

## JUDGMENT SHEET

### ISLAMABAD HIGH COURT, ISLAMABAD, (JUDICIAL DEPARTMENT)

C.R. No.566/2007

Ramzan-ul-Haq, etc.

*versus*

Muhammad Yaqoob

C.R. No.567/2007

Ramzan-ul-Haq, etc.

*versus*

Muhammad Yaqoob & another

Petitioners by: Mr. Naeem Hussain, Advocate.

Respondent(s) by: Mr. Muhammad Arif Khan, Advocate.

Date of Hearing: 24.12.2019.

**MOHSIN AKHTAR KAYANI, J:** By way of this common judgment, I intend to decide both the captioned civil revisions arising out of same judgment and decree dated 31.10.2007, passed by learned Additional District Judge, Islamabad, whereby the regular first appeal filed by Aziz-ud-Din (deceased), represented by LRs, was dismissed vide consolidated judgment and decree dated 13.12.2004, whereby suit for specific performance of agreement, damages and permanent injunction filed by the said Aziz-ud-Din (late) was dismissed, while the suit for possession, recovery and permanent injunction filed by Muhammad Yaqoob/respondent against Aziz-ud-Din (late) was decreed.

2. Brief and consolidated facts referred in the captioned civil revisions are that the predecessor-in-interest of the petitioners namely Aziz-ud-Din (late) (*hereinafter called "plaintiff"*) had filed a suit for specific performance of agreement to sell against the respondent on the basis of agreement dated 24.04.1983, regarding Plot No. 12, measurement 80x42, Sector G-10/1, Islamabad, allotted by the CDA (*hereinafter called "suit plot"*) against total sale consideration of Rs.70,000/-. As per the contents of plaint, it was agreed between the parties that the respondent will transfer the suit plot in the name of plaintiff after acquiring complete rights and in the meanwhile the plaintiff had

4 constructed a house upon the suit plot after incurring cost of Rs.400,000/-, however when the respondent refused to transfer the plot in the name of plaintiff, the plaintiff as an alternate claimed an amount of Rs.850,000/- being market value of the plot, compensation for non-compliance of terms of agreement and cost of construction as referred in Para-6 of the plaint.

3. Conversely, Muhammad Yaqoob/respondent has also filed a suit for possession of House No.12, Sector G-10/1, Islamabad (*hereinafter called "suit house"*), recovery of Rs.108,000/- mesne profit and permanent injunction against the plaintiff and also contested the suit for specific performance with the specific stance that he neither entered into agreement to sell nor any sale consideration of Rs.70,000/- was paid and as such, the alleged agreement dated 24.04.1983 is a forged document comprising of forged signatures of the respondent. Similarly, he is also seeking possession of the suit house on the ground that he trusted upon the plaintiff due to close family relationship and requested him to supervise the construction work due to his engagement in official work and in this regard, the respondent had paid the plaintiff an amount of Rs.275,000/-, which was obtained from the House Building Finance Corporation (*hereinafter called "HBFC"*), but at that time the plaintiff requested him to lease out the suit house at monthly rent of Rs.1,600/-, which was accepted by the respondent and the family of plaintiff started living in the suit house from 01.03.1984. The rent was paid up to 30.09.1984, whereafter nothing was paid as per the details provided in Para-4 of the preliminary objection of written statement filed by the respondent. The respondent in his original suit also claimed the rent of the said premises w.e.f. October, 1984 till actual realization by giving the details of rent of market referred in Para-5 & 6 of the suit for possession.

4. The plaintiff in his written statement to suit for possession being defendant has denied the relationship of landlord and tenant, rather put emphasis on the agreement to sell.

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5. The learned Trial Court after recording of evidence of the parties dismissed the suit of plaintiff and decreed the suit of the respondent vide consolidated judgment and decree dated 10.10.1984. However, the Hon'ble Lahore High Court Rawalpindi Bench, Rawalpindi had decided the RFAs vide judgment and decree dated 26.12.2001, whereby the matter was remanded to the learned Trial Court with the direction to decide the case afresh pursuant to recording of the opinion of handwriting expert.
6. After post remand proceedings, the signature of the respondent was compared on the basis of application for comparison vide order dated 07.03.2002 and in this regard a report referred as Exh.DW-5/1 was submitted by DW-5 Shouqat Ali/ Assistant Director Technical, FIA.
7. The suits were again decided vide consolidated judgment and decree dated 13.12.2004, where suit for specific performance of agreement to sell filed by the plaintiff was dismissed, while the suit filed by the respondent for possession was decreed.
8. The plaintiff had died during pendency of said proceedings and his legal heirs namely Ramzan-ul-Haq and others were impleaded, who filed the two regular first appeals against the said judgment and decree of the learned Trial Court, however the same were dismissed vide impugned judgment and decree dated 31.10.2007. Hence, these civil revision petitions.
9. Learned counsel for petitioners/LRs of the plaintiff contended that both the Courts below have not appreciated the record in its true perspective and misread the evidence; that the handwriting expert's opinion given by DW-5 Shouqat Ali is illegal and without reasons, whereas minor variations in the statements of witnesses could not be considered fatal against the case of plaintiff; that the learned Trial Court misinterpreted the provisions of the Qanun-e-Shahadat Order, 1984 and as such, the execution of agreement to sell was duly proved as the agreement was partly performed, but this aspect was not taken into account; that solitary statement of DW-4 Muhammad Yaqoob denying the agreement to sell could not be considered over and above the

/overwhelming evidence of the plaintiff, who had proved his case through substantial evidence; that the learned first Appellate Court has violated the mandatory provisions of Order 41 Rule 31 CPC and the learned Trial Court has not framed proper issues arising out of the pleadings of the parties.

10. Conversely, learned counsel for respondent contended that the onus to prove the agreement to sell is upon the plaintiff, who had not discharged the onus and even failed to proof the consideration as well as the agreement available on record through any reliable means and as such, the suit for specific performance has rightly been dismissed; that the respondent has proved his case for possession as well as the relationship of landlord and tenant through cogent evidence, which was not denied in express manner by the plaintiff and the learned Trial Court has rightly decided the issues in his favour.

11. On the other hand, learned counsel for CDA contended that the suit plot was owned by the respondent namely Muhammad Yaqoob and as such, the suit is barred under Section 49-E of the CDA Ordinance, 1960 as the plot was allotted to the respondent being member of Central Employees Cooperative Housing Society and the plot could only be transferred within the members of the said Society after getting NOC, which was not done in this case and as such, the learned Trial Court has rightly passed the decree.

12. Arguments heard, record perused.

13. Perusal of record reveals that the entire case revolves around the counter claim of the plaintiff namely Aziz-ud-Din (late) and respondent namely Muhammad Yaqoob, whereby Plot No.12, measurement 80x42 sq. ft., Sector G-10/1, Islamabad was allotted in favour of the respondent, against whom the plaintiff i.e. predecessor-in-interest of the petitioners had filed a suit for specific performance of agreement to sell dated 24.04.1983, as referred in Para-2 of the plaint, against total sale consideration of Rs.70,000/-. The respondent/defendant denied the execution of such agreement together with his signatures thereon and filed a counter suit for possession of the suit

plot along with recovery of Rs.108,000/- on account of rent/compensation for illegal use and occupation of the suit property w.e.f. 01.10.1984 till 28.09.1987.

14. The main onus to prove the agreement to sell is upon the plaintiff, who appeared as PW-1 in his own favour and referred the agreement Exh.PW1/1, and produced duplicate letter of allotment as Exh.PW1/2 along with letter of possession issued by CDA as Exh.PW1/3. PW-1 Aziz-ud-Din further alleged that he constructed the house with the help of contractor and was residing in the said house since November, 1993 and as such, all the utilities including electricity, gas and water were installed on his own expenses, even otherwise, he spent an amount of Rs.400,000/- for construction of the suit house, but the same was not transferred in his name, although promise was made by respondent due to which PW-1 Aziz-ud-Din had got approved the site plan in the name of respondent.

15. PW-1 Aziz-ud-Din in order to substantiate his case had produced Muhammad Din as PW-2, who is the marginal witness of agreement to sell Exh.PW-1/1 and acknowledged his signature, but he could not explain the plot number and stated that a deal was done in the shop of plaintiff when he had gone to the said shop for grocery purposes.

16. The plaintiff also produced Muhammad Aslam as PW-3, who has produced Mark-A document, which could not be considered as a valid piece of evidence under the law, therefore, his statement could not be considered valid.

17. While considering the above background, the primary question before this Court is as to whether the plaintiff had discharged the onus to prove the agreement to sell Exh.P1 under the law or otherwise? In this regard, the learned trial Court has framed Issue No.3, which is as under:

*"Whether defendant No.1 entered into agreement to sell through written agreement dated 24.04.1983 and received sale consideration? If so, with what effect? OPP*

18. While considering the above evidence as well as Issue No.3 referred above, the entire matter has to be seen in the light of Evidence Act, 1872, as the alleged agreement was executed prior to promulgation of the Qanun-e-Shahadat Order, 1984 i.e. in the year 1983, therefore, only one witness could be considered lawful in terms of Section 68 of the Evidence Act, 1872. Reliance is placed upon 2003 CLC 78 Peshawar (Said Khoban vs. Momin Khan).

19. I have also gone through the mechanism provided in Evidence Act, 1872, wherein the mode and manner to prove any document or a fact has to be considered in the light of Sections 67 & 68 of the Evidence Act, 1872, which has certain prerequisites, therefore, both the provisions have been reproduced as under:

67. *If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.*

68. *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness 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 provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.*

20. The above referred mandatory provisions of law impose a duty upon the plaintiff i.e. predecessor-in-interest of the petitioners to prove the factum of signature on Exh.PW-1/1 i.e. as to whether the respondent had signed the said agreement or otherwise? The said direction was also given by the Hon'ble Lahore High Court in first round of proceedings when the matter was remanded vide order dated 26.12.2001 to the learned Trial Court, whereafter evidence of DW-5 Shouqat Ali/A.D. Technical Wing, FIA was recorded, who submitted report Exh.DW-5/1 qua the signature of the respondent in the following manner:

*"The examination of the case has revealed that the questioned signatures now marked as "A" on original Agreement Exh.P/1 is forged in characteristics such as hesitation, treamour, pen lifts, re-tracing, re-touching, pen stops, and*

*compare to the specimen and routine signatures now marked as S/1 to S/10, and R/1 to R/9 (on the deed of assignment and partnship No.130923, dated 27-10-83), R/10 to R/18 (on deed of assignment & partnership No.130925 (triplicate), R/19 on original I.D. Card, registration No.101-41-004092, Serial No.AJ 035324, dated 1-11-73, R/20 on Agreement dated 3-5-83 between CDA and Muhammad Yaqoob, of Muhammad Yaqoob provided for comparison."*

21. DW-5 Shouqat Ali was cross examined at length by the plaintiff regarding the above referred report, but nothing was discovered in favour of the plaintiff and the signature of the respondent was proved to be fake as DW-5 Shouqat Ali stated in his evidence that: that:

Exh.DW5/1 میں میری findings درج ہیں جس کے مطابق یعقوب کے دستخط جو کہ Exh.P1 پر ہیں وہ نمونہ دستخط کے ساتھ نہ ملتے ہیں اور نہ ہی دیگر دستاویزات ہائے سے ملتے ہیں۔"

22. The above referred findings, if seen in the light of Section 67 of the Evidence Act, 1872, whereby "the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting", as such, the plaintiff was liable to prove the signature of the respondent in all respects and when such onus was not discharged, the very foundation claimed by the plaintiff crumbles down as the signature of the respondent was not proved.

23. It is trite law that when the document is disputed or the signature was denied, the onus has been shifted upon the beneficiary to prove the very existence of the fact regarding;

- a) Due execution of agreement Exh.PW-1/1;
- b) Payment of sale consideration of Rs.70,000/-;
- c) Signature of the respondent (seller) on the document Exh.PW-1/1; and,
- d) Contents of the document Exh.P1.

All the above referred facts have not been proved by the petitioners in their evidence, although the opinion of the handwriting expert is only a corroborative piece of evidence as held in 2008 CLC 1228 Karachi (Ahmed through LRs vs. Mst. Zainbun Nissa through LRs), 2006 SCMR 193 (Mst. Saadat Sultan, etc. vs. Muhammad Zahur Khan), 2008 YLR 952 Lahore (Dr. Azher Ata Malik vs. Chairman NAB), 1971 P.Cr.LJ 918 Lahore (Ghulam

Abbas vs. The State), 1968 SCMR 1126 (Syed Shabbir Hussain vs. The State), PLD 1962 SC 102 (Ali Ahmad alias Ali Ahmad Mia vs. The State) and PLD 1960 Dhaka 897 (M.A. Motalib vs. The State). In all these case laws, it was settled that the expert opinion being a corroborative piece of evidence is circumstantial in its nature and cannot be considered final word on the subject and as such, even the Court is entitled to make independent comparison of handwriting apart from the opinion of the expert, therefore, while relying upon the above principles, when the expert report comes against the claim of the plaintiff, he has to prove other factors through independent means failing which it is considered that he has failed to discharge his onus, especially when Section 67 of the Evidence Act, 1872 was incorporated by the legislature.

24. I have also attended the proposition in hand on the basis of Sections 59, 60, 61, and 62 of the Evidence Act, 1872, whereby all facts have to be proved through oral evidence, except the contents of document, and the facts referred in the document must be proved through direct evidence in shape of primary evidence, whereas in this case the factum of payment of Rs.70,000/- on account of sale consideration was not proved independently nor any such evidence has been brought on record through which it could be proved that such a huge amount was available with the plaintiff back in the year 1983 to be paid to the respondent through any banking instrument, therefore, the basic onus was not discharged by the plaintiff in support of his case.

25. The other important issues in this regard i.e. Issue No.7, 8, 9 and 10, are reproduced as under:

7. *Whether defendant No.1 is entitled to the possession of the suit house as prayed for? OPD-1*
8. *Whether defendant No.1 is entitled to recovery of Rs.1,08,000/- from 1.1.1984 to 28.9.87 as prayed for? OPD-1*
9. *Whether defendant No.1 is entitled to the mesne profit as prayed for? If so, to what extent? OPD-1*
10. *What is status of plaintiff for his occupation of the suit house? OPP*

26. The onus to prove above referred issues was upon the respondent, however the respondent has taken the stance that he had leased out the premises to the plaintiff and



by taking such plea, he has to discharge the onus to the effect that the parties had ever executed a document of lease in terms of Section 105 of the Transfer of Property Act, 1882, whereas no such document was brought on record, rather the entire case is built upon oral testimony of the respondent, although it is not denied that the suit plot belongs to the respondent at the initial stage and same is in the name of the respondent as of today. The relationship has to be established by way of other circumstances brought on record like;

- i. Handing over possession of the property;
- ii. Receiving of rent; and,
- iii. Notice for determination of lease.

27. I have attended to the above position from the testimony of the respondent i.e. Muhammad Yaqoob, who appeared as DW-4 and admitted that he had family relationship with the plaintiff, who was appointed for supervision of construction work of the house and in this regard the respondent had paid an amount of Rs.275,000/- for the construction of the said building, whereafter he received a loan from HBFC and in his examination-in-chief, he stated that:

" گراؤنڈ فلور جب مکمل ہو گیا تو مدعی نے مجھے کہا کہ میں اسے اس میں رہنے کی اجازت دوں۔ جس پر میں نے اسے بطور کرایہ دار رہنے کی اجازت دی۔  
 کرایہ مبلغ- 1600/- روپے ماہوار ملے ہوا۔ 01/3/84 کو مدعی گراؤنڈ فلور پر بطور کرایہ دار شفٹ ہوا۔ 1/3/84 سے 3/9/84 تک مدعی نے مجھے باقاعدہ کرایہ بشرح- 1600/- روپے ماہوار دیا اس کے بعد کرایہ دینا بند کر دیا۔

28. During the course of cross-examination, DW-4 Muhammad Yaqoob/respondent admitted his evidence that:

- مدعی نے تعمیرات بذریعہ ٹھیکیدار کرائی تھیں۔ ٹھیکیدار کا اصل نام کیا تھا یاد نہ ہے البتہ اسے مٹری کے نام سے پکارتے تھے۔ ٹھیکیدار سے کوئی تحریر مدعی کی یا میری نہ ہوئی تھی۔
- ہر روز مکان کی تعمیرات کے سلسلہ میں موقع پر جاتا تھا۔ مٹری ٹھیکیدار کو کیا payment کی گئی ہے وہ مدعی کو پتہ ہوگا۔ مجھے پتہ نہ ہے۔
- مجھے یہ پتہ نہ ہے کہ وہ خرچ کی تفصیل اپنے پاس لکھتا تھا یہ نہیں۔ میں بھی اپنے پاس خرچ کی تفصیل نہ لکھتا تھا۔ جو نہی رقم مدعی کے پاس ختم ہو جاتی تھی وہ مجھ سے فون پر یا ملاقات پر رابطہ کر لیتا تھا اور میں اسے مزید رقم دے دیتا تھا۔ میں تفصیل رقم جو میں نے مدعی کو دفاتر فوٹا کی تھی نہ بتا سکتا ہوں۔ میں یہ بھی نہ بتا سکتا ہوں کہ میں نے کس مہینہ میں کتنی رقم مدعی کو دی تھی۔"

29. Besides the above referred evidence, no material evidence was brought on record through which it could be proved that the suit house was handed over to the plaintiff

on rent, therefore, the principle of Qanun-e-Shahadat Order, 1984 comes into play, wherein Article 117 of the said Order lays a heavy onus upon the respondent to prove his legal right or a liability depending on the existence of fact which he asserts, he must prove that those facts exist, therefore, the onus to prove those facts of lease agreement is upon the respondent in terms of Article 118 of the Qanun-e-Shahadat Order, 1984, which he had failed to discharge, hence it is confidently held that the relationship of landlord and tenant was neither in existence nor the respondent proved that he ever received any rent as per his own claim from the plaintiff. Similarly, the entire record is silent qua determination of lease as required in terms of Section 111 of the Transfer of Property Act, 1882, nor any notice was given by the respondent in this regard.

30. In view of above, the following facts have been observed from the record.

- a) Suit Plot No.12, Sector G-10/1, Islamabad was allotted to Muhammad Yaqoob/respondent by the CDA for being the member of the Central Employees Cooperative Housing Society.
- b) The respondent handed over the suit plot to Aziz-ud-Din (deceased)/plaintiff for the purpose of construction of a house.
- c) Claim of the plaintiff regarding agreement to sell of the suit plot through Exh.PW-1/1, dated 24.04.1983, is not proved.
- d) Sale consideration of Rs.70,000/- as claimed by the plaintiff was not proved independently through any banking channel or any other mode.
- e) The fact of payment made by the respondent to the plaintiff for construction of the suit house is not proved.
- f) Relationship of landlord and tenant between the respondent and the plaintiff has not been proved by the respondent as he had not brought on record any document of lease, nor any payment of rent was established by him.

- g) DW-5 Shouqat Ali/Handwriting expert opined in his report Exh.DW-5/1 that the signature of the respondent on agreement to sell (Exh.PW-1/1) is forged.
- h) Muhammad Yaqoob/respondent has obtained a loan from HBFC for the construction of house over the suit plot, which has been confirmed from DW-3 Muhammad Younas, District Manager, HBFC, who has referred certified copy of application dated 17.08.1983 for HBFC Loan with reference to suit plot as Exh.DW-3/1, deed of assignment dated 02.11.1983 as Exh.DW-3/8, agreement dated 03.05.1983 as Exh.DW-3/9, permission to assign in favour of HBFC as Exh.DW-3/10, certificate of possession as Exh.DW-3/11 and approval of building plan as Exh.DW-3/13.

31. In view of above, both the Courts below have concurrently decided the suit for specific performance in favour of the respondent and dismissed the claim of the plaintiff in accordance with law and as such, the plaintiff had failed to discharge his onus as he could not prove the transfer of payment of Rs.70,000/- as sale consideration to the respondent. Similarly, the signature of the respondent was declared to be forged, although same is corroborative in nature, but the probability leans in favour of the respondent as no contrary evidence was brought on record by the plaintiff. Hence, suit for specific performance filed by the plaintiff was rightly dismissed by the learned trial Court as well as by the first Appellate Court.

32. Similarly, the claim of the respondent regarding rent of the suit house is not proved in terms of requirements laid down in Transfer of Property Act, 1882, therefore, the judgment and decree passed in his favor to the extent of rent amount is illegal as findings on Issue No.8 are not legally proved from the evidence, hence, the concurrent findings of both the Courts below to the extent of payment of lease/rent in shape of decree of recovery are hereby SET ASIDE and the claim of the respondent is to be treated to the extent of possession of the suit plot only as he himself acknowledged that

initially he had delivered possession of the suit plot to the plaintiff for the purpose of construction of a house, although the said fact was independently not proved.

33. On the basis of above discussion, while considering the judgments and decrees of the learned Trial Court as well as of the learned first Appellate Court, both the civil revision petitions are decided in following terms:

- a) The claim of the plaintiff namely late Aziz-ud-Din regarding specific performance of agreement to sell Exh.PW-1/1 has rightly been dismissed by both the Courts below through impugned judgments and decrees and the captioned civil revision petitions to that extent are hereby **DISMISSED** on the ground that this Court will not interfere into the concurrent findings of both the Courts below.
- b) The relief granted to respondent on the basis of Issue No.8 regarding entitlement of rent is not proved as he has failed to establish the relationship of landlord and tenant, therefore, the findings of Issue No.8 to the extent are hereby **SET ASIDE** and the captioned civil revision petitions of the petitioners to that extent only are **ALLOWED**. Rest of the judgments and decrees are **MAINTAINED**.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in open Court on: **09.01.2020**.

JUDGE

Khalid Z.