

ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Civil Revision No. 114/2013

Malik Sajid Aziz and another

Versus

Muhammad Mushtaq and another.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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(07)

10.09.2020

Sardar Anzar Iqbal Khan, Advocate for the petitioners.

Ms. Wajiha Pervaiz, Advocate for respondent No.2.

C.M No. 624/2019

Through the instant application, the applicants intends to transpose themselves in place of (petitioner Malik Abdul Aziz) being legal heirs due to his demise on 24.09.2015 and to that extent Death Registration Certificate alongwith Family Registration Certificate has been appended with the said application.

2. In view of above, instant application is allowed. However, petitioner has already submitted the amended memo of petition by impleading the description of the parties, whereby applicants i.e. Malik Sajid Aziz and Malik Asif Aziz have been arrayed as petitioners being the legal heirs of Malik Abdul Aziz (deceased).

MAIN CASE.

MOHSIN AKHTAR KAYANI J. Through the instant civil revision, the petitioners father have assailed the concurrent findings of the Courts below, whereby suit for declaration, specific performance,

permanent and mandatory injunction of agreement dated 05.01.1994 referred as Exh.P1 has been dismissed vide judgment and decree dated 24.05.2011, passed by learned Civil Judge, 1st Class, Islamabad and the same has been maintained by learned Additional District Judge (West), Islamabad vide judgment and decree dated 15.01.2013.

2. Learned counsel for the petitioners contends that father of the petitioners has entered into agreement dated 05.01.1994 Exh.P1 to purchase property i.e. Unit No. 4 comprising of basement, one shop, veranda, one bath and Flat without roof against the total sale consideration of Rs. 725,000/-. However, he had paid Rs.600,000/- through pay order and Rs.100,000/- in cash at the time of execution of agreement and Rs.25,000/- was left, which was to be paid at the time of transfer of the property. He further contends that the defendant has been proceeded against ex-parte and he had produced two witnesses alongwith his own testimony to prove his case, even he has produced the sale deed Exh.P2, which was executed by two of the sellers for their share, except Muhammad Mushtaq/respondent No.1 and as such the entire agreement of sale consideration and transfer of part of property including complete possession has been admitted by the defendant side by his implied conduct, but all these aspects have not been considered by the learned Trial Court as well as by learned First Appellate Court. It has lastly been

contended that the Courts below have misread the entire evidence.

3. Conversely, learned counsel for respondent No.2/CDA contends that petitioners have failed to discharge their onus to prove the contents of the agreement under Qanun-e-Shahadat Order, 1984, therefore, their suit has rightly been dismissed by the Courts below.

4. This Court has issued notices to respondent No.1 through substituted mode of service by publication in Daily Pakistan dated 09.04.2020 and office has appended the newspaper Daily Pakistan, which includes the publication of the notices in the name of respondent No.1, however, no one has put appearance on his behalf, hence, respondent No.1 has been proceeded against ex-parte.

5. Arguments heard and record perused.

6. Perusal of record reveals that the father of the petitioners entered into an agreement with respondent No.1 Exh.P1 dated 05.01.1994 to purchase suit property i.e. Unit No. 4 comprising of basement, one shop, veranda, one bath and Flat without roof against the total sale consideration of Rs. 725,000/-. The agreement was executed with three parties namely Abdul Rasheed, Khawaja Shakeel Ahmed and Muhammad Mushtaq/respondent No.1, who were owner of the suit property, however, the property was not transferred in the name of father of the petitioners, who was constrained to file a suit on 06.12.2004, however, respondent No.1 has been proceeded

ex-parte, whereafter the petitioner/Malik Abdul Aziz has recorded his ex-parte evidence in shape of three witnesses including himself.

7. The petitioner in order to prove his case and to discharge his onus in terms of Article 117 of the Qanun-e-Shahadat Order, 1984 has produced Malik Asif Aziz/PW-2, his real son, who is not witness of the said agreement, similarly, he has also produced Raja Muhammad Hanif/PW-3, who is stated to be the nominee of the petitioner/Malik Abdul Aziz being an actual transferee, even he was not the witness in the said agreement.

8. The entire record reflects that the petitioner/Malik Abdul Aziz has produced Exh.P2 a sale deed of the suit property, whereby two of the sellers have transferred their shares from a joint property vide registered sale deed No. 3236 dated 10.07.2004 referred as Exh.P2, but this does not absolve the petitioner to independently prove the entire case as required in terms of Article 17 read with Article 79 of Qanun-e-Shahadat Order, 1984, whereby it is the obligation of the petitioner to discharge the onus, especially where entire suit was based upon the agreement to sell, which requires to be proved through contents as well as its execution in an independent manner, which is lacking in this case, therefore, this Court is fortified with the view taken in the case law reported as **1999 SCMR 2004 (Ghulam Rasul represented by Legal Heirs Vs. Muhammad**

**Hussain and 4 others) and PLD 2019 Islamabad
406 (Arif-uz-Zaman Vs. Mst. Sabir Jan and others).**

9. It has also been observed that the agreement as well as its contents have not been proved by the petitioner, even suit was filed with delay of 10 long years without valid justification, whereby the limitation period provided for specific performance is three (03) years, which has also not been adhered to in a proper manner.

10. For what has been discussed above, instant civil revision is misconceived and same is hereby **DISMISSED.**

(MOHSIN AKHTAR KAYANI)
JUDGE

RAMZAN