

2012 C L C 94 [Lahore]

Before Muhammad Ameer Bhatti, J

MUHAMMAD SARWAR KHAN through Legal Heirs----Petitioner

Versus

SALAMAT ALI and 2 others----Respondents

Civil Revision No.943 of 2003, decided on 19th July, 2011.

(a) Qanun-e-Shahadat (10 of 1984)---

----Arts. 17(2) & 79---Specific Relief Act (I of 1877), S.12---Suit for specific performance of sale agreement---Execution of sale agreement by brother (male defendant) for himself and as general attorney of his real sister/co-owner (female defendant) in suit-land---Execution of sale agreement admitted in written statement by male defendant on his behalf as well as on behalf of female defendant by mentioning her name therein without obtaining her signatures thereon---Plaintiff in support of his claim examined himself, and scribe and one marginal witness of sale agreement---Non-production of evidence by male defendant---Suit decreed by Trial Court upheld by Appellate Court in appeal filed thereagainst by male defendant impleading therein female defendant---Validity---Examination of scribe would not fulfil mandatory requirement of attestation by him separately---Plaintiff must have produced marginal witnesses to prove execution of sale agreement---Male defendant had admitted execution of sale agreement, but his such admission could not apply to female defendant---Male defendant was neither general attorney of female defendant nor did she give any consent to him for entering into sale agreement---Female defendant had not filed written statement and no proof of her service was available on record---Duty of plaintiff before entering into sale agreement was to verify existence or validity of general power of attorney as claimed by male defendant on behalf of female defendant---Courts below were duty bound to take due care and caution in matters relating to ladies especially illiterate ones---Courts below had decreed suit by relying upon admission of male defendant and had given property of female defendant to plaintiff without any consideration, her consent and giving her an opportunity of hearing---Female defendant was not party to sale agreement, thus, her land could not be transferred to plaintiff in garb of sale agreement executed by male defendant---High Court upheld impugned decrees to extent of male defendant, but set aside same to extent of female defendant and dismissed suit to her extent, in circumstances.

PLD 2011 SC 241; PLD 2011 SC 323; 2008 SCMR 1639; 2009 YLR 289; 2007 CLC

1885 and 2011 SCMR 286 **ref.**

PLD 2011 SC 241 **rel.**

(b) Qanun-e-Shahadat (10 of 1984)---

----Art. 79---Sale agreement, execution of---Proof---Scope---Examination of scribe would not fulfil mandatory requirement of attestation by him separately---Marginal witnesses must be produced for such purpose.

PLD 2011 SC 241 **rel.**

(c) Qanun-e-Shahadat (10 of 1984)---

----Art. 79---Admitted document, execution of---Proof---Such document would exclude from fulfilment of requirement of Art.79 of Qanun-e-Shahadat, 1984.

PLD 2011 SC 241 **rel.**

Muhammad Riaz Sathi and Ch. Sohail Arif Sandha for Petitioner.

Muhammad Hussain Awan for Respondent No.1.

Mehmood Ali Khan for Respondents Nos.2 to 4.

Date of hearing: 14th July, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.--- Through this C.R., the petitioner has challenged the judgment and decree dated 6-11-1995 and 10-4-2000 passed by the learned Civil Judge and learned Additional District Judge Narowal respectively, whereby the suit for possession through specific performance has been decreed in favour of the respondent No.1.

2. The relevant facts necessary for the decision of this C.R. are that the respondent No.1 filed a suit for possession through specific performance against the petitioner and respondents Nos.2 to 4 for land measuring 85-K and 17-M on the basis of agreement to sell dated 8-1-1989, for a consideration of Rs.72,000/-, which was paid at the time of agreement and possession has also been claimed to have been handed over to the respondent No.1 according to the agreement to sell.

3. The suit was contested by the defendants through a written statement filed on behalf of all the defendants Nos.1 to 4. It will not be out of place to mention here that the written statement has been filed by the petitioner. There are no signature on behalf of the respondents Nos.2 to 4, however, it is mentioned in the written statement that he was a general attorney and that the agreement to sell has also been executed on behalf of respondents Nos.2 to 4 by the petitioner, as their general attorney.

4. After filing the written statement, issues were framed and the plaintiff produced his evidence as P.W.1 to P.W.3. P.W.1 was scribe of the agreement, P.W.2 was Ghulam Hussain, one of the marginal witnesses P.W.3 plaintiff and documentary evidence was also produced including the agreement to sell. The right of the defendants for leading evidence had been closed under Order XVII, Rule 3, C.P.C. due to non-compliance of the order of the Court and the suit was decreed vide judgment dated 6-11-1995. Appeal was filed by the present petitioner by impleading the co-owners/the present respondents Nos.2 to 4, the real sister of the petitioner. Appeal was dismissed by the learned Additional District Judge vide his judgment dated 10-4-2000 and upheld the findings of the learned Trial Court, hence this revision petition.

5. The learned counsel for the petitioner contends that the agreement to sell has not been proved according to the provisions of law i.e. Article 79 of Qanun-e-Shahadat. Only one marginal witness has been produced, which does not fulfil the requirement of Qanun-e-Shahadat, where the two marginal witnesses have to be produced to prove the agreement to sell. Hence, the suit was liable to be dismissed. Further contends that the scribe of the impugned document (agreement to sell) cannot be considered as marginal witness of the document, hence the requirement of law in terms of Article 79 of the Qanun-e-Shahadat has not been adhered to and the suit must have been failed. He has relied on case law reported as **PLD 2011 SC 241**, Further added that neither he was the attorney of the respondents Nos.2 to 4 nor any authorization had been conferred upon him by the said respondents for the execution of this agreement, therefore, the agreement itself is void. Further pointed out that grant of decree for specific performance is a discretionary as provided under section 12 of Specific Relief Act and the same can be refused where it may appear to be inequitable or may cause hardship to the other side. Reliance has been placed as **PLD 2011 SC 323**.

6. Learned counsel appearing on behalf of respondents Nos.2 to 4 contends that both the Courts below have failed to consider this aspect of the case that the respondents Nos.2 to 4 neither had given joint power of attorney to the petitioner nor any power of attorney has ever been produced in the Court. Even the respondents Nos.2 to 4 had not signed the written statement and the present written statement cannot be considered to have been filed by the

present respondents Nos.2 to 4, As such, the petitioner neither having any power to file the written statement on their behalf nor empowered to sell their land. The written statement and the agreement to sell on their behalf cannot be considered the stand of the respondents. They have been condemned unheard at every stage and never served in any proceedings except this. Further contends that neither the petitioner has any authority to enter into the agreement to sell on their behalf nor they have issued any power of attorney in this behalf in favour of the petitioner. So, the transaction on their behalf is illegal, void, unlawful, and they cannot be considered liable if any act on their behalf has been done by the petitioner without any power. Further contends that it was the duty of the respondent No.1 to verify about the presence of the general power of attorney, hence he cannot be blamed to the present respondents for the non-fulfilment of the agreement to sell because it cannot be considered on their behalf nor they directly participated in the agreement, hence suit to their extent, at least, is liable to be dismissed. The Courts below have failed to consider this aspect of the case which has resulted in miscarriage of justice. Further contends that this Court otherwise has the jurisdiction under section 115 of C.P.C. for passing any equitable order in the interest of justice on its own. Since the matter is pending before this Court, this Court, while exercising the jurisdiction provided under section 115 of C.P.C., can extend justice to the present respondents Nos.2 to 4.

7. Conversely, respondent No.1/deed-holder contends that the written statement had been filed on behalf of the petitioner as well as the respondents Nos.2 to 4. Even in the written statement, the petitioner has admitted about the execution of the agreement to sell even on behalf of respondents Nos.2 to 4 by disclosing the fact that he is general attorney of the respondents Nos.2 to 4. So, the Article 79 of the Qanun-e-Shahadat is not attracted rather the Article 130 of the Qanun-e-Shahadat having the full implication, as the agreement to sell has been admitted by the petitioner as well as respondents Nos.2 to 4 in their written statement. He further contends that it is sufficient to produce one marginal witness and the scribe of the document, who can be considered as a marginal witness if he is witness of the transaction. Since scribe is witness of the transaction as well as the consideration, the requirement of the provisions has been fulfilled. He has relied on the case-law reported as **2008 SCMR 1639**. Further contends that where the agreement is admitted, there is no need to further prove it. He has relied on case-law reported as **2009 YLR 289 and 2007 CLC 1885**. Learned counsel for the respondent No.1 contends that the civil revision is also time-barred and section 5 is not applicable and the civil revision is liable to be dismissed on this sole ground. He has relied on **2001 SCMR 286**.

8. I have heard the learned counsel for the parties and perused the record.

9. There is no denying the fact that the petitioner has not denied the execution of the agreement to sell on his behalf as well as on behalf of the respondents Nos.2 to 4. Even he has filed the written statement in which he admitted not only the execution of the agreement to sell on his behalf but also on behalf of the respondents Nos.2 to 4. Even the written statement has been filed on their behalf declaring himself as their general attorney. It is well-settled law that the marginal witnesses must have been produced as the writer does not fulfil and meet the mandatory requirement of attestation by him separately. I will get the support from the judgment reported as **PLD 2011 SC 241** where it has been

held:---

"Therefore, in my considered view 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 fulfil 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".

I have the honour to go through this judgment as a whole and gather from this judgment that the admitted documents have been excluded from the fulfilment of the requirement of Article 79 of the Qanun-e-Shahadat. For that matter, I would like to reproduce the relevant portion of the judgment as under:---

"For the submission that the agreement in this case was received in evidence without any objection, therefore, it cannot be excluded from consideration, suffice it to say that the submission is wholly misconceived, the said agreement was never tendered in evidence or exhibited, rather was only marked "A". Besides the said rule shall not be applicable to the case which comes within the mischief of Article 79, on account of its language as explained above that such document shall not be used in evidence, therefore, it is the command of the law to exclude it from evidence, until it is admitted to have been executed by the side against whom it is sought to be used and enforced." (Underline by me for emphasis).

Nevertheless, the facts and circumstances of this case to the extent of the petitioner constrain this Court to apply the execution of agreement to sell as its execution has not been denied by the petitioner but his admission cannot be considered to be applicable to the extent of respondents Nos.2 to 4 due to many reasons. One is that the petitioner executed the agreement to sell in favour of respondent No.1 on behalf of the respondents without any power of attorney on their behalf. Second is that there is no written statement on behalf of the respondents Nos.2 to 4, even there is no proof of their service.

10. I have minutely examined the written statement which has been filed by the petitioner but their names have been mentioned. The written statement spells out the specific words as:-

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The written statement filed by the petitioner/defendant No.1 leaves not even an iota of doubt in the mind of this Court that neither the petitioner was the general attorney of the respondents Nos.2 to 4 nor he has been given any consent by them for entering into the agreement to sell. Even it was the duty of the respondent No.1 /plaintiff/alleged vendee before entering into an agreement, to verify the existence/validity of general power of attorney as claimed by the petitioner on behalf of the respondents Nos.2 to 4. Since the respondent No.1 on his own risk and cost, ventured an agreement to sell on behalf of the respondents Nos.2 to 4, so he cannot blame the present respondents Nos.2 to 4 for any wrongful act committed by the petitioner. In the suit proceeding, neither the learned Trial

Court nor the First Appellate Court have considered this aspect of the case. They did not even bother to go through the written statement submitted by the petitioner on behalf of the respondents Nos.2 to 4/females and it has been time and again observed by the Hon'ble Supreme Court as well as this Court for taking due caution and care in the matters relating to ladies --- especially the illiterate ones. It is astonishing to this Court that there is no general power of attorney on behalf of the respondents Nos.2 to 4/females in favour of the petitioner nor they have signed the written statement, even then both the Courts below blindly passed the decree in favour of the respondent No.1 on the admission of the petitioner. That admission may have been taken into consideration to the extent of the petitioner but it was the duty of both the Courts below to verify this fact whether there was any general attorney in favour of the petitioner at the time of executing the document. Whether they have or have not been represented through any general attorney and whether the general attorney has or has not been filed by the person in the court proceedings, who claimed to be the attorney of filing written statement on their behalf. These all aspects of the case have been altogether ignored by both the courts below and only taking the admission of the petitioner No.1 into consideration, passed the decree in favour of the respondent No.1, thus giving the property of the respondents Nos.2 to 4 to the petitioner without any consideration, without their consent, without giving them a chance of hearing.

11. In view of the above discussion, I set aside the judgments and decrees of both the Courts below to the extent of respondents Nos.2 to 4 while exercising the power under section 115, C.P.C. to dispense complete justice. This court feels obligated to set aside the decree against the respondents Nos.2 to 4, as they were never party to the agreement to sell and their land cannot be alienated to the respondent No.1 in lieu of the agreement to sell executed by the petitioner in favour of respondent No.1. Consequently, this revision petition is dismissed. However, the decree of the Court below is set aside to the extent of respondents Nos.2 to 4 and the suit of the respondent No.1 is hereby dismissed to the extent of respondents Nos.2 to 4 but shall remain decreed to the extent of the petitioner. No order as to costs.

S.A.K./M-297/L

Order accordingly.