IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 19 of 2008

(Muhammad Farooq & others v. Muhammad Sabir)

Date of hearings: **13.12.2021 & 10.01.2022**
Date of Announcement: **01.04.2022**

Mr. Sarfraz A. Akhund, Advocate for the Applicants
Mr. Abdul Naeem Khan, Advocate for the Respondent

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J U D G M E N T

Muhammad Junaid Ghaffar, J. **–** Through this Civil Revision, the Applicants have impugned Judgment dated 14.02.2008, passed by III-Additional District Judge, Sukkur in Civil Appeal No.83 of 2002 (**Muhammad Hanif and another v. Muhammad Sabir**), whereby, Civil Appeal stands dismissed and the Judgment of the Trial Court dated 27.11.2002, passed in F.C Suit No.95 of 1995 (**Muhammad Sabir v. Muhammad Farooq and another**) has been maintained, through which the Civil Suit of the Respondents was decreed.

2. I have heard Applicants' Counsel; whereas, the Respondent's Counsel has filed written arguments, which have also been perused including the record placed before this Court.

3. It appears that the Respondent had filed a Civil Suit for specific performance of agreement dated 06.04.1995 entered into jointly with the present Applicants No.1 & 2. The said Suit was decreed by the Trial Court vide its Judgment dated 27.11.2002, which was then impugned before the Appellate Court in Civil Appeal No.83 of 2002 and by Judgment dated 16.08.2004, the Appellate Court after setting aside the judgment had remanded the case to the trial Court with direction to examine the second attesting witness of the agreement. At the same time, it was further directed that Applicant No.1 be also produced before the Court and shall be confronted with Exh-20. Such Judgment of the Appellate Court was impugned by the present Respondents in Civil Revision No.129 of 2004 before this Court, which was then allowed vide order dated 28.2.2005 and the matter was sent back to the Appellate Court to decide the Civil Appeal on merits on the basis of available record. Through impugned Judgment,

the Appellate Court has now dismissed the Civil Appeal of the present Applicants.

4. Insofar as the case of the present Respondent is concerned, it was averred that the property was purchased by way of an agreement in question and to prove the agreement, one attesting witness of the agreement was examined. In addition, there were five receipts of the payment made to the present Applicants and the witnesses to said receipts were also examined. On the contrary, the Applicant No.1 never turned up either to file his written statement or enter into the witness box; nor at the same time executed any power of attorney or authorized the Applicant No.2 to lead any evidence on his behalf. On the other hand, the Applicant No.2 did file his written statement and also led evidence. However, he in his evidence, continuously also came forward and denied the entire case not only on his behalf; but so also on behalf of the Applicant No.1. His denial was to the extent that in response to each and every question, he gave a negative answer including the questions that whether the Suit property was owned by him and his brother? And whether they were in possession or not? It would be advantageous to refer to his evidence especially his cross-examination, which reads as under: -

> **Cross to Mr. Abdul Naeem Advocate for the plaintiff**.
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> ***It is incorrect to suggest that I and my brother Farooq are owners of the property in question***. ***It is correct that I have written in the written statement that I and Muhammad Farooq are owners of the property in question.*** It is correct that suit property consists of shop on ground floor and upper portion first and second is residential purpose. It is correct that I and my brother Farooque is in possession of the property in question. It is incorrect to suggest that I and my brother agreed to sale the property in question on 5.4.95 at 11-00 pm in the upper portion of the suit property of the suit property for Rs.11 Lacs, and received Rs.2 lacs as earnest money. It is incorrect to suggest that my brother Farooque in his own hand writing Ex.20 acknowledging Rs. Two lacs in presence of Muhammad Rafique and Muhammad Saleem. It is incorrect to suggest that Ex.20 bears signature of my brother and mine. It is incorrect to suggest that I and my brother executed sale agreement dated 6.4.95 in presence of Mehfooz ur Rehman and Muhammad Rafique in favour of the plaintiff. I do not know the number of my NIC which is mentioned in the sale agreement bearing No.409-85-127583. I have not brought my NIC it may be the number of NIC of my brother which shown in the sale agreement bearing No.409-53-127584. It is incorrect to suggest that I and my brother executed sale agreement dated 6 April, 95 and same bears our signatures. It is incorrect to suggest that we have received Rs.50,000/- in presence of Muhammad Saleem and Muneer Ali and issue the receipt Ex.22 and same bears my signature and signature of my brother Muhammad

> Farooque. It is incorrect to suggest that I and my brother received Rs.70,000/- in presence of Munir Ali and Saleem on 25.7.1995 and bears my signature and signature of my brother Muhammad Farooque. It is incorrect to suggest that I received Rs.30,000/- and issued receipt on 5.9.1995 in presence of Muhammad Saleem and bears the signature of my brother and mine. It is incorrect to suggest that I and my brother received Rs.50,000/- on 3.10.1995 and issued receipt in presence of Munir Ali and Muhammad Saleem and bears my signature and signature of my brother. It is incorrect to suggest that all the documents from Exh.20 to Ex.25 are true and correct. It is incorrect to suggest that I have received Rs. Four lacs towards consideration amount. It is incorrect to suggest that I and my brother have mentioned in the receipt Ex.25 that we will execute sale deed within one month in favour of the plaintiff. It is incorrect to suggest that plaintiff approached me several time for execution of registered sale deed but we have refused to execute the same. It is incorrect to suggest that plaintiff is ready to perform part and contract but I and my brother Muhammad farooque failed to perform the part of contract. It is incorrect to suggest that I and my brother usurp the amount of Rs. Four lacs. It is incorrect to suggest that I and my brother refused to part of contract with malafide intention. It is incorrect to suggest that father of Muhammad Saleem is not partners in the business. It is incorrect to suggest that plaintiff is not running business Sindh Faran Medicine. It is incorrect to suggest that I am deposing falsely that Saleem is paying rent in respect of shop of Muhammad Sabir. It is incorrect to suggest that I am deposing falsely".

5. Now if the above evidence is perused, the Applicant No.2 denies that he and his brother are owners of the property in question. He was immediately confronted as to his written statement and he accepts that in written statement it was stated by him that he and his brother Muhammad Farooq (Applicant No.1) are owners of the property in question. He has again admitted that he and his brother are in possession of the property in question. Now when this evidence of Applicant No.2 is examined as a whole, it clearly leads to a conclusion that it cannot be relied upon. A witness coming into a witness box on oath cannot deny the admitted facts so stated by him in his own written statement, and if he does so, then his entire evidence is to be disbelieved as his credibility as a witness is seriously damaged leaving no option with the Court; but to disbelieve it in all respects. It is also a matter of record that his brother, the other co-owner of the property neither came forward to deny the execution of the agreement and the receipts, which in fact were also separate and independent in his name to a certain extent; nor he authorized his brother, the other owner of the property to lead evidence on his behalf and enter into the witness box. Both these things do not support the case of the Applicants in any manner. On the other hand, the Respondent led his evidence along with one witness of the agreement and of the receipts in question. Though an objection has been raised that it was mandatory to examine two attesting witnesses of the agreement, and if not, then the

agreement does not stands proved. In the given facts and circumstances, this does not appear to be a case wherein strict compliance of Article 79 of the Qanun-e-Shahadat Order, 1984 has to be made inasmuch as when the evidence of the present Applicants is put in juxtaposition. The Courts below were fully justified in drawing an inference that the agreement was proved. The Court has to look into the peculiar facts and circumstances of each case along with the conduct of the parties and their credibility while appreciating the respective evidence led by them. Reliance can be placed on the case of ***Sajjad Ahmed Khan v Muhammad Saleem Alvi (2021 SCMR 415)*****,** wherein in somewhat similar facts the following observation are relevant for the present purposes.

> 7. As far as non-appearance of the second attesting witness of the agreement Ex-PW-2/1, is concerned, that has undisputedly been brought on the record that the other witness, Dr. Fazal Sher Khan was not available and was residing in America. The provisions of Article 79 (Q.S.O., 1984), are applicable only in those cases where execution of a document is disputed between maker of document and the person in whose favour purportedly the same is executed. Here in this case, execution of the agreement Ex-PW-2/1, though has been denied and disputed by Respondent No.1 by filing his joint written statement but mere denial would not be sufficient in presence of plethora of overwhelming evidence on the record. Such an evidence cannot be discarded merely for non-production/appearance of second marginal; witness. The prime and foremost requirement of Article 79 (Q.S.O., 1984) is to prove execution of a document in case of a denial of execution by producing two marginal witnesses. When. the allegation goes un-rebutted that Respondent No.1 himself was the author/scribe of the document. When again un-rebutted fact is there on the record that the other witness being abroad was not capable of giving evidence, when the stance of Notary Public regarding attestation of agreement goes un-shattered, when PW-1, Hamayoon Shinwari not only confirms the execution rather gives each and every detail of the transaction between petitioner and Respondent No.1 and PW-4 is also the witness of execution and the entire evidence supported by the petitioner himself then in the given circumstances mere non-production of other attesting witness of Ex-PW-2/1 being not available would be nothing much less a hyper technicality and not the violation of Article 79 ibid. We may observe that concurrent findings of dismissal of suit by the three courts are a bitter and distressing example of misreading and non-reading of material evidence available on the record and misapplication of law.

6. Similar view has been expressed in the case of ***Abdul Hameed v Jehangir Khan (2020 SCMR 2107)*** in the following terms;

> 6. Perusal of the entire evidence and the available record makes it abundantly clear that there was an agreement to sell between the parties and the petitioner had tried to deceive and mislead by denying the transaction but he miserably failed in his attempt to rebut the evidence led by the respondent. Simple denial in such like situations cannot be considered as sufficient to ignore the material evidence available on the record. Record of the case shows that no criminal or civil proceedings whatsoever were initiated by the petitioner against the respondent or the petition-writer who scribed the said agreement to justify and

support his stance of denial. CNIC number of the petitioner was there along with his signatures on the agreement (Ex-PW-5/1) and there is no explanation and any action by him in this regard. Record produced by PW-2, would also reflect that brother of the petitioner, who also being a grantee of similar piece of land with same terms, had sold away his property to respondent against the same amount of sale consideration and that agreement was also scribed by PW-2 and said Haji Shams-ud-Din was also marginal witness to that deed. The role of Haji Shams-ud-Din, what appears from the record, is not simpliciter of a attesting/marginal witness rather he being a broker/property dealer negotiated a bargain with petitioner for respondent and a look at the statement of PW-5, Jahangir Khan, respondent, makes it abundantly clear that he is a truthful witness. He has narrated the chain of events in the manner, the same happened.

8. ……..“When we see the very evidence brought on the record to prove the sale agreement, the same makes it clear that the document has been proved in accordance with the requirements of the Qanun-e-Shahadat, the scribe, the marginal/attesting witnesses, the man who negotiated the bargain between the vendor and the vendee appeared and supported the stance of respondent. The factum of payment of sale consideration to vendor also goes un-rebutted and un-shattered. The law on the subject is very much clear and settled. We cannot confine ourselves to that definition of attestation alone which in the end provides "but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary". Presence of other attesting witness Haji Shams-ud-Din, PW-3 has also been admitted by the witness. So, the argument of the learned counsel regarding defective attestation under Section 3 of the Act does not get any support from the record and the law. In presence of such overwhelming evidence on the record, we don't think that the argument advanced by the learned counsel would affect validity or enforceability of the agreement. We may add further that attestation and proof of a document are two different and distinct/independent aspects. Contract/agreement of sale need not be in writing always. It can be oral as well. Offer and acceptance of a sale contract can also be implied but when terms and conditions of a sale are reduced into writing between the parties, then in that case that document of sale requires attestation as contemplated in section 3 of the Act. When the sale agreement gets a shape in black and white then, it requires proof in line with the different modes of proof provided in Qanun-e-Shahadat as per requirements of the case. Reference can also be made to a five Member judgment of this court in the case of Muhammad Sattar v. Tariq Javaid (2017 SCMR 98).

7. In this case, though the Applicant No.2 has vehemently denied all suggestions in respect of execution of the agreement and payments of sale consideration; however, a cursory look into his cross examination reflects that he has entered the witness box with a preset and determined mindset of denial, as if he was trained or prepared for such purposes. And this is why he has even denied his as well his brothers ownership of the property in question. Hence, in view of the facts and circumstances of the case in hand, even such denial does not support the case of the present Applicants.

8. Lastly, it is needless to observe that a finding on a question of fact by the First Appellate Court based on appraisal of evidence and inference drawn therefrom could not be interfered with by the High Court under section 115, C.P.C. merely because the said Court on reappraisal could form a different opinion about the evidence based on different inferences drawn by it.[1] It is also settled law that a mere fact that another view of the matter was possible on appraisal of evidence, would not be a valid reason to disturb concurrent finding of fact in a Civil Revision[2]. It is further settled that High Court cannot upset finding of fact; however erroneous such finding is, on reappraisal of evidence and take a different view of such evidence[3].

9. In view of hereinabove facts and circumstances of this case, it appears that the two Courts below have arrived at a just, fair and legal conclusion in accordance with the available facts and law, which does not warrant any interference by this Court in this Revision Application under Seciton 115 CPC. Accordingly, this Civil Revision does not merit any consideration and is hereby **dismissed.**

Dated: 01.04.2022

J U D G E

Ahmad

[1] ABDUL QAYUM V. MUSHK-E-ALAM (2001 S C M R 798)
[2] Abdul Ghaffar Khan v Umar Khan (2006 SCMR 1619)
[3] Muhammad Feroz v Muhammad Jamaat Ali (2006 SCMR 1304)