumstance within the knowledge of a person---Burden of proving a circumstance/fact was on the person who had knowledge of the same and on his failure to do so, absence of such fact/circumstance was to be presumed."

In view of above, appellant had to discharge the onus of due execution of Transfer Application Form No. 108835, payment of sale consideration and execution of agreement to sell but he failed to do so. Hence, it is proved that the independent witnesses were not produced as if they appear before the court they might record their evidence against the appellant and the said evidence was withheld by the appellant willfully in view of Article 129 (g) of Qanoon-e-Shahdat, Order, 1984. In this regard we are fortified by the view of Hon'ble Supreme Court of Pakistan in

judgment reported as (PLD 2011 Supreme Court 241) "Hafiz Tassaduq Hussain versus Muhammad Din through legal heirs and others" wherein it was held that:-

"For the purpose of proof of such a document, attesting witnesses had to be compulsorily examined as per requirement of Art.79 of Qanun-e-Shahadat, 1984, otherwise it was not to be considered and taken as proved and used in evidence--- Such principle of law was in line with the principle that where law required an act to be done in a particular manner, it had to be done in that way and not otherwise---Scribe of a document could only be a competent witnesses in terms of Arts.17 and 79 of Qanun-e-Shahadat, 1984, if he had fixed his signature as an attesting witness of the document and not otherwise----Signing of document in the capacity of a writer did not fulfill and meet mandatory required of attestation by him separately----Scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Art.79 of Qanun-e-Shahadat, 1984, itself not as a substitute."

Similar view has also be taken by the Hon'ble Supreme Court of Pakistan in judgment reported as (2015 SCMR 1044) "Farid Bakhsh Versus Jind Wadda and others" wherein it was held that:-

"----Art. 79---Execution of document---Proof---Words "two attesting witnesses at least"---Scope---Words "two attesting witnesses at least" show that calling two attesting witnesses for the purpose of proving execution of document 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 Art.79 of Qanun-e-Shahadat, 1984, as being procedural rather than substantive and equating testimony of scribe with that of an attesting witness would not only defeat the letter and spirit of the Art.79 but reduce the whole exercise of re-enacting it to a farce---Provision of Art.79 of Qanun-e-Shahadat, 1984, being mandatory has to be construed and complied with as such."

27. In nutshell following discrepancies are noted by this Court:-

- a) Appellant has not discharged the onus of due execution of transfer application form No. 10885 dated 22.02.1997 Mark CW-1.
- b) Appellant failed to prove the thumb marks of Biwi Jan (Respondent No. 1) on the transfer application form No. 10885 dated 22.02.1997 Mark CW-1, Ex.D1 dated 18.03.1997 Agreement to Sell and request for transfer of application before the office of CDA.
- c) Appellant failed to produce any evidence regarding payment through receipt or instrument to Mst. Bibi Jan (Respondent No. 1).
- d) Mark CW-1 transfer application form No. 10885 dated 22.02.1997 submitted in the office of Director Estate Management, CDA is not original, found photocopy and later on admitted by the Admitting Officer of CDA without recognizing the fact that document is a photocopy on which thumb mark of Bibi Jan is not original.
- e) Ex.P6/1 report of Shoukat Ali Inspector handwriting/fingerprint expert, FIA declares the thumb impression of Biwi Jan on transfer application request form, Iqrar nama Ex.D1 are different from sample thumb impression of Biwi Jan T1.
- f) Appellant has produced DW-2 and DW-3 brothers of Bibi Jan, Respondent No. 1 as witnesses whereas DW-2 and DW-3 both admits the fact that they were not present at the time of sale transaction nor they are witnesses in this regard.
- g) Appellant has not cross-examined PW-6 Shoukat Ali, Inspector FIA/handwriting expert regarding the thumb impression of Respondent No. 1 available on Ex.D1, request for transfer application, hence the report Ex.PW-6/1 is considered as admitted.
- h) Appellant has not produced CDA Record Keeper, as witness of transfer application form No. 10885 i.e. Magistrate 1st Class, as countersigning witness and attesting witness of the form referred in the column of certificate i.e. Manager Allied Bank of Pakistan Ltd. G-7 Markaz, Sitara Market, Islamabad.

28. From the perusal of above mentioned discrepancies and material contradictions it is proved that the beneficiary i.e. appellant has not discharged the onus rather failed to prove the due transfer of said plot in his favour, withheld the independent evidence to prove his claim, appellant has also made no effort to produce or call any evidence of CDA officials in his favour especially Admitting Officer, CDA. Whereas, under Article 117 of Qanun-e-Shahadat Order, 1984 appellant has to discharge the onus. In this regard we are fortified by the dictum

laid down in judgment reported as **2015 SCMR 1**, wherein, it was held that beneficiary of transaction of document was obliged/duty bound to prove the same. Hence Civil Court has rightly passed the decree in favour of Respondent No. 1 and declared the entire transfer as result of fraud.

29. For what has been discussed above, the instant RFA being devoid of merits is liable to be dismissed. Resultantly the same is hereby dismissed.

(MOHSIN AKHTAR KAYANI) (SHAUKAT AZIZ SADDIQI)
JUDGE JUDGE

Ramzan

Approved for reporting.

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