

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL  
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

**Civil Petition No.3097/2015 and Civil Appeal No.1074/2015**

(On appeal from the judgments dated 29.9.2015 passed by the Peshawar High Court, D.I.Khan in C.R.No.65-D/2014 & CR-93-D/2014).

Abdul Hameed

**...Petitioner/Appellant**  
(In both cases)

Versus

Jahangir Khan

**..Respondent**  
(In both cases)

For the petitioner/appellant: Syed Mastan Ali Shah, ASC  
Mr. Mehmood A. Sheikh, AOR  
(In both cases)

For the respondent: Malik Qamar Afzal, ASC  
(In both cases)

Date of hearing: 09.7.2020

**JUDGMENT**

**Mazhar Alam Khan Miankhel, J.-**

A piece of land measuring 100 kanals situated in village Yaara *Manjhi Khel*, Tehsil & District Dera Ismail Khan (fully described in the plaint) was given to one Abdul Hameed son of Haq Nawaz (the petitioner) as a grant under Para-18(3) of 'The Land Reforms Regulation, 1972' (M.L.R. No.115) and a mutation No.204 was also attested on 22<sup>nd</sup> of June, 1992 in his favour. The same accordingly was incorporated in the revenue record in the name of petitioner. This mutation and its incorporation in the revenue record made the petitioner a full owner of

the land. The suit land and most of the adjoining lands are admittedly barren lands since long and as such recorded as '*banjar qadeem*' in the revenue record. Such barren lands under the law, are shown in possession of the owners and the petitioner being owner was also recorded as in possession of the land as reflected in copy of Record of Rights and *khasra girdawari* (Ex-PW-1/1 and Ex-PW-1/3 respectively). The only source of irrigation in the area is heavy rains. The petitioner in the year 2008 entered into an agreement to sell (the agreement) regarding the landed property referred above (the property) with one Jahangir Khan son of Muhammad Anwar (the respondent) against a sale consideration of Rs.7,00,000/- (Rupees seven lac). The sale consideration so agreed was paid to the petitioner as per details given in the sale agreement (Ex-PW-5/1). The agreement also contained a penal clause that in case vendee fails to pay the balance amount i.e. Rs.2,00,000/- (Rupees two lac) within the stipulated time, (20<sup>th</sup> March, 2009), the earnest money of Rs.5,00,000/- (Rupees five lac) would stand forfeited and the agreement would be deemed cancelled. Besides the above, a penal clause for the vendor was also there that if the vendor fails to perform his part of the agreement, he would be liable to pay back the sale consideration he received and would also be liable to pay Rs.500,000/-(Rupees five lac) as compensation.

2. The respondent was constrained to file a suit for declaration/possession/specific performance on failure of the petitioner to abide by the commitments he made through the agreement. The respondent in his suit alleged his complete ownership of the property after completion of sale, delivery of possession of the property and payment of entire sale consideration. So, also asked for a declaration besides specific performance of the agreement. The petitioner through his

written statement denied altogether the very existence of the agreement by alleging the same as fake and frivolous. After a regular trial, suit of the respondent was decreed by Civil Judge-V-Dera Ismail Khan vide his judgment and decree dated 10<sup>th</sup> September, 2012. The petitioner being aggrieved, filed an appeal against the same. The appellate court modified the judgment and decree of the trial court and disposed of the appeal in the following terms:-

- i. Defendant/appellant Abdul Hameed is obliged to either get the sale completed through attestation of mutation in favour of plaintiff Jehangir Khan within one month from the date when instant decree attains finality or he may opt to return the sale price Rs.700,000/- alongwith Rs.500,000/- as compensation to plaintiff within the same period. Defendant shall convey which of the two options he would exercise before the Executing Court.
- ii. If defendant does not exercise any of the said options, mutation shall be attested within one month of finality of decree and suit land shall become the ownership of plaintiff absolutely to the exclusion of defendant. If plaintiff is not already in possession, he shall immediately be placed in possession thereof thereafter.
- iii. In case defendant opts to pay back the sale price and compensation, the agreement between the parties shall stand rescinded and if possession is with plaintiff, it shall revert back to defendant at the time of payment of said amount.
- iv. Since defendant took a frivolous defense, he shall also pay to plaintiff the cost of suit and this appeal alongwith compensatory cost of Rs.10,000/-.

The manner and the mode, the appeal was disposed of by the appellate court, both the petitioner and the respondent filed their separate Civil Revisions before the Peshawar High Court, Bench Dera Ismail Khan. Civil Revision filed by the respondent (CR-93-D/2014) was accepted resulting in restoration of trial court's decree while Civil Revision of the petitioner

(C.R.No.65-D/2014) was dismissed through a common judgment and decree dated 29<sup>th</sup> September, 2015.

3. The petitioner still not satisfied with the findings, filed a Civil Petition for Leave to Appeal of this Court against dismissal of his Revision Petition *ibid* and a direct appeal against acceptance of respondent's Civil Revision *ibid* but the judgment and decree dated 29<sup>th</sup> September, 2015 of both the Civil Revisions, impugned herein, is common. So, we would also like to decide both the matters **(C.P. 3097/2015 & C.A.1074/2015)** through this single judgment.

4. We have heard the learned counsel for the parties and have gone through the entire record of the case.

5. Perusal of the record reveals that the bone of contention between the parties is an agreement to sell dated 18<sup>th</sup> December, 2008 (Ex-PW-5/1). The respondent being beneficiary of the agreement and fully aware of the bounden duty laid down by the law on him, has fully proved the transaction between the parties, execution of the agreement and its contents by producing one Ayaz Balouch (PW-2), the scribe, Haji Shams-ud-Din, (PW-3), the property dealer/middleman/negotiator of the transaction between the parties, witness of making payment of sale consideration to petitioner/vendor through his hands and also the attesting/marginal witness of the agreement, Abdul Waheed, (PW-4), the other attesting/marginal witness to the agreement. To further strengthen the above evidence, respondent also appeared as a witness, PW-5. The stance of the petitioner was a simpliciter denial and he also tried to take a shelter under MLR 115 regarding a ban/bar of alienation of land received in grant, for a specific period. Copy of mutation No.204 attested on 22<sup>nd</sup> June, 1992 (Ex-DW-1/1) was brought on the record by Abdul

Qadeem ADK/DW-1. DW-2 Fazal-ur-Rehman, Gardawar, produced a letter showing the names of proposed villages falling in the command area of Gomal Zam Canal/project, whereas petitioner himself appeared as DW-3.

6. Perusal of the entire evidence and the available record makes it abundantly clear that there was an agreement to sell between the parties and the petitioner had tried to deceive and mislead by denying the transaction but he miserably failed in his attempt to rebut the evidence led by the respondent. Simple denial in such like situations cannot be considered as sufficient to ignore the material evidence available on the record. Record of the case shows that no criminal or civil proceedings whatsoever were initiated by the petitioner against the respondent or the petition-writer who scribed the said agreement to justify and support his stance of denial. CNIC number of the petitioner was there alongwith his signatures on the agreement (Ex-PW-5/1) and there is no explanation and any action by him in this regard. Record produced by PW-2, would also reflect that brother of the petitioner, who also being a grantee of similar piece of land with same terms, had sold away his property to respondent against the same amount of sale consideration and that agreement was also scribed by PW-2 and said Haji Shams-ud-Din was also marginal witness to that deed. The role of Haji Shams-ud-Din, what appears from the record, is not simpliciter of a attesting/marginal witness rather he being a broker/property dealer negotiated a bargain with petitioner for respondent and a look at the statement of PW-5, Jahangir Khan, respondent, makes it abundantly clear that he is a truthful witness. He has narrated the chain of events in the manner, the same happened.

7. The main stress of the learned ASC representing the petitioner was that the attestation of the agreement in question was in violation of the definition provided in Section 3 of the Transfer of Property Act, 1882 (The Act) and his other limb of argument was that the respondent being beneficiary of the agreement was legally bound to prove the execution of the deed as required under Article 79 of the Qanuna-e-Shahadat Order 1984 (Qanuna-e-Shahadat). He further argued that the petitioner being a grantee of the land in question was not legally competent to alienate his property for a specific period as contemplated in the provisions of MLR 115.

8. We have also considered the case of the petitioner from this angle. Much stress was given on the argument that the sale agreement has not been attested as per requirements of Section 3 of the Act *ibid*. For ease of reference the word “attested” provided in Section 3 *ibid* is reproduced here-in-below:-

“3. Interpretation clause.- .....

“Immovable property” .....

“Instrument” .....

“Attested” in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature of mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary; (Emphasis supplied)

“Registered” .....

“Attached to the earth” .....

**“Actionable claim” .....**  
**“A person is said to have notice.....”**

Yes! a specific mode and manner of attestation of an instrument by two or more witnesses has been provided but the matter would not end here. This only refers to the mode of attestation of an instrument. The said instrument also requires to be proved under Qanun-e-Shahadat. Once it is proved in line with the different modes of proof of a document provided by Qanun-e-Shahadat according to the facts and circumstances of the case, only then, it can be relied upon and considered in support of a person claiming benefit of the same. When we see the very evidence brought on the record to prove the sale agreement, the same makes it clear that the document has been proved in accordance with the requirements of the Qanun-e-Shahdat, the scribe, the marginal/attesting witnesses, the man who negotiated the bargain between the vendor and the vendee appeared and supported the stance of respondent. The factum of payment of sale consideration to vendor also goes un-rebutted and un-shattered. The law on the subject is very much clear and settled. We cannot confine ourselves to that definition of attestation alone which in the end provides “but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary”. Presence of other attesting witness Haji Shams-ud-Din, PW-3 has also been admitted by the witness. So, the argument of the learned counsel regarding defective attestation under Section 3 of the Act does not get any support from the record and the law. In presence of such overwhelming evidence on the record, we don’t think that the argument advanced by the learned counsel would affect validity or enforceability of the agreement. We may add further that attestation and proof of a document are two different

and distinct/independent aspects. Contract/agreement of sale need not be in writing always. It can be oral as well. Offer and acceptance of a sale contract can also be implied but when terms and conditions of a sale are reduced into writing between the parties, then in that case that document of sale requires attestation as contemplated in Section 3 of the Act. When the sale agreement gets a shape in black and white then, it requires proof in line with the different modes of proof provided in Qanun-e-Shahdat as per requirements of the case. Reference can also be made to a five Member judgment of this court in the case of Muhammad Sattar v. Tariq Javaid (2017 SCMR 98).

We are living in a society wherein such like things are happening as a matter of routine. The parties due to lack of legal knowledge ask friends/persons available at the moment to sign the document as a witness and the witnesses also being unaware of the legal requirements sign the documents. We are also aware of the fact that fake and frivolous documents are also prepared by maneuvering the presence of two witnesses. We cannot shut our eyes to these aspects. These are the realities of practical life happening in the daily routine around us. Yes! If an objection regarding admissibility and genuineness of a document is raised by a party, then it will carry a heavy weight if the party denying the execution of a document does not stop there but takes a strong action under the law against the attempt made on his civil rights attached to the property. It is on the record that no such action was initiated by the petitioner against anybody and the learned counsel for the petitioner when asked during the course of arguments in this regard, he frankly conceded the fact that till date no such action has been taken. It is humanly impossible that a valuable property of a person is being fraudulently alienated and he simply denies the



execution and only defends the litigation of the person who is going to grab his property through fraudulent means. We do agree with the case law relied upon by the learned counsel in the case of Sardar Ali v. Sardar Bibi (2010 SCMR 1066) but the same in the peculiar circumstances of the case is not applicable and distinguishable. So, in view of the above discussion, we have no hesitation to hold that the respondent not only proved the execution of the document but also the contents of the document and the petitioner bitterly failed to rebut the evidence led by the respondent.

9. Now comes the last argument that the petitioner was not legally competent to enter into a bargain of sale because of ban/restrictions under MLR 115. Perusal of the record in this regard would reveal that no doubt the petitioner has taken an objection in his written statement and has also asserted the same fact in his statement before the court but besides the above there is nothing else on the record to confirm his stance. Even the order of allotment issued by the Deputy Land Commissioner has not been tendered in evidence to consider and evaluate the nature of such bar, if any. Copy of mutation No.204 *ibid*, Ex-PW-1/1 is also silent in this regard and shows him a complete owner without any sort of ban or restrictions. When proprietary rights are transferred in full by the government then no such bar can be imposed. If at all there was a bar on further alienation for any specific period, then that period now has elapsed during pendency of the suit and there remains no clog on further alienation when the agreement between the parties has been proved through an overwhelming evidence. We may add further that once a person enters into an agreement of genuine sale, then there remains no moral or legal justification for him to challenge the validity of such sale. He being “*in pari delicto*” cannot take any advantage

of any defect in sale. Sale of land (when proved) even if in violation of MLR 115 or Section 54 of the Act, 1882 *ibid*, cannot be held to be void *ab-initio*. This court is of the considered view in this regard and we can make reference to the cases of Mohd. Saeed v. Province of West Pak.(PLD 1964 SC 572), Fakhar Imam Shah v. Abdul Haq (2006 SCMR 550) and Sakhi Jan v. Shah Nawaz (2020 SCMR 832).

10. In view of the aforesaid reasons, both **Civil Petition No.3097/2015 & Civil Appeal No.1074/2015** are dismissed with costs. All the pending CMAs are also dismissed. Before parting with the judgment we may add that respondent is in litigation since 2010 because of the conduct of the petitioner as reflected from the record and discussed above, process of execution of decree should be completed within three months positivity.

11. Short order of even date is reproduced herein-below for ready reference:-

“For the reasons to follow, these cases (Civil Petition No.3097/2015 and Civil Appeal No.1074/2015) are dismissed”.

Judge

Judge

Islamabad, the  
09<sup>th</sup> July, 2020  
Sarfraz /-‘

“APPROVED FOR REPORTING”.