HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Civil Revision No.169 of 2015

Mohammad Tariq
Versus
Mrs. Marrium Sial and another

Petitioner by	**:**	**Mr. Mohammad Nazir Jawad, Advocate.**
Respondent by	**:**	**M/s Attiq ur Rehman Kiani and Imran Ali Kayani, Advocates for respondent No.1.** **Ms. Mehraj Tareen, Adv. for CDA.**
Date of Hearing	**:**	**10-10-2022**

***Babar Sattar, J*:-** The petitioner is aggrieved by judgment and decree passed in appeal by the learned Additional District Court dated 11.04.2015 by which the petitioner's suit for specific performance was dismissed and the judgment and decree passed by the learned Senior Civil Judge dated 20.04.2011 ordering the specific performance of agreement dated 13.01.2003 was set aside.

2. The petitioner entered into a sale agreement ("Agreement") with respondent No.1 ("Seller") dated 13.01.2003 for purchase of Plot No.213, Sector I-16/4, Islamabad for a total sale consideration of Rs.450,000/- (Rupees four hundred and fifty thousand). He claimed to have paid Rs.100,000/- in cash as earnest money at the time of execution of the Agreement. The balance consideration was payable within a period of four weeks. On 21.01.2003 the mother of the Seller called the petitioner to the MNA hostel where she was staying and asked him to bring along

the original Agreement so that she could have her nephew take a look at it. The petitioner arrived at Family Suit No.05, MNA Hostel, Islamabad on 13.01.2003 and handed the original Agreement to the Seller's mother. The Seller and her mother retained the Agreement and refused to hand it back. The petitioner went straight to the police station and filed a complaint dated 21.01.2003. He subsequently issued a legal notice to the Seller as well. Upon failure of the Seller to abide by her obligations under the Agreement he filed a civil suit. The learned Civil Court framed the following issues by order dated 20.12.2003:

ISSUES:

i. Whether the plaintiff is entitled to decree for specific performance of the sale agreement dated 13.01.2003 and permanent injunction as prayed for? OPP

ii. Whether the suit is not maintainable? OPD

iii. Whether the suit is barred by law? OPD

iv. Whether the plaintiff has not come to the court with clean hands? OPD

v. Whether the suit is frivolous and vexatious and defendants are entitled to special costs under Section 35-A CPC? OPD

vi. Relief.

3. The petitioner and Seller adduced evidence in support of their claims. Respondent No.2 (i.e. CDA) did not adduce evidence and its right to adduce evidence was closed on 25.02.2011. The petitioner attached with his plaint a copy of the Agreement the specific performance of which was sought. It was stated in the plaint that the original Agreement had been illegally retained by the Seller, in relation to which a police compliant had been

registered, which was adduced as Exh.P2. A copy of the Agreement was included in the Court record as Mark-A. The petitioner also adduced a receipt on the letter head of PW-2 stating that the petitioner would pay Rs.50,000/- at the time of issuance of stamp paper and such acknowledgement receipt was signed by the Seller and also by Mr. Tanvir Ahmad Hashmi who appeared as PW-3. PW-2 as well as PW-3 deposed that the petitioner had paid the Seller Rs.100,000/- in cash at the time of execution of the Agreement. The Seller appeared as DW-1 and simply denied the execution of the Agreement. During cross-examination she was confronted with a copy of the Agreement (Mark-A) and asked if the signature affixed on it as a witness was that of her mother Mrs. Iqbal Sial. She denied such suggestion and claimed that she ever met with the petitioner at the MNA hostel. She however acknowledged having received a legal notice from the counsel for the petitioner placed on record as Mark-B. She adduced no evidence to counter the petitioner's claim. In view of such evidence the learned Civil Court found that the petitioner had succeeded in proving the execution of the Agreement and the transaction contemplated therein. It noted that the testimony by the three plaintiff's witnesses had not been rebutted by the Seller. In view of the acknowledgment receipt (Exh.P1) the Court found that the petitioner had proved payment of Rs.50,000/- by the petitioner to the Seller as earnest money. As the petitioner had already deposited Rs.3,50,000/- with the learned Civil Court, it found that the petitioner was liable to pay a further amount of Rs.50,000/- and decreed the suit. The petitioner deposited the said amount Rs.50,000/- with the Court.

4. The Seller impugned the judgment and decree of the learned Civil Court. The learned Additional District Court concluded that even though the Seller had not cross-examined the PWs produced by the petitioner, the petitioner remained under an obligation to prove the Agreement in accordance with law. It noted that the Agreement was a marked document and not an exhibit and that the petitioner had produced a photocopy of such document without permission of the Court under provision of the Qanun-e-Shahadat Order, 1984, (**"QSO"**). It was further held that the Agreement had not been proved in accordance with requirements of Article 79 of the QSO as the petitioner had only produced one witness to such Agreement. The learned Additional District Court thus concluded that the petitioner had failed to prove the execution of the Agreement and the transaction contemplated therein. On the question of whether the acknowledgment receipt (Exh.P1) supported the case of the petitioner, the learned Appellate Court found that the signature of the Seller on the acknowledgment receipt when compared to that on the written statement and *vakalatnama* appeared similar. But that the pleadings in the suit were silent in relation to the content of the acknowledgment receipt (Exh.P1). It held that an explicit reference ought to have been made to the acknowledgement receipt (Exh.P1) in the plaint if it was a document signed before the execution of the Agreement. It thus found that the transaction contemplated in the acknowledgment receipt had also not been proved and set aside the judgment and decree of the learned Civil Court.

5. The learned counsel for the petitioner submitted that the learned Civil Court had correctly appreciated the evidence adduced before it. The petitioner together with two other witnesses to the execution of the Agreement had testified as such and had confirmed the handing over of Rs.100,000/- as earnest money by the petitioner to the Seller. That such testimony had not been rebutted by the Seller. And that one such witness (i.e. PW-2) was also a marginal witness to the Agreement. The second marginal witness was the mother of the Seller, who never appeared before the Court even in order to support the story of the Seller. The Appellate Court failed to take into account that the petitioner had proved both the execution of the Agreement as well as payment of earnest money on a balance of probabilities. The learned Appellate Court also failed to take into account the fact that the original Agreement could not be produced and exhibited as it had been snatched away by the Seller and her mother, which fact was specifically pleaded in the plaint and also supported by the complaint filed by the petitioner with police authorities on the date of such incident i.e. 21.01.2003. He submitted that requirements of QSO had been complied with and Article 76 of QSO contemplated that secondary evidence could be given in relation to a document which is not available with a claimant. The learned Appellate Court itself observed in the impugned judgment that the signature of the Seller on the acknowledgement receipt (Exh.P1) and on the *vakalatnama* and pleadings filed by her were similar. The Seller also acknowledged receipt of legal notice (Exh.P2) sent by the petitioner. The complaint filed by the petitioner against the Seller on the date on which the Agreement was snatched by

mother of the Seller was on record. And the testimony of three plaintiff's witnesses supported the content of the plaint and the petitioner's claim that the Agreement had been executed and advance consideration in the amount of Rs.100,000/- had been paid to the Seller and the Agreement had subsequently been snatched away by the Seller and her mother. There was thus sufficient evidence to establish on a balance of probabilities that the petitioner had proved his case. In support of his submissions he relied on ***Arbab Tasleem Vs. The State (PLD 2010 SC 642), Mst. Zareena and 5 others Vs. Syeda Fatima Bi (PLD 1995 Karachi 388), Khalid Hussain and others Vs. Nazir Ahmad and others (2021 SCMR 1986), Dawood Foundation through Chairman and another Vs. Ghulam Hasan and another (2016 CLC Note 25), Mst. Farida Bano Vs. Karachi Electric Supply Corporation through Managing Director (2008 MLD 62), Allah Dad Vs. S.M. Khan (1989 CLC 2287) and Mohammad Mohsin Malik Vs. Mst. Qamar Jehan and 2 others (2009 YLR 289).***

6. Learned counsel for the respondent submitted that it was the petitioner's obligation to prove his claim in accordance with provisions of QSO, which he had failed to do. Under Article 79 of the QSO it was necessary to produce two attesting witnesses to prove a document, which the petitioner had failed to do as he had produced only one witness. The petitioner had also not produced the stamp vender who issued the stamp paper for purposes of the Agreement or the scribe who prepared the necessary documentation. He submitted that the police report (Exh.P2) regarding the snatching of the Agreement proved nothing. A copy

of the Agreement had been included in the case record as Mark-A but there was no provision in the Civil Procedure Code (CPC) for treating a marked document as part of evidence. The Appellate Court had correctly appreciated the fact that the acknowledgment receipt (Exh.P1) was not part of the pleadings and the plaint. The Seller was not confronted with the copy of the Agreement during cross-examination. The requirements for producing secondary evidence in support of the Agreement under Article 76 and 77 of QSO had not been complied with. And as the Seller (DW-1) had denied the execution of the Agreement or having given her consent to the transaction contemplated in the Agreement, the onus to prove the same was on the petitioner, which he failed to discharge and the learned Appellate Court correctly set aside the judgment and decree passed by the learned Civil Court and dismissed the petitioner's suit. In support of his submissions he relied on ***Syed Shabbir Hussain Shah Vs. Asghar Hussain Shah and others*** ***(2007 SCMR 1884),*** ***Ghulam Ali Shah and others Vs. Mohammad Khalid and others*** ***(2017 SCMR 1849),*** ***Farid Bakhsh Vs. Jind Wadda and others*** ***(2015 SCMR 1044),*** ***Mst. Nagina Begum Vs. Mst. Tahzim Akhtar and others*** ***(2009 SCMR 623),*** ***Shah Mohammad through L.Rs. and 4 others Vs. Nawab Din*** ***(2006 MLD 823),*** ***Imam Din and 4 others Vs. Meraj Din and others*** ***(2003 MLD 329),*** ***Ghulam Nazak Vs. ZTBL through Manager and another (2007 CLD 667),*** ***Mohammad Rafique and 7 others Vs. Noor Ahmad*** ***(2007 MLD 1554),*** ***Farzand Ali and another Vs. Khuda Bakhsh and others*** ***(PLD 2015 SC 187),*** ***Province of Punjab through Secretary, Irrigation and Power***

Department, P.W.D., Secretariat Old Anarkali, Lahore and 3 others Vs. Ch. Mehraj Din & Co. through Proprietor *(2003 CLC 504),* ***Ghulam Nabi Vs. Mohammad Yusuf and 2 others*** *1993 CLC 314),* ***State Life Insurance Corporation of Pakistan and another Vs. Javaid Iqbal*** *(2011 SCMR 1013),* ***Mst. Rasheeda Begum and others Vs. Mohammad Yousaf and others*** *(2002 SCMR 1089),* ***Mst. Sakina Bibi and another Vs. Mohammad Anwar alias Mujahid and others*** *(PLD 2007 Lahore 254),* ***Rafaqat Ali and others Vs. Mst. Jamshed Bibi and others*** *(2007 SCMR 1076) and* ***Ashiq Hussain and 5 others Vs. Anjuman Islamia, Kamalia Regd. through Mohammad Amin and others*** *(2007 CLC 71).*

7. Let us first consider the pleadings and evidence of the petitioner. Para 03 of the plaint stated that out of the total sale consideration Rs.450,000/-, Rs.100,000/- was paid in cash at the time of execution of the Agreement and the balance consideration was to be paid at the time of transfer within four weeks of the execution of the Agreement. Para 05 provides details of how the mother of the Seller summoned the petitioner and procured the original Agreement that was fraudulently seized and not returned. Para 07 states that the incident was immediately reported to the police on 21.01.2003 and recorded in the *Roznamcha* of the police station. Para 09 states that a legal notice dated 24.01.2003 was served on the Seller.

8. In support of the claim in the plaint the petitioner (PW-1) reiterated his claim and produced a copy of the Agreement which was marked as Mark-A by the learned Civil Court. The petitioner testified that he had paid Rs.100,000/- as earnest money,

Rs.50,000/- of which was paid through Ejaz Hussain Shah (property dealer), and stated that the receipt was acknowledged by the Seller in the form of Exh.P1. He also produced a copy of the legal notice referred to in the plaint which was marked as Mark-B. PW-2 supported the claim of the petitioner and confirmed that an amount of Rs.100,000/- was paid by the petitioner to the Seller at the time of execution of the Agreement and a receipt in the amount of Rs.50,000/- was a signed acknowledgment receipt (Exh.P1) issued by him. He acknowledged the execution of the Agreement in his presence and payment of initial consideration in the amount of Rs.100,000/-. PW-3 testified that he was the real estate agent who connected the petitioner to the Seller through PW-2, who was the real estate agent for the Seller. He testified that he witnessed the payment of Rs.100,000/- as earnest money by the petitioner to the Seller. The Seller called PW-2 on 21.01.2003 requesting that the petitioner bring the original Agreement so it can be shown to a relative of the Seller and that he communicated that message to the petitioner. He then went along with the petitioner to the MNA hostel where the Seller was residing. And after being handed the original Agreement, the mother of the Seller refused to hand it back to the petitioner, after which he accompanied the petitioner to the police station for filing of a complaint in this regard on 21.01.2003. Cross-examination of DW-1 reflects that she was confronted with the copy of the Agreement (Mark-A) and was asked whether the signature in the signature block for a witness (immediately above her own signature) was that of her mother, which she denied. She was also asked about the legal notice served by the petitioner (marked as

Mark-B by the learned Civil Court), which she acknowledged as having received.

9. What emerges from the evidence adduced is that the petitioner included a copy of the Agreement in the documents appended to the plaint, in view of which the learned Civil Court issued an injunctive order while making a note in its order dated 20.12.2003 that the copy of the Agreement was presented before the Court. It was the petitioner's claim that the original Agreement has been snatched away by the Seller, which claim was mentioned in the plaint and supported by a police complaint filed by the petitioner dated 21.03.2003 and produced as Exh.P2. The petitioner himself produced a copy of the Agreement during his own testimony. The Seller was also confronted with the copy of the Agreement when she appeared in the witness box as DW-1 and she was asked if she recognized the signature of her mother on the Agreement in the signature block as a witness.

10. In view of the above, it is obvious that the petitioner as an executant of the Agreement presented a copy of the same while stating that the Seller had illegally seized the original and the Seller as DW-1 was confronted with a copy of the Agreement during cross-examination. The second fact that emerges is that PW-2 was the real estate agent in touch with the Seller and PW-3 was the petitioner's real estate agent at the time of the transaction that formed the subject matter of the Agreement. PW-2 issued a receipt, as is customary on part of the agent of the seller, which documented the proposed transaction and noted that Rs.50,000/- was to be paid at the time of issuance of stamp paper for the Agreement. This receipt was issued on 10.01.2003 and was

signed by the Seller as well as the petitioner's real estate agent (i.e. PW-3). The Agreement was then executed on 13.01.2003 and was signed by the petitioner and the Seller, and by PW-2 and the mother of the Seller as marginal witnesses. Perusal of the signature of Seller on the copy of the Agreement (Mark-A), acknowledgement receipt (Exh.P1), and written statement and *vakalatnama* filed on behalf of the Seller reflects that the signature of the Seller on all these documents are identical as also noted by the learned Appellate Court in the impugned judgment. The testimonies of PW-1, PW-2 and PW-3 were not contested by the Seller and remained un-rebutted. Consequently what we have is the testimony of the petitioner as the purchaser and executant of the Agreement, one marginal witness of the Agreement (PW-2), who is also witness to payment of Rs.100,000/- as earnest money to the Seller (including Rs.50,000/- through him in lieu of which he issued the acknowledgment receipt (Exh.P1)), and PW-3 who was the real estate agent for the petitioner and a witness to the execution of the Agreement (even though he was not a marginal witness), signatory to the acknowledgment receipt (Exh.P1), witness to payment of earnest money in the amount of Rs.100,000/- by the petitioner to the Seller, and witness to the sequence of events through which the original Agreement was wrestled away by the Seller and her mother from the petitioner, as well as a witness to the filing of police complaint by the petitioner against the Seller in relation to illegal seizing of the Agreement.

11. In view of the above evidence this Court is of the view that the learned Civil Court had correctly appreciated the evidence and concluded that the petitioner had succeeded in establishing, on a

balance of probabilities, the execution and content of the Agreement, the payment of consideration in the amount of Rs.100,000/- as earnest money as well as the illegal procurement of the original Agreement by the Seller from the petitioner. The learned Appellate Court without appreciating all aspects of the evidence adduced and the standard of proof required in support of a civil claim (i.e. balance of probabilities), took a very technical view of provisions of the QSO to conclude that the Agreement had not been proved by the petitioner. The only fact that the learned Civil Court appears not to have appreciated correctly was evidence supporting the petitioner's contention that he paid earnest money in lieu of sale consideration in the amount of Rs.100,000/- and not Rs.50,000/-. The pleadings in the plaint and the testimony of PW-1 was that he had paid the amount of Rs.100,000/- as earnest money. PW-3 also testified to the same effect. PW-2 further testified that the total amount paid at the time of execution of the Agreement was Rs.100,000/- and that acknowledgment receipt (Exh.P1) in the amount of Rs.50,000/- had been issued by him at the time of the transaction forming the subject matter of the Agreement had been agreed in principle. In view of the evidence in the form of deposition by PW-1, PW-2 and PW-3, the payment in the amount of Rs.100,000/- stood proved. While Rs.50,000/- out of a total payment of Rs.100,000/- was acknowledged in the acknowledgment receipt (Exh.P1), the same had been explained in the testimony of PW-2. Consequently, the learned Civil Court erred when it concluded that only an amount of Rs.50,000/- had been paid by the petitioner to the Seller as earnest money as that was the amount in relation to which the acknowledgment receipt

Exh.P1 was issued by PW-2. In reaching such conclusion the learned Civil Court did not appreciate the sequence of the transaction and the practice of handing over a certain sum to the real estate agent by a purchaser when he/she seeks to make a serious offer for purchase of immoveable property together with agreement to make further payment at various stages of the transaction. The learned Civil Court, while accepting the testimonies of PW-2 and PW-3 and holding that acknowledgment receipt (Exh.P1) stood proved, erred in directing the petitioner to deposit a further sum of Rs.50,000/- as a condition for ordering the specific performance of the agreement.

12. Let us take into account the relevant provisions of QSO. Article 2(4) of the QSO states the following:

> *"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"*

This provision encapsulates the standard of proof in civil matters i.e. on a balance of probabilities. In view of the sum total of the evidence adduced, a Court is to determine the claim on a balance of probabilities. In other words, a Court is to take into account the pleadings of parties, the testimonies of witnesses, and the documentary evidence before it to determine whether a prudent man would conclude, on the balance of probability, that the claim is supported by facts. Article 59 of QSO entitles the Court to seek opinion of experts and contemplates therein seeking of expert opinion in relation to handwriting and thumb impression etc. The learned Civil Court as well as the learned Appellate Court could

have sought an expert opinion in relation to the signature of the Seller as affixed on the copy of the Agreement (Mark-A), acknowledgement receipt (Exh.P1) and the pleadings of the Seller and her *vakalatnama* as filed before the Court. This was not done. However, the Court can also compare signatures itself to determine if they belong to the person they have been ascribed to under Article 84 of QSO. This was done by the learned Appellate Court which then noted in the impugned judgment that the signature of the Seller as affixed on the acknowledgment receipt was the same as that on the *vakalatnama* and the pleadings filed before the Court. In this view of the matter the learned Appellate Court disbelieved the testimony of the Seller as DW-1 where she denied signing the acknowledgment receipt (Exh.P1).

13. Learned counsel for the respondent made two basic legal arguments. One, in order for an agreement for the sale of immoveable property to be enforceable, such agreement must be executed by at least two attesting witnesses for it to be provable in view of Article 17(2)(a) of the QSO. And two, that without the production of two male witnesses an agreement cannot be proved in view of Article 79 of the QSO. The other legal submissions by the learned counsel for the respondent were that secondary evidence can only be produced with the permission of Court subject to satisfaction of the requirements under Article 77 of the QSO, and a document which is not exhibited and only marked cannot be read in evidence. Let us address the aforementioned arguments.

14. Even though the Court is a neutral arbiter of the law and facts, in a dispute between contesting parties it is not a

disinterested bystander. The Court is under an obligation to play an active role to determine the truth of the matter brought before it while passing judgment on the validity of the claim before it. To dispense justice in accordance with law is ultimately the responsibility of a Court. And while the Court cannot fill any lacuna in the claim of the party or relax the obligation of a party to discharge its burden of proof, the Court is under an obligation to ascertain the truth of claims made before it by contesting parties. It is for such purpose that under the CPC as well as the QSO ample authority has been vested in the Court to require the contesting parties to clarify their positions, to summon essential witnesses as Court witnesses and to seek expert opinion where required. A Court sitting in judgment over rival claims ought to exercise such power proactively in order to determine the truth in the controversy before it and dispense justice in accordance with law.

15. A Court is required to decide a civil claim on the balance of probabilities. It is the Court that is the ultimate judge of sufficient evidence to determine whether or not a claim has been proved on a balance of probabilities. It is in this context that the Court is under an obligation to take a holistic view of the pleadings and the evidence adduced before it. This scheme does not change even in relation to a suit for specific performance in which grant of relief is discretionary. The discretion vested in the Court is to be exercised in accordance with requirement of fairness. The discretionary nature of the relief of specific performance does not change the fact that in order to determine whether or not the transaction contemplated by the agreement (the performance of which is

sought) has been proved, the Court must apply the balance of probability standard in view of the sum total of the evidence adduced before it. The contention that an agreement which is not witnessed by two male witnesses (in view of the requirement of Article 17(2)(a) of the QSO) can never be proved and consequently performance of the transaction contemplated therein cannot be specifically enforced, cannot be countenanced. Even where an agreement is not witnessed by two male witnesses, the Court will take into account secondary or corroborating evidence to determine whether or not there was an agreement between the parties to perform the obligations stated in such agreement. And consequently after taking into account primary evidence and secondary/corroborating evidence the Court will determine whether on a balance of probabilities the claimant has established the validity of his/her claim. In this context the lack of proof of an agreement in terms of Article 79 of the QSO where either two attesting witnesses are unavailable or cannot be produced to testify is not fatal to the claim of a party seeking the performance of obligations under such agreement. The requirements of CPC and QSO have been designed to facilitate the adjudicator in deciphering the truth of a claim while rendering judgment that meets a minimum safety requirement, but not as legal traps to frustrate legitimate claims on the basis of a straight-jacket application of procedural and technical requirements.

16. It is settled law that only such documents can be read into evidence which have been duly exhibited before the Court. The Civil Procedure Code, 1908, requires that a claimant append with the plaint the documents on the basis of which he/she supports a

claim. The claimant also lists the documents that he/she relies on in the list of reliance filed along with the suit. The purposes of these requirements is to bring to the attention to the respondent all relevant documents on which a claim is based to allow the respondent to admit or deny the documents relied upon by the claimant. The defendant in a suit is under a similar obligation to bring along all the relevant documents in relation to the claim upon being summoned by the Court. The purpose of these provisions is to provide for discovery during the stage when pleadings are being completed to ensure that all parties are aware of all the documents that are being relied upon by the parties in support of their claim and/or counter-claim and to try the suit without any party springing a last minute surprise on the other party.

17. In order to determine the veracity and authenticity of a document, law requires the author or repository of a document to produce it before the Court at the earliest stage in the trial proceedings. It is for such purpose that record keepers are summoned to produce documents before the Court which are to be read in evidence. However, in the event that a document is appended to the plaint and listed in the list of reliance and produced by a witness in his testimony and or confronted to a witness during cross-examination, and the Court while including such document as part of case record identifies it with a ”mark” and not as an ”exhibit”, neither of the contesting parties is responsible for such identification by the Court. The fact that the document is not identified by the Court as an exhibit but is identified as a mark despite having been duly produced by a party

at an appropriate stage during trial proceeding, in accordance with requirements of CPC, does not exclude the same from the material which is to be read in evidence by the Court. The law laid down by the august Supreme Court stating that a marked document is not to be read in evidence cannot be applied out of context. It is settled law that no party can be held liable for the acts of a Court. It is for the Court to ensure that the parties have a fair opportunity to object to documents that are to be exhibited before the Court and read into evidence. And after affording such opportunity, the documents presented before a Court, to the extent that they satisfy the requirements in CPC, are to be identified as exhibits. Consequently, it is for the Court to ensure that no document is included in the case record as a marked document, if it does not fulfill the requirements of being exhibited. Such responsibility cannot be shifted to litigating parties. And while either party is within its right to raise an objection before an Appellate Court that a certain document did not meet the requirement of law and could not be exhibited, the action of a Court in identifying a document as a mark when it qualifies to be identified as an exhibit in and of itself does not require the exclusion of such document from being read as part of evidence.

18. Allowing the exhibition of a document as part of material which can then be appreciated by a Court as evidence adduced before it has no co-relation with whether or not such document has been proved. The executant of a contract for example (or in some circumstances even a repository who is a beneficiary under such document and has founded his/her claim on such document) can exhibit such document before a Court and it would be

identified as an exhibit. Whether or not such document constitutes a contract having been executed by the counter-party is then a question of fact to be determined by the Court. Whether or not such contract is proved to have been executed and its content supports the claim of the party is another question to be answered by the Court, which question is independent of its admissibility. In other words, the exhibition of a document must not be confused with the proof of such document. The proof of a document is a question of evidence and the manner in which a document is to be placed on record as an exhibit and the timing of such placement is a matter of procedure prescribed by CPC. The procedure is guided by the need to ensure discovery and prevent surprises during the adjudication of civil claims and not to limit the production and exhibition of documents by a party in support of its claim.

19. Article 74 of the QSO defines secondary evidence. Article 76 provide exceptions to the requirement of Article 75 to prove documents by primary evidence. Included within the exceptions under Article 76 are *inter-alia* the following:

> *(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in Article 77 such person does not produce it;*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*

Article 77 requires that the parties seeking to produce secondary evidence must give notice to the other counter-party who has possession of the document. The proviso to such Article 77 states

that a notice under the Article is not required is *inter-alia* the following cases:

> *(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;*
>
> *(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;*

20. The scheme of Article 74 to 77 is based on common sense and provides that documents ought to be proved through primary evidence. If that is not possible, parties are allowed to adduce secondary evidence in circumstances contemplated by Article 76, in which case a party adducing secondary evidence is to notify a counter-party that it is seeking to rely on secondary evidence. But such notice requirement is itself subject to certain exceptions, including, for example, where the original is either with the counter-party or the counter-party is aware that it would be required to produce such original document due to the nature of a claim. Once again the object of these rules is to enable the Court to determine the veracity of documents on the basis of primary evidence while also ensuring that no party is able to spring a surprise on the counter-party and that the cards, on the basis of which claims are to be asserted or defended, are placed on the table for everyone's knowledge at the beginning of the adjudicatory process.

21. Let us now revisit the facts of case. It is the claim of the petitioner that the original Agreement was obtained and seized by the Seller fraudulently. Such claim formed part of the petitioner's pleadings in the plaint and consequently his right to adduce secondary evidence fell within the exception contemplated in Article 76(a) of QSO and the obligation to issue a notice under

Article 77 was exempt under clause (3) of the proviso to Article 77. In support of such facts the petitioner produced testimonies of PW-2 and PW-3 along with his own testimony and also produced the police report of the incident (Exh.P2), according to which the original Agreement had surreptitiously been snatched by the Seller from the petitioner. The petitioner also served a legal notice on the Seller, which was produced before the court and identified as Mark-B, which the Seller acknowledged as having received during cross-examination as DW-1. This settled the issue of production of copy of the Agreement. That the copy was marked as Mark-A was due to no fault of the petitioner. The orders of the learned Civil Court reflect that a copy of the Agreement was appended to the plaint on the basis of which an ad interim injunction was granted. The Agreement was also listed in the list of reliance putting the respondent on notice that it formed the basis of the petitioner's claim. It was adduced in evidence by the petitioner during his testimony as PW-1 and the Seller was also confronted with it during cross-examination as DW-1. The petitioner has therefore, duly produced a copy of the Agreement that he was an executant of, at the relevant time as required by CPC, and such document ought to have been identified as an exhibit by the learned Civil Court. That it was wrongly identified as Mark-A can therefore not be a basis for its exclusion from the evidence to be considered by the Court.

22. To prove the Agreement the petitioner himself entered the witness box and also produced PW-2 and PW-3 who deposed as witnesses. PW-2 was a marginal witness to the Agreement and PW-3 deposed that he witnessed the execution of the Agreement.

The second marginal witness to the Agreement was the mother of the Seller who did not appear in Court as a witness even to support the claim of her own daughter. The trial Court could therefore not reasonably require the petitioner to produce the mother of the Seller (who was alleged to have fraudulently wrestled away the original Agreement from the petitioner) as a witness in compliance with the requirement of Article 79 of QSO. The petitioner did, however, produce an acknowledgement receipt (Exh.P1) as corroborating evidence of the transaction contemplated by the Agreement. The acknowledgment receipt was issued by PW-2 who testified to such effect. It was also signed by PW-3 as a witness apart from being signed by the Seller. The petitioner as PW-1, and PW-2 and PW-3 all testified that the petitioner paid earnest money in the amount of Rs.100,000/- to respondent No.1 at the time of execution of the Agreement. No evidence was adduced by the Seller to contradict such testimony. PW-2 in his testimony also explained how he had issued a receipt in the amount of Rs.50,000/- while testifying that the petitioner did pay the Seller a total of Rs.100,000/- (including the Rs.50,000/- in lieu of which he had issued a receipt at the time of execution of the Agreement). The assertion regarding the payment of sale consideration in the amount of Rs.100,000/- as earnest money was therefore supported by the testimony of PW-2 and PW-3 and by Exh.P1, which was verified by its author PW-2 and by its witness PW-3.

23. The learned Civil Court in view of the evidence adduced concluded that the execution and content of the Agreement stood proved by the petitioner. The learned Additional District Court

disagreed with such conclusion on the basis that the Agreement had not been proved in accordance with the requirement of Article 79 of QSO. It did however observe that the signature of PW-1 on the acknowledgment receipt (Exh.P1) was the same as that on the *vakalatnama* and pleadings signed by the Seller. The learned Additional District Court did not make a comparison of signatures on the copy of the Agreement under the belief that the same could not be read in evidence. As this Court has held above that the copy of the Agreement ought to have been marked as an exhibit in view of provisions of Article 76 and 77 of QSO, a comparison of the signature of the Seller on the copy of the Agreement with that of her signature on the acknowledgment receipt (Exh.P1) and her signature on the *vakalatnama* and pleadings filed before the learned Civil Court reflects that they are identical.

24. In view of the above discussion this Court comes to the conclusion that the learned Additional District Court misinterpreted and misapplied provisions of Article 76, 77 and 79 of the QSO to conclude that the petitioner was not entitled to adduce secondary evidence before the learned Civil Court. And further that the copy of the Agreement adduced as secondary evidence had not been proved. The petitioner had no option but to produce a copy of the Agreement as secondary evidence as his claim against the Seller was founded on the basis that the Seller with the connivance of her mother had fraudulently wrestled away the original executed Agreement during the incident on 21.01.2003, which was promptly reported to police authorities and the report was exhibited as Exh.P2. In view of the above, this Court agrees with the learned Civil Court that the petitioner proved the Agreement dated

13.01.2003 and is entitled to have the Agreement specifically performed. The only point of divergence with the opinion of the learned Civil Court is that the petitioner also successfully proved before the learned Civil Court that he had paid consideration in the amount of Rs.100,000/- as earnest money at the time of execution of the Agreement and was only liable to pay balance sale consideration in the amount of Rs.350,000/-, which he did at the time of filing of the suit for specific performance. Consequently, the additional requirement of paying an extra sum of Rs.50,000/- as imposed by the learned Civil Court through its judgment dated 20.04.2011 was based on misappreciation of evidence, especially as the learned Civil Court had already found that the testimony of PW-2 and PW-3 was un-rebutted and was liable to be accepted for being trustworthy. Both PW-2 and PW-3 had deposed that the petitioner paid earnest money in the amount of Rs.100,000/- to the Seller at the time of execution of the Agreement.

25. The judgment and decree passed by the learned Additional District Court is liable to be reversed. The judgment and decree passed by the learned Civil Court is restored with the modification that the petitioner is entitled to retrieve the additional amount of Rs.50,000/- deposited with the learned Civil Court in terms of the judgment and decree dated 20.04.2011. This petition is ***allowed.*** The judgment and decree passed by the learned Appellate Court is set aside. The petitioner is entitled to cost of litigation in the amount of Rs.50,000/- payable by respondent No.1 to the petitioner within a period of 30 days. Learned counsel for respondent No.1 will file a certificate with Deputy Registrar

(Judicial) of this Court stating that the order granting costs has been complied with by or before the expiry of 30-day period.

26. Before we part with this judgment it may be beneficial to reiterate some observation regarding the role of the trial court adjudicating civil claims:-

(i) The role of the trial court is not that of a disinterested bystander witnessing a trial. As the adjudicator of claims between contesting parties its role is that of a seeker of true facts underlying a controversy. To perform such role, the CPC endows the court with extensive powers, which are not to be reduced to black letter law but are to be used for proactive administration and management of the trial process.

(ii) It was held by the august Supreme Court in ***Imtiaz Ahmad Vs. Ghulam Ali*** *(**PLD 1963 SC 382**)* that the role of procedure is to function as a stepping stone in the dispensation of justice and not as a stumbling block. The Court must employ procedure to facilitate determination of facts and the truth and not as a means to frustrate such enterprise.

(iii) The scheme for conducting a trial under CPC (especially Order IX-A) places the court in a controlling role in the middle. The provisions of CPC imagine an adjudicatory process where the contesting parties place their cards on the table face-up, and pursue their claims in view of the available evidence in relation to the claims and

defences that all sides are aware of. For such purpose, CPC provides for production of documents and identification of witnesses in support of factual claims at the earliest stage in the trial, a case management and scheduling conference facilitating discovery of relevant material germane to the controversy, provisions for discovery, inspection and admissions, followed by provisions for alternative dispute resolution and summary judgment. Without complete discovery at the earliest stage before commencement of trial, there would be limited potential for alternative dispute resolution succeeding or the court possessing the ability to pass summary judgment.

(iv) Case management and scheduling conference is a mandatory step in the trial process that cannot be ignored. After completion of service and once pleadings have been filed, the court must schedule this conference to draw out a plan for the trial and the way forward in consultation with the counsels for the parties.

(v) The claimant is obliged under Order VII Rule 14 of CPC to produce in the court at the time of filing the plaint the documents on the basis of which he files his suit along with a list of documents (whether in his possession or not) that he wishes to use in support of his claim.

(vi) The defendant is under a similar obligation in view of Order V Rule 7, which requires him to produce all documents in his power and possession that he intends to rely on in support of his case when he is first summoned by the court.

(vii) Order VII Rule 18 prescribes consequences for the plaintiff for not presenting before the court at the time of filing of the plaint (or listing documents in the reliance list) as such omitted documents cannot be received the evidence during the hearing of the suit, except with the leave of the court, excluding any document required to cross-examination or confront the defendant's witnesses.

(viii) Order IX-A Rule 2 vests in the court overarching authority to manage the trial process and chart out a future roadmap with time-lines, and includes necessary power for "control of discovery through discovery management".

(ix) Order XIII provides a detailed mechanism for production of documents, their admission into evidence and return of documents that are found to be irrelevant or inadmissible. Order XIII conceives of a hearing where all the court does is consider all documentary evidence sought to be adduced by the parties, mark them as exhibits together with details prescribed by Order XIII Rule 4, and reject and return documents under Order XIII Rule 6 found to be inadmissible. The court must remember that

this is a stage prior to settlement of issues and recording of evidence in support of the issues framed. The court must not confuse admissibility of a document into the record for consideration during trial with the proof of such document or the weight and relevance to be attached to it in support of a claim. The proof of a document and the weight to be accorded to it is to be determined by the court after recording of evidence while pronouncing judgment.

(x) Orders XV and XV-A dealing with disposal of suit at the first hearing and summary judgment follow Order XIII, as by then all documentary evidence must be before the court and in view of such documentary record there might be no need for recording of evidence if, on the basis of admitted or uncontested documents, the controversy can be resolved. If not, the trial then moves to the stage of summoning of witnesses under Order XVI.

(xi) The scheme for conducting a trial in practice in disregard of the one mentioned in the CPC as enumerated above, in which the requirements of Order V, Order VII, Order IX-A and Order XIII for production of documents at the earliest stage and marking them as exhibits is ignored, and further no case management and scheduling conference is convened and no date is fixed exclusively for

admitting and returning documents, is not in accordance with provisions of CPC.1

(xii) CPC prescribes clearly marked stages in a trial. If such stages are ignored the possibility of resolution of (i) disputes based on admissions, or (ii) through alternate means of dispute resolution (including compromise) or (iii) through summary judgment (without a trial of facts) dwindles. Unless the claims and material in support of such claims is laid bare for the benefit of all parties, no party is incentivized to enter into a compromise, the court is unable to determine in an educated manner the issues in controversy between the parties, and has no ability to decide the matter at the first hearing or through summary judgment. This renders provision of Order IX, Order IX-A, Order XV and Order XV-A redundant, results in all suits brought to the court being subjected to trial, and populates court dockets with matters that might be resolved without trial and without inordinate delay in cases finding a resolution.

(xiii) The practice of allowing witnesses to adduce documentary evidence during their examination-in-chief as the primary mode of producing documentary evidence is in breach of provisions of Order V, Order VII and Order XIII as explained above and cannot be countenanced. It is only upon showing "good cause" for non-production of a

document at the first instance (as required by Order V and Order VII) that the court may allow production of such document at a later stage in accordance with Order XIII Rule 2. If courts hold scheduling conferences under Order IX-A as required and forces discovery before fixing a date for admission and rejection of documents under Order XIII, none of the parties would be prejudiced and suits would proceed in accordance with the schemes prescribed by CPC.

(xiv) Courts of law have no authority to contrive a procedure for conduct of trials that is in contradiction with that prescribed by CPC. There is urgent need to bring the practice of the courts in compliance and consonance with the law.

27. Let a copy of this judgment be shared with the MIT and the learned District Judges in Islamabad to enable them to take steps to ensure that trials are conducted in accordance with the scheme prescribed by CPC, as enumerated above.

(BABAR SATTAR)
JUDGE

Announced in open Court on 21.10.2022.

JUDGE

Approved for reporting .

M.A. Raza