

2024 M L D 1176

[Lahore]

Before Ahmad Nadeem Arshad, J

MUHAMMAD SHARIF---Petitioner

versus

Rana MUHAMMAD SHARIF

(deceased through LRs) and 2 others---Respondents

Civil Revision No. 2827 of 2016, heard on 16th April, 2024.

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

**---Arts.17, 79, 80 &129(g)---Specific Relief Act (1 of 1877) , S. 12 ---
Suit for specific performance---Agreement to sell, execution of---Proof---
Marginal witness, non-producing of---Effect---Withholding of evidence---
Suit filed by the plaintiff was concurrently dismissed---Validity---
Petitioner/plaintiff though got exhibited agreement-to-sell but failed to
prove its valid execution --- It is the duty of the beneficiary of the
agreement to prove its genuineness by producing its marginal witnesses---
Under Arts. 17 & 79 of Qanun-e- Shahadat 1984, a plaintiff is duty
bound to prove the genuineness of the document through cogent,
confidence inspiring and independent evidence---Where the law requires
an act to be done in a particular manner, it has to be done in that way
and not otherwise---Agreement in question was attested by two marginal
witnesses; though the petitioner produced only one of them but later
failed to produce him for cross examination, therefore, earlier**

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statement/evidence of said marginal witness was of no support to the petitioner and the said statement could not be read against respondent--- Although it was apprised to the Trial Court that said witness had died but the petitioner failed to produce the death certificate of said witness till the final decision of the case---Petitioner also failed to produce the second marginal witness---Petitioner while recording his own statement deposed that said (second) witness had died while his counsel got exhibited /produced photo copy of his death certificate but the Courts below did not accept the said photocopy of death certificate as a piece of evidence---Simple oral assertion was not enough to prove the factum of death of both the marginal witnesses of agreement to sell ---Article 80 of Qanun-e-Shahadat, 1984, provides the procedure how to prove document when no attesting witness is found---It was obligatory upon the petitioner to prove the fact that his witnesses had died or could not be traced out---Petitioner had a way to prove the factum of death by leading secondary evidence---Best evidence was withheld without showing any justification, thus inference of Art. 129(g) of Qanun-e-Shahadat 1984, had to be drawn against him---Petitioner failed to produce attesting witnesses or to comply with the requirements of Art. 17 & 79 of Qanun-e-Shahadat, 1984---Provisions of Art. 79 of Qanun-e-Shahadat 1984 are mandatory and non-compliance thereof renders agreement as inadmissible in evidence---Petitioner had failed to prove genuineness of a valid agreement to sell in his favour, therefore, the Courts below had rightly concluded and dismissed the suit of the petitioner concurrently---Civil revision, filed by the plaintiff, was dismissed, in circumstances. [pp. 1181, 1182, 1183, 1184, 1185] A, B, C, D, E, F & H

Sheikh Muhammad Muneer v. Mst. Feezan PLD 2021 SC 538; Ghulam Sarwar (Deceased) through L.Rs. and others v. Ghulam Sakine 2019 SCMR 567; Muhammad Sarwar v. Mumtaz Bibi and others 2020 SCMR 276; Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others PLD 2011 SC 241 and Khudadad v. Syed Ghuzanfar Ali Shah alias S.Inam Hussain and others 2022 SCMR 933 ref.

(b) Civil Procedure Code (V of 1908) ---

---S. 115 --- Concurrent findings---Revisional jurisdiction of the High Court---Scope---Findings of lower Courts on question of facts and law based upon proper appreciation of oral as well as documentary evidence are not liable to be reviewed or substituted by the High Court ---Concurrent findings of the fact cannot be disturbed unless Courts below while recording findings of the facts have either misread the evidence or have ignored any material piece of evidence or they are perverse and reflect some jurisdictional error. [p. 1185] G

Syed Hasnain Naqvi and others v. Mst. Begum Zakara Chatha through LR's and others 2015 SCMR 1081; Noor Muhammad and others

v. Mst. Azmat-e-Bibi 2012 SCMR 1373; Muhammad Akbar v. Mst. Manna and 3 others 20014 SCMR 1700; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Abdul Mateen and others v. Mustakia 2006 SCMR 50 and Malik Muhammad Kha an v. Trustees of the Port of Karachi (KPT) and others 2008 SCMR 428 ref.

Ch. Muhammad Attique for Petitioner.

Qasim Ali Kalyar for Respondents Nos. 1 and 2.

Usman Nasir Awan and Ahmer Waseem Malik for Respondent Nos. 2 and 3.

Date of hearing: 16th April, 2024.

JUDGMENT

AHMAD NADEEM ARSHAD, J.---Through this Civil Revision, filed under section 115 of *Code of Civil Procedure, 1908*, the petitioner has called in question the validity and legality of impugned judgments and decrees of learned Courts below, whereby, his suit for specific performance of agreement to sell was dismissed, concurrently.

2. Facts in brevity are that the petitioner instituted a suit for specific performance of an agreement to sell on 13.07.2007 and sought performance of agreement to sell dated 17.07.2004, whereby, respondent No.1 agreed to sell his land measuring 08 *kanals* for a consideration of Rs.400,000/- and after receipt of earnest money of Rs.200,000/- executed agreement to sell. The petitioner maintained in his plaint that respondent No.1, who was owner of land measuring 16 *kanals* agreed to sell 08 *kanals* out of the said land for a consideration of Rs.400,000/- and after receipt of Rs.200,000/- executed an agreement to sell dated 17.07.2004; that it was settled that remaining consideration amount would be paid within one month and after that respondent No.1 transferred the said property to him; that thereafter respondent No.1 agreed to sell his remaining 08 *kanals* land situated near the *Abadi Deh* for a consideration of Rs.600,000/- through oral sale agreement dated 07.08.2004; that said land was transferred through oral sale mutation No.2214, incorporated in revenue record on 25.08.2004 and registered on 15.04.2005; that respondent No.1 sold the land of agreement to sell dated 17.07.2004 to respondents Nos.2 and 3 through oral sale mutation No.2227 dated 26.11.2004; that petitioner asked respondent No.1 to perform the agreement to sell dated 17.07.2004 and cancelled the mutation No.2227 dated 26.11.2004 but he refused to do so which constrained him to institute the suit. Respondent No.1 as well as respondents Nos.2 and 3 resisted the suit through filing their separate contesting written statements. Respondent No.1 in his written statement took a stance that he agreed to sell his land measuring 08 *kanals* for a

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consideration of Rs.400,000/- to the petitioner and in this regard he executed agreement to sell dated 17.07.2004; that subsequently he transferred the suit property to the petitioner through oral sale mutation No.2214 dated 15.04.2005; that the petitioner illegally incorporated the consideration amount of Rs.600,000/- instead of Rs.400,000/- in the said mutation; that when this fact came into his knowledge, he instituted a suit for permanent injunction which was subsequently withdrawn; that he fulfilled his part of agreement to sell dated 17.07.2004 by transferring the suit property in the name of the petitioner through oral sale mutation No.2214 dated 15.04.2005 and prayed for dismissal of the suit. Respondents Nos.2 and 3 also resisted the suit on the ground that they are *bonafide* purchasers with consideration without any notice of prior agreement to sell with the petitioner and prayed for dismissal of the suit. The learned trial Court, in the light of divergent pleadings of the parties, framed necessary issues and invited them to produce their respective evidence. After recording evidence of the parties pro and contra, oral as well as documentary, dismissed the suit vide judgment and decree dated 30.01.2013. Feeling aggrieved, the petitioner preferred an appeal which also met the same fate and dismissed by the learned appellate Court vide judgment and decree dated 25.11.2015. Being dissatisfied, the petitioner approached this Court through the instant Civil Revision.

3. I have heard learned counsel for the parties at full length and perused the record with their able assistance.

4. The petitioner sought performance of an agreement to sell dated 17.07.2004 (Exh.P-1) whereby respondent No.1 agreed to sell his land measuring 08 *kanals* situated in *Khewat* No.56, *Khatoni* Nos.152 to 154 for a consideration of Rs.400,000/-. It is also evident from the said agreement to sell that Rs.200,000/- was paid as an earnest money and it was settled that remaining amount of Rs.200,000/- would be paid within a period of one month. It was also settled that after payment of remaining consideration amount of Rs.200,000/- the petitioner would be entitled to get registered sale deed and if respondent No.1 failed to transfer the suit property in the name of the petitioner then he would pay damages equal to the earnest money and the petitioner would also be entitled to get registered the suit property through instituting a suit for specific performance. It was also agreed that if the petitioner failed to pay the remaining consideration amount within settled period then the earnest money will be confiscated and the bargain would be cancelled. This agreement to sell was scribed by Ikhlaq Ahmad scribe and witnessed by Asim Mahmood Dar son of Inayat Ullah Dar and Sardar Ali son of Anokhay Khan. From perusal of said agreement to sell (Exh.P-1) it appears that 160/863 share measuring 08 *kanals* from a joint *Khewat* No.56 consisted upon 43 *kanals* 03 *marlas* was agreed to be sold by respondent No.1 to the petitioner.

5. The petitioner claimed that said agreement to sell (Exh.P1) is yet to be performed, whereas, the stance of respondent No.1 is that he performed the said agreement to sell by transferring land measuring 08 kanals through mutation No.2214 dated 15.04.2005. The petitioner produced copy of oral sale mutation No.2214 as Exh.P-6. (Whereas, the respondents also brought on record said document as Exh.D-3). Perusal of the said oral sale mutation No.2214 it appears that factum of oral sale was reported to the Patwari on 25.06.2004 who got incorporated said factum in his register *Roznamcha Waqiyati* at Serial No.26. Said *Rapt Roznamcha Waqiyati* No.26 dated 25.08.2004 was brought on record as Exh.P-11. Perusal of said *Rapt Roznamcha Waqiyati* and oral sale mutation it appears that share of 160/863 measuring 08 kanals land from a joint *Khewat* No.56 consisted upon 43 kanals 03 marlas was transferred from respondent No.1 to the petitioner. Statements of the parties were recorded on 03.09.2004 and case was adjourned for verification of government dues. The government dues were paid on 07.09.2004 and mutation was registered on 15.04.2005. When agreement to sell (Exh.P-1) and oral sale mutation are put in juxta position then it appears that respondent No.1 performed the agreement to sell, however, there is a difference between the sale consideration. In the agreement to sell, the sale consideration was fixed as Rs.400,000/-; whereas in the oral sale mutation the consideration amount was incorporated as Rs.600,000/-. It is also matter of record that respondent No.1 after sanction of the said oral sale mutation instituted a suit for permanent injunction on the very next day i.e. on 16.04.2005, wherein, he pleaded that he agreed to sell his land measuring 08 kanals for a consideration of Rs.400,000/- but the petitioner entered an excessive amount of Rs.600,000/- in the oral sale mutation. Copy of the said plaint is available on the record as Exh.P-14. Although said suit was dismissed as withdrawn on 24.05.2006 but the institution of the suit from respondent No.1 on the very next day supported his version that he agreed to sell his land measuring 08 kanals for a consideration of Rs.400,000/- but the petitioner got entered an excessive consideration amount in the oral sale mutation.

6. The petitioner failed to prove the factum of oral sale agreement dated 07.08.2004. Neither the witnesses in whose presence said bargain was struck down were produced nor payment of consideration amount of Rs.600,000/- was proved. Similarly the petitioner also failed to produce the witnesses of oral sale mutation who identified the parties at the time of recording of statements by the revenue officer. Another fact also nullifies the claim of the petitioner that the petitioner instituted the suit for specific performance of agreement to sell on 13.07.2007 for performance of the agreement to sell dated 17.07.2004. There is no explanation why he remained silent for such a long period of three years. Agreement to sell was executed on 17.07.2004, whereby, it was settled

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that remaining consideration amount would be paid within one month. The oral sale mutation No.2214 was incorporated in the *Rapt Roznamcha Waqiyati* No.26 on 25.08.2004 after one month and seven days and the statements of the parties were recorded on 03.09.2004 and government dues were paid on 07.09.2004. All these facts also supported the version of respondent No.1.

7. Respondent No.1, who was owner of 18 *kanals* 19 marlas land, transferred his remaining land measuring 10 *kanals* 19 marlas from the said joint *khata* through oral sale mutation No.2227 dated 26.11.2004 (Exh.P-4) to respondents Nos.2 and 3. Said sale was incorporated in the *Rapt Roznamcha Waqiyati* at Serial No.67 on 04.10.2004 which is available on record as Exh.P-10 and the said oral sale mutation was sanctioned on 26.11.2004. Perusal of the *Rapt Roznamcha Waqiyati* and oral sale mutation it appears that respondent No.1 sold 219/863 share land measuring 10 *kanals* 19 marlas from the joint *Khewat* No.56 consisted upon 43 *kanals* 03 *marlas* for a consideration of Rs.745,695/- to respondents Nos.2 and 3. Said mutation was sanctioned on 26.11.2004 and possession was also handed over to respondents Nos.2 and 3. The petitioner, who was resident of the same village and also share holder on the basis of oral sale mutation No.2214 remained silent till the institution of his suit. It is unbelievable that petitioner remained un-aware of the said oral sale mutation for a long period of three years.

8. Even otherwise, the petitioner failed to prove a valid execution of agreement to sell dated 17.07.2004 (Exh.P-1). It is the duty of the beneficiary to prove its genuineness by producing its marginal witnesses. Under Article 17 read with Article 79 of Qanun-e-Shahadat Order, 1984, a plaintiff was duty bound to prove the genuineness of the said document through cogent, confidence inspiring and independent evidence. It is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise. Said agreement was witnessed/attested by two marginal witnesses namely Asim Mahmood Dar son of Inayat Ullah Dar and Sardar Ali son of Anokhay Khan. The petitioner produced Sardar Ali, one of the attesting witnesses as PW-2. The petitioner when produced the said witnesses, at that time respondent No.1 was proceeded against *ex-parte* and said PW-2 was only crossed examined by respondents Nos.2 and 3. Thereafter, *ex-parte* proceedings initiated against respondent No.1 were set-aside but the petitioner failed to produce Sardar Ali (PW-2) for cross examination, therefore, earlier statement/evidence of marginal witness is of no support to the petitioner and the said statement cannot be read against respondent No.1. Although his counsel apprised to the Court that said witness had been died and maintained that the death certificate of the said witness would be produced but the petitioner failed to produce the death certificate of said Sardar Ali till the final decision of the case. No

sufficient reason has been produced for non-production of death certificate of said witness. In this way the petitioner withheld best piece of evidence. A

9. The petitioner also failed to produce the second marginal witness namely Asim Mahmood Dar. The petitioner while recording his statement as PW-1 deposed that said Asim Mahmood has been died. Petitioner's counsel produced photo copy of his death certificate as Exh.P-7. The learned Courts below did not accept the said photocopy of death certificate as a piece of evidence. Simple oral assertion is not enough to prove the factum of death of both the marginal witnesses of agreement to sell dated 17.07.2004. Article 80 of Qanun-e-Shahadat Order, 1984, provides the procedure how to prove when no attesting witness is found. It is obligatory upon the petitioner to prove this fact that his witnesses had been died or cannot be traced out. Article 80 of Qanun-e-Shahadat Order, 1984 is as under: - B

"Proof where no attesting witness found. If no such attesting witness can be found, it must be proved that witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so."

In this regard the august Supreme Court of Pakistan held in case "Sheikh Muhammad Muneer v. Mst. Feezan" (PLD 2021 SC 538) as under:-

"The Article states that it must be proved that the witness had either died or could not be found. Simple alleging that a witness cannot be found did not assuage the burden to locate and produce him. The petitioner did not lead evidence either to establish his death or disappearance, let alone seek permission to lead secondary evidence."

It was further held in "Ghulam Sarwar (Deceased) through L.Rs., and others v.. Ghulam Sakine" (2019 MR 567) as under:-

"Mere assertion that marginal witnesses of the mutations had died would not discharge the burden of a party. There is nothing to establish the death of said witnesses."

10. The petitioner failed to lead any evidence to establish death of the said witnesses. The petitioner had a way to prove the factum of death by leading secondary evidence. In this way, best evidence was withheld without showing any justification, thus inference of Article 129(g) of Qanun-e-Shahadat Order, 1984 has to be drawn against him. Reliance in this regard can again be placed upon the case "Muhammad Sarwar v. Mumtaz Bibi and others" (2020 SCMR 276) wherein it was held as under:- C

"It is also noticeable that the concerned Tehsildar who had allegedly sanctioned the mutation namely Rehmat Ali and another witness of the mutation namely Anwar Hussain (Patidai) were material witnesses of the alleged gift mutation. They were however not produced for any valid reason. Therefore, the presumption of Article 129 of the Qanun-e-Shahadat Order by reason of withholding of the best evidence can also be drawn against the petitioner."

The petitioner failed to produce attesting witnesses. In this regard reliance is placed upon case titled as "Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others" (PLD 2011 SC 241) wherein it was held as under: -

"The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koer and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984 (See Rain Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that

for the validity of the instrument falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise."

In recent decision cited as "Khudadad v. Syed Ghuzanfar Ali Shah alias S.Inam Hussain and others" (2022 SCMR 933), the apex Court once again reinforced its earlier verdicts by holding as under:-

"The attestation and execution both have distinct characteristics. The execution of document attributes signing in presence of attesting witnesses including all requisite formalities which may be necessary to render the document valid. While the fundamental and elemental condition of valid attestation is that two or more witnesses signed the instrument and each of them has signed the instruments in presence of the executants. This stringent condition mentioned in Article 79 is uncompromising. So long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses. The provision of this Article is mandatory and noncompliance will render the document inadmissible in evidence. If execution of a document is specifically denied, the best course is to call the attesting witnesses to prove the execution. When the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage. "

The petitioner also remained failed to comply with the requirements of Articles 17 and 79 of Qanun-e-Shahadat Order, 1984. | E

11. The provisions of Article 79 are mandatory and non-compliance thereof rendered agreement as inadmissible in evidence. The petitioner has badly failed to prove genuineness of a valid agreement to sell in his favour, therefore, the learned Courts below have rightly concluded and dismissed the suit of the petitioner concurrently. | F

12. I have minutely gone through the record available on the file as well as the impugned judgments and decrees passed by learned Courts below. I have seen no illegality, irregularity and mis-reading or non-reading of evidence on the part of two Courts below, as learned Courts

below while passing the impugned judgments and decrees took a count of every bit of evidence, oral as well as documentary, produced before them and nothing is shown to have been over-looked any part of the record from their judicious consideration. The findings of learned lower Courts on question of facts and law having based upon proper appreciation of oral as well as documentary evidence are not liable to be reviewed or substituted by this Court. Moreover, the concurrent findings of the fact cannot be disturbed unless Courts below while recording findings of the facts have either misread the evidence or have ignored any material piece of evidence or those are perverse and reflected some jurisdictional error. In this regard, reliance is placed on case titled "Syed Hasnain Naqvi and others v. Mst. Begum Zakara Chatha through LRs and others" (2015 SCMR 1081), "Noor Muhammad and others v. Mst. Azmat-e-Bibi" (2012 SCMR 1373), "Muhammad Akbar v. Mst. Manna and 3 others" (20014 SCMR 1700), "Ghulam Muhammad and 3 others v. Ghulam Ali" (2004 SCMR 1001), "Abdul Mateen and others v. Mustakia" (2006 SCMR 50) and "Malik Muhammad Khaqan v. Trustees of the Port of Karachi (KPT) and others" (2008 SCMR 428). Learned counsel for the petitioner has been unable to point out any piece of misreading and non-reading of evidence qua the concurrent findings of the learned Courts below.

13. For what has been discussed above, the instant civil revision is, hereby, dismissed being without any merits with no order as to costs.

MQ/M-48/L

Revision dismissed.

2024 M L D 1185

[Federal Shariat Court]

Before Iqbal Hameedur Rahman, CJ and Syed Muhammad Anwer, J

MUHAMMAD KASHIF---Appellant

versus

The STATE and 2 others---Respondents

Criminal Appeal No. 02-I of 2023, decided on 29th February, 2024.

(a) **Offence of Qazf (Enforcement of Hadd) Ordinance (VIII of 1979)---**

---S. 7---Commission of offence of qazf---Appeal against acquittal ---
Appreciation of evidence---Motive not proved---Accused was charged
---involving imputation of zina against the