

Judgment Sheet

**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

**Civil Revision No. S – 135 of 2014**

Applicant: Bungul through Mr. Nisar Ahmed  
Bhanbhro Advocate.

Respondent No.1 Rahib Ali through Mr. Soomar Das R  
Parmani Advocate.

Respondents 2 to 4: Through Mehboob Ali Wasan AAG &  
Mr. Ahmed Ali Shahani, AAG

Date of hearing: 30.08.2021

Date of judgment: 25.10.2021

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**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** – Through this Civil Revision, the Applicant has impugned judgment dated 12.11.2014 passed by the Additional District Judge, Ubauro, in Civil Appeal No.79 of 2014, whereby the judgment and decree dated 27.5.2014 and 03.06.2014, respectively, passed by the Senior Civil Judge, Ubauro, in F.C. Suit No.102 of 2011, through which the Suit of Respondent No.1 was decreed, has been maintained and the Appeal has been dismissed.

2. Learned Counsel for the Applicant submits that the learned Appellate Court as well as the trial Court have erred in decreeing the Suit of Respondent No.1; that the agreement of which the specific performance has been allowed was not proved in accordance with law, including various provisions of the Qanoon-e-Shahadat Order, 1984; that no material witnesses were examined; that Respondents witnesses were interested witnesses; that there was discrepancy in the evidence of Respondents witnesses; that Respondent No.1 never examined the stamp vendor and the attesting witness; that even the possession was forcefully taken over from the Applicant; hence, the Applicant had a good case; therefore, both the judgments are liable to set-aside. In support he has relied upon the case reported as Muhammad Bashir Ahmed v. Syed Ali Abbas (1993 CLC 2439), Muhammad Khan and others v. Muhammad Boota and others (1994 MLD 1622), Messrs Kashmirian Pvt. Ltd. through Shomaila Loan Marker and 6 others v. Ghulam Nabi Gujjar and another

(2006 CLC 482), Mst. Asiya Kausar and another v. Amjad Ikram and another (2002 YLR 2082), Imam Din and 4 others v. Meraj Din and others (2003 MLD 329) and Abdul Hameed v. Suhrab through Legal Heirs (PLD 1997 Karachi 589).

3. On the other hand, Respondent's Counsel has supported the impugned judgment and has contended that no indulgence is warranted against concurring findings of the two Court below as neither it is a case of non-reading nor of misreading of the evidence and record; hence, the Revision is liable to be dismissed. In support he has relied upon the cases reported as Moeen-un-Din v. Ms. Fahmeeda Begum through Legal Heirs (2016 YLR 2413), Muhammad Bux Kumbhar v. Habib Bank Ltd. through President and Chief Executive and 3 others (2016 PLC (C.S.) 468), Sher Muhammad through Legal Heirs and 9 others v. Messrs Sui Southern Gas Company Ltd. (2016 YLR 1321), The Chairman, WAPDA and 4 others v. Messrs Sitara Marbles Industry through Managing Director (2016 YLR 205), Mst. Shahida Parveen v. Saiful Malook (2016 MLD 1696), Saadabad Co-operative Housing Society Ltd. through Secretary v. Ghulam Rasool Bhatti and others (2018 CLC 1972) and Khursheed Ali v. 3rd Additional District and Sessions Judge, Karachi South and 4 others (2018 YLR 1749).

4. I have heard both the learned Counsel and perused the record.

5. It appears that Respondent No.1 had filed a Suit for specific performance of an agreement along with injunction in respect of agricultural land comprising of various Survey Nos. It was his case that the total sale consideration was Rs.22,82,500/- out of which Rs.12,00,000/- was paid at the time of execution of the agreement on 9.6.2008, whereas the balance amount of Rs. 500,000/- and Rs. 582,500 was paid on 5.1.2009 and 25.7.2009 respectively. It was further pleaded that the entire payment was made in presence of witnesses and receipts were also issued. The learned Trial Court was pleased to decree the Suit which has been maintained by the learned Appellate Court. The Trial Court settled 7 issues<sup>1</sup> and was pleased to answer the same in favor of Respondent No.1 and decreed the Suit accordingly. Insofar as the Appellate Court is concerned; it formulated a consolidated point for determination covering the entire controversy that "*Whether execution of an agreement of sale, payment of sale consideration and possession was not proved by the respondent No.1/plaintiff in suit, suit was time barred and whether*

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<sup>1</sup> Whether the defendant No.1 has executed and (sic) agreement of sale dated; 09.6.2008 for consideration of Rs.2282500/-; whether the plaintiff paid the entire sale consideration to the defendant No.1; whether documents of the plaintiff are false, forged and are managed; whether No.1(sic) in part performance have delivered the possession to the plaintiff; whether the suit of the plaintiff is hopelessly time barred; whether the plaintiff is entitle for the relief as claimed; what should the decree be;

*there was misreading and misappreciation of the evidence by the Trial Court?*”. It came to the following relevant findings:

“12] I have carefully considered the submissions of both the learned advocates and perused the impugned judgment and decree and also gone through the Record & Proceedings of the trial Court, R & Ps of appeal so also the relevant case-law. Now it is to be seen first whether an agreement of sale is required by Law to be proved by examining the scribe of document and Notary Public who attested the sale-agreement.

13] Article-79 of Qanoon-e-Shahadat Order, reveals that, if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses of least have been called for the purpose of proving its execution, if there be two attested witnesses alive, and subject to the process of the Court and capable of giving evidence.

14] In the case in hand, plaintiff examined himself at Ex.49 and also examined two attesting witnesses of sale agreement namely Ghulam Yaseen and Muhammad Khan at Ex.50 & 51, as required by article 79 of Qanoon-e-Shahadat, therefore, only in absence of marginal witnesses, scribe and Notary Public who scribed & attested the document can be the marginal witnesses but in the case in hand marginal witnesses of sale-agreement have been examined by the plaintiff in support of his claim, therefore, in my view the examination of scribe and Notary Public was not required under the Law. So far, proving the receipt Ex.49/2 plaintiff examined the witness Lal Khan and son of witness No.1 Meer Hazar at Ex.52 & 53 and for proving the receipt Ex.49/3 plaintiff examined P.W Ghulam Yaseen and Muhammad Basheer at Ex.50 & 54 as per requirement of article 79 of Qanoon-e-Shahadat.

15] The next contention of the counsel for appellant was that there is contradiction in the evidence of plaintiff, his witnesses and documents Ex.49/1 to 49/4. I have considered the contention raised by the parties' counsel and have minutely perused the evidence and documents available on record. The plaintiff Rahib claims that defendant No.1 agreed to sell and he agreed to purchase the suit property shown in para No.1 of the plaint on total sale consideration of Rs.22,82,500/- and he paid the entire sale consideration, initially he paid Rs.12,00,000/- at the time of execution of agreement dated 09.6.2008 in presence of witnesses and according to terms and conditions he paid remaining amount of Rs.500,000/- on 05.01.2009 and last payment of Rs.5,82,500/- was paid on 25.7.2009, total amount of Rs.22,82,500/- were paid under receipts and possession was delivered to him. He further claims that the defendant No.1 agreed that after final payment he will perform his part of contract and will execute the registered sale deed after completing the necessary formalities. The plaintiff to prove his claim examined himself at Ex.49 and also produced the documents and also examined the attesting witnesses of sale agreement and receipts. The plaintiff and his witnesses have been cross-examined at length but the evidence of plaintiff and his marginal witnesses could not be shaken on the relevant facts, on the contrary the plaintiff and his witnesses were cross-examined in a manner in which the execution of document (Ex.49/1), the payment of advance money and payment of remaining

sale consideration have been confirmed. During cross-examination of plaintiff it has been clarified that the payment of earnest money of Rs.12,00,000/- at the time of bargain which was reduced in writing on 09.6.2008 in presence of marginal witnesses and also clarified the receipt Ex.49/2 by putting a question to which reply of plaintiff Rahib came that "On 05<sup>th</sup> January, I paid Rs. 500,000/- to Bangul through Ex.49/2 were mixed notes at the otaque of Mir Hazar." He further clarified in cross examination of plaintiff that "on 25<sup>th</sup> July 2009 as per Ex.49/3 he paid Rs.5,82,500/-. Such evidence of plaintiff is supporting the document Ex.49/2 i.e. receipt which bears the date of execution on 05<sup>th</sup> January 2009. Therefore, the execution of sale-agreement dated 09<sup>th</sup> June 2008 and its bargain, receipts, payment of sale consideration have been proved by the plaintiff in accordance with Law, the parties are related to each other, therefore, the question of identification of executant on sale agreement was no effect. However, if any minor discrepancies in the evidence of plaintiff could not effect upon the case of plaintiff provided under article 2(i)(c) of Qanun-e Shahadat order 1984. Reliance is placed on PLD 1994 S.C P-162.

16] Moreover, the plaintiff/respondent No.1 claims that in part of performance of sale-agreement possession was delivered to him. He produced such land revenue receipts (Ex.49/15 to 49/20). In support of his assertion plaintiff examined himself and his witnesses Ghulam Yaseen & Muhammad Khan. Both the witnesses have supported the assertion of plaintiff by saying that after four days Bangul handed over possession of suit land and house to Rahib Ali. This piece of evidence in respect of possession is not cross-examined. During cross-examination of P.W Ghulam Yaseen and Muhammad Khan no question of denial were put, neither the defendant No.1 in his evidence has produced any document, land revenue receipts etc. to show that he is in enjoyment and possession of suit property, on the contrary during site inspection the plaintiff is reported to be in possession of suit property, the mutation of suit property is not yet to be effected in favour of plaintiff in the revenue record, therefore, only the land revenue receipts have been issued and produced before the Court. It was for the defendant to have produce the Khasra Girdwari of suit land if he is in cultivating possession as still Khata is mutated in his name but he failed to rebut the case, therefore, the possession is proved by the plaintiff.

17] The defendant No.1 Bangul, in his written statement has alleged that plaintiff is his near relative and was coming and going in his house and plaintiff mischievously stolen the photocopy of his C.N.I.C and managed the sale-agreement but no evidence is led by him on this plea by the defendant No.1, therefore, mere plea raised in the written statement without evidence on Oath cannot be considered, no any complaint was made by the defendant No.1 regarding stolen away of his N.I.C by the plaintiff, therefore, the plea raised by the defendant No.1 in his written statement could not be believed. Other plea was raised by the defendant No.1 in his written statement that the daughter of plaintiff Mst. Maira Kiran arranged Court marriage with his son, hence plaintiff has managed the false agreement and documents in revenge to usurp his property. In support of this plea defendant No.1 examined himself and produce FIR crime No.691/2009 of P.S Sadiqabad at Ex.56, Nikahnama at Ex.56/2, affidavit of Mst. Maira Kiran solemnized at Ex.56/3, petition filed at Bahawalpur at Ex.56/4, and

order Ex.56/5, FIR in crime No.62/2010 at Ex.56/6, order of A.T.C Court Sukkur dated 11.5.2011 at Ex.56/7. Application u/s 22-A Cr.PC at Ex.56/8.

18] I have considered such contention which are denied by other side, except criminal litigation. I have considered the documents produced by defendant No.1, the perusal of Nikahnama and free-will affidavit Ex.56/2 & 56/3 which reveals that the Nikah of Mst. Maira was performed with the son of Bangul on 01<sup>st</sup> December 2009, whereas the criminal litigation was started between the parties in that period and the sale agreement of suit property was held in June, 2008 much prior to marriage of son of Bangul with daughter of Rahib. The defendant No.1 in suit failed to adduce any oral as well as documentary evidence which could show that the sale agreement and receipts were managed in back date, no such plea was raised in written statement that the said documents were managed in back date, therefore, defendant No.1 miserably failed to prove such contention.

19] So far, the issue of limitation framed by the Trial Court is without pleadings, no such plea was raised by the defendant No.1 in his written statement. However, the sale-agreement (Ex.49/1) has been executed on 09.6.2008 and according to terms and conditions last payment was made on 25.7.2009 such Iqarnama was also executed on 25 July 2009, the suit has been filed on 08.6.2011 within a period of two years though the period for filing of suit for Specific Performance of Contract has been provided under article 113 of Limitation Act, 1908 three years, the suit is within time.”

6. The aforesaid finding of the Appellate Court answers all the issues and objections so raised on behalf of the Applicant and I do not see any misreading and or non-reading of the evidence and the material placed before the Court(s) below. It has come on record that Respondent No.1 /plaintiff in addition to himself, also examined two attesting witnesses<sup>2</sup> to fulfill the requirement of Article 79 of the Qanoon-e-Shahadat Order, 1984. Not only this, Respondent No.1 also proved the receipt(s) (Exh-49/2 and 49/3) by examining witnesses to the said receipts. And their evidence has gone unchallenged as to the material issue, whereas, in cross examination it has not been dislodged so as to disbelieve the same. The agreement, receipts, payment of sale consideration have been proved as required in law and even if there are minor shortcomings, they are not of such nature so as to throw out the entire claim of Respondent No.1. As to part performance and handing over of possession, Respondent No.1 produced witnesses and they have come forward to support this claim which again has not been dislodged in their cross examination. On the contrary, the Applicant had miserably failed to produce any evidence to rebut this contention of

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<sup>2</sup> Ghulam Yaseen and Muhammad Khan Exh-50 and 51

Respondent No.1. Neither any official witness or for that matter any other witnesses were produced to support his stance.

7. As to the evidence of the Applicant, it may be observed that the same was not only evasive, but was in fact contradictory. The Applicant led its evidence with only one supporting witness in addition to himself. For example, the Applicant (as DW-1: Exh-56) in response to a question replied that “*Ali Gul is brother of Mir Hazar Khan, Mir Hazar Khan is my relative. **It is incorrect to suggest that Mir Hazar Khan was nek mard of our village**”.* Whereas, his own witness Lal Bux (DW-2: Exh-57) replied that “**it is fact Hazar Khan was nek mard of our village.**” This contradiction in material terms (as it is the claim of Respondent No.1 that matter was settled / property was sold with the intervention of Mir Hazar Khan) destroys the case of the Applicant in totality; notwithstanding that he otherwise had failed to lead any convincing evidence in defence. Similarly, the Applicant in his evidence has admitted that “**written statement file by my advocate at my instance in this case but written statement was not read over to me by my advocate.**” How a person could come into a witness box without knowing the contents of his written statement and defend a case against him. It is also a matter of fact that it is not that simple and easy to deny each averment of Respondent No.1/ Plaintiff as the parties are admittedly interrelated very closely, inasmuch as (PW-4 Lal Bux) is the son of Kaloo Khan who is (DW-2). He had signed the agreement as a witness and came to affirm that agreement and the fact that the Applicant was present at the time of signing of the agreement. All these facts and the material evidence has been correctly appreciated by the Courts below and does not require any interference in the matter. After going through above findings and the material evidence available on record, which has been relied upon on behalf of the Applicant, I am unable to convince myself to exercise any discretion in favour of the Applicant so as to upset the impugned findings and substitute the same with my own on the basis of the evidence as suggested on behalf of the Applicant. This, in the present facts and circumstances is impermissible. If the conclusion drawn is not suffering from any infirmity, then it ought not to be interfered with and a mere fact that on examining the evidence, another view can be taken or is possible, it is not sufficient to upset the decision of the Courts below, until and unless the facts so warrant. Unfortunately, the case of the Applicant is not an exception of that nature<sup>3</sup>. In Civil cases what is required or considered sufficient is preponderance of probability while weighing the evidence of both the parties and while doing

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<sup>3</sup> Reliance may be placed on the cases reported as *Abdul Qayum v Mushk-e-Alam* (2001 SCMR 798) and *Abdul Ghaffar Khan v Umar Khan* (2006 SCMR 1619)

so in the present facts it appears that the Applicant has failed to lead any convincing evidence to rebut or challenge the claim of the Respondent who did his best to prove his claim.

8. In view of hereinabove facts and circumstances of this case, no case for interference is made out as the Courts below have drawn a fair and legal conclusion, whereas, no case of any jurisdictional defect: or misreading or non-reading of the evidence or material on record is made out; hence, this Civil Revision Application being misconceived is hereby **dismissed**.

**Dated: 25.10.2021**

Abdul Basit

J U D G E