

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL
MR. JUSTICE MUNIB AKHTAR

Civil Petition No. 84/2016

(On appeal from the judgment dated 26.10.2015 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat in C.R.No.902-M/2012).

Sajjad Ahmad Khan

...Petitioner

VERSUS

Mohammad Saleem Alvi & others

...Respondents

For the petitioner: Mr. Naveed Akhtar, ASC

Respondents: Mr. Muhammad Ilyas Siddiqui, ASC
(No.2-3)

Date of hearing: 20.10.2020

JUDGMENT

MAZHAR ALAM KHAN MIANKHEL, J.-

Petitioner being plaintiff of a suit for specific performance through instant Petition for Leave to Appeal, has questioned the impugned judgment dated 26th October, 2015 rendered by learned single Judge in Chambers of the Peshawar High Court, Mingora Bench (Dar-ul-Qaza), Swat, whereby the learned Judge while dismissing the civil revision upheld the concurrent findings of the two courts below regarding dismissal of suit of the petitioner.

2. Learned counsel for the parties were heard and record of the case was perused.

3. It appears from the record that there was an oral sale agreement between Petitioner and Defendant/Respondent No.1 probably on or before 6th August, 1991 when first receipt of earnest money was executed between them and later on an agreement to sell (which itself does not bear any date of execution). (Agreement), Ex-PW-2/1, was executed between parties *ibid* and Petitioner signed the agreement on 16th February, 1992. The agreement, Ex-PW-2/1, refers to a sale, in lieu of Rs.3,37,500/- (Rupees three lac thirty seven thousand five hundred) with Respondent No.1 regarding suit property fully described in the agreement and the plaint. Certain amounts of sale consideration were paid in advance and proper receipts were duly executed by Respondent No.1 and Rs.200,000/- (Rupees two lac) was paid to Respondent No.1 on 24th January, 1992. The entire amount of Rs.2,71,000/- (Rupees two lac seventy one thousand) paid to Respondent No.1 as earnest/advance at different times was duly reflected in the agreement Ex-PW-2/1 alongwith the dates. It was also agreed upon between the parties that the balance sale consideration of Rs.66,500/- (Rupees sixty six thousand five hundred) would be paid at the time of registration of sale deed. We may observe that no specific date for completion of the agreement was given. The physical possession of the suit property was also handed over to the petitioner before the execution of agreement and this very fact has also been reflected in the agreement Ex-PW-2/1 besides being established from the record. When Respondent No.1 failed to execute a proper sale deed in favour of petitioner, a suit for specific performance was filed by the petitioner and the same was decreed ex-parte vide judgment and decree dated 18th December, 1997 in favour of petitioner.

4. The other part of the story which appears from the record is that Defendant/Respondent No.2 (subsequent vendee) (Respondent No.2) filed an application under Section 12(2) of the Code of Civil Procedure, 1908 (C.P.C.) which was accepted vide order dated 25th November, 2004 and the said order was upheld in appeal. Resultantly, ex-parte judgment and decree dated 18th December, 1997 *ibid* was set aside and an amended plaint was accordingly filed wherein Respondent No.2 was also impleaded as Defendant No.2. Respondent No.1 being vendor and Respondent No.2 being subsequent vendee, filed their joint written statement by alleging an agreement to sell dated 11th February, 1992 (subsequent agreement) by Respondent No.1 in favour of Respondent No.2. Record of the case further reveals that Respondent No.1 and Respondent No.2 were also locked in a litigation due to this subsequent agreement and ultimately a fresh agreement dated 16th September, 1997 followed by a compromise between them was effected. Accordingly, a decree on the basis of said compromise in favour of Respondent No.2 was passed in the Civil Court of District Rawalpindi (leaving aside the question of territorial jurisdiction and cause of action). Thereafter, Respondent No.1 executed a registered deed of general power of attorney in favour of Respondent No.2. Respondent No.2 then transferred the suit property as an attorney in favour of Respondent No.3 (His Son) through a registered deed bearing No.38 dated 15th January, 2005.

The Respondent No.3 after becoming owner of the property filed a suit for possession and permanent injunction against the petitioner and his wife. This suit by Respondent No.3 itself establishes the factum of possession of the suit property with the

petitioner. Both the suits (*suit for specific performance filed by petitioner and suit for possession filed by Respondent No.3*), pending trial were consolidated. After a full-fledged trial, the trial court dismissed both the suits vide its judgment and decree dated 18th August, 2011. Two separate appeals filed by plaintiffs of both the suits, were also dismissed by the appellate court vide its judgment and decree dated 14th September, 2012. The issues regarding alleged subsequent sale in favour of Respondent No.2 and then to Respondent No.3 were decided against Respondents No.2 & 3. Though Respondent No.3 challenged said findings by way of an appeal but that too was dismissed by upholding the findings of Trial Court and did not question the same before High Court. So, the findings regarding subsequent sale attained finality against Respondents No.2 & 3. The High Court maintained and upheld the concurrent findings of dismissal of suits and appeals by dismissing the civil revision filed by present petitioner vide impugned judgment. Respondent No.3 did not question the findings of dismissal of his appeal which attained finality.

5. The main reason which prevailed with the learned Judge of the High Court in Chambers was that payment of sale consideration reflected in three different receipts was not proved according to law and witnesses mentioned in the receipts were also not produced and similarly the very agreement (Ex-PW-2/1) was also not proved in accordance with the provisions of Article 79 of the Qanun-e-Shahadat Order, 1984 (Q.S.O.,1984) as out of the two attesting witnesses only one witness was produced.

6. As far as the payment of part of sale consideration through three different receipts *ibid* is concerned, the same as well as

further payment of Rs.200,000/- (Rupees two lac) on 24th January, 1992 has been reflected in the agreement alongwith their respective dates and thereby an amount of Rs.2,71,000/- (Rupees two lac seventy one thousand) out of total sale consideration of Rs.3,37,500/- (Rupees three lac thirty seven thousand five hundred) was admitted to have been received. Respondent No.1 himself was the author of the agreement. Record reflects that it was an oral agreement to sell when first part payment was paid on 6th August, 1991. Needless to mention here that it is a settled law that a sale/agreement to sell can be oral or offer and acceptance of sale can also be inferred from the acts of the parties to the sale agreement. We may refer to a judgment dated 9.7.2020 of this court titled Abdul Hameed v. Jahangir Khan passed in Civil Petition No.3097/2015 & Civil Appeal No.1074/2015) and Muhammad Sattar v. Tariq Javaid (2017 SCMR 98) and this question has very well been dealt with in the above judgments. Respondent No.1 though in his joint written statement has alleged the agreement and his signatures over the same as fake and fictitious but has not specifically challenged the agreement in question either by way of criminal proceedings or through a civil suit. Simple denial of a document being fake and fictitious is not legally sufficient unless the same facts are proved and established on the record. Possession of the petitioner at the site has also been admitted even by Respondent No.3, in his suit, in the shape of some sort of constructions made by the petitioner. Respondent No.1 even disappeared from the scene and left the Respondents No.2 & 3 to contest the suit with petitioner. He even did not appear as a witness to rebut the material brought against him what to talk of proving his allegations against the petitioner.

7. As far as non-appearance of the second attesting witness of the agreement, Ex-PW-2/1, is concerned, that has undisputedly been brought on the record that the other witness, Dr. Fazal Sher Khan was not available and was residing in *America*. The provisions of Article 79 (Q.S.O.,1984), are applicable only in those cases where execution of a document is disputed between maker of document and the person in whose favour purportedly the same is executed. Here in this case, execution of the agreement Ex-PW-2/1, though has been denied and disputed by Respondent No.1 by filing his joint written statement but mere denial would not be sufficient in presence of plethora of overwhelming evidence on the record. Such an evidence cannot be discarded merely for non-production/appearance of second marginal witness. The prime and foremost requirement of Article 79 (Q.S.O.,1984) is to prove execution of a document in case of a denial of execution by producing two marginal witnesses. When the allegation goes un-rebutted that Respondent No.1 himself was the author/scribe of the document. When again un-rebutted fact is there on the record that the other witness being abroad was not capable of giving evidence, when the stance of *Notary Public* regarding attestation of agreement goes un-shattered, when PW-1, Hamayoon Shinwari not only confirms the execution rather gives each and every detail of the transaction between petitioner and Respondent No.1 and PW-4 is also the witness of execution and the entire evidence supported by the petitioner himself then in the given circumstances mere non-production of other attesting witness of Ex-PW-2/1 being not available would be nothing much less a hyper technicality and not the violation of Article 79 *ibid*. We may observe that concurrent findings of dismissal of suit by the three courts are a bitter and

distressing example of misreading and non-reading of material evidence available on the record and misapplication of law.

8. We in the circumstances are left with no option but to convert this petition into appeal and allow the same with costs. The concurrent findings of the three courts below dismissing the suit of petitioner are set-aside.

9. By keeping in mind the conduct of Respondent No.1, we hereby decree the suit of petitioner for specific performance of agreement to sell Ex-PW-2/1 in lieu of Rs.3,37,500/- (Rupees three lac thirty seven thousand five hundred) out of which Rs.2,71,000/- (Rupees two lac seventy one thousand) have already been paid to the Respondent No.1. Balance of Rs.66,500/- (Rupees sixty six thousand five hundred) be deposited in the trial court within sixty (60) days from today. Needless to mention that the alleged subsequent sale of suit property in favour of respondent No.2 and then in favour of respondent No.3 being sham transactions are hereby cancelled and the same will have no adverse effects on the rights of the petitioner.

Judge

Judge

Islamabad,
20th October, 2020
Sarfraz /-
'APPROVED FOR REPORTING'