

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

C.R. No.175/2014

Mst. Syeda Irshad Fatima Rizvi

versus

Bashir Ahmad, etc.

Petitioner by: Raja Muhammad Aleem Khan Abbasi, Advocate.

Respondents by: Mian Ghaffar, Advocate for Respondent No.1.
Mr. Zahid Mehmood Raja, Advocate for
Respondent No.2 through LR's.

Date of Hearing: 28.08.2019.

MOHSIN AKHTAR KAYANI, J: Through this civil revision, the petitioner namely Mst. Syeda Irshad Fatima Rizvi has assailed judgment and decree dated 09.02.2011, whereby her suit for specific performance of agreement to sell, permanent and mandatory injunction has been dismissed by the learned Civil Judge, 1st Class, Islamabad, which was further upheld by the learned first Appellate Court vide judgment and decree dated 30.01.2014.

2. Brief facts referred in the instant civil revision petition are that Mst. Syeda Irshad Fatima Rizvi (*petitioner*) filed a suit for specific performance of agreement to sell dated 09.10.1999 (Exh.P2), executed between Bashir Ahmad (*Respondent No.1*) and the petitioner for sale and purchase of Plot No.4, Category-V, measuring 25x40, Street No.80, Sector G-13/1, Islamabad (*suit plot*) in the scheme launched by the Federal Government Employees Housing Foundation (*FGEHF*). The total sale consideration fixed between the parties was Rs.275,000/-, whereas Rs.150,000/- was paid by petitioner to respondent No.1 as earnest money while the remaining consideration was to be deposited

by petitioner in the office of FGEHF within prescribed days. All the original documents were handed over to petitioner by respondent No.1 at the time of execution of agreement. The suit plot was provisionally allotted to respondent No.2 by the FGEHF. Respondent No.1 executed a receipt (Exh.P3) dated 09.10.1999 regarding receiving of Rs.25,000/-, from the petitioner and the entire suit has been contested on the basis of authority letter Exh.P4, which was allegedly executed on behalf of Respondent No.2 in favour of Respondent No.1, whereby an authority was given to Respondent No.1 to deal with the affairs of suit plot. An agreement dated 20.03.2000 (Exh.P5) was also placed on record, which was executed between Respondents No.1 and 2.

3. The suit was contested by Respondent No.2, whereas respondent No.1 conceded the claim of petitioner and the learned Trial Court after framing of issues recorded the evidence of parties and finally dismissed the suit, which was upheld by the learned first Appellate Court and as such, there are concurrent findings of facts recorded against the petitioner, who failed to substantiate her claim before the Courts below. Hence, the instant civil revision.

4. Learned counsel for petitioner contends that petitioner has paid the entire sale consideration and her stance was conceded by Respondent No.1, who was the actual purchaser of the suit plot from allottee i.e. Respondent No.2; that Respondent No.2 acknowledged her signature on the authority letter given by her to Respondent No.1 and as such, the denial of claim on the part of Respondent No.2 is just an afterthought; that once the contents of document have been admitted, the due execution stands proved and as such, both the Courts below

have not appreciated the admission of authority letter Exh.P4; that the petitioner has proved the due execution of documents, even produced the entire record in shape of documentary evidence, whereas Respondent No.2 has not only failed to substantiate her plea, but also failed to explain under what circumstances her original documents have been placed on record by the petitioner side, which shows her greedy nature to extort money from the petitioner as the price of suit plot has been increased manifold.

5. Conversely, learned counsel for Respondent No.2 contends that she neither entered into agreement to sell with any of the parties nor she received any sale consideration with respect to suit plot and even she was not aware that any plot was allotted by Respondent No.3 unless a notice issued by the Court was served upon her; that Respondent No.1 has committed fraud in connivance with Respondent No.3 as the address for the purpose of communication in record of Respondent No.3 was changed, whereafter all the original records, documents and allotment letter were corresponded to Respondent No.1, who allegedly handed over the same to the petitioner; that the alleged affidavit/authority letter Exh.P4 is a forged document and the signatures allegedly attributed to Respondent No.2 are forged and fabricated, which have not been confronted or proved through any handwriting expert as petitioner has not proved the due execution of the document, therefore, she has rightly been deprived of the claim of specific performance.

6. Arguments heard, record perused.

7. Perusal of record reveals that petitioner filed a suit for specific performance of agreement to sell, permanent and mandatory injunction on 29.12.2003 against Bashir Ahmad (Respondent No.1), Mrs. Sharafat Begum (Respondent No.2) and FGEHF (Respondent No.3) regarding Plot No.4, Category-V, measuring 25x40, Street No.80, Sector G-13/1, Islamabad (*suit plot*), which was allotted to Respondent No.2 vide provisional allotment letter dated 01.09.1999 (Exh.P6). The petitioner entered into agreement to sell with Respondent No.1 directly through an agreement dated 09.10.1999 (Exh.P2) against sale consideration of Rs.275,000/-, whereby it was specifically written in the body of agreement that the plot is allotted to Respondent No.2, who is unable to pay the charges and amount of suit plot in the office FGEHF, which compelled her to authorize Respondent No.1 to make the said payments, whereafter she will transfer the suit plot through an agreement.

8. Respondent No.1 has conceded the claim of petitioner in his written statement and contended that he has received the entire sale consideration of suit plot at prevailing market price and as such, the claim of petitioner/plaintiff was acknowledged, whereas the contesting original allottee i.e. Respondent No.2 has denied the version of petitioner in her written statement with the specific plea taken in Para-4, which is as under:

"4. That the Plaintiff has not come to the Court with the clean hands, in fact outset of the pleading shows the connivance of the Plaintiff and the Defendant No.1, which further affirms the manipulation of the alleged agreement malafidely, illegally and for the ulterior motives, moreover all the correspondence on behalf of the answering Defendant with the Defendant No.3 is forged, fabricated and without the written permission of the answering Defendant. As a matter of fact the answering Defendant is residing in House # C-708, Chowk Nasir Khan,

Mohallah Nadir Ali, Peshawar City, and applied for a plot against the application No.29568 in the office of the Defendant No.3, who asked the answering Defendant to deposit the seed money and accordingly the answering Defendant deposited Rs.35,000/- through pay order No.562612 dated 09.02.1999 and thereafter kept on waiting for intimation from the office of Defendant No.3, but the answering Defendant never received any information about the allotment of the plot, the answering Defendant being lady of old age was unable to visit the office and to pursue her case, the answering Defendant received the notice from this Honourable Court and thereafter, approached the office of Defendant No.3, from where it revealed to the answering Defendant that the suit plot stand allotted in the name of answering Defendant and from checking the file it revealed that the Defendant No.1 cleverly and in connivance with the staff of the Defendant No.3 managed to change the address of correspondence i.e. House # 180-D, St. # 56, G-6/4, Islamabad, where the Defendant No.1 is residing. That the answering Defendant had no concern at all with the Defendant No.1 and never ever either authorized the Defendant No.1 to deal with or to execute any of the agreement, and also not visited the office before, therefore what ever is done in the office No.3 which was exclusively done by the Defendant No.1 fraudulently and all the correspondence with the Defendant No.3 was carried out by the Defendant No.1 with the fake and bogus signatures against which the Plaintiff reserves her right to initiate criminal proceedings against the wrong doers."

(Underlining is provided for emphasis)

9. On the basis of above referred pleadings, the learned Trial Court has framed issues, pursuant to which the petitioner put appearance as PW-1 and reiterated her stance of entering into agreement to sell with Respondent No.1 against sale consideration of Rs.275,000/- and has submitted special attorney (Exh.P1) in favour of Asim Ali, agreement to sell dated 09.10.1999 executed between Respondent No.1 and petitioner (Exh.P2), receipt amounting to Rs.25,000/- signed by Respondent No.1 (Exh.P3), authority letter allegedly executed by Respondent No.2 in favour of Respondent No.1 (Exh.P4) and has also produced an alleged agreement executed between Respondent No.2 and Respondent No.1

dated 20.03.2005 (Exh.P5). The petitioner has also produced provisional allotment letter dated 01.09.1999 (Exh.P6), the payment schedule (Exh.P7) and payment receipts (Exh.P8 & Exh.P8/1-7) and original allotment letter dated 16.04.2002 (Exh.P9). However, during the course of cross examination, the petitioner conceded that agreement Exh.P2 was not executed with Respondent No.2, who is the actual owner of the suit plot and it was admitted by petitioner as PW-1 that alleged power of attorney Exh.P4 was executed in favour of Respondent No.1 after the agreement Exh.P2.

10. The petitioner has also produced Syed Mehdi Abbas Rizvi as PW-2 and Aleem Akhtar as PW-3, who are witnesses of Exh.P4 and Exh.P5. Both the said witnesses reiterated the stance of petitioner and acknowledged that at the time of execution of agreement Exh.P2, plot number was not allocated and authority letter/power of attorney Exh.P4 was executed after execution of agreement Exh.P2, even PW-3 Aleem Akhtar has not confirmed as to the fact that Respondent No.2 has signed Exh.P5 in his presence. Besides this admission, he has also not confirmed as to whether signature of Respondent No.2 are original or otherwise.

11. On the other hand, Respondent No.2 appeared as DW-2 and reiterated her stance that she has neither entered into agreement nor received any amount or signed any authority letter and as such, she denied her signature on Exh.P4 and Exh.P5 as she declared her signatures thereon as forged one. She has produced her applications Exh.D3 & Exh.D4 together with seed money Exh.P5 on record. She has further taken the specific plea that:

"میں نے کسی کے ساتھ پلاٹ متدعویہ کا Agreement نہ کیا ہے میں مدعا علیہ نمبر 1 کو مقدمہ سے قبل نہ جانتی تھی۔ میں نے نہ تو محمد بشیر کے ساتھ کوئی اقرارنامہ کیا نہ ہی کوئی اتھارٹی لیٹر دیا۔ Exh.P5 پر میرے دستخط نہ ہیں جو کہ جعلی طور پر کیے ہیں۔ Exh.P4 پر بھی میرے دستخط جعلی ہیں۔ جب ہی حج سے

واپس آئی تو میں نے پتہ کروایا تو پتہ چلا کہ میرا پلاٹ نکلا ہے کہ نہیں جس پر مجھے علم ہوا کہ مدعا علیہ نمبر 1 نے دفتر والوں سے مل کر اپنا پتہ دے کر تمام خط و کتابت از خود اسی پتہ پر کرتا رہا۔"

During the course of cross-examination, she was confronted with a question as to what was the date of allotment of the plot and in response whereof she has taken the following acknowledgment:

"میں ان پڑھ ہوں میں انگوٹھا بھی لگاتی ہوں اور دستخط بھی کر لیتی ہوں۔
Exh.P5 پر دستخط میرے نہ ہیں۔ میں بشیر مدعا علیہ نمبر 1 کو نہ جانتی ہوں۔"

She has also acknowledged that she has only deposited the seed money, but any of the installments has not been paid by her as she has not received any letter in this regard. However, at the same time she has admitted that she is not in possession of original documents of suit plot. Respondent No.2 was when confronted with Exh.P4, she acknowledged her signature thereon and contended that the signatures are same as available on Exh.D7.

EFFECT OF ADMISSION

12. Keeping in view the above background, the petitioner is contesting the entire matter on the strength of only one admission on the part of Respondent No.2 that:

"یہ درست ہے کہ Exh.P4 پر میرے دستخط ہیں۔"

13. As per petitioner's stance, once a party admits signature on a disputed document, the entire document stands prove and in this regard the counsel for petitioner has relied upon 2006 SCMR 774 (Syed Zawar Hussain Shah vs. Haider), wherein it was held that "execution of agreement was admitted by defendant who took the plea that their signatures and thumb impressions were obtained on blank paper." However, the facts of instant case are different as in the aforesaid case the plaintiff had

otherwise proved due execution of agreement as observed by the apex Court in the following manner:

“Plaintiffs had duly proved execution of sale agreement as well as receipt of payment of entire consideration amount by defendants by producing stamp vendor, deed writer and attesting marginal witnesses.”

Essentially, this aspect is lacking in the instant matter. The learned counsel for petitioner while relying upon 2000 CLC 929 Lahore (Zubaida Begum vs. Majeeda Kaukab), 1995 SCMR 296 (Muhammad Ashraf Khan vs. Abdul Qadar), 1995 CLC 1 Lahore (Amanullah Khan vs. Abdul Majeed Khan), 2001 CLC 1530 Karachi (Muhammad Ameer vs. The State), and 2008 MLD 252 Lahore (Chiragh Din vs. Akram Mohiuddin) tried to convince this Court that once a signature has been admitted no exception could be taken. However, the above referred case laws are distinguishable from the instant matter as Respondent No.2 is an illiterate lady and the petitioner has not proved the contents of Exh.P4 i.e. the authority letter, which is a unilateral and unregistered letter, even only one witness namely PW-2 Syed Mehdi Abbas has been produced to prove the said document, while the other attesting witness was not produced in the Court, therefore, the due execution of Exh.P4 (authority letter) is in doubt.

14. Besides the above referred legal proposition, the petitioner seeks specific performance of Exh.P2, which was not executed by Respondent No.2, therefore, if the suit is decreed in favour of petitioner on the basis of alleged agreement to sell dated 09.10.1999, the same is not executable against Respondent No.2 i.e. the original allottee. Even otherwise, the conceding statement of Respondent No.1 in favour of petitioner is of no use, when he himself not opted to put appearance in witness box in

favour of petitioner to prove the contents of the alleged power of attorney i.e. Exh.P4, which was executed on a white page. The signature available on the document Exh.P4 and circled as Exh.D7, although the same was confronted to Respondent No.2 during the course of cross examination, requires proper verification and comparative analysis from a handwriting expert, especially when Respondent No.2 denied the document as well as her signature on the ground of fraud in the pleadings (written statement), therefore, the onus is shifted upon petitioner to prove the due execution of power of attorney Exh.P4, the petitioner is under legal duty to get the alleged thumb impression or the signature on Exh.P4 to verify the same from the expert, which has not been done by the petitioner and the same resulted into an adverse inference. Reliance is placed upon 2019 MLD 485 Lahore (Jameel Ahmad Zahid vs. Rasheeda Begum, etc.).

15. Learned counsel for petitioner has also argued his case on the strength of Section 196 of the Contract Act, 1872 and tried to convince this Court that the act of ratification has been done by Respondent No.2 and she has acknowledged her signature on Exh.P4, by such acknowledgment all acts done by Respondent No.1 stand ratified, but this Court is of the view that the knowledge requisite for valid ratification is materially defective in terms of Section 198 of the Contract Act, 1872 as Respondent No.2 was confronted with her signature in isolation.

16. The mere admission of signature in one line itself is wrong on point of fact. In terms of Article 34 of the Qanun-e-Shahadat Order, 1984, an admission, even though, if considered to be legal one, was a relevant

fact, which clearly connoted that admission was not a conclusive against a party making it. Similarly, the oral admission as to contents of document is not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of contents of such document in terms of Article 35 of the Qanun-e-Shahadat Order, 1984 or unless the genuineness of document along with contents has been proved. Similarly, Article 36 of the Qanun-e-Shahadat Order, 1984 settled the proposition in the following manner:

36. Admissions in civil cases, when relevant: *In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.*

Therefore, keeping in view the above background, the one liner admission of signature on Exh.P4 on behalf of respondent No.2 is not conclusive of the matter and admission which is wrong in point of fact or made in ignorance of legal right has no binding effect on the person making it as settled in PLD 1979 SC 311 (Amjad Khan vs. Rasool Shah, etc.). This view has also been highlighted in 2013 CLC 1171 Peshawar (Fida Muhammad, etc. vs. Umar Khitab), wherein it was held that admission being wrong on point of fact was also not admissible. Reliance is also placed upon 2005 YLR 946 Lahore (Shahadat Khan vs. Zulfiqar, etc.). This Court considers the admission of signature by respondent No.2 on Exh.P4 is in ignorance of her rights and the same was made erroneously, whereas mere admission regarding signature on Exh.P4 without admission regarding contents of Exh.P4 is of no use, therefore, the same could not be relied upon. Reliance is placed upon 1993 CLC 1248 Lahore (Fateh Muhammad vs. Additional Commissioner,

etc.), 2006 YLR 1431 Lahore (Maqsood Ahmad vs. Muhammad Anwar Ali), 2001 MLD 427 Lahore (Mst. Hameeda Begum vs. Khadim Hussain) and 2001 CLC 527 Lahore (Nazir Ahmad vs. Zeban Bibi).

PRECAUTIONS FOR ILLITERATE AND PARDA NASHEEN LADY

17. Respondent No.2 is an illiterate *parda nasheen* lady and in this regard petitioner/plaintiff has been burdened with heavy responsibility to discharge the onus that no fraud has been committed while executing Exh.P4. In this context, the apex Court in judgments reported as 2016 SCMR 1225 (Phul Peer Shah vs. Hafeez Fatima), 2017 SCMR 1110 (Abdur Rehman vs. Mst. Majida Bibi alias Majeedan), 2015 SCMR 1704 (Baja through LRs vs. Behkan, etc.), 2014 SCMR 1469 (Mst. Zaitoon Begum vs. Nazar Hussain, etc.), 2012 SCMR 1258 (Syed Sharif ul Hassan through LRs vs. Muhammad Hafeez, etc.), 2006 SCMR 930 (Fateh Khan deceased through LRs vs. Surraya Begum) and 2004 SCMR 1259 (Khawas Khan through LRs vs. Sabir Shah, etc.), has outlined the following mandatory provisions to be complied with:

- a) That lady was fully cognizant and was aware of transaction and its probable consequence.
- b) She had independent advice from reliable source/person of trust who fully understands the nature of transaction.
- c) Witnesses to the transaction were such, who were close relatives or fully acquainted with the lady and had no conflict of interest with her.
- d) Sale consideration was duly paid and received by the lady.
- e) Very nature of transaction may be explained in a language she understands and she was apprised of the contents of deed, receipts, as the case may be.

- f) Courts have to look into the surrounding circumstances to ascertain the true intent behind the document so as to determine its validity and to ensure that women were not deprived of their property through frivolous or fraudulent means by taking advantage of their illiteracy, weak social background and other compelling circumstances to which they might be easily exposed.
- g) The burden of proof was on a person in whose favour the deed was executed by such lady.
- h) Mere thumb marking a document would not tantamount to a valid execution, until and unless such lady was duly apprised with and made to understand true nature and contents thereof.

The above referred principles left no other exception in favour of petitioner's case as Respondent No.2 is an illiterate *parda nasheen* lady, who was not privy to any advice from her close relative, husband, son or brother and even Exh.P4 was not attested by any of the family member of Respondent No.2, therefore, the document Exh.P4 fails on the above referred guiding principles established by the superior Courts.

EFFECT OF NON REGISTRATION OF EXH.P4

18. In the instant proposition, the petitioner is under legal obligation to submit those reasons as to why she has not directly entered into an agreement with Respondent No.2 when the instrument Exh.P4 was not a registered instrument. Whereas, it is trite law that the power of attorney requires registration in terms of Section 17 of the Registration Act, 1908, a document conveying transfer of title or authority to transfer requires compulsory registration and in case of non-registration in terms of Section 49, it has no legal effect. Reliance is placed upon 2015 CLC 385

(Bakhtiar vs. Nasrullah), 2002 CLC 1165 SC AJK (Manzoor Hussain vs. Muhammad Fazal), 2002 SCMR 1821 (Muhammad Sadiq vs. Muhammad Ramzan), and 2007 YLR 2440 Lahore (Mst. Salaman vs. Bashir Ahmad), therefore, authority letter Exh.P4 has no legal sanction to convey any right or title on behalf of Respondent No.2 in favour of Respondent No.1 to execute any agreement with the petitioner, therefore, the agreement to sell Exh.P2, even though has been conceded by Respondent No.1 (who is not the actual owner), has no legal value.

EXECUTION OF POWER OF ATTORNEY (EXH.P4) AFTER THE EXECUTION OF EXH.P2

19. In addition to above referred technical defects, the power of attorney Exh.P4 was executed after the execution of agreement Exh.P2 as acknowledged by the witnesses of petitioner, therefore, Exh.P4 is an afterthought and was executed with intent to defeat the right of Respondent No.2 and as such, the plea of misrepresentation and fraud is apparent on record. The petitioner/plaintiff is under legal obligation to prove due execution of document i.e. Exh.P4 (attorney), which is lacking in this case, especially when two attesting witnesses of Exh.P4 have not substantiated the case as per law and consideration has not been conveyed to Respondent No.2 in any manner, even the change of address by Respondent No.1, in connivance with officials of FGEHF, has been alleged and no legal justification was brought on record by the FGEHF as well as Respondent No.1 as to why the address has been changed. All these factors confirm that Respondent No.1 has committed fraud in connivance with petitioner as well as with officials of the FGEHF to deprive Respondent No.2 (actual owner of suit plot) from her valuable right of allotment.

CONFLICT OF INTEREST

20. Besides the above referred position, it is astonishing to observe that Respondent No.1 has submitted his conceding statement in favour of petitioner and acknowledged the agreement in which Respondent No.2 was not privy and as such, the said written statement on behalf of respondent No.1 was drafted and executed by the same counsel, who has also separately filed written statement on behalf of FGEHF in the same suit, which itself is a conflict of interest as it has been noted with great concern that the counsel, who was representing the department has also been engaged by private party in the same suit having different rights/claims, especially in this case when Respondent No.2 has specifically alleged fraud on the part of Respondent No.1 in connivance with officials of the FGEHF to deprive her from her valuable rights, therefore, such kind of practice by same counsel is depreciated and not to be allowed in legal proceedings.

INTERPOLATION OF JUDICIAL RECORD

21. I have also gone through the record of the learned Trial Court in order to ascertain the veracity of Exh.P4 (affidavit/attorney), but surprisingly the plaint filed by petitioner/plaintiff is silent qua the execution of Exh.P4 and the said document has not been mentioned in the body of plaint, even the petitioner has not referred the same in any of the paragraphs of plaint to the effect that Exh.P4 was executed by Respondent No.2 in favour of Respondent No.1, who was authorized to alienate the suit plot to any third party. I have also gone through order dated 04.07.2009, passed on application filed under Order XXXIX Rule 1&2 CPC, whereby reference of Exh.P4 was neither argued, nor even

reflected, therefore, as a last resort, I have gone through the list of documents appended with the plaint (فہرست دستاویزات پیش کردہ) which was signed by presiding officer on 05.01.2014, in which Exh.P4 has not been referred.

22. Similarly, I have gone through the list of reliance in terms of Order VII Rule 14(2) of CPC, wherein Exh.P4 (بیان حلفی) /authority letter dated 25.10.1999 was found mentioned in Column No.2,

but it has been observed that the original Urdu version of the document in question was filled with black ballpoint as Column No.1 i.e. (عرضی دعویٰ کیا تم جواب دعویٰ کے ساتھ کوئی دستاویز داخل کر چکے، کون کون) has been filled with black ballpoint referring (جی ہاں بمطابق فہرست دستاویزات), while the second column

i.e. (کیا تم کوئی اور دستاویزات پیش کرو گے جو تمہارے قبضہ، اختیار میں ہیں اور کس کس کے قبضہ میں ہیں), which has been answered while using the same black ballpoint with (جی ہاں), while rest of the entries there-under have been made with blue ballpoint at

later stage in order to manage affairs of Exh.P4, which shows interpolation of record with aim to achieve ulterior motives of petitioner/plaintiff, therefore, any document which is not part of pleadings at the initial stage and even not mentioned in the list of documents in terms of Order VII Rule 14(1) CPC or relied in terms of Order VII Rule 14(2) CPC is not to be allowed to be placed on record as by placing Exh.P4 on record through a backdoor

intervention as reflected from the record gives a premium to the petitioner/plaintiff, who is not allowed to lead evidence beyond her pleadings and in case such evidence is led, the same could not be read, nor a party can be allowed to improve its case through evidence, if the case is not set up in the pleadings. Reliance is placed upon PLD 2010 Lahore 649 (Irshad Begum vs. Muhammad Rafique), 2008 SCMR 1682 (Muhammad Iqbal vs. Ali Sher) and 2007 SCMR 1682 Lahore Development Authority vs. Sultan Ahmad), and as such, the rule of *secundum allegata et probata* precluded a party from proving what had not been alleged or pleaded as held in 2014 SCMR 914 (Muhammad Nawaz alias Nawaza vs. Member Judicial Board of Revenue).

23. It is the sacred duty of courts of law to explore the ways and means for undoing what was unjust and unfair as a principle of administration of justice and this Court is of a clear view that Exh.P4 was not in existence at the time of filing of suit, which was placed on record through a backdoor by interpolation in record of the learned Trial Court after filing of suit. This aspect has not been noted by both the Courts below, though the suit of petitioner has rightly been dismissed vide impugned judgments, therefore, contents of document Exh.P4 could not be looked into by any stretch of imagination despite the fact that Exh.P4 was exhibited and no objection was raised by Respondent No.2, even otherwise, Order XIII Rule 2 CPC permits to bring on record any such document if good cause is shown to the satisfaction of court for non production thereof and in such eventuality the court receiving any such evidence shall record the reasons for doing so, otherwise the

language referred in Order XIII Rule 2 CPC is mandatory to be implemented as the phrase used by the legislature i.e. *"no documentary evidence in the possession or power of any party which should have been, but has not been produced in accordance with requirement of Rule 1 shall be received at any subsequent proceedings"*, therefore, Exh.P4 was not placed on record, even on the first hearing of the suit as required under Order XIII Rule 1 CPC as it was not found mentioned in the list at that very time.

CONCLUSION

24. I have gone through the concurrent findings of both the Courts below, wherein no legal defect has been found and both the Courts below have rightly passed the judgments and dismissed the suit for specific performance in a right manner under the law. It is trite law that concurrent findings of facts could not be interfered with as there is neither any error on record nor any factor of misreading or non-reading of evidence is available on record, even no illegality has been observed therein. Reliance in this regard is placed upon 2016 SCMR 24 (Nazim-ud-Din vs. Sheikh Zia-ul-Qamar), 2007 SCMR 953 (Province of Punjab through Collector Sargodha vs. Muhammad Akhtar), 2014 SCMR 1469 (Mst. Zaitoon Begum vs. Nazar Hussain), 2000 SCMR 431 (Anwar Zaman vs. Bahadur Sher) and 2010 SCMR 817 (Moulvi Muhammad Azeem vs. Alhaj Mehmood Khan Bangish).

25. Besides the above referred legal position, it is not obligatory upon the Courts to pass a judgment for specific performance of agreement in favour of plaintiff in all cases, even in cases where agreement has been

proved as the relief of specific performance is discretionary. Reliance is placed upon 2015 SCMR 828 (Adil Tiwana vs. Shaukat Ullah Khan Bangash), 2017 SCMR 1696 (Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad) and 2018 SCMR 769 (Shaukat Ullah Khan Bangash vs. Adil Tiwana). Although, in present case the payment of sale consideration to Respondent No.2 is not proved by the petitioner. Respondent No. 2 i.e. allottee of the suit plot had not authorized Respondent No.1 to alienate her property in any manner, even she was not privy of contract with petitioner/plaintiff qua the suit plot, therefore, there is no occasion to pass a decree for specific performance under the law. The record has been manipulated and document Exh.P4 has been brought on record unauthorizedly and illegally, which was not part of pleadings and not even referred in the list of reliance in the first instance, and the so called power of attorney Exh.P4 was un-registered and the attorney i.e. respondent No.1 himself has failed to appear before the Court as a witness and as such, the best evidence was withheld by the petitioner.

26. By virtue of above discussion, the instant civil revision is misconceived and the same is hereby DISMISSED.

27. Before parting with this judgment, it has been observed that the petitioner has deposited installments against the suit plot through Exh.P8 and Exh.P8/1 to Exh.P8/7, therefore, petitioner is entitled to receive the same and as such, the legal heirs of Respondent No.2 are directed to return the amount by way of depositing the same in the learned Trial Court/Executing Court account, within the period of 30

days. The learned Trial Court shall release the same in favour of petitioner after its verification.

28. The entire amount of sale consideration i.e. Rs.275,000/- was received by Bashir Ahmad/Respondent No.1 from Mst. Syeda Irshad Fatima Rizvi/petitioner through Exh.P2 (agreement to sell), therefore, he is directed to return the same to the petitioner along with additional amount of Rs.500,000/- as compensation, within the period of 30 days, by applying the principles settled by the apex Court in cases reported as 2017 SCMR 902 (Malik Bahadur Sher Khan vs. Haji Shah Alam) , 2015 SCMR 21 (Muhammad Iqbal vs. Mehboob Alam), 2010 SCMR 1507 (Shakeel Ahmad vs. Mst. Shaheen Kousar), and 2018 SCMR 769 (Shaukat Ullah Khan Bangash vs. Adil Tiwana). The original documents i.e. Exh.P6 (provisional offer of allotment) along with schedule of payment Exh.P7, Exh.D1 and Exh.D2 shall be returned to the legal heirs of Respondent No.2 i.e. Sharafat Begum, through the learned Trial Court/Executing Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 3rd September, 2019.

JUDGE

APPROVED FOR REPORTING.

Khalid Z.