

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

C.R NO.1005 OF 2009

Ismail.....Petitioner.

Versus

Nazreen and othersRespondents.

Present:

Barrister Dr. Adnan Khan for Petitioner.

Mr. Shah Salam Khan, Advocate for Respondents.

Date of hearing: 26.05.2022.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This single judgment in the instant petition shall also decide the connected **C.R No.339-M/2016** titled "**Ismail Vs. Mst. Bakht Roza and others**" not because the parties are same but the dispute also pertains to one and same property.

2. Facts of instant **C.R No.1005 of 2009,** whereby the petitioner seeks setting aside of the judgment & decree dated 25.08.2009 of the learned Additional District Judge/ Izafi Zila Qazi, Shangla, vide which, his appeal against judgment & decree dated 23.10.2008 of the learned Civil Judge/ Ilaqa Qazi, Alpuri, Shangla dismissing his suit No.231/1 of 2002, was dismissed, are that the petitioner filed the suit on 15.08.2002 seeking therein declaration in respect of the property commonly known as Dherai Patay Ghair

Mumkin Kotha situated in *Khasra* No.1845/982 along with *Khasra* No.981 on the strength of registered deed No.51 dated 19.09.2000 for sale consideration of Rs.3,50,000/-, to the effect that he is owner in possession of it, with which, the defendants have got no concern, whatsoever; that entries in the revenue papers in favour of respondents/defendants to the extent of *Kotha* are ineffective upon his rights, on the ground that *Khasra* No. 1845/982 was part and parcel of *khatoni* No.154 *khewat* No.137, which was later on bifurcated into two different *Khasra* numbers i.e., *Khasra* Nos. 1845/982 and 981 and not only the possession of the entire property was transferred, which was the subject matter of registered deed No.51 including *kotha* in *Khasra* No. 1845/982 but sale consideration was also paid. Suit of the plaintiff was resisted by the legal heirs of Umer Dad whereas the brothers of Umer Dad defendants No.1 to 3 have submitted their cognovits. After completion of evidence, the learned trial Court through its judgment & decree dated 23.10.2008 dismissed the suit and the Civil Appeal No.34/13 of 2008 filed by the petitioner was also dismissed on 25.08.2009 by Hafiz Nasim Akbar, Additional District Judge/ Izafi Zila Qazi Shangla, as then he was.

3. Facts of connected C.R No.339-M/2016 whereby the petitioner has challenged judgment & decree dated 27. 10.2016 of the learned Additional District Judge, *Shangla*, by which, Civil Appeal No.50/13 of 2014 against judgment and decree dated

13.02.2014 of the learned Civil Judge/ Ilaqa Qazi, Shangla dismissing suit No.50/1 was allowed, consequently suit of the respondents/ plaintiffs was decreed, are that the respondents/ plaintiffs filed the suit on 04.07.2005 for declaration to the effect that *Khasra* No.1845/982 measuring 14-kanal 12-marla of the revenue estate of Dawlat Kalay, Tehsil Alpuri, District Shangla was the ownership of Umer Dad, their predecessor in interest and defendants No.2 to 4 with collusion of defendant No.1 *inter se* fraudulently executed deed No.51 dated 19.09.2000, whereby they were deprived of their property, for which, neither any sale consideration was paid nor their predecessor in interest namely Umer Dad ever appeared before the Sub-Registrar as he was deaf-and-dumb, thus, was required to be treated as a special person especially in the circumstances when he had no male issue, hence, the registered deed No.51 and thereafter entries in the revenue papers in favour of the defendant No.1/ petitioner is ineffective upon their rights. After completion of evidence, the learned trial Court through its judgment & decree dated 13.02.2014 dismissed the suit, against which, respondents filed civil appeal No.50/13 whereas Muhammad Azeem who was defendant No.2 filed civil appeal No.51/13. Both the appeals were consolidated and vide consolidated judgment and decree dated 27.10.2016 of the learned Appellate Court, appeal No.50/13 was accepted and judgment and decree of learned trial Court dated 13.02.2014 was set aside and suit

was decreed in favour of the respondents/ plaintiffs whereas appeal No.51/13 was dismissed, being meritless.

4. Arguments heard and record perused.

5. After hearing learned counsel for the parties, it appears that the controversy revolves around on the legal questions:

(1) Whether Azcem Khan was legally appointed as attorney by Umer Dad, predecessor in interest of the plaintiffs, if not, could he appear and take part in attestation of the disputed registered deed No.51 (Ex.PW3/1)?

(2) Whether the sale consideration was received by Umer Dad?

(3) Whether the registered deed No.51 (Ex.PW3/1) was proved by the petitioner? and

(4) Whether admission of defendants No.1 to 3 of suit No. 231/1 and the statement of official from the office of Sub-Registrar could be equated with the proof as required under Article 79 of the *Qanun-e-Shahadat* Order, 1984?

6. The copy of deed (Ex.PW3/1) were placed on record in the statement of PW-3, the petition writer. It reveals that it was executed through one Azeem Khan s/o Ghotay resident of Alpuri, District Shangla purportedly to be the general attorney on whose instance the property bearing *Khasra* No.1845/982 measuring 14-kanal 12-marla was sold by Umer Dad alia Pacho alongwith shares of shamilat (جملہ حقوق داخلی و خارجی). Overleaf of the deed reflects that it was signed by Shah Wazir Khan and Pervaiz as marginal witnesses, whereas Azeem Khan as attorney. Neither any reference of general power of attorney with its particulars, i.e., registered

number of power of attorney nor date of its attestation was mentioned in registered deed Ex.PW3/1 nor any such document was placed on record since the institution of the suit till today. Even today, Barrister Dr Adnan Khan representing the petitioner was questioned as to whether any document regarding appointment of Azeem Khan as attorney by Umer Dad was placed on record or the petitioner is in possession of any such document, he conceded it at the bar that neither any document was placed on record nor he is in possession of the same. How a person could alienate the property of other without their being any legal relationship i.e., of principal and agent was a question to be answered by the petitioner but such evidence is lacking on the part of petitioner. Likewise, the petitioner did not produce Azeem Khan before the Court as a witness to corroborate his version, however, learned counsel for the petitioner stated at the bar that Azeem Khan was made as a party in suit No.50/1 of 2005 as a defendant No.2. Though there is no statement of Azeem Khan in both the civil revisions, nonetheless the judgment of learned trial Court in suit No.50/1 (*neem*) of 2012 available at page No.63 of the connected petition reflects that Azeem Khan appeared as CW-1 who deposed that:

مکی عمر داد عرف۔ پچو کا عمار عام رہا ہوں۔ بحیثیت عمار عام میں نے کسی لیس دین یا خرید و فروخت منجانب عمر داد نہیں کیا ہے۔ مجھے دعویٰ مدعیان کی بابت کوئی علم نہ ہے۔

In cross-examination, he has made another statement that his son Ayaz Mir has purchased property from Umar Da. Even

otherwise, one cannot be held as attorney without any document and proof thereof. Mere impleading of Azeem Khan in the suit No.50/1 of 2005 by the plaintiff of that suit could not absolve the petitioner from the legal requirement to prove the relationship between Azeem Khan and Umar Dad. More-so, it was for the petitioner to prove that Azeem Khan was the attorney of Umar Dad. Learned counsel for the petitioner pointed out that the statement and cross examination of PW-2 is of much significance which reflects that Sub-Registrar himself inquired from Umar Dad about the alienation of the property and after his satisfaction, he registered deed Ex.PW3/1. Be that as it may, the statement of Clerk is not sufficient enough to hold that the Sub-Registrar proceeded to Umar Dad, personally met with him, got requisite information and satisfied himself regarding the alleged transfer of the property in favour of the present petitioner. In such circumstances, the petitioner was legally required to produce the concerned Sub-Registrar before the Court as a witness or to depose the reasons of his non-production. No reason, whatsoever, was put forth by the petitioner in that respect. Thus, I am of the view that neither Azeem Khan was the attorney of Umar Dad nor he was legally authorized to execute the document in favour of the petitioner on behalf of Umar Dad.

7. Admittedly, sale consideration has not been received by Umar Dad. It was alleged by the plaintiffs of suit No.50/1 of 2005

that their predecessor in interest has not received the sale consideration. In such an eventuality, the petitioner was required to prove the payment of sale consideration and its receipt by vendor Umar Dad but the petitioner has not been able to prove it. Though, the petitioner has produced one Amjad Khan Manager Muslim Commercial Bank Alpuri as DW-5 and contended that through cheque bearing No.38097322 dated 16.09.2000 the amount of sale consideration was paid, however, statement of DW-5 Amjad Khan Manager MCB reflects that this cheque was in the name of Azeem Khan, which was placed on record as Ex.DW5/1 and this amount was received by Azeem Khan, therefore, this statement too is not favorable to the plaintiff/petitioner because the payment of sale consideration to Azeem Khan is of no worth when there was no relationship between Azeem Khan and the alleged vendor Umar Dad. Even otherwise when the receipt of sale consideration was denied then the petitioner was required to prove it that the same was received by the principal Umar Dad and not by his attorney. Hon'ble Supreme Court in case titled Sardar Ali versus Khan (2005 SCMR 1583) has held:

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

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

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

9. The Apex Court in case titled *Ghulam Mustafa versus Muhammad Yahya 2013 SCMR 684* has held:

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

10. In *Mst. Hajyane Bar Bibi (PLD 2014 SC 794)* it was held by the Hon'ble Supreme Court that:

“Agreement to sell---Validity---Payment of balance sale consideration not established---Possession since date of agreement to sell not proved---Effect---No evidence was produced to establish that remaining sale consideration was paid to the purported seller/respondent---Purported purchaser/petitioner also failed to establish that she was in possession of the suit property since the date of agreement to

sell---Suit for declaration filed by petitioner had been rightly dismissed in such circumstances.”

11. In Mst. Moiz Abas's (2019 SCMR 74) it was held that:

“Furthermore, the alleged oral agreement to sell in favour of the respondent appeared to be concocted---No date, time, place or names of witnesses of the alleged oral agreement had been mentioned in the reply to the legal notice, the written statement, or the suit filed by the respondent---Such requirement was sine qua non for proving the oral sale agreement.”

12. Record reflects that neither the stamp vendor nor the marginal witnesses of the deed were produced by the petitioner. It is appropriate to mention that statement of Shah Wazir was recorded as CW-2 and that of Pervaiz as CW-3 in suit No.50/1. CW-2 in his cross-examination deposed that the front page of registered deed correctly bears his signature, however, added that deed was scribed some three months earlier from its registration. Likewise, CW-3 deposed that front page of registered deed correctly bears his signature. But the registered deed reveals that it was scribed on 15.09.2000 and registered on 19.09.2000. On the overleaf of the deed, there are signatures of the witnesses CW-2 & CW-3 but none of them accepted their signatures on the overleaf as correct.

13. Turning to other captivating aspect of the case that on 15.09.2000 two deeds were scribed, one of them is registered deed which reads that the sale consideration has already been received by the vendor/Azeem Khan whereas in the other deed available at page No.83/12 of the instant petition on same i.e., 15.09.2000. Petitioner

Ismail stated that an amount of Rs.70,000/- as sale consideration is outstanding against him which shall be paid on 30.01.2001. This deed too was signed by both Shah Wazir and Pervaiz but they deposed nothing about it. The contents of both the deeds about payment of sale consideration are repelling to each other. Shah Wazir Khan and Pervaiz have been mentioned as marginal witnesses of the deed Ex.PW3/1. In accordance with the provisions of Article 79 of *Qanun-e-Shahadat* Order, 1984, a document could be proved only when two marginal witnesses thereof were produced before the Court. In case titled "Zulfiqar and others versus Shahadat Khan" (PLD 2007 SC 582), the apex Court has held that:

"As noted above, copy of the Roznamcha Waqiyati was neither produced nor the vendor or the Patwari was examined. Therefore, the entry in the mutations referring to the report recorded in Roznamcha Waqiyati was not the primary evidence. Although Roznamcha Waqiyati is required to be maintained under the West Pakistan Land Revenue Rules, 1968 and entry made during the course of performance of official duty is admissible yet if the report contains the statement of a private individual, it is required to be proved to establish its correctness."

14. Moreover, after the death of Umar Dad, his brother could be termed as legal heirs because he had no male issue but in the life time when he had daughters, the brothers were not the sharers as per inheritance. Admission of defendants No.1 to 3 has got no value as no relief was sought against them nor their admission without their appearance before the Court in order to fortify the version of petitioner for the purpose of sale in his favour. No independent

person representing Umar Dad either at the time of the execution of the deed or registration thereof was produced by the petitioner before the Court as a witness. Statement of Azcem Khan the alleged attorney was also not recorded by the petitioner wherefrom an adverse inference is drawn that had he been produced, he would not support the petitioner. In case titled "Ibadullah and others Versus Sher Afzal (2006 CLC 666) it was held that:

“If a best piece of evidence was available to a party and he failed to produce that, then it was presumed that said party had some sinister motive behind it and a presumption under illustration 'g' of Art, 129 of Qanun-e-Shahadat, 1984 could be drawn that had the said evidence been produced, it would have not been favourable to the party concerned.”

15. In the case of "Wali Muhammad Versus Noor Muhammad through Legal Heirs and 2 others (2017 Y L R Note 419), it was held that:

“The above quoted words have come from the mouth of a witness of the respondent in response to a question put to him during cross-examination. I am of the view that the said 'Mohammed Salch' was an important witness, who was not produced by the applicant as such he is also responsible for withholding of the best available evidence. As per provision of Article 129(g), the Court has rightly reached to an adverse presumption against the applicant due to withholding of an important and best available evidence. Thus, non-appearance of attesting witness Muhammad Salch made the claim of the applicant highly doubtful. In the case reported as Sughran Bibi v. Mst. Aziz Begum (1996 SCMR 137), the Hon'ble Supreme Court held that, if evidence of vital importance is not produced or is withheld, the Court in terms of Article 129(g) of Qanun-e-Shahadat would draw adverse inference that had such evidence been produced by the party it would have gone against him”.

16. Learned Courts below in suit No.231/1 of 2002 and the learned Appellate Court in civil suit No.50/1 of 2005 have properly appraised the evidence of the parties and those findings of the learned Courts below, in view of the above discussion, are not open to any exception. Learned counsel for the petitioner has not been able to point out any illegality, irregularity or jurisdictional defects in the impugned judgments and decrees, as such, these petitions, being bereft of any merits, are hereby dismissed.

Announced
26.05.2022


JUDGE

Office
5/6/2022
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