

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, BANNU BENCH
JUDICIAL DEPARTMENT

Civil Revision No. 102-B of 2021

JUDGMENT

Date of hearing: **06.12.2021**

For petitioner: **Mr. Ashiq Hussain Marwat, Advocate.**

For respondents: **Mr. Umar Farooq, Advocate.**

MUHAMMAD NAEEM ANWAR.J- Petitioner has questioned the judgment and decree of learned Additional District Judge-II, Lakki Marwat dated 13.03.2021 whereby his appeal was dismissed and the judgment and decree of learned trial court dated 13.01.2020 was maintained.

02. Facts of the instant petition are that respondent No.01 filed a suit for specific performance of a contract dated 26.07.2012, whereby the petitioner has agreed to transfer the property bearing Khasra Nos. 452 and 453 situated in the estate of Dadiwala, District Lakki Marwat at the rate of Rs.25000/-per kanal wherefrom he has paid Rs.3,00,000/- as an earnest money and for rest of the amount it was agreed to be paid within 06/07 days when the mutation would be attested. Allegedly it was settled that in case of failure on part of petitioner he would pay an amount of Rs. 6,00,000/- to respondent No.01 whereas in case of failure in fulfilling the terms and conditions of the agreement respondent No.1 would pay an amount of Rs. 3,00,000/- to

petitioner. Defendant/ respondent was asked to transfer the property in favour of plaintiff and to receive remaining amount but he refused. In alternate a prayer for recovery of Rs. 3,40,000/- was also sought against them.

03. Suit was resisted by petitioner whereas defendant No.2 namely Mst. Bibi Aisha while appearing before the learned trial court has submitted an application under order VII rule 11 CPC to the effect that she is the owner of property but neither she had entered into any agreement with plaintiff nor she has given any power of attorney to her son/respondent No.1, therefore, her name may be struck off from the array of defendants. Her application was allowed on 28.04.2015 and her name was struck off from the panel of defendants. Suit was contested by defendant/respondent No.1 on various legal and factual objections. From divergent pleadings of the parties learned trial court framed issues, parties produced their evidence and after conclusion of evidence, suit of plaintiff/ respondent No.1 was decreed to the extent of alternate prayer i.e., recovery of Rs. 6,40,000/-. Petitioner has assailed the decree of learned trial court through his appeal; however, his appeal was dismissed by the learned appellate Court through its judgment and decree dated 13.03.2021, hence the instant petition.

04. Learned counsel for petitioner contended that plaintiff could not produce any evidence in order to substantiate his suit

based on the alleged agreement dated 26.07.2021 nor the payment of sale consideration was proved. He added that not only there are contradictions in the statements of PWs regarding payment of sale consideration and venue thereof but the scribe of deed has outrightly negated payment of sale consideration in his presence, therefore, Ex.PW2/2 could not be relied upon and no decree could be passed against the petitioner.

05. Conversely, learned counsel for respondent No.1 contended that all the witnesses are consistent with regard to the payment of sale consideration to petitioner by respondent No.1 and that the petitioner while entering into the witness box, in reply to a question he has shown his willingness for comparison of his thumb impression through Forensic Science Laboratory but thereafter petitioner has not provided his thumb impression for Forensic Science Laboratory examination despite Court direction therefore, the suit was rightly decreed against the petitioner.

06. Arguments heard; record perused.

07. It is reflected from the pleadings of the parties that suit of the plaintiff/respondent No.1 hinges upon Ex.PW2/2 and as per its contents an amount of Rs. 3,00,000/- was paid by plaintiff/respondent No.1 to the petitioner. In order to prove Ex. PW2/2 plaintiff produced petition writer as PW-1 who in his cross-examination deposed that in his presence no sale

consideration has ever been paid by the plaintiff to defendant No.1. Plaintiff himself appeared in witness box as PW-3 and in his cross-examination, he replied to a question that an amount of Rs. 3,00,000/- was paid at the time of scribing of Ex. PW2/2. Mr. Farhad Ullah PW-4 also deposed in cross examination that Rs.3,00,000/- was paid at the time of scribing of deed whereas Abdul Rehman, the other marginal witness deposed that the plaintiff has paid Rs. 3,00,000/- in his presence in his *Baithak* and thereafter they proceeded to the petition writer for scribing of deed. The payment of Rs. 3,00,000/- was crucial aspect but PW-2 and rest of the witnesses were contradicted each other. PW-2 has denied from the payment of sale consideration in his presence and similarly, Abdu Rehman, the other witness has also deposed that 3,00,000/- rupees were paid in his *Baithak* and thereafter all of them proceeded to petition writer. Though learned counsel for respondent No.1 contended that the narration about the payment of sale consideration at the time of scribing of deed shall be construed as payment in presence of witnesses and the contradictions pointed out by the petitioner being minor is of no significance. There is no cavil with the proposition that civil suits are decided on the basis of preponderance of evidence and plaintiff was required to prove his case through cogent, coherent, reliable and convincing evidence. Neither the payment of sale consideration was proved nor witnesses were consistent. In such

like situation Hon'ble Supreme Court in case titled *Sardar Ali versus Wazir 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.

08. In Muhammad Rasheed Khan's case (2009 SCMR 740) it was held 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.

09. Furthermore, there is no denial that petitioner was neither owner of property nor he was legally appointed special attorney of his mother and his mother while appearing before the court has outrightly negated that neither she entered into any transaction nor she has received an amount of Rs.3,00,000/- thereafter she was struck off from the panel of defendants and that order was even not assailed by the respondent No.1. It is well settled that a person cannot transfer the better title of his own, Ref: "Itbar Shah and others vs. Ahmad Shah and others" (2001 CLC 1021), "Abdul Hameed through legal heirs and others Vs. Shamssuddin and others" (PLD 2008 SC 140). Therefore, there was no suit against respondent No.2/defendant No.2, however, the respondent No.1 was required to prove the payment of earnest amount in order to prove his case to the extent of alternate prayer but he has failed to prove the payment of sale consideration and though much stress was laid by respondent No.1 regarding the acceptance of application for examination of thumb impression of petitioner, however, if at all the thumb impression of petitioner would have been sent to FSL, even then opinion of expert in accordance with Article 59 of Qanoon-e-Shahadat Order, 1984 is the weakest type of evidence which could only be considered as corroborative piece of evidence against the petitioner but when statements of PWs are



not in line with each other plaintiff could not be held entitled for an alternate decree against the petitioner.

10. The scanning of record led me to an irresistible conclusion that both the learned Courts below have failed to appreciate the evidence in its true perspective which resulted into an illegality therefore, on acceptance of this petition the judgments and decrees impugned through this petition are hereby set aside and suit of the respondent No.1/plaintiff is dismissed. Keeping in view the exceptional circumstances, as discussed above the parties shall bear their own cost.

Announced.

06.12.2021

Ihsan



JUDGE



(S.B) Hon'ble Mr. Justice Muhammad Naeem Anwar.

09 DEC 2021

