JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(*Judicial Department*)

C.R No.358-M/2011

Sultanat Khan and another..... Petitioners.

Versus

Sadbar Khan and others..... Respondents.

Present: ***Mr. Hazrat Rehman, Advocate for Petitioners.***

M/S. Asghar Ali and Amjad Hussain, Advocates for Respondents.

Date of hearing: **03.10.2022**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This single judgment in the instant petition shall also decide connected ***C.R No.357-M/2011*** titled "***Sultanat Khan and another Vs. Sadbar Khan and others***" and ***C.R No.1284-P/2011*** titled "***Sadbar Khan and others Vs. Sultanat Khan and others***" as all these petitions are arising out of one and same consolidated judgment dated 05.07.2011 of the learned Additional District Judge/Izafi Zila Qazi, *Chakdarra*, District Dir Lower, whereby, the learned Appellate Court through impugned judgment and decree has modified the findings of the learned trial Court dismissing suit of plaintiffs No.1 to 4 against defendants and decreeing it in favour of plaintiffs No.5 to 12 against defendants, and granted a preliminary decree in favour of respondents/ plaintiffs against all the defendants.

2. Facts lying in the background of all these petitions are that respondents No.1 to 11 of instant petition alongwith one Tajbar Khan filed a suit seeking therein declaration that they are owners in possession of the property as described in the headnote "الف" of the plaint, commonly known as *Kotkay Patay*, *Spina Khawro* of the kind of *Shawara* (barren/unfertile) with which, the petitioners/ defendants have got no concern whatsoever and as such they cannot deny from ownership of plaintiffs. A prayer for recovery of possession was also sought alongwith a relief for permanent injunction restraining the petitioners/defendants from altering the nature of property through any mean, by alleging therein that they are the permanent residents of village *Ramora* Tehsil *Adenzai* from their ancestors being Afghan caste and are original owners (*Asal Malikan*) of the property from hill to plain (غرتا سم) whereas, the petitioners/ defendants have migrated from Dir Upper to this area; that they had been the tenants of plaintiffs and were put in possession of the property only as mortgagees and as care taker of the disputed property which is adjacent to the mortgaged property. It was also alleged that few days ago, when the they proceeded to disputed property for the purpose of its division/partition amongst the owners, the petitioners/ defendants denied from their proprietorship; that the

petitioners/ defendants are not original owners of this area rather they have purchased certain property and that they being *Malikan-e-Qabza* have no interest in common land (*Shamilat*). Suit was resisted by the petitioners/ defendants through their written statement on the grounds that the disputed property, at the spot, is a barren hill; that plaintiffs No.1 to 3, 11 and predecessor in interest of plaintiff No.12 had sold the disputed property through different deeds at different times, whereas the plaintiff No.4 Majeed Ullah Khan & plaintiffs No. 5 to 10 have no owned property in the estate are no more owners in the common land which is barren property. It was further alleged by them in written statement that plaintiffs No.5 to 10 were given a specific portion in *Shawara* land known as *Babu Ghundai* at *Spina Khawaro*, which they had sold in favour of Ghulam Sher Khan, whereas other portion known as *Palai Gul Patay* is still in their possession. In addition to above, it was also alleged that they had been in possession of the property for last 38 years after its purchase from Hakim Khan, the plaintiff No.11 in lieu of Rs.1,50,000/- and that they have made it cultivable, constructed houses and grown trees therein, by spending a huge amount, thus, they are entitled for improvements if the suit is decreed against them. After a proper contest, on completion of evidence, suit was decreed in

favour of plaintiffs No.5 to 12, and to the extent of plaintiffs No. 1 to 4 it was dismissed by learned trial Court through its judgment and decree dated 24.02.2007. The plaintiffs No. 1 to 4, being aggrieved from dismissal of their suit, preferred Civil Appeals No.16/13 of 2007, whereas present petitioners/ defendants filed Civil Appeal No.17/13 of 2007 for setting aside decree passed against them in favour of plaintiffs No.5 to 12. Both the appeals were consolidated and after hearing same, learned Appellate Court through its judgment & decree dated 05.07.2011 modified the judgment and decree of the learned trial Court, whereby dismissal of suit to the extent of plaintiffs No.1 to 3 was maintained, however, the decree passed by the learned trial Court was converted into preliminary decree against the petitioners/ defendants while for determination of cost of improvements in suit property it was directed that these factors shall be considered during the course of conversion of preliminary decree into final decree, hence, all these petitions.

3. Arguments heard and record perused.

4. It appears from the record that there were three sets of plaintiffs i.e., (i) plaintiffs No.1 to 4; (ii) 5 to 10; and (iii) 11 & 12. Though the plaintiffs alleged that the defendants were their tenants in other agricultural properties and were care takers of disputed of *Shawara* (barren land) while defendants alleged

that through Ex.PW5/1, they have become the owners of property in lieu of Rs.1,50,000/- and deed to this effect was executed on 11.01.1996. Neither the petitioners/defendants have alleged themselves to be the original owners nor they have denied from the title of the plaintiffs except No. 4 & 5 to 10 and that too on the ground that plaintiffs No.4, was not the owner in the estate for the purpose of his claim in the common *shawara* land likewise, they have asserted that plaintiffs No. 5 to 10 were allotted other properties from the common land therefore, they have no shares in the disputed property. In such an eventuality their claim rests on the deed vide which they alleged to have purchased the property from plaintiffs No. 1, predecessor in interest of plaintiffs No. 2 & 3 and plaintiff No. 11 (Hakim Khan) through deeds Ex.DW5/1 & Ex.DW7/1 (written on both sides of paper in Persian language). During the course of arguments Mr. Hazrat Rehman Advocate who is representing the petitioners stated at the bar that the overleaf of Ex DW 7/1 is regarding the claim of the petitioners. Though the front page bears the signatures of executants and the marginal witnesses but the overleaf of which reflects only the signatures of Musafer Khan and Tajbar Khan. When the petitioners claimed to have purchased the property on the basis of Ex DW 7/1 then they were required to prove it. Admittedly,

it was not signed by the marginal witnesses. In such circumstances the evidence produced by the parties requires reappraisal for substantial justice, especially when the petitioner alleged that both the sides of the deed were written in the same sitting. Taj Muhammad, Hazar Khan, Jahan Bakht and Abdul Wahab were named as marginal witnesses of the deed and the petitioners produced Habib Khan the brother of Abdul Wahab to prove his signature as DW-6, Hazar Khan as DW-7, and Taj Muhammad as DW-8. DW-6 deposed in his cross examination that he couldn't identify the signature of his brother Abdul Wahab. DW-7 deposed that the deed was not signed by him and further deposed that it bears only his name but not his signature and that in his presence no one had singed it. Statement of Taj Muhammad is of worth perusal who in his cross examination deposed that he is illiterate, he had not thumb impressed the deed, in his presence only single side of the paper was scribed and lastly, in his presence only Jahan Bakht signed the paper. Deed reflects the name of Jahan Bakht and not his signature. Thus, none of the signatories of the deed relied upon by the petitioners appeared before the Court in order to substantiate their contentions for grant of relief in their favour. When the deed was evaluated, learned counsel for petitioners contended that it was scribed on 08.01.1965, being

30-years old document caries presumption of truth in consonance with the provisions of Evidence Act, 1872. No doubt that presumption of truth is attached to 30-years old document but mere 30 years age of a document would not provide any justification for its proof unless it is proved in accordance law, when it was questioned. The sole ground that the age of the document is 30 years would not be taken as gospel truth, when the genuineness of the document is disputed, it the duty of the Court to determine the question of its genuineness and correctness because age of the document alone would not amount to be a proof about the correct contents of such document. If genuineness of a document was susceptible to suspicion, the Court could refuse to raise presumption and could ask for the proof of its contents. Ref: "***Ch. Muhammad Shafi vs. Shamim Khanum***" (**2007 SCMR 838**). The Hon'ble Supreme court has held that:

> "It is settled law that 'presumption qua thirty years old document under Article 100 of Qanun-e-Shahadat Order, 1984 is permissive and not imperative. The Court must consider the evidence of the documents, in order to enable it to decide whether in any specific case it should or should not presume proper signature and execution. It is settled law that the Court should be very careful about raising any presumption under Article 100 in favour of old documents specially when the same are produced during the trial of suits in which under proprietary rights are set up on the basis of such documents/deeds. It is also settled law that the Court may refuse to apply the presumption where evidence in proof the document is available, or where the evidence has produced and disbelieved".

Reference can also be on "***Muhammad Naseem Fatima's*** case (**PLD 2005 Supreme Court 455**).

5. More Particularly, when the defendants were alleging to have purchased the property from some of the plaintiffs as Sadbar Khan who was the son Musafar Khan alleged executant, entered in the witness-box but he was not confronted with the signature of his father in terms of documentary evidence produced and relied upon by the petitioners. It is important to note that the document Ex.DW7/1, which was later on referred to Forensic Science Laboratory for its verification, and the report was placed on record but evidentiary value of such report even if it is positive could not help the petitioners because of infirmities in the statement of PWs as discussed in the preceding Para. There is no cavil with the proposition that sole opinion of expert on its own cannot be made basis for determining the admissibility of a document when direct evidence is available, and goes against the party and the expert opinion, which otherwise is nothing but confirmatory and explanatory to direct evidence. Rel: ***Qazi Abdul Ali and others v. Khawaja Aftab Ahmad*** (**2015 SCMR 284**). Moreso, the expert report is not binding upon the Court. Reliance may be placed on the case of "***Mrs. Perin J Dinshaw***

v. Mubarak Ali and another" **(2016 YLR 251)**, wherein it was enunciated that:

> "Even the report of Expert is an opinion under the law and it is not binding upon the Court. Undoubtedly, the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof, as the opinion of Handwriting Expert is a very weak type of evidence and the Expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence inspiring evidence is available. Light can be taken from the judgment of august Supreme Court of Pakistan reported as "2006 SCMR 193 (Mst. Saadat Sultan and others v. Muhammad Zahur Khan, and others)".

6. Turning to the other crucial aspect of payment of sale consideration, neither the witnesses of petitioners nor the attorney could prove the payment of sale consideration to their alleged vendors. When they have alleged to have purchased the property, they were bound to prove the sale and payment of sale consideration when it was disputed by other side. Non-payment of sale consideration would amount to no sale in favour of vendee. Hon'ble Supreme Court in case titled ***"Sardar Ali versus Khan"*** **(2005 SCMR 1583)** has held:

> "It is true that P.W.3 is scribe of the document but he had failed to furnish trustworthy evidence to establish that the 'transaction in respect of sale of land took place between the parties in pursuance whereof the petitioner paid Rs. 1,00,000 out of total sale consideration of Rs.1,25,000. Since the document (Exh.P.1) has not been proved on record according to law, therefore, no exception can be taken to the impugned judgment which is based on correct appreciation of evidence available on record."

7. In ***Muhammad Rasheed Khan's case*** **(2009 SCMR 740)** it was held by the apex Court that:

> "This is an admitted fact that only one marginal witness to the agreement to sell was produced and he also did not support the claim of the appellant regarding payment of sale consideration in his presence as was mentioned in the agreement therefore, the assertion of the respondent that her signature on the agreement were obtained deceitfully would be sufficiently supported by the evidence on the record. The genuineness of the agreement and the transaction of sale was not proved as per requirement of Article 17 read with Article 15 of Qanun-e-Shahadat Order, .1984 and this is settled law that relief of specific performance cannot be granted unless the execution of sale agreement as per requirement of law and payment of sale consideration in part or full is proved."

The apex Court in case titled "***Ghulam Mustafa versus Muhammad Yahya"*** **(2013 SCMR 684)** has held that:

> "This is an admitted fact that only one marginal witness to the agreement to sell was produced and he also did not support the claim of the appellant regarding payment of sale consideration in his presence as was mentioned in the agreement therefore, the assertion of the respondent that her signature on the agreement were obtained deceitfully would be sufficiently supported by the evidence on the record. The genuineness of the agreement and the transaction of sale was not proved as per requirement of Article 17 read with Article 15 of Qanun-e-Shahadat Order, .1984 and this is settled law that relief of specific performance cannot be granted unless the execution of sale agreement as per requirement of law and payment of sale consideration in part or full is proved."

Reliance may be placed on ***Mst. Hajyane Bar Bibi's*** case **(PLD 2014 SC 794)** & ***Moiz Abbas***'s case **(2019 SCMR 74).**

8. Moreover, learned counsel for the petitioners/ defendants contended that since the document was executed on

08.01.1965, therefore, neither it requires the proof as provided under Article 79 of *Qanun-e-Shahadat* Order, 1984 nor the provisions of Limitation Act, 1908 would be applicable to it, as in those days, no such law was extended to this particular area. Be that as it may, this matter requires determination being based upon the principle of preponderance of evidence, which on evaluation of it does not favour the petitioners/ defendants. Reliance in this regard may be placed on the law enunciated by the apex Court in the cases of "***Ch. Abdul Hamid Vs. Deputy Commissioner and others***" **(1985 SCMR 359)** and "***Ch. Muneer Hussain Vs. Mst. Wazeeran Mai alias Mst. Wazeer Mai***" **(PLD 2005 SC 658)**.

9. Lastly, the contention of Mr. Hazrat Rehman, Advocate representing the petitioners that when the status of the petitioners/ defendants was not proved to be that of care takers of the property then their possession is admitted by the plaintiffs qua the execution of document dated 08.01.1965, the suit of plaintiffs/respondents deserves dismissal is also misconceived because the document has not been proved and that permissive possession could not provide the petitioner any shelter for dismissal of suit and insofar as the adverse possession is concerned the same has been held by the apex Court to be repugnant to the injunction of Islam. The status of

the petitioners/ defendants when they could not prove their ownership in juxtaposition with the relief of the plaintiffs, whereby recovery of possession was sought against them, provides a cause of action to the plaintiffs when the petitioners denied from their title. Now, their status over the disputed property is nothing more than that of encroacher or trespasser which deserves their dispossession through process of law.

10. The findings of the learned Appellate Court in granting the decree for preliminary decree are against the law because the petitioners have no right to remain in possession. Similarly, the findings of learned trial Court are also the result of misreading and nonreading of record.

11. For the reasons discussed above, the judgment and decree of the learned Appellate Court to the extent of conversion of final decree into preliminary decree was against the law. The defendants have got no concern whatsoever and in such a way they could not justify their possession from the moment they denied the title of plaintiffs. Likewise, the findings of learned trial Court in dismissing the suit to the extent of plaintiff No. No. 1 to 4 are also held to be the result of misreading and nonreading of record, thus, it is held that:

> **The plaintiffs are the owners and defendants /petitioners have got no concern or interest with the disputed property, the findings of learned Appellate**

Court and learned trial Court to the extent of dismissal of plaintiffs' suit are set aside. Consequent to the acceptance of C.R No. 1284-Mof 2011, the suit of the plaintiffs stands decreed, whereas this Civil Revision No. 358-M of 2011 & C.R No. 357-M of 2011 are dismissed.

12. Keeping in view the legal aspect of the matters no order as to costs. All these petitions are disposed of in above terms.

Announced
03.10.2022

JUDGE

Sabz Ali/* (S.B) HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR

Office 12/10/2022 WR