

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

RFA No.10-D/2018 with
CMs No.26-D/2018

Mehboob Aamir & others
Versus:
Abdur Rasheed Khan & others

For Appellants: Mr. Zain-ul-Abideen Advocate.

For respondents: Mr. Salimullah Khan Ranazai Advocate.

Date of hearing **20.10.2022**

JUDGMENT

MUHAMMAD FAHEEM WALI, J.- Appellants through this Regular First Appeal, filed under Section 96 of the Code of Civil Procedure (Act-V) 1908, have called in question the vires of Judgment & Decree dated 24.01.2018 passed by the learned Civil Judge-IV, D.I.Khan, whereby suit of respondents/plaintiff for recovery of Rs.1,30,00,000/- was decreed.

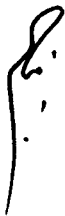
2. Facts forming factual canvas of this appeal are that respondents instituted a suit for recovery of Rs.1,32,60,000/-

on account of outstanding price of 1667 bags of gram grains and Rs. 260,000/- as cost of litigation etc. They in their plaint, contended that appellants deal in business of grains with the name & style of Murshid Traders and they were having good business terms with the respondents. In that context, appellants on various occasions, purchased gram grains from respondents and it was agreed that after the sale of said crop in the market, appellants will pay the price to respondents; but thereafter, appellants failed to pay the amount, due to which a criminal case was registered against respondents. Moreover, the matter was referred to arbitration committee who gave its decision on 17.03.2013 whereby appellants admitted the liability, but they did not obey the said arbitration decision. The suit was contested by appellants through filing written statement; and after framing issues, recording evidence and hearing arguments of parties, the learned Civil Judge-IV D.I.Khan decreed the suit for recovery of Rs.1,30,00,000/- vide Judgment & Decree dated 24.01.2018. Hence, the instant appeal has been preferred by appellants/defendants.

3. Arguments of the learned counsel for parties heard and record gone through with their valuable assistance but for the sake of brevity, without reproducing the arguments of the

counsels, same will be adequately dealt with at appropriate stages in this judgment.

4. A meticulous sifting of the record transpires that the respondents have based their claim on oral assertions, some receipts on the pad of Murshid Traders and the arbitration decision of Dispute Resolution Committee (DRC) of Police Station Cantt. D.I.Khan, whereby, allegedly appellants admitted the liability of payment. In order to prove their case, the first and foremost obligation of respondents was to prove the delivery of gram grains to appellants. Except some receipts produced as Ex.P.W.1/2 to Ex.P.W.1/11, exhibited under objection, there is nothing on the record which could establish the delivery of gram grains; whereas, bare reading of receipts reveals that same have been scribed on the simple pad of Murshid Traders and with the same stamp reflecting name of "Mahboob Aamir" and his purported signature. No name and signature of any witness does appear on the said receipts and even signature of respondents as a token of delivery of gram grains are also not available. Mere production and marking of documents as Exhibits by the Court cannot be held to be due proof of its contents, its execution has to be proved by admissible evidence that is by the evidence of those persons who can vouchsafe for the truth



of the facts in issue. The execution of all the receipts has been denied by the appellants and specific objection with regard to its admissibility and authenticity was raised at the time of exhibition of said receipts. The provisions of Article 79 of the Qanoon-e-Shahadat Order, 1984, are applicable as execution of a document is disputed between maker of document and the person in whose favour purportedly the same is executed. While rendering this view, I am fortified by the dictum laid down by the Apex Court in the case of "*Pervez Khan and others Vs. Ali Asghar Khan and others*" (2022 SCMR 1857) and relevant passage reads as under:

"Even otherwise, if a document is disputed by the opponent, the onus to prove its execution in accordance with law is upon the party, relying on it. Since the respondents were claiming to be the beneficiary of the document in question, which has been disputed by the petitioners, therefore, the burden of proof of its genuineness, age, production from proper custody and its execution and signing by the executant was upon them. The respondents did not produce any evidence in this behalf, enabling the Courts below to presume that



the predecessor of the plaintiffs and defendants Nos.3 and 4 was the executant and signatory of the agreement, therefore no presumption of correctness could be attached to the said document. Both the courts have erred in law by drawing such presumption. Reliance is also placed in the case reported as Mst. Hajyani Bar Bibi through L.R. v. Mrs. Rehana Afzal Ali Khan and others.”

5. Further guidance in this context has been provided by the Apex Court in the case titled, ***“Khudadad Vs. Syed Ghazanfar Ali Shah alias S. Inaam Hussain and others”*** **(2022 SCMR 933)**, wherein the august court observed that 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. The provision of this Article is mandatory and non-compliance 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.



6. Moreover, if the receipts, produced by respondents in evidence, are evaluated by keeping aside the requirement of Article 79 of the Qanoon-e-Shahadat order, 1984, even then the same cannot be taken into consideration for the purpose of proof. The receipt dated 13.08.2012 (Ex.P.W.1/3) portrays that delivery is pending as word (مال بقايا) has been written in the end; the receipts dated 29.08.2012 and 05.09.2012 reveals the word "مال وصول" at the end without any signature; receipts dated 13.08.2012, 02.09.2012, 03.09.2012, 05.09.2012 (Ex.P.W.1/3, Ex.P.W.1/6, Ex.P.W.1/7 & Ex.P.W.1/8 respectively) show an entry of one Badshah/Ghulam Badshah broker; receipt dated 21.07.2012 (Ex.P.W.1/9) reveals the name 'Fateh Ullah broker', receipt dated 24.07.2012 (Ex.P.W.1/10), reflects the name of 'Sami Ullah broker' and receipt dated 02.08.2012 (Ex.P.W.1/11) transpires the name of 'Ahmad Nawaz broker'. None of the said persons/brokers signed any of the receipts. Even the receipts dated 21.07.2012 and 24.07.2012 i.e. Ex.P.W.1/9 and Ex.P.W.1/10 only contain the stamp with no signature.

7. Ghulam Badshah broker appeared as PW-7 and narrated about the deal of 840 sacs of gram grains and also produced the register containing entries of bargains as Ex.P.W.7/1, which reveal the deal of 500 sacs of gram on

04.08.2012, however, no corresponding receipt is available on the record. Receipts Ex.P.W.1/3, Ex.P.W.1/6, Ex.P.W.1/7 & Ex.P.W.1/8, containing the name of Badshah/Ghulam Badshah, shows bargain of 240, 120, 270, 100 sacs respectively which make a total of 730 sacs, and this fact contradicts the stance of witness about deal of 840 sacs. Moreover, the witness in his cross examination admitted that various pages have been torn-out from the said register and various pages have been left blank. The relevant excerpt from his cross examination runs as under:

"یہ درست ہے کہ امروز پیش کردہ ڈائری سال 2011 پر تقریباً 11 صفحہ جات 26 اپریل 2011 تا 28 مئی 2011 تک خالی پڑے ہوئے ہیں جنکی فوٹوکاپی پیش کرتا ہوں جو کہ Ex.P.W.7/D-1 میں ہے اور مشتمل بر گیارہ اوراق ہیں۔ یہ درست ہے کہ آج پیش کردہ سودا book میں سے جا بے جا صفحہ جات کاٹے گئے ہیں جو کہ اب اس ڈائری کا حصہ نہیں ہیں۔"

8. Similarly, Fatehullah was examined as PW-8, who in his statement deposed that in his presence one vehicle of gram sacs was given to appellants; but he, in his cross examination, contradicted his own stance by admitting that appellant had not taken away the said gram in his presence; and in his cross examination dated 17.10.2015 he further

stated that whatever he said about the delivery of gram sacs, was not witnessed by him, rather respondents had told him about this.

9. The respondent No.2 himself appeared as PW-3 and he placed another version of wheat grains besides gram grains. The relevant portion of the examination-in-chief of PW-3 reads as under:

"مدعا علیہم سے ہمارے دوستانہ مراسم تھے۔ ہم تینوں نے اگست 2012 میں 1307 بوری گندم چند جبکہ 360 گندم بوری حاجی محمد رمضان، یعنی کل 1667 بوری چند، جنگلی مالیت تقریباً ایک کروڑ تیس لاکھ بنتی ہے۔"

10. The respondent/plaintiff No.3 himself appeared as PW-4 but he did not state any word about the controversy; he just stated that he is owner of the shop and remaining witnesses are his business partners. Hence, the plaintiff's evidence is not trustworthy nor inspire confidence, hence, cannot be relied upon.

11. Apart from the above, respondents also made efforts to prove their case through the Arbitration Decision dated 17.03.2013 of the Dispute Resolution Committee of Police Station Cantt. D.I.Khan. The said decision was produced as Ex.P.W.1/2 and objection as to its authenticity and

admissibility was also raised at the time of its exhibition. As a proof of the arbitration decision respondents produced PW-2, PW-5, PW-9 and PW-10.

12. A threadbare perusal of the arbitration decision dated 17.03.2013 (Ex.P.w.1/2) reveals that a note has been given at the margin to the effect that after settling the matter on 23.03.2013, another meeting will be convened. The relevant excerpt reads as under:

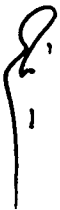
نوٹ: مورخہ 23/03/2013 کو تمام معاملات طے کر کے دوبارہ
میٹنگ کر کے فائنل معاہدہ تحریر کیا جائیگا۔

13. PW-9, Inspector Muhammad Iqbal, claimed that on his dictation the said decision was scribed by Madad Moharrir Abdul Ghafoor (PW-10); he in his cross examination stated that no further meeting with regard to the note written on the margin, was convened. The relevant sentence is reproduced hereunder:

"مبینہ Ex.PW 1/12 میں جو نوٹ تحریر اُس کی نسبت دوبارہ کوئی
میٹنگ عمل میں نہیں لائی گئی۔"

14. Thus, there remains no cavil to the proposition that the matter was yet to be finalized and the arbitration decision was incomplete. Moreover, it is also an admitted fact that

Mehboob Aamir, whose name appear in the stamp of Murshid Traders, affixed on all the receipts, is not a signatory of the said arbitration decision. Even otherwise, the witnesses so produced in support of the arbitration did not state even a single word about the mode, manner and conditions of the settlement. It is well settled principle that attestation in relation to instrument means attested by two or more witnesses each of whom has seen the executant, signed, or affixed his mark to the instrument, or has seen other person signing the instrument in his presence and by the direction of the executant or has received from the executant a personal acknowledgement of his signature or mark of the signatures of such other persons and each of whom has signed the instrument in presence of the executant. The necessary conditions for a witness attesting an instrument are that, he has seen the executant and secondly, he has signed the instrument in the presence of the executant and thirdly, he is aware of all the contents of such instrument. Guidance in this regard has been derived from verdict of worthy Apex Court rendered in case titled "*Nazir Ahmad and another Vs. M. Muzaffar Hussain*" (2008 SCMR 1639) wherein it was held:



“The attesting witness is one who not only sees the document being the executant but also signs it as a witness.”

15. Article 117 of the Qanun-e-Shahadat Order, 1984 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Reliance is placed on the case of “Amjad Ikram VS. Mst. Asiya Kausar and 2 others” (2015 SCMR 1), wherein the worthy Apex Court was pleased to observe:

It is an equally settled principle of law that it is the duty and obligation of the beneficiary of a transaction or a document to prove the same. Reference in this behalf may be made from the judgments of this Court, reported as Akhtar Ali v. The University of the Punjab (1979 SCMR 549), Haji Muhammad Khan and others v. Islamic Republic of Pakistan and 2 others (1992 SCMR 2439) and Khan Muhammad v. Muhammad Din through LRs. (2010 SCMR 1351).



16. Respondents, as discussed above, failed to prove the execution of receipts and also prove the delivery of gram grains to appellants and liability of appellant to pay the sum to respondents. Even there is no iota of evidence to establish the connection of appellants with the 'Murshid Traders' particularly when the same is not registered one; and telephone or cell numbers printed on the pad form cannot be taken as a universal truth as one can easily get print pad forms, with any name, style and particulars from a printing press. Also, there is no prohibition under the law to restrict such printings, unless there is violation of any copyright laws or breach of registered trademark. Besides, respondents are placing a heavy reliance upon the arbitration decision dated 17.03.2013, which too has not been proved. However, their reliance on the arbitration decision ousts the jurisdiction of Civil Court to entertain and adjudicate upon the matter within the purview of Section 32 of the Arbitration Act, 1940, which provides as under:

32. Bar to suit contesting arbitration agreement or award: *Notwithstanding any law for the time being in force, no suit shall lie on any ground for a decision upon the existence, effect validity of an arbitration agreement or award, nor shall any*

arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

17. Thus, the learned trial court was having no jurisdiction to mechanically rely upon the arbitration decision while deciding issues No.3, 4 & 5, until and unless the enforcement of same would have been sought in accordance with the provisions of Arbitration Act, 1940.

18. In view of the foregoing discussion, this Court is of the affirmed view that the learned trial court erred in law in decreeing the suit respondents/plaintiffs vide impugned judgment dated 24.01.2018 and the same is not sustainable at law, hence, the same is hereby set-aside by allowing this regular first appeal; and consequently, the suit of respondents/ plaintiffs stands dismissed with no order as to cost.

Announced.
20.10.2022.

(*M/Subhan)



JUDGE

Office
Faheem
1/10/22