

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

Revision Application No. S-48 of 2008

Date	Order with signature of Judge
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1. For hearing of main case
2. For hearing of CMA No.260/2008

Mr. Mushtaque Ahmed Shahani, Advocate for applicants.
Mr. Mansoor Hussain Maitlo, Advocate holding brief for Mr.
Asif Aman Shaikh, Advocate for respondents.

Date of hearing : 06.12.2021
Date of decision : 06.12.2021

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ORDER

KHADIM HUSSAIN TUNIO, J- Through captioned revision application, the applicants have impugned the judgment dated 30.06.2008 and decree dated 05.07.2008, passed by learned IInd Additional District Judge, Sukkur whereby he allowed the Civil Appeal No.41 of 2007 Re- Noor Mustafa and another Vs. Muhammad Ilyas and others, thereby setting aside the judgment and decree dated 16.05.2007, passed by IInd Senior Civil Judge, Sukkur in Civil Suit No.11 of 2002 Re- Noor Mustafa and another Vs. Muhammad Ilyas and others.

2. Briefly facts of the instant civil appeal are that the plaintiffs and defendants had executed a sale agreement dated 20.01.2001, which was signed by notary public in respect of one acre out of agricultural land of defendants No.1

and 2 in S. No. 160 (4-00 acres) for the consideration of Rs. 100,000/- and the respondents/defendants issued acknowledgement receipts of Rs.50,000/- in presence of witnesses as an earnest money. Thereafter, plaintiffs approached the defendants for the transfer/mutation of the agricultural land but they later find out that the defendants had been trying to sell the agricultural land to another party in secrecy. Therefore, the applicants/plaintiffs filed Suit for “Specific Performance of Contract and Permanent Injunction” bearing No. 11 of 2002 which was initially dismissed, but after an appeal the case was remanded back to the trial Court for re-writing of judgment whereafter the judgment and decree dated 16.05.2007 were passed, which were then set aside; vide impugned judgment and decree.

3. Learned counsel for the applicants has primarily argued that the judgment of the Senior Civil Judge-II, Sukkur was proper and in accordance with law but was reversed by the Appellate Court without keeping in mind the rights of the parties; that the learned appellate Court failed to consider the fact that the appeal was barred under Court-Fee Act; that the appellate Court failed to consider the evidence of defendant Muhammad Ilyas wherein he has admitted to selling the suit land to Muhammad Panjal; that the learned appellate Court has not considered section 52 of transfer of property Act whereby a person cannot transfer the property during the pendency of suit, therefore making the sale of land to the

defendant No. 3 and 4 is illegal. He therefore prays that the impugned judgment and decree may be set aside and the judgment and decree passed by the learned trial Court may be restored.

4. On the other hand, learned counsel for the respondents while supporting the impugned judgment and decree argued that the same are well-reasoned and do not call for any interference by this Court; that the plaintiffs have failed to examine all the marginal witnesses; that the learned trial Court had failed to appreciate the facts in the evidence and its judgment was rightly set aside; that all the witnesses of the applicants/plaintiffs have denied the execution of any receipt for payment of any earnest/advance money towards the sale consideration; that the stamp paper of the agreement of sale does not bear names of the parties and is forged and fabricated; that the suit land was sold out to respondents/defendants No. 3 and 4 through a registered sale deed, which the plaintiffs did not dispute by filing a suit for cancellation of the same.

5. I have heard the learned counsel for the parties and have perused the record available before me.

6. From the perusal of record, it is evident that the parties were at loggerheads with each other and the applicants/plaintiffs had also paid Rs. 200,000/- as fine in a murder case. Now coming to the main issue at hand; whether

there exist a sale agreement between the parties and whether the respondents/defendants had received an earnest money of Rs. 50,000/- for the total sale consideration of Rs. 100,000/- directed towards one acre out of Survey No. 160. It is a 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 may be made to the case of **Amjad Ikram v. Asiya Kausar (2015 SCMR 1)**. The applicants/plaintiffs produced the alleged sale agreement dated 20.01.2001 which was allegedly attested by the Oath Commissioner/Notary Public namely Ayaz Hussain. It is a matter of record that the plaintiffs have failed to examine him. Perusal of record also shows that the scribe of the said document has not been examined by the plaintiffs. The plaintiffs have not submitted any explanation for non-examination of all *marginal* witnesses which *otherwise* is necessary so as to satisfy the requirement of law. Reference can well be made to the case of **Hajyani Bar Bibi v. Rehana Afzal Ali Khan (PLD 2014 SC 797)**

wherein it is held as under:

“The appellants since claimed to be the beneficiaries of the document of WILL, therefore, notwithstanding the formulation of terms of issue no.4 it was essential for them to have proved its execution through the marginal witnesses and the scribe of the instrument in case such witnesses and the scribe of the instrument in case such witnesses were not alive / could not be found to depose as the case may be, which they failed to explain, nor even the original document was produced therefore, presumption of its execution cannot be attached within meaning of Article 100.”

7. Non-examination of a marginal witnesses, without any legal justification, would be taken as adverse against the party insisting upon the document because in law, it is not the thumb-marking/signing on a document but the law requires proving of all *series* which includes but is not limited to an agreement between two competent persons against a valid consideration. Reference may also be made to the case of **Shabbir Hussain v. Asghar Hussain Shah (2007 SCMR 1884)** wherein it has been observed that:

“According to Article 78 of the Qanun-e-Shahadat, 1984, execution of a document is to be proved to be in the handwriting or signature of thumb-mark of the alleged executant, which would mean signing or putting thumb-mark over a document as consenting party thereto. Execution of document would not only mean mere signing or putting thumb-impression but something more than mere signing or putting thumb-impression by the executant. It must be proved that thumb-mark was made in the presence of witness in whose presence the document was written and read over and it was understood by the vendor and would not only be limited to merely signing a name or placing thumb impression upon a blank sheet of paper so as to prove the document to have been executed whose identification should also be proved by reliable and authentic evidence that a person who has affixed thumb mark or signature was the same person who owned the land and sold the same to the vendee. Execution would mean series of acts, which would complete the execution. Mere signing or putting thumb mark would not amount to execution in terms of Article 78 of Qanun-e-Shahadat, 1984. A document which is not proved is inadmissible in evidence, unless strict proof of it is waived.

8. Moreover, the witnesses so examined by the applicants/plaintiffs denied the receipt of Rs. 50,000/-. The counsel for the applicants/plaintiffs relied on the statement

given in evidence by respondent Muhammad Ilyas who stated that he had sold out one acre to the plaintiff, but did not remember the Survey number and also claimed the same to be a verbal agreement. I am afraid that the applicants/plaintiffs cannot claim any benefit from the same as it is of no consequence as he categorically denied the execution of agreement to sale in question. The stamp paper was also alleged to have been purchased by Ghulam Nabi, the brother of the applicants/plaintiffs and he also allegedly identified the executant before the attesting officer and scribed the alleged agreement to sell alleged to have been executed by the defendants in favour of plaintiffs, who has not been examined either, therefore the applicants/plaintiffs have been unable to prove the sale agreement dated 20.01.2001 and also payment of earnest money.

9. Resultantly, this Court found no illegality in the impugned judgment dated 30.06.2008 and decree dated 05.07.2008, passed by learned IInd Additional District Judge, Sukkur in Civil Appeal No. 41 of 2007 which were upheld and instant revision application was dismissed vide short order dated 06.12.2021. These are the reasons for the same.

J U D G E