

JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

W.P No.4636/2018.

Q. H. Tariq Muhammad Sharif **Vs.** **Mrs. Fouzia Khurshid etc.**

Petitioner by: Mr. Zulfiqar Ali Abbasi & Mr. Shahid
Munir, Advocates.

Respondents No.1 to 4 by: Mr. Jamal Khan & Ms. Sitwat Jahangir,
Advocates.

Date of Decision: **17.02.2020.**

MOHSIN AKHTAR KAYANI, J:- Through the instant writ petition, the petitioner has assailed the order dated 06.09.2018, passed by learned Civil Judge 1st Class (West) Islamabad and order dated 22.11.2018, passed by learned Additional District Judge (West) Islamabad, whereby application U/A 76 & 77 of Qanun-e-Shahdat Order, 1984 has been dismissed concurrently.

2. Learned counsel for the petitioner contends that the petitioner filed suit for specific performance of agreement regarding plot No.11, street No.155, sector G-13/4, Islamabad against respondent No.1/Fouzia Khurshid and has taken categorical stance in para 6 of the plaint that all the original record i.e. agreement to sell, original allotment letter and offer of allotment have been handed over to respondent No.2/Muhammad Ishtiaq the property dealer, who in connivance with respondent No.1 has returned the same and misappropriated those documents in the office of Housing Authority and in order to justify his plea, he has filed application U/A 76 & 77 of Qanun-e-Shahadat Order, 1984 for grant of permission to produce secondary evidence against those documents; that respondents side admitted that the documents referred in the application are with the respondents and such admission has not been considered by learned Trial Court and application has been turned down without appreciating the law on the subject; that both the Courts below have not gone through the spirit of article 76 of Qanun-e-Shahadat Order, 1984, which only imposes duty upon the party, who is interested to produce secondary evidence to justify those reasons as required in Article 76 of Qanun-e-

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Shahdat Order, 1984 before the permission to produce the documents in secondary manner. In support of his contention, learned counsel for the petitioner has relied upon 1995 SCMR 1237 (*Khurshid Begum vs. Chiragh Muhammad*) and C.P No.783/2016 dated 21.03.2016 title *Syed Tariq Ahmed vs. M/s Capital Tyres Company and others*.

3. Conversely, learned counsel for respondents No.1 to 4 contends that the respondents have already transferred another plot in lieu of claim of the petitioner i.e. plot No.800 measuring 35 x 70, sector G-14/4, Islamabad and as such the subsequent compliance of the agreement has already been made and the plea raised by the petitioner for submission of secondary evidence is not tenable in the eye of law; that there is no need for submission of secondary evidence as such the petitioner has failed to justify his case and despite several opportunities the evidence has not been produced.

4. I have heard the arguments and perused the record.

5. Perusal of the record reveals that the petitioner entered into an agreement to sell with respondent No.1/Fouzia Khurshid regarding plot No.7, street No.155, sector G-13/4, Islamabad on 26.08.1998 and the petitioner filed suit for specific performance on 15.12.2008 with specific contention in para-6 of the plaint, which is reproduced as under:-

"That the Defendant No.2 called the Plaintiff and Defendant No.1 in the office of the Defendant No.3 for the transfer of the Plot No.7, Street No.155, Sector G-13/4, Islamabad measuring 35' x 70' when the Plaintiff reached along with all the original documents which were handed over by the Defendant No.1 to the Plaintiff, in the office of Defendant No.3 accordingly, the Defendant No.2 obtained a transfer form from the office of the Defendant No.3 and filled that accordingly. After filling that form he asked the Plaintiff to hand over the original agreement, original allotment letter and offer letter, the Plaintiff replying on him and handed over the original agreement and other documents, which are still lying with the Defendant No.2 with connivance of Defendant No.1 and despite of several requests he has not handed over these documents to the Plaintiff till now."

6. The stance taken by the petitioner in para-6 of the plaint has been denied by respondents No.1 & 2 in para-1 of on facts in written statement by referring following reasons:-

"That para 1 of the plaint is incorrect as stated. The answering defendant No.1 was entitled for allotment of the plot measuring 35' x 70' in the Sector G-13, but later on, unfortunately the sizes of the plot were reduced by the defendant No.3/ Housing Foundation and a plot measuring 30' x 60' was offered to the answering defendant No.1. Answering defendant already entered into sale agreement with

the plaintiff for a plot measuring 35' x 70' in the said sector. When the size of the plot was reduced by the defendant No.3, the plaintiff refused to accept the said plot and asked the answering defendant to give him a plot of the same size measuring 35' x 70'. On the repeated requests and demands of the plaintiff the answering defendant arranged Plot No.800, measuring 35' x 70', Sector G-14/4, Islamabad through defendant No.2 and transferred the said plot to name of plaintiff with his free consent. The defendant No.2 is the witness of all the documents of transfer of Plot No.800 in the name of plaintiff. ANSWERING DEFENDANT NO.1 & 2 CAN TAKES SPECIAL OATH OF THE SAME ON HOLY QURAN. At the time of transfer of Plot No.800, measuring 35' x 70' Sector G-14/4, Islamabad to the name of plaintiff, the prices of plots in Sector G-13 and G-14/4 were the same, but with the passage of time, the prices of plots in Sector G-13 were gone high and in Sector G-14 slight below from the Sector G-13. The plaintiff is only blackmailing the answering defendant for the said difference in the prices and demanding some money through harassment frivolous litigation."

7. Learned Trial Court while considering pleadings of the parties framed issues on 26.09.2011, however, the suit could not be adjudicated on merits due to different reasons including the dismissal for non-prosecution as well as its restoration, however, when the case was fixed for evidence after its restoration, the petitioner filed application U/S 76 & 77 of Qanun-e-Shahadat Order, 1984 with the prayer to produce secondary evidence against three documents i.e. original agreement, original allotment letter, offer letter mainly on the ground that the original documents have been taken by respondent No.2 in connivance with respondent No.1 on the pretext referred in para-6 of the plaint referred above although the respondent have denied such factum with different contention that they have transferred another plot to the petitioner, however, all these facts require adjudication on merits but question remains the same as to whether secondary mode in terms of Article 76 of Qanun-Shahadat Order, 1984 can be applied in present case. Article 76 of Qanun-Shahadat Order, 1984 is reproduce as under:-

"76. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition or contents of a document in the following cases: —

- (a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in Article 77 such person does not produce it;*
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in interest;*
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not*

arising from his own default or neglect, produce it in reasonable time ;

- (d) when, due to the volume or bulk of the original, copies thereof have been made by means of microfilming or other modern device;*
- (e) when the original is of such a nature as not to be easily movable;*
- (f) when the original is public document within the meaning of Article 85 ;*
- (g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;*
- (h) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;*
- (i) when an original document forming part of a judicial record is not available and only a certified copy thereof is available, certified copy of that certified copy shall also be admissible as a secondary evidence.*

In cases (a), (c), (d) and (e), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (f) or (g), certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (h), evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such document."

8. The above referred Article, if seen in the light of proposition in this case has to be seen with reference to Article 76(a) of the Order, whereby the documents are not in possession or power of person, who intended to prove the same or the said documents are out of reach, therefore, a notice in terms of Article 77 is required, which has its own parameters and the relevant rules as to notice to produce in terms of Article 77(3) of the Order applies in such proposition "*where it appears or is proved that adverse party has obtained possession of the original by fraud or force*". In this regard explanation has already been given by the petitioner in para-6 of the plaint and the detailed reply in written statement of the respondents is available.

9. While considering the above situation all the three documents, which were claimed by the petitioner are stated to be in possession of the respondents although this factum requires proof but at this stage learned counsel for the respondent in categorical terms accepted and admitted that the documents are in their possession and they have transferred alternate plot No.800, sector G-14/4, Islamabad in favour of the petitioner, such qualified admission on part of the respondents before this Court fulfills certain pre-

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requisites of Articles 76 and 77 of Qanun-Shahadat Order, 1984, therefore, there is no need to further prove contents of those documents separately, however, the only question left for determination by learned Trial Court is to dig out those circumstances and reasons in which original documents have been handed over to the respondents as referred in para-6 of the plaint as the question of fraud requires to be proved in terms of Article 177(3) of Qanun-Shahadat Order, 1984. The requirement of notice has already been fulfilled by way of filing of civil suit, which contains relevant facts in Para-6 of the plaint and the petitioner also issued separate notice and this fact of misappropriation and removal of documents by way of fraud was in the knowledge of the respondents at the time of filing of written statement before learned Trial Court. I have gone through the order of learned Trial Court, whereby application U/A 76 & 77 of Qanun-e-Shahadat Order, 1984 was dismissed for the following reasons:-

“The agreement has not lost. Every executants of document should have his/her document in his/her own possession and if he/she delivers any document in original to someone else, it is his/her own fault but on the basis of such plea he/she cannot claim to produce secondary evidence. Furthermore, first the plaintiff should prove the fact of handing over the subject document to the defendant and if he succeeded then he may ask for production of documents by the defendant. Hence, instant application is dismissed.”

10. The above referred position has now been changed and respondents No.1 & 2 through their learned counsel have admitted the stance of the petitioner that they have received the documents and in lieu of those documents they have transferred another plot No.800, sector G-14/4, Islamabad but this aspect also requires evidence.

11. The proposition raised in this case has also been considered by this Court in the light of unreported judgment passed in *C.P No.737/16* title *Syed Tariq Ahmed vs. M/s Capital Tyres Company and others*. Similarly, 1995 SCMR 1237 (Khurshid Begum vs. Chiragh Muhammad), it was held that:-

“In our opinion, the High Court fell in error in refusing to examine the question whether the plaintiff had succeeded in establishing the loss of the original documents on the assumption that the point of allowing secondary evidence due to the alleged loss of the original documents had acquired finality when the revisional Court (vide order dated 31-7-1979) disallowed the contention of the defendants (appellants herein). A careful perusal of the said order, however, reveals that accordingly thereto only the plea that evidence of the loss of documents should be heard first and if the evidence led establishes the said plea, secondary evidence be allowed to be produced, was rejected. It was held that the loss of the documents and secondary evidence can be produced simultaneously but the

former has to precede the latter. It was further observed at the time of decision of the case that the Court has to see as to whether loss has been proved or not. If the loss is not proved secondary evidence would become valueless."

12. Keeping in view the above mandate, both the Courts below have not appreciated the wisdom settled by the law, therefore, existence of the documents, their delivery to the respondents referred in Para-6 of the plaint and plea taken by respondents No.1 & 2 in their written statement requires evaluation and appraisal after recording of evidence. Impugned orders passed by the Courts below are contrary to law. Therefore, instant writ petition is allowed. Impugned orders are set aside. Learned Trial Court is directed to record plea and evidence of both the parties in proper manner and decide the question at the time of passing of final judgment & decree.

13. Before parting with this judgment, it is important to mention that civil suit is pending before learned Trial Court since 2003, which explains conduct of learned Trial Court, therefore, learned Trial Court seized with the matter is directed to conclude the matter within a period of 04 months from today. A progress report shall be submitted on monthly basis through learned MIT.

(MOHSIN AKHTAR KAYANI)
JUDGE