

**IN THE HIGH COURT OF SINDH AT KARACHI**

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

**SUIT NO.1127/1997**

Plaintiff : Mst. Saeeda Sultana,

Defendants : Mst. Nasreen and others.

**SUIT NO.744/1998**

Plaintiffs : Mst. Nasreen and another,

Defendants : Mst. Saeeda Sultana.

**Appearance:**

Mr. Mayhar Qazi advocate for Mst. Saeeda Sultana.

Mr. Muhammad Saad Siddiqui advocate for Mst. Nasreen Muslim and Mst. Rukhsana Sagheer.

Date of hearing & short order : 20.10.2021

**JUDGMENT**

**Captioned** suits were filed by rival parties involving same *controversy* having been consolidated vide order dated **20.12.1999**, hence being disposed of by this *common judgment*.

2. The Plaintiff in Suit No.**1127/1997** has pleaded that she is the lawful owner and sub-lessee of **House No.65/III**, Phase-V, Khayaban-e-Shaheen, Defence Housing Authority, Karachi, measuring **650** square yards (***subject property***) and the same was lying vacant in **1989** as she was with her husband at Lahore. Whereas the brother of the husband of the plaintiff namely **Abdul**

**Rauf** requested to the plaintiff that the subject property be given to his very old/close friend **Sagheer Ahmed** (*defendant No.3 in Suit No.1127/1997*) for some time and Mr. Abdul Rauf further *assured* to the plaintiff that the said house would be *vacated* by defendant No.3 as and when required, thus the possession of the house was given to defendant No.3. However, the plaintiff shifted to Karachi *sometimes* in the year **1995**, and in the year **1996** somewhere in the month of **June 1996**, Abdul Rauf informed to the plaintiff that defendant No.3 had agreed to vacate the house who was residing there as **licensee**; Whereas, the plaintiff was residing in another house as a tenant and wanted to continue as tenant for some time, therefore she wanted to give the subject property on rent. Moreover, Abdul Rauf *informed* to the plaintiff that Defendant No.3 has *recommended* one Muhammad Ramzan (defendant No.4 in Suit No.1127/1997)) as a tenant, consequently the plaintiff and defendant No.4 *entered* into a **tenancy agreement** at a monthly rent of **Rs.15,000/-** who paid the rent to the plaintiff upto **December 1996** *only* and failed to make the payment from **January, 1997** and on her demand refused to pay the rent. However, she visited the premises in **March 1997**, but defendant No.4/tenant was not available there instead found one **Babar Saleem Ghazi** (defendant No.05 in Suit No.1127/1997) in occupation of the subject property, and the plaintiff on enquiry came to know that defendant No.04 had un-authorizedly, sub-let/handed over the possession of the premises to defendant **No.5** for some *financial* benefit, hence the request was made to said defendant to **vacate** the premises, but he refused. Furthermore, the plaintiff made hectic efforts to obtain the address of tenant/Defendant No.4 but he

avoided to meet her, hence the plaintiff through her counsel sent a legal notice dated **25.03.1997** to the tenant/Defendant No.4 *requesting* him to hand over the possession of the premises to her; Nonetheless, defendant No.4 *neither* replied the aforesaid **legal notice** *nor* handed over the peaceful vacant possession of the subject property, thereafter the plaintiff also served another legal notice **dated 07.04.1997** through **TCS** upon defendants No.4 and 5, but the same also remained un-responded.

3. **Moreover**, the plaintiff also came to know that the illegal occupant/defendant No.5 was using the premises as a **Guest House** and giving the same to the different occupants on weekly rental basis, consequently the plaintiff filed a Rent petition No.**45/1997** before the learned Additional Rent Controller Clifton Cantonment Karachi against the tenant/defendant No.4 as well as the sub-tenant /defendant No.5, who jointly filed an application under **Order 23 Rule 3 CPC**, which the plaintiff and defendants No.4 and 5 *signed* said as compromise application and said defendants *undertook* to vacate the premises up-to **14<sup>th</sup> May 1997** with undertaking that in case of failure to hand over the possession, the writ of possession may be issued without notice, with police aid and to break/open the lock in absentia. But they failed to comply their undertaking, *hence* the plaintiff filed an **Execution** Application No.16/1997 before the Court of III<sup>rd</sup>. Senior Civil Judge South Karachi. However the defendants No.1 & 2 filed an application **U/S 12(2) CPC** read with Section **151** CPC on **05.06.1997** stating therein that defendants No.1 & 2 have jointly *purchased* the subject property in **August, 1995** against a sum of **Rs.26,00,000/-** and the total price of the said

house was paid to the plaintiff in lump sum at the time of execution of the **Sale Agreement** and filed photocopy of the same and the title documents and an application addressed to the Administrator, DHA, Karachi. It was further averred in their application falsely that since **1989**, defendants No.1 & 2 were *occupying* and residing in the said premises, which was previously under tenancy of defendant No.3 vide forged tenancy agreement dated **7<sup>th</sup> November 1989** and from August **1995** onwards alleged as lawful owners of the premises under a *forged and fabricated sale agreement*. Whereas, fact is that the plaintiff never sold out the property, and she filed the counter affidavit, yet the Rent Controller *recalled* and set a side the ejectment order.

4. **It has** also pleaded that some time back defendant No.3 wanted the Photostat copies of the sub-lease for school purposes of children and said Abdul Rauf had handed over the original lease to the defendant No.1 for getting the *photocopies* of the sub-lease and he promised to return the original to him, but the original sub-lease remained with defendant No.3 and he avoided to return the same on one or other pretext with malafide intentions and ulterior motives and as such he is in possession of the original sub-lease of the plaintiff. Moreover, the sale agreement which has been filed by the defendant No.1 and 2 before the Controller and Senior Civil Judge is a forged and fabricated document and the plaintiff never entered into such agreement of sale with the defendant No.1 and 2 and that the defendant **No.3** had never been a tenant of the plaintiff and the defendants **No.1, 2 & 3** in *collusion* with defendant **No.4** and defendant **No.5** want to *usurp* the property of the plaintiff and

*occupying* the subject property illegally and un-lawfully and are trespassers. Whereas the utility connections are in the name of the plaintiff and till today the sub-lease is also in the name of the plaintiff and it appears that under a plan and scheme the defendants in collusion with each other, illegally and malafidely want to deprive the plaintiff from her **exclusive** property, resultantly she is *continuously* suffering from *anxiety* and *mental torture*, hence she prayed for:-

- i. **Declaration** to the effect that the plaintiff is the **lawful owner** /sub-lessee of the premises house built on **Plot No.65/III, Phase V, Khayaban-e-Saheeh, Defence** Housing Authority, Karachi, measuring 650 square yards by virtue of registered Sub-Lease in the name of the plaintiff and never transferred possession to the defendants No.1 and 2 as purchasers nor defendants No. 3 as tenant and the alleged Tenancy Agreement dated **07.11.1989** and the sale agreement purporting to have been made on **06.08.1995** in respect of the said property is as such **forged/fabricated** and illegal document and is **void**, ab initio and have no legal effect and the plaintiff being the registered lawful sub-lessee of the suit property is its bonafide owner and as such entitled to recover possession of the suit property in illegal possession of the defendants No.1, 2 and 3 who are continuing in possession as trespassers in the same in this case.
- ii. **Mandatory injunction** for possession against the defendants No. 1, 2 and 3 *ordering* these defendants and/or any person or persons through them to vacate the suit property bearing House No.65/III, Phase V, Khayaban-e-Shaheen Defence Officers' Housing Authority, Karachi, measuring 650 sq. yards and hand over its vacant peaceful possession to the plaintiff in this case alongwith above said 4 A.Cs with other fittings and fixtures.
- iii. **Permanent injunction** as against the defendants No. 1, 2 and 3, their agents, heirs, assigns, executors, administrators and representative in-interest etc restraining them all from selling, claiming, alienating, disposing of, and parting with the possession of the suit property bearing No.65/III, Phase V Khayaban-e-Shaheen, Defence Housing Authority, Karachi,

- iv. **Order the delivering** up and **cancellation** of the documents alleged sale agreement dated **06.08.1995** and the application addressed to the Administrator, Defence Housing Authority having no date on it and alleged tenancy agreement dated **07.11.1989** and with forged signatures of the plaintiff in respect of the suit property.
- v. **General damages of Rs.25,00,000/-** against the all the defendants jointly and severally for conspiracy in forging the documents causing inconvenience, harassment, anxiety, mental torture, mesne profit, vexations and unlawful interfering with property and goodwill of the plaintiff by making false claim of the suit property.
- vi. **Cost** of the suit.

5. **Conversely**, the claim of defendants **No.1** and **2** in Suit **No.1127/1997** and plaintiffs No.1 and 2 in **Suit No.744/1998** as pleaded in the latter suit is that plaintiff No.1 (**Ms.Nasreem Muslim**) is sister of one Sagheer Ahmed (*defendant No.3 in Suit No.1127/1997*) and plaintiff No.2 is his wife and in November, **1989** Sagheer Ahmed took the subject premises on rent from Mst.Saeeda against a monthly rent of **Rs.5000/-** with security deposit of **Rs.30,000/-** vide agreement of tenancy dated 7<sup>th</sup> November, 1989 and both the plaintiffs *started* living with him in *joint* family system; in the month of August, **1995** the plaintiffs had *jointly purchased* the subject property against a total sale consideration of **Rs.26,00,000/-** from the defendant, the plaintiffs paid total sale *consideration* to the defendant in *lump sum* and at the time of *executing* the sale agreement with the defendant, she handed over/delivered all the original documents *including* the **title documents** pertaining to the **subject property** to the plaintiffs; the defendant also *signed* an application requesting to the authority to transfer/mutate the property in the name of the plaintiffs, hence they are residing in the

said property being the sole and absolute owners. Whereas the defendant by playing *fraud* and *misrepresentation* of facts filed a **Rent Case No.45/1997** in respect of subject property, against two fictitious persons namely Muhammad Ramzan and Baber Saleem Ghazi *without* joining to the plaintiffs and *obtained* the ejectment order by way of so-called *compromise* within a period of less than a month as the said rent case was *filed* on **23.04.1997** and the **ejectment** order was **obtained** on **14.05.1997**. That the defendant *filed* an execution application No.16/1997 and upon notice the present plaintiffs made their appearance before the Court and came to know for the first time about the **fraud** committed by the *defendant* not only upon the Court of Additional Controller of Rent, Clifton Cantonment, Karachi, but also upon present plaintiffs as such they filed an application under **section 12(2)** read with Section 151 CPC and *filed* material documents which was **allowed**. Moreover, the Additional Controller of Rent, Clifton Cantonment also got the site inspected through his officials for the purpose of *ascertaining* as to which party is in physical possession of the subject property, and inspection report *confirmed* the physical possession of the plaintiffs for a period of **8/10** years. Furthermore, after hearing the parties the learned Additional Controller of Rent, Clifton Cantonment Karachi, passed an order dated **14.05.1997** which was recalled/set aside which order has *attained* the finality as no appeal was preferred.

6. **It has** further *averred* that the defendant filed a **suit No.600** on false and baseless *allegations* against the present plaintiffs which was *conditionally* withdrawn, but the defendant *failed* to comply with that condition and the sale agreement dated

**06.08.1995** asserted as legal, valid, authentic and genuine document as the same has been duly signed by defendant Mst. Saeeda as well as the plaintiffs and which also signed by the **attesting witnesses** namely Sagheer Ahmed and Abdul Rauf, who is brother-in-law of Mst. Saeeda, and the document was *established* to be genuine before the learned Additional Controller of Rent, Clifton Cantonment, Karachi, therefore, the ejectment order was recalled/cancelled. That all the documents relating to the property in dispute are **genuine**, valid and legal *including* the applications addressed to the Administrator DHA and CBC along-with the **four** specimen *signatures* of the defendant. Whereas the Tenancy Agreement was executed between the defendant and Sagheer Ahmed and in pursuance of the agreement to sale the defendant is bound to perform her *obligation* for the **specific performance** and liable for **damages** to the plaintiffs at **Rs.500,000/-** each since **06.08.1995** till the transfer/mutation is **affected**, thusly prayed:-

- a) For **Specific Performance** of the **Contract/Agreement of Sale** dated **06.08.1995** by the defendant or any other person claiming through or under the behalf of the defendant to execute and convey in favour of the plaintiffs jointly in respect of the property viz. bearing No.65/III, Phase 5, Khayaban-e-Shaheen, Defence Officer's Housing Authority, Karachi, OR the Nazir of this honourable Court be appointed and empowered to execute all such documents in favour of the plaintiffs and get the transfer/mutation in the names of plaintiffs jointly.
- b) To grant **damages** at **Rs.5,00,000/** each plaintiffs since August, 1995 to the plaintiffs till the mutation is affected in their joint names.
- c) To grant **permanent injunction** restraining the defendant her agents, attorneys, persons and or any other person or persons claiming through her and under her behalf from disturbing the possession of

the plaintiffs over the said property and from doing all such acts, deeds and things by which the right of the plaintiffs over the said property is effected in any manner.

**d) Cost** of the proceedings.

**e) Any other** further and better **relief/s** which this Honourable Court may deem fit and proper under the circumstances of the case.

7. **Nevertheless**, Sagheer Ahmed, Defendant No.3 in suit **No.1127/1997** in his counter-affidavit to injunction application filed by the plaintiff, has supported the contentions of defendants **No.1** and **2** in that suit, while adding that defendant **No.4** Muhammad Ramzan is a **planted** person of the plaintiff, and defendant **No.5** Babar Saleem Ghazi is very close relative of the plaintiff being brother of wife of said Abdul Rauf who is real brother of husband of the plaintiff, *hence* they are all in **collusion** with each other.

8. **From** the *pleading* of the parties, court framed following issues:-

1. **Whether** the agreement of **tenancy** dated **07.11.1989**, and the sale agreement dated **6<sup>th</sup> August 1995** and the transfer application are **forged** document?
2. **Whether** the husband of the **plaintiff No.2** took the premises in suit on rent from the defendant at the rate of **Rs.5000/-** and also paid a sum of **Rs.30000/-** to the defendant vide agreement of tenancy dated **07.11.1989** if so what is its effect?
3. **Whether** on **06.08.1995** plaintiffs *entered* into an agreement of sale with the defendant and *purchased* the suit property from her for a total **consideration** of

**Rs.26,00,000/-** and the defendant received the total sale consideration amount and in terms of the said agreement handed over the original title documents of the property to the plaintiff?

**4. Whether** the defendant had **signed** the application form and other form to the *authority* for the *submission* in **DHA** for the transfer/mutation in the names of the plaintiffs, if so what is its effect?

**5. Whether** the defendant *fraudulently* filed rent case **No.45 of 1997** against the *fictitious* persons if so what is its effect?

**6. Whether** the plaintiffs are **entitled** for the relief as claimed in the suit?

**7. What** should the **decree** be?

9. In order to prove facts Plaintiff Saeeda Sultana *examined* herself as well witness Rauf Ahmed. From defendants' side Muhammad Muslim (*attorney of Defendants No.1 and 2- Nasreen and Rukhsana*) and Sagheer Ahmed (*defendant No.3*) were examined.

10. I have heard learned counsel for respective parties and perused the record.

11. **Learned counsel** for Mst. Saeeda Sultana has argued that suit property was let out to defendant No.4 on **02.07.1996** who failed to pay the rent from January, **1997** as well un-authorizedly sub-let the premises to defendant **No.5**, who failed to *vacate* the premises, inspite of hectic efforts address of defendant **No.4** could not be found, *therefore* on **25.03.1997** legal notice was sent to actual

tenant/defendant **No.4** and on **07.04.1997** to defendants No.4 and 5 served through TCS, but the same was not replied, hence Rent Case No.45/1997 was filed against the tenant/defendant **No.4** and the sub-tenant/defendant **No.5**, during proceedings jointly filed the compromise application with undertaking to vacate the premises on specified date, *however* failed to comply with their undertaking hence Execution Application **No.16/1997** was filed, whereas defendants No.1 and 2 came in picture by filing an application under section **12(2) CPC** claiming that they have *jointly* purchased the suit property through sale agreement with payment of entire sale consideration of **Rs.26,00,000/-** and in possession of the title documents as well application for transfer of suit property addressed to Administrator, DHA, Karachi signed by the plaintiff, falsely claiming that they are in possession **since 1989** previously under tenancy of defendant No.3 and from **August 1995** onwards as alleged lawful owners; all those documents, according to the learned counsel, are forged and fabricated with malafide intentions and in order to usurp the suit property as the same was never sold to them. Regarding the original property documents in possession of these defendants, the learned counsel has contended that defendant No.3 wanted the Photostat copies of the sub-lease for school purposes of the children and said Abdul Rauf had handed over the original lease to the defendant No.1 for obtaining the photocopies of the sub-lease and he *promised* to return the original to him, but original sub-lease remained with defendant No.3 and he avoided to return on one pretext or the other with malafide intentions and ulterior motives. It was argued that defendant No.3 was never remained a tenant of the plaintiff and that

defendants No.1, 2 and 3 in collusion with defendants No.4 and 5 want to usurp the suit property. He maintained that the utility connections are in the name of the plaintiff and till today sub-lease is also in her name and by an scheme defendants in collusion with each other, illegally and malafidely intends to deprive the plaintiff from her valuable lawful property. He has relied upon 2017 SCMR 98, PLD 2021 SC 538, PLD 2011 SC 241, 2015 SCMR 1044, PLD 1995 SC 381, 2020 CLC 243, 2020 SCMR 2107, 2020 YLR 1695, 2010 SCMR 1351, 2017 CLD 1459, PLD 2020 SC 338, 2019 SCMR 524, 1998 SCMR 133, 1993 SCMR 197, 1988 CLC 678, 1997 MLD 1047.

12. **In rebuttal** the learned counsel for Mst. Nasreen and Mst. Rukhsana contended that they were *firstly* the tenant and then purchased the **suit property** from Mst. Saeeda Sultana through sale agreement dated **06.08.1995**, paid entire sale consideration, received original documents, *continuing* their peaceful possession, original utility bills are with them; that the collusive Rent petition was filed and eviction order was obtained by the plaintiff mentioning incorrect address and impleading irrelevant parties, and all was managed and committed fraud not only with the defendants, but also to the Court hence the plaintiff was *exposed* by the defendants by filing the application under **section 12(2) CPC**, whereupon; an inspection was got conducted and eviction order was recalled on the basis of inspection report, and the same had attained finality as no appeal was filed. He also argued the inspection carried out also proved the possession of said defendants and two separate applications addressed to CBC and DHA whereby sought **transfer** of the suit property in favour of said defendants which bears the signatures of

the plaintiff; She had **accepted** that original documents of suit property are in possession of the defendants which according to her stance, she had '**kept**' with the defendants with explanation that same were to *facilitate* admission of the children, but she had failed to prove her such stance. Moreover in Suit No.744/1998 defendant Saeeda Sultana in her written statement has **admitted** about the partial payment *received* by her from the plaintiffs, whereas time and again she had **denied** the sale agreement executed between the parties which is also *contrary* to the documents on record. Learned counsel has referred deposition of the plaintiff Saeeda Sultana in terms that: ***“No such agreement was written or executed by or on behalf of the defendant and no such sale of the suit property was effected.”*** which is contrary to her admission that: ***“Falsity of the claim of the plaintiffs is clear from the fact that they claimed to have paid to the defendant, the entire amount of consideration, although at the time of execution of the sale agreement only a small part of the price money is paid by the Vendee to the Vendor as earnest money.”*** and that ***“It is correct that Mr. Saghir Ahmed is in occupation of suit property since 1989.”*** ..... ***“It is correct that the address of both the opponents in R.C. No.45/1997 were of not the suit property, the address of Mr. Ramzan is given as resident of House No.63/1, Phase V, Defence Housing Authority.”*** ..... ***“It is correct that Sagheer Ahmed got telephone connection at the suit property on 24.12.1989, since then the defendants are paying all the utility bills of suit property.”*** ..... ***“It is correct that on my recommendation the plaintiff handed over the original “A”-Lease of suit property to***

**Mr. Saghir Ahmed in the year 1989-90. Voluntarily says that this document was given to him to facilitate the admission of his children. It is correct that since then the documents A-lease is in possession of Mr. Saghir Ahmed.”** .... Learned counsel has also referred admission of witness Rauf Ahmed that: **“It is correct that defendants No.1 & 2 are residing in the suit property since 1989 with their families till today.”** Concluding his submissions, the learned counsel has argued that **Suit No.1127/1997** filed for **cancellation** of the sale agreement is not *maintainable*, tainted with malafides, filed with *unclean* hands and ulterior motives, hence liable to be **dismissed**, whereas; **Suit No.744/1998** filed for the specific performance of the contract may be **decreed** as prayed as the plaintiffs in that suit have established their case. He has relied upon 2018 YLR 1244 and 2018 CLC 4s43.

13. **My findings** on the above issues are as under with following reasons.

### **FINDINGS**

ISSUE NO.1.	Affirmative.
ISSUE NO.2.	Negative.
ISSUE NO.3.	Negative.
ISSUE NO.4.	Negative.
ISSUE NO.5.	Negative.
ISSUE NO.6.	As discussed.
ISSUE NO.7.	Suit No.1127/1997 is decreed while Suit No.744/1998 is dismissed.

## **REASONS**

### **ISSUES NO.1 & 3.**

14. The burden of proving of these issue lies upon defendants **No.1** and **2** in the leading suit. These defendants examined their attorney Muhammad Muslim and also examined defendant No.3 Sagheer Ahmed. Muhammad Muslim, in his cross examination has stated that he was present when the tenancy agreement **Exb D/3** was executed, and it was executed at the residence of Mr. Rauf Ahmed which is D.H.A Khayaban-e-Shaheen in morning hours. At the time of Execution of **Exb D/3**, Mr. Rauf Ahmed, Mr. Saghir Ahmed, the plaintiff and husband were present. He admits that the plaintiff signed **Exb D/3** in his presence, which was brought by the husband of the plaintiff duly typed. He stated that the plaintiff's husband got **Exb D/3** attested from Notary Public. This piece of evidence of Muhammad Muslim, the attorney of the defendants No.1 and 2, shows that neither the terms and conditions were settled between plaintiff Saeeda Sultana and defendants No.1 & 2 nor the agreement at **Ex.D/3** was read over to them and the alleged present witnesses. It was brought by the husband of plaintiff Saeeda Sultana and according to Muhammad Muslim, it got attested by the husband of the plaintiff and the same was not **reduced** in writing in presence of the attesting authority. He stated that he has no documentary evidence to the effect that defendant No.3 ever paid the rent to the plaintiff, but he *himself* and his family are the witnesses of the payment of the rent by defendant No.3 to the plaintiff and this fact has not been mentioned in his written statement.

15. On the other plaintiff Saeeda Sultana has pleaded that she is the lawful owner and sub-lessee of House No.65/III, Phase-V, Khayaban-e-Shaheen, Defence Housing Authority, Karachi, measuring 650 square yards (**subject property**). It was lying vacant in **1989** as she was at Lahore with her husband. Her husband's brother namely Abdul Rauf *requested* her that the vacant house may be given to his very old/close friend Sagheer Ahmed (*defendant No.3 in Suit No.1127/1997*) for some time and Mr. Abdul Rauf further *assured* to the plaintiff that the subject property would be vacated by defendant No.3 as and when *required*, as such; the possession of the house was given to defendant No.3;

16. **Since** defendants No.1 and 2 are claiming that in November, 1989 Sagheer Ahmed took the subject premises on rent from Mst. Saeeda at a monthly rent of Rs.**5000/-** with security deposit of Rs.**30,000/-** vide agreement of tenancy dated **7<sup>th</sup> November, 1989** and both the plaintiffs started living with him in joint family system and in the month of August, 1995 the plaintiffs had *jointly* purchased the **subject property** for a total consideration of **Rs.26,00,000/-** from defendant. It is further claimed that the defendant also signed an application *requesting* to the authority to transfer/mutate the subject property in the name of the plaintiffs *hence* they are **residing** in the said property being the sole and absolute owners. Whereas, there are **Two** agreements i.e. the rent agreement and the sale agreement are on record and defendants No.**1** & **2** had to prove the same *according* to the provisions of **Qanoon-e-Shahadat Order, 1984**. In order to prove the same, the attorney of the defendant No.**1** & **2** and the defendant **No.3** have been examined.

Nonetheless the contesting defendants No.1 & 2 had to prove both the controversial agreements by *examining* the **attesting/marginal** witnesses of the same, but they have been failed to examine them. **Besides** this the Notary Public who has *attested* the agreements, the author/scribe of the agreements and the stamp vendor have not been examined, who could have furnish the details of *circumstances* under which the said stamp paper was *purchased* and the agreements were scribed. It is settled law that the contents of a document can only be proved through executants, marginal witnesses and scribe of document. In present case, the *purported* executant is not examined, only one marginal witness has been examined in support of the documents. Neither the scribe (stamp vendor) of the document nor the person who notarized it, have been examined.

17. **D.W** Sagheer Ahmed in his cross examination has stated that he had not shown the rent and *fixed* deposit in my income tax returns and he never *demand*ed rent receipt from the plaintiff due to good relation with the plaintiff and her family. He stated that at the relevant time he gave **Rs.26,000,00/-** to the plaintiff and again says that Muhammad Muslim paid **Rs.16,000,00/-** to the plaintiff. He admits that the defendant was not served with any legal notice for the finalization of sale transaction of suit property.

18. **Now** reverting to the sale agreement, regarding which the **D.W** Muhammad Muslim, has stated that he is **not attesting witness** of sale agreement **Ex.D/4**. It was *executed* at the suit property, and at that time the plaintiff, her husband, Rauf Ahmed, Saghir Ahmed, he himself and his family members were present and

the wife of defendant **No.3** was also there. That it was *executed* in morning hour, but he has not *remembered* the time. The sale consideration was paid in cash, it was mixed currency notes. The plaintiff's husband had brought the typed sale agreement. He stated that Rauf Ahmed, Sagheer Ahmed, Saeeda Sultana, Nasreen Muslim and Rukhsana Saghir have signed in his presence. He stated that exhibits **D/6** and **D/9** were never submitted in the office of addresses because the plaintiff was not *accompanied* with defendants **No.1** and **2** to the addressee. Exhibits **D/6** and **D/9** were written by Mr. Shaheen Nazar, the husband of the plaintiff and the plaintiff put her signatures on both the letters in his presence. He stated that in the year **1995**, the suit property was a built-up property. He **admits** that in exhibits **D/6** and **D/9** only plot number is mentioned. **D.W** Sagheer Ahmed in his cross examination has stated that Muhammad Muslim is his brother in law. No other witness has been *examined* to prove the agreements.

19. **It is settled** law that the relief of **specific performance** of the contract is *discretionary* relief which cannot be claimed as a matter of right. The agreement to sale is *required* to be proved in consonance with Articles **17** and **79** of **Qanoon-e-Shahadat Order 1984**. The relevant provisions are reproduced as under: -

**“17. Competence and number of witness.—(1) - .....**

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law.

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and

(b) -----“

**“79. Proof of execution of document required by law to be attested.** If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution; if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.

Provided.....”

20. **The** Article **17** of Qanun-e-Shahadat Order, 1984 provides that in the matters *pertaining* to the financial or future obligations, the instrument if reduced in to writing, shall *compulsorily* be **attested** by two men, or one man and two women and the execution and contents of the instruments could be established before the Court of law through the **attesting witnesses**. While under Article **79** of Qanun-e-Shahadat Order, 1984 if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses have been called for proving its execution; if there be **two attesting** witnesses alive, and subject to the process of the Court and capable of giving evidence. The defendant side has no *convincing* reason for *non-examining* the marginal/attesting witnesses of the sale agreement. Thus the rent and sale agreements have not been proved in accordance with Article **17** and Article **79** of Qanun-e-Shahadat Order, **1984**.

21. **No other witness** has been examined by the defendant side in support of the sale agreement. The *buyer* of the stamp paper i.e. the husband of the plaintiff has also not been examined, who could have deposed *regarding* the circumstances under which he purchased the stamp paper and the purpose of its purchase. **No** cogent reason has been brought on record *regarding* his non-

examination. In case of **Muhammad Yousaf and others v. Allah Ditta** (2006 YLR 1899), it was held that;

“Learned counsel appearing for the respondents argued that neither Ashraf nor Ameer, who are the two marginal witnesses to the agreement (Exh.P.2), were produced and no explanation was given as to why these witnesses were not produced. Only Muhammad Ismail appeared as P.W.4 to prove the agreement whose sole testimony was rightly held by the Courts below to be insufficient for proving the agreement.”

22. I am also *fortified* with the case of **Allah Dad v. S.M. Khan** (1989 CLC 2287), wherein High Court of Baluchistan has held that;

“Besides non-production of attesting marginal witness of document **Ex.P/1** for proving its execution by petitioner specially when it is shrouded with afore discussed doubts is certainly wherein fatal and in the light of observation following decided cases has far reaching effects.

- (i) Ghulam Hussain etc. v. Muhammad Hussain 1986 CLC 770.
- (ii) Ghulam Muhammad v. Muhammad Shafi 1985 MLD 101.
- (iii) Muhammad Bakhsh v. Nisar Ahmed 1985 CFLC 1974.
- (iv) Abdullah Khan v. Govt. of Sind 1986 MLD 1500.”

23. In present case the execution of the agreements is *denied* by plaintiff Saeeda Sultana. It is settled law that in the cases where the execution of a document is *denied* by the other party, the burden to prove *execution* of that document lies upon the *beneficiary*. In case of **Said Amin v. Mst. Nayab and others** (2011 CLC 309), it was held by the Peshawar High Court that;

“In such like cases where execution of a document is denied by the other party then heavy burden lies on the beneficiary of the document not only to prove the execution of the document but also its contents.”

24. It was held by the Lahore High Court in case of **Bashir Ahmed Chaudhry and others. V. Tahir Mahmood and others** (2011 CLC 681) that;

“In the absence of any plausible explanation or reasons in not producing the said second marginal witness Farooque by the plaintiff/appellant during the trial, it cannot be said that the requirements of Article 79 of the Qanun-e-Shahadat Order, 1984 have been fulfilled by the appellant. The non-production of second marginal witness makes the original agreement to sale Exh.P.3 as inadmissible document.”

25. It is settled law that relief of the Specific Performance of the Contract is a *discretionary* relief which can only be granted when a document is proved *according* to the provisions of **Article 17 and 79 of Qanun-e-Shahadat Order, 1984**. Whereas no payment receipt of the sale consideration amount has been produced, thus the purported payment of the same has become doubtful. Moreover, there was no receipt of payment of rent has been produced to prove the payment of the same vis a vis earnest money. Besides that defendant **No.01 & 2** have also *failed* to prove the reasons of *availability* of the original documents with them. Thusly these facts are revealing the questionable conduct of the defendants No.1 and 2 at very inception.

26. **Upshot** of the above discussion is that, the defendants No.01 & 02 have failed to bring on record any *confidence* inspiring and concrete evidence to prove that the **tenancy agreement, sale agreement** and *applications* are not the forged documents, therefore

they have also failed to prove the agreement to sale. Therefore, I answer the issue No.1 in affirmative and issue No.3 in negative.

**ISSUE NO.2.**

27. It has already been discussed in the issue No.1 that the alleged **rent** agreement is a forged document and the husband of the plaintiff No.2 in subsequent Suit did not take the subject premises on rent from the defendant at the rate of Rs.5000/- and also paid a sum of Rs.30000/- to the defendant vide agreement of tenancy dated 07.11.1989. Therefore this issue is answered in negative.

**ISSUE NO.4.**

28. The defendant in the subsequent suit has denied the **signing** of the application form for transfer of the subject property alongside other form to the authority i.e DHA in the names of the plaintiffs, hence the burden of proof lies upon the plaintiffs of the subsequent suit to prove the same as genuine. However, the plaintiffs in the subsequent suit have stated that at the time of executing the sale agreement with the defendant, she handed over/delivered all original documents including the "**title documents**" pertaining to the said property to the plaintiffs; and the defendant also signed an application *requesting* to the authority to transfer/mutate the property in the name of the plaintiffs. Whereas Muhammad Muslim, the attorney of defendants No.1 and 2 in his cross examination has stated that exhibits **D/6** & **D/9** were written by Mr. Shaheen Nazar, the husband of the plaintiff in his presence and the plaintiff put her signature on both the letters in his presence. He admits that he did

not remember the date when he firstly and lastly requested the plaintiff to accompany him for submission of exhibits D/6 and D/9 in the office of the addressee. If it is believed that the plaintiff had **signed** the letter and the application then what was the harm to the plaintiff that she did not *accompany* the defendants No.1 and 2 for submitting the same to the addressee. Except the evidence of Muhammad Muslim, no other evidence has been brought on record to prove the *signatures* of the plaintiff on these documents. Hence the plaintiffs of subsequent suit have been failed to prove these documents according to provisions of Article **17** & **79** of Qanoon-e-Shahadat Order, 1984 as discussed above.

29. Moreover, the Honourable Supreme Court in the case of **Najaf Iqbal v. Shahzad Rafique** reported as 2020 SCMR 1621 held that “*the defendant was having a choice to produce the handwriting expert when he disputed his signatures upon the cheque in dispute after the statement of PW 2 the Bank Manager.*” In the present case, when the plaintiff was **disputing** her signatures over the agreements, letter and application then it was *obligatory* upon the contesting defendants to pray for *referring* the admitted and disputed signatures of the plaintiff to the *handwriting* expert, but no application was moved in this regard. In this situation when the plaintiff is specifically denying her signatures over the documents despite the defendants have failed to prove the execution of agreements in accordance with the law, hence it cannot be *believed* that the defendant had **signed** the application form and other forms to the authority for the submission in DHA for the **transfer**/mutation in the

names of the plaintiffs. Consequently, the defendants have failed to prove this issue hence answered in negative.

**ISSUE NO.5.**

30. **The** burden of proving this issue *lies* upon the defendants No.1 & 2. However, plaintiff Ms.Saeeda Sultana in her suit has pleaded that she filed a Rent Case No.45/1997 before the learned Additional Rent Controller Clifton Cantonment Karachi against the tenant/defendant **No.4** and the sub-tenant / defendant **No.5**, during the *proceedings* whereof, jointly filed an application under **Order 23 Rule 3 CPC** and in her cross examination she stated that she filed two cases.

31. Conversely, defendants No.1 and 2 have pleaded that the plaintiff (Saeeda Sultana) by playing fraud and misrepresentation of facts filed a Rent Case No.45/1997 in respect of subject property, against two fictitious persons namely Muhammad Ramzan and Baber Saleem Ghazi without joining them and obtained ejectment order by way of so-called *compromise* within a period of less than a month as the said rent matter was filed on **23.04.1997** and the *ejectment* order was obtained on **14.05.1997**. But the contesting defendant filed an execution application No.16/1997 and upon notice the present defendants made their appearance before the learned Court and came to know for the first time about the fraud committed by the plaintiff not only upon the Court of Additional Controller of Rent, Clifton Cantonment, Karachi, but also upon plaintiffs in subsequent suit, as such they filed an application under section **12(2)** read with

Section **151** CPC with material documents which was **allowed** subsequently. It has also agitated that the Additional Controller of Rent, Clifton Cantonment also got the site *inspected* through his officials for the purpose of *ascertaining* as to which party is in physical possession, and the inspection report *confirmed* the physical possession of the plaintiffs for a period of last **8/10** years; Who after hearing the parties passed an order whereby the earlier order dated 14.05.1997 was recalled/set aside, and the same has attained finality as no appeal was preferred. However, there is no element of fraud has been brought on record in filing rent application. As no suggestion has been put upon the plaintiff that she had filed rent application fraudulently. Therefore this issue is answered in negative.

**ISSUE NO.6.**

32. On what has been discussed above, I am of the view that plaintiff Saeeda Sultana has established her claim over the suit property, hence she is entitled for the relief claimed as prayed, while the plaintiffs in the *subsequent* suit have *failed* to establish their claim, therefore, they are not entitled for the relief claimed.

**ISSUE NO.7.**

33. For the reasons discussed above, Suit No.1127/1997 is **decreed** as prayed, whereas Suit No.744/1998 was dismissed with no order as to the costs.