

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.181/2013
Abdul Khaliq
Versus
Muhammad Younas and others

Date of Hearing: 19.11.2018
Petitioner by: Mr. Zulfiqar Ali Abbasi, Advocate
Respondents by: Malik Babar Hameed, Advocate for respondent No.1.
Mr. Faiz Akhtar, Advocate for respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, Abdul Khaliq, impugns the judgment and decree dated 18.03.2013, passed by the Court of the learned Additional District Judge, Islamabad, whereby respondent No.1's appeal against the judgment and decree dated 24.09.2011, passed by the Court of the learned Civil Judge, Islamabad, was allowed. Vide the said judgment and decree dated 24.09.2011, the learned Civil Court dismissed respondent No.1's suit for specific performance of the agreement to sell dated 25.05.2005 and permanent injunction.

2. The record shows that on 25.05.2005, Muhammad Aslam (respondent No.2) and Muhammad Younas (respondent No.1) entered into an agreement (Ex.P/1), whereby the former agreed to sell 7 *kanals*, 10 *marlas* of land in *khasra* No.2203 in Revenue Estate Mohra Noor, Islamabad ("the suit land"), to the latter for a total sale consideration of Rs.11,62,500/-. Respondent No.1 had paid Rs.1,00,000/- as earnest money, whereas the remaining amount of Rs.10,62,500/- was payable at the time of the transfer of the suit land. The parties to the said agreement had agreed to transfer the suit land by 25.07.2005. Furthermore, it was agreed that if the balance sale consideration was not paid by 25.07.2005, the earnest money would be forfeited by respondent No.2, and if respondent No.2 fails to transfer the suit land in

respondent No.1's favour by the said date, respondent No.2 would pay double the amount of the total sale consideration (کل قیمت) to respondent No.1. Respondent No.1 was also given the right to enforce the said agreement through a civil suit. This agreement was witnessed by Muhammad Zaheer and Muhammad Naveed who was respondent No.1's son.

3. On 11.07.2005, respondent No.2 sold the suit land to the petitioner, (Abdul Khaliq), through a registered sale deed.

4. On 12.07.2005, respondent No.1 filed a suit for specific performance of the agreement to sell dated 25.05.2005. The petitioner was impleaded as defendant No.2 in the said suit. Respondent No.2 and the petitioner contested the said suit by filing their separate written statements. After the framing of the issues, respondent No.1's evidence was recorded on 04.12.2010. Since the petitioner and respondent No.2 did not produce evidence despite having been given warnings and burdened with costs, on 12.09.2011, they were proceeded against *ex-parte*. Vide judgment and decree dated 24.09.2011, the learned Civil Court dismissed respondent No.1's suit.

5. Respondent No.1's appeal against the said judgment and decree dated 24.09.2011 was allowed by the learned Appellate Court, vide judgment and decree dated 18.03.2013. The said judgment and decree dated 18.03.2013 has been assailed by the petitioner in the instant civil revision petition.

6. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant civil revision petition, submitted that the so-called agreement dated 25.05.2005 is not specifically enforceable; that the said agreement is unilateral in nature and has not been executed on stamp paper; that a presumption of correctness would attach to the registered sale deed dated 11.07.2005 through which respondent No.2 sold the suit land to the petitioner; that the said registered sale deed was executed prior to the institution of the suit by respondent No.1; that in the said suit, respondent No.1 did not pray for the cancellation of the said registered sale deed; that respondent No.1's suit could not have been decreed in the presence of the registered sale deed;

that the mere fact that the petitioner was impleaded as a defendant in the said suit shows that respondent No.1 was well aware as to the sale of the suit land through the said registered sale deed in the petitioner's favour; that even after the filing of the written statement, the suit was not amended so as to challenge the said registered sale deed; and that since respondent No.1 had not prayed for the relief of possession, the said suit was not competent in terms of Section 42 of the Specific Relief Act.

7. Learned counsel for the petitioner further submitted that the learned Civil Court erred by not framing an issue regarding the question as to whether the said registered sale deed should be cancelled; that respondent No.1 had failed to prove the execution of the agreement to sell dated 25.05.2005; that although the marginal witnesses of the said agreement were produced as PW-2 and PW-3, respondent No.1 failed to produce the scribe of the said agreement; that by failing to produce the scribe, respondent No.1 withheld the best evidence; and that the learned Appellate Court acted beyond its powers by decreeing respondent No.1's suit. Learned counsel for the petitioner prayed for the instant civil revision petition to be allowed and for the appellate judgment and decree dated 18.03.2013 to be set-aside. In making his submissions, learned counsel for the petitioner placed reliance on the judgments reported as 2006 CLC 571, 2005 MLD 364 and PLD 1976 Lahore 6.

8. On the other hand, learned counsel for respondent No.1 submitted that the agreement to sell dated 25.05.2005 was not a unilateral but a bilateral agreement; that the said agreement was signed by respondent No.2 (as the seller) and respondent No.1 (as the purchaser) of the suit land; that the said agreement has also been signed by two marginal witnesses who gave testimony as to the execution of the said agreement as PW-2 and PW-3; that the receipt of the earnest money by respondent No.2 is admitted; that respondent No.2 executed a registered sale deed in the petitioner's favour on 11.07.2005 i.e., prior to the date fixed in the said agreement to sell for the transfer of the suit land and

payment of the remaining sale consideration; that respondent No.1 filed the suit for specific performance of the said agreement after coming to know that respondent No.2 was planning to sell the suit land to the petitioner; that possession of the suit land is with respondent No.1; that on 23.06.2010, respondent No.2 had sworn an affidavit (Ex.P/3) admitting the execution of the agreement to sell dated 25.05.2005 and the receipt of the earnest money; that the Notary Public who attested the said affidavit appeared as PW-4 and affirmed that the said affidavit was signed by respondent No.2 in his presence; and that there were sufficient material on the record so as to prove the execution of the said agreement to sell.

9. Learned counsel for respondent No.1 further submitted that in the instant civil revision petition, the petitioner had also challenged the learned Civil Court's order dated 12.09.2011 whereby the petitioner and respondent No.2 (i.e., the defendants in the civil suit) were proceeded against *ex-parte*; that the petitioner and respondent No.2 had not filed any application for the recall of the said order dated 12.09.2011; that although respondent No.1's witnesses had been cross-examined, the petitioner and respondent No.2 did not produce any evidence; that the petitioner and respondent No.2, in their respective written statements, did not specifically plead the factum regarding the execution of the registered sale deed; that the petitioner and respondent No.2 made no mention of the said registered sale deed in their respective lists of documents on which they intended to place reliance; and that the impugned appellate judgment and decree dated 18.03.2013 does not suffer from any legal infirmity. Learned counsel for respondent No.1 prayed for the instant civil revision petition to be dismissed.

10. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

11. The facts leading to the filing of the instant civil revision petition have been set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

12. The agreement to sell dated 25.05.2005 was signed by respondent No.2 (as the seller) and respondent No.1 (as the purchaser) of the suit land. The two marginal witnesses of the said agreement gave evidence as PW-2 and PW-3 affirming the execution of the said agreement. The said agreement clearly describes the suit land and fixes the deadline by which the suit land is to be transferred in respondent No.1's favour upon the payment of the remaining sale consideration by respondent No.1. The said agreement places bilateral obligations on respondent No.1 to pay the remaining sale consideration, and on respondent No.2 to transfer the suit land in respondent No.1's favour by an agreed date. Since I am of the view that the essential particulars of a specifically enforceable agreement are not lacking in the said agreement to sell, there is no substance in the contention of the learned counsel for the petitioner that the said agreement to sell was unilateral in nature.

13. It is well settled that in cases where the execution of a document is proved by producing the marginal witnesses, the omission to produce the scribe of a document is of no consequence. The scribe of a document cannot be substituted for a marginal witness, unless the scribe also happens to be a marginal witness of an agreement to sell. A document is to be proved according to the provisions of Article 79 of the *Qanun-e-Shahadat* Order, 1984, by producing the two marginal witnesses. Since this requirement has been satisfied in the case at hand, the omission on respondent No.1's part to produce the scribe of the agreement to sell dated 25.05.2005 is not fatal to his suit for specific performance. In holding so, I derive guidance from the law laid down in the following cases:-

- (i) In the case of Farid Bakhsh Vs. Jind Wadda (2015 SCMR 1044), Article 79 of the *Qanun-e-Shahadat* Order, 1984, was interpreted in the following terms:-

"This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The words "shall not be used as evidence" unmistakably show that such document shall be proved in such and no other

manner. The words "two attesting witnesses at least" further show that calling two attesting witnesses for the purpose of proving its execution 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 the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce."

- (ii) In the case of Hafiz Tassaduq Hussain Vs. Muhammad Din (PLD 2011 SC 241), it has been held as follows:-

"... a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses, or in the eventuality those are conceived by Article 79 itself not as a substitute."

14. There was nothing preventing respondent No.1 to have produced the scribe for further strengthening his case but since he had already produced the two marginal witnesses of the said agreement to sell, and since their testimonies as to the execution of the said agreement to sell was in consonance with respondent No.1's evidence, the non-production of the scribe of the said agreement was immaterial. Consequently, I do not find any substance in the contention of the learned counsel for the petitioner that the agreement to sell in question is not a valid agreement or that its execution had not been proved in accordance with the law.

15. As regards the question whether in the presence of the registered sale deed dated 11.07.2005, precedence could be given to an earlier agreement to sell dated 25.05.2005, suffice it to say that there is no pleading in the written statements filed by the petitioner and respondent No.2 as to the execution of the said registered sale deed. The said registered sale deed was not produced in evidence and does not even find mention in the list of the documents on which the petitioner and respondent No.2 wanted to place reliance. As mentioned above, the petitioner and

respondent No.2 were both proceeded against *ex-parte* on 12.09.2011. Prior to being proceeded against *ex-parte*, petitioner and respondent No.2 were given warnings and were also burdened with costs for not producing their evidence. Since the petitioner and respondent No.2 were given ample opportunities to produce their evidence, they could have done so and in this process, the registered sale deed dated 11.07.2005 could have been produced in evidence. The petitioner and respondent No.2 have only their own selves to thank for the unsavory consequences flowing from their failure to produce evidence or to tender the said registered sale deed in evidence. The petitioner has not given me any reason to interfere with the order whereby he and respondent No.2 were proceeded against *ex-parte* by the learned Civil Court.

16. Although respondent No.2, in his written statement, had denied the execution of the agreement to sell dated 25.05.2005, the petitioner, in his written statement, had not even pleaded lack of knowledge as to the execution of the said agreement to sell. For the petitioner to gain the benefit of Section 41 of the Transfer of Property Act, 1882, it was incumbent on him to plead that he had no knowledge or notice of the earlier agreement to sell prior to the purchase of the suit property by him. Absence of such pleadings would take such a party out of the pale of a subsequent *bona fide* purchaser for value without notice.

17. It has become commonplace for the unscrupulous to enter into agreements to sell property and before the expiry of the period fixed in such agreements for performance, they sell the same very property at a better price to third party purchasers. Such reprehensible conduct on the part of sellers leads to endless litigation and waste of public time. Courts would be failing in their duty if such sellers are not burdened with actual as well as heavy exemplary costs when decreeing suits for specific performance of agreements to sell.

18. In the case at hand, respondent No.2 entered into an agreement to sell the suit land with respondent No.1 and before the expiry of the period fixed for the performance of the

transaction, he sold the same very land through a registered sale deed to the petitioner. This act on respondent No.2's part caused respondent No.1 to invoke the jurisdiction of the Civil Court. Since the past thirteen years, respondent No.1 has been languishing at first before the learned Civil Court, then before the learned Appellate Court and finally, before this Court. All this agony suffered by respondent No.1 was because respondent No.2 concealed the factum as to the execution of the agreement to sell dated 25.05.2005 from the petitioner while executing the sale deed with the petitioner. Had respondent No.2 not done so, respondent No.1's woes would have been averted.

19. A seller by entering into an agreement to sell his land with one party and then by simply ignoring his obligations under such an agreement conveys the same land along with possession to another party exposes himself to a claim by the subsequent purchaser to the present market value of the land, including all expenditures incurred thereon. To hold otherwise would amount to encouraging such sellers to succeed in their nefarious designs.

20. For the reasons mentioned above, the instant petition is dismissed with costs throughout payable by respondent No.2. Additionally, respondent No.2 shall pay costs amounting to Rs.1,00,000/- to respondent No.1 under Section 35(1)(iii) of the Civil Procedure Code, 1908, as amended by Costs of Litigation Act, 2017.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018.

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING

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