

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

C.R. No.290/2018

Muhammad Rizwan

versus

Ch. Aamir Shahzad & another

Petitioner by:	Raja Muqsit Nawaz Khan, Advocate.
Respondent No.1:	Ex-parte.
Respondent No.2:	Nemo.
Date of Hearing:	24.06.2019.

MOHSIN AKHTAR KAYANI, J: Through this civil revision, the petitioner impugns judgment and decree dated 22.09.2017 of the learned Civil Judge 1st Class (East), Islamabad, whereby suit filed by petitioner for specific performance, mandatory and permanent injunction has been dismissed. The petitioner has also called in question judgment and decree dated 26.02.2018 of the learned Additional District Judge-III (East), Islamabad, whereby appeal filed by petitioner against the judgment and decree dated 22.09.2017 has been dismissed.

2. The facts in brief as referred in the instant petition are that on 11.03.2013, petitioner entered into agreement with respondent No.1 regarding purchase of Flats No.1, 2 & 3, situated at 5th Floor, Usman Arcade-II, Plot No.53, Phase-4, Bahria Town, Islamabad (*suit property*) against sale consideration of Rs.12,000,000/-, out of which Rs.5,500,000/- was paid as earnest money. As per terms of the agreement, petitioner paid entire sale consideration but respondent No.1 in violation of settled terms failed to fulfill his contractual obligation constraining the petitioner to file a civil suit, which was contested by respondent No.2 by filing his written statement, whereas respondent No.1 failed to appear

before the Court and accordingly he was proceeded against ex-parte vide order dated 29.09.2016. The learned Civil Judge after framing of issues and recording of evidence of both the parties, dismissed the suit vide impugned judgment and decree dated 22.09.2017. The petitioner feeling aggrieved thereby filed an appeal, which was also dismissed by learned Additional District Judge vide impugned judgment and decree dated 26.02.2018. Hence, the instant civil revision.

3. Learned counsel for petitioner contends that the learned trial Court has not appreciated the fact that contesting respondent No.1 was proceeded against ex-parte on 27.09.2016 and passed the impugned judgment and decree in violation of procedure laid down in Order IX Rule 6(1)(a) CPC; that both the Courts below despite knowing the fact that the evidence produced by the petitioner was not rebutted, have passed the impugned judgments and decrees, which are the results of misreading and non-reading of evidence, therefore, the same are liable to be set-aside.

4. On the other hand, this Court vide order dated 30.01.2019 has proceeded ex-parte against respondent No.1, who despite of service of notice has not put appearance, whereas the learned counsel for respondent No.2 has appeared on the preceding dates, except today, who has recorded conceding statement that he has no objection if the instant petition is accepted.

5. Arguments heard, record perused.

6. Perusal of record reveals that the petitioner had filed a suit for specific performance and mandatory injunction against respondents with the contention that Ch. Amir Shahzad/respondent No.1 entered

into agreement to sell with petitioner on 11.03.2013 and offered to sell Flats No.1, 2 & 3, situated at 5th Floor, Usman Arcade-II, Plot No.53, Phase-4, Bahria Town, Islamabad against sale consideration of Rs.12 Million, out of which petitioner has paid an amount of Rs.5.50 Million along with Shop No.8, Lower Ground Floor, Commercial Plot No.26, Civic Centre, FECHS, E-11/2, Islamabad. The petitioner also sold out one flat to third party with consent of respondent No.1 and when he demanded the possession of Flat No.1 and 2, respondent No.1 has not fulfilled his obligation which resulted into filing of suit.

7. During the course of proceedings, respondent No.1 has been proceeded ex-parte vide order dated 29.09.2016 and issues were framed on 04.04.2017, whereafter petitioner appeared as PW-1 on 20.05.2017 and recorded his stance before the Court. The petitioner has also produced Zeeshan as PW-2, the agreement as Exh.P1 and Exh.P2, copy of allotment letter as Mark-A and sale agreement dated 09.01.2014 as ExhP3, whereafter the learned Trial Court while relying upon Article 17 read with Article 79 of the Qanun-e-Shahadat Order, 1984 dismissed the suit by holding that two marginal witnesses have not been produced to prove the agreement and its term. The said order was further maintained by the learned first Appellate Court.

8. There is no denial to proposition that plaintiff is under obligation to prove the very execution of agreement to sell by producing the attesting witnesses in terms of Article 17 read with Article 79 of the Qanun-e-Shahadat Order, 1984 as the apex Court has also endorsed the said concept in judgment reported as 2002 SCMR 1089 (Rashida Begum vs. Muhammad Yousaf, etc.), wherein it was opined that it is the

obligation of plaintiff to prove his agreement in accordance with law and in case of failure to produce the attesting witnesses the agreement will be considered as having not proved in the Court of law. However, learned counsel for petitioner contends that when agreement has been proved otherwise, there is no requirement to produce all the marginal witnesses and the attaining circumstances in which documents have been executed have to be looked into. He further contends that scribe could be a competent witness and would replace the requirement of producing marginal witnesses, if the parties had executed and signed the document in his presence. Reliance in this regard was placed upon 2005 MLD 261 (Mst. Allah Jawai vs. Maqbool Shah, etc.). Learned counsel for petitioner while relying upon 1998 SCMR 760 (Abdul Wali Khan vs. Muhammad Saleh) has further contended that two marginal witnesses of agreement to sell, if not produced, had no consequence as anyone of the marginal witness could prove execution of document provided that his evidence is confidence inspiring.

9. Keeping in view the above background and available record, this Court comes to the conclusion that the evidence brought on record by the petitioner side reflects the entire transaction as agreement (Exh.P1) has not been denied from any angle and there is no other evidence through which it could be assumed that the agreement was not actually executed or the same was forged or fictitious, even the Bahria Town/respondent No.2 in their written statement has also acknowledged the ownership of respondent No.1. Similarly, original documents have been produced before the Court and PW-2 Zeeshan, although was not witness of the document, acknowledged the entire

transaction and terms of agreement dated 11.03.2013 together with the fact of payment of sale consideration, therefore, the minimum requirement of producing two witnesses is indirectly fulfilled, especially when agreement itself is silent qua the signature of two witnesses. The agreement (Exh.P1) bears the instance of only one witness namely PW-3 Usman Ahmad, hence this Court comes to an irresistible conclusion that compliance of minimum requirements has been reflected on record and both the Courts below have failed to appreciate the evidentiary value of such statements.

10. This Court in view of above discussion is positive to hold that the Courts below have not exercised jurisdiction vested in them and refused to acknowledge the evidence, therefore, by applying the provisions of Section 115 CPC, the instant civil revision is hereby **ALLOWED** and the concurrent findings of both the Courts below are hereby **SET ASIDE**. The matter is remanded to the learned Trial Court seized with the matter to re-hear the same and if parties desire to submit further evidence in support of their case, such evidence could be considered and consequently the case shall be decided within the period of 06 months, under intimation to this Court. The office is directed to transmit the record to the court seized with the matter.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: **03.07.2019.**

JUDGE

Khalid Z.