

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI

IInd Appeal. No. 125 of 2019

Dated: Order with signature of Judge(s)

1. For orders on Office Objection
2. For hearing of CMA No. 2029 of 2021
3. For hearing of CMA No. 499 of 2020
4. For hearing of Main Case.

Date of Hearing : 11 May 2023

Appellant : Muhammad Shahid Memon represented by Mr. Sami Majeed, Advocate

Respondents : Zeenat Jamal the Respondent No. 1 (i) represented by Ms. Nailia Tabasum, Advocate.

: Ghyasussdin Ahmed the Respondent No. 2 represented by Ehasanullah Khan

: Ejaz Rasool the Respondent No. 3 through his Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

: Sami Uddin Ahmed the Respondent No. 4 through his Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

: Samina the Respondent No. 5 through her Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

: Rukhsana Haq the Respondent No. 6 through her Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

: Asad Salahuddin the Respondent No. 7(i) through his Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

: Sonia Salahuddin the Respondent No. 7(ii) through hr Attorney Ghyasussdin Ahmed represented by Ehasanullah Khan

J U D G E M E N T

1. This is a Second Appeal that has been maintained by the Appellant under Section 100 of the Code of Civil Procedure, 1908 as against the Judgment dated 7 March 2019 and Decree dated 11 March 2019 passed by the Illrd Additional District Judge Karachi (East) in Civil Appeal No. 214 of 2017 upholding the Judgement and Decree dated 2 August 2017 that had been passed by the 1st Senior Civil Judge Karachi (East) dismissing Civil Suit No. 939 of 2012 that had been instituted by the Appellant for the Specific Performance for the purchase of Plot No. 152 and 153, Sector 24, Korangi Industrial Area, Karachi (hereinafter referred to as the "Said Property")

2. Civil Suit No. 939 of 2012 was instituted by the Appellant seeking Specific Performance on a Sale Agreement dated 15 September 2006 and a Supplementary Agreement dated 8 July 2009 for the purchase of the Said Property and construction thereon against a consideration of Rs. 10,000,000 (Rupees Ten Million) purportedly owned by one Jamaluddin who was the Defendant in the Suit and who has since expired (For the sake of convenience Jamaluddin is being referred to as the "Respondent" in this Judgement). The Appellant, in addition, sought damages of Rs. 5,000,000 (Rupees Five Million) for mental torture and agony caused to the Appellant by the Respondent for not performing on the contract as purportedly entered into as between the Appellant and the Respondent.

3. The Respondent filed his Written Statement and has contended that:

- (i) The Said Property was owned by the Respondent's mother who had since passed away and was succeeded to her seven children;

- (ii) The Appellant was the tenant of the Respondent and had rented out the Said Property initially for a sum of Rs. 25,000 (Rupees Twenty Five Thousand) and which rent had at the time of the filing of the Written Statement increased to Rs. 132,000 (Rupees One Hundred and Thirty Two Thousand)
- (iii) That the Respondent not being the sole owner of the Said Property could not have entered into the Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009 with the Appellant.

4. From the pleadings the following issues were framed by the Court:

- “ ...
- (i) Whether the Suit is maintainable?
 - (ii) Whether the defendant is bound to fulfil his contractual obligations at per sale agreement dated 15-09-2006 and supplementary agreement dated 08-07-2009?
 - (iii) Whether the plaintiff is entitled for any damages?
 - (iv) Whether the plaintiff is entitled for relief claimed?
 - (v) What should the decree be?”

5. The matter was heard by the 1st Senior Civil judge Karachi (East) who by his Judgement and Decree dated 2 August 2017 had been pleased to dismiss Civil Suit No. 939 of 2012 holding that:

- (i) That the Suit was maintainable;
- (ii) That as the execution of the Sale Agreement dated 15 September 2006 and the execution of the Supplementary Agreement dated 8 July 2009 had been denied by the Respondent, it was incumbent on the Appellant to prove the execution of both of these documents in accordance with clause (a) of Sub-Article 2 of Article 17 read with Article 79 of the Qanun e Shahdat Order, 1984 and as the Appellant had failed to

adduce the evidence of the attesting witnesses to prove the execution of these documents the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009 they remained unproved and therefore specific performance was refused; and

- (iii) That as the Appellant was unable to show that he was entitled to Specific Performance on the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009, no question of claiming any damages arose

6. Being aggrieved and dissatisfied with the Judgement and Decree dated 2 August 2017 that has been passed by the 1st Senior Civil judge Karachi (East) dismissing Civil Suit No. 939 of 2012, the Appellant preferred Civil Appeal No. 214 of 2017 before the Illrd Additional District Judge Karachi (East) who by a Judgment dated 7 March 2019 and Decree dated 11 March 2019 was also pleased to dismiss Civil Appeal No. 214 of 2017 holding that:

- (i) As the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009 had been denied by the Respondent, it was incumbent on the Appellant to prove the execution of both of these documents in accordance with clause (a) of Sub-Article 2 of Article 17 read with Article 79 of the Qanun e Shahdat Order, 1984 and as the Appellant had failed to adduce in evidence the attesting witnesses to prove the execution of the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated

8 July 2009, those documents remained unproved and therefore specific performance was refused;

(ii) That the right to adduce additional evidence on appeal under Ordre XLI Rule 27 in respect of a memorandum of deposit of title deed dated 17 September 2009, a promissory note dated Rs. 5,500,000 (Rupees Five Million Five Hundred Thousand) and the attesting witnesses could not be adduced:

(a) the documents were not mentioned in the Plaint and would be adduced to fill lacunas in the evidence of the Appellant;

(b) as these documents were prima facie available with the Appellant at the time of evidence being adduced and hence could not be adduced at this belated stage; and

(c) the Appellant could not fill in lacunas in their evidence at the Appellate stage

7. The Appellant has preferred this Second Appeal under Section 100 of the Code of Civil Procedure, 1908 submitting that both the Illrd Additional District Judge Karachi (East) in Civil Appeal No. 214 of 2017 and the 1st Senior Civil judge Karachi (East) in Civil Suit No. 939 of 2012 failed to appreciate that in a Tenancy Agreement dated 1 May 2008 the following clause existed:

" ... *THE LESSOR HEREBY COVENANTS WITH THE LESSEE AS FOLLOWS...*

3. *Inspite of this agreement, the terms and conditions of the Sale Agreement dated 15 September 2006 executed by the parties in respect of the same property shall continue to operate and both the parties shall be bound to act upon it in its true sense."*

He further contended that in the cross examination of the Respondent on 30 May 2017 he had admitted that:

“ ... *It is correct to suggest that at Exh:D/1 contains my signature on all three pages. I own each and every word of rent agreement at Exh:D/1. It is incorrect to suggest that in clause -3 at page No. 3 of rent agreement at Exh D/1 have admitted execution of sale agreement dated 15-09-2006. Vol says that agreement at EX:D/1 was executed in the office of plaintiff and page No. 1 was got exchanged by plaintiff through his accountant and the changed copy was supplied to me.*

Mr. Sami Majeed, appeared on behalf of the Appellants and contended that as the Respondent had admitted to “owning” each and every word of the rent agreement he had accepted that the Sale Agreement dated 15 September 2006 had been executed by him. There being such an admission the Appellant was not bound thereafter to adduce evidence of the attesting witnesses to prove the execution of either the Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009.

8. He further contends that he had moved an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 to adduce additional evidence so as to prove that he had paid the balance sale consideration for the purchase of the Said Property and which had incorrectly been declined by the Illrd Additional District Judge Karachi (East) in Civil Appeal No. 214 of 2017. He finally contended that the as per clause 2 of the Supplementary Agreement dated 8 July 2009, he had been granted a period of 120 days to complete the transaction for acquiring the Said Property and Suit No. 939 of 2012 was maintained within three years of the expiry of that period and hence was maintainable. He did not reply on any case law in support of his contentions.

9. Ms. Naila Tabassum appeared on behalf of the Respondent No. 1 and has contended that the entire transaction that is being advanced by the Appellant is a sham. She contended that the Said Property was owned by

the mother of the Respondent and therefore the Respondent never had the capacity to transact on the said Property as at any given time as:

- (i) the mother of the Respondent i.e. Aisha Riaz was the owner of the Said Property, and
- (ii) after Aisha Riaz passing, the Said Property was inherited by the Respondent and his six brothers and sisters

It was therefore maintained that the property having never been solely in the Respondent name, specific performance on the purported Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009 cannot be granted. She also did not rely on any case law in support of her contentions. Mr. Ehsanullah Kahn, representing the Respondents No. 2 to 7 adopted the arguments of Ms. Naila Tabassum.

10. I have heard the parties and have perused the record. It is apparent that the Respondent has specifically denied the existence of both the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009. Under Article 117 of the Qanun e Shahdat Order, 1984 it has been clarified that:

“ ... 117. Burden of proof:
 (1) 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.
 (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

As such prima facie the obligation is on the Appellants to prove both the existence of the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009. Regarding the manner in which a document is to be proved Article 79 of the Qanun e Shahdat Order, 1984 has clarified that:

“ ... 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 given Evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

(Emphasis is added)

This section may be read in conjunction with the provisions of Article 17 of the Qanun e Shahdat Order, 1984.

“ ... **17. Competence and number of witnesses:**

(1) *The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and Sunnah:*

(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) *In all other matters, the Court may accept, or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.”*

(Emphasis is added)

Clearly both the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009 are documents that “pertain to financial and future obligations” and which have been reduced to writing need to be proved by either two men or one man and two men. The exception to this rule is contained in Article 81 of the Qanun e Shahdat Order, 1984. That article states as under:

“ ... 81. ***Admission of execution by party to attested document:***

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.”

The Supreme Court of Pakistan in the decision reported as **Muhammad Afzal (Decd) vs. Muhsammad Bashir**¹ has held that:

“ ... *Article 81 is an exception to the general rule that where a document is required by law to be attested the same cannot be used in evidence unless two attesting witnesses are called for the purposes of proving its execution. The simple reading of Article 81 shows that where the execution of a document is admitted by the executant himself, the examination of attesting witness is not necessary.*”

As such in the event that the Respondent had in his deposition admitted as to the execution of the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009 then there would be no need on the part of the Appellant to prove either of those two documents.

11. I am not able to accept the contentions of the Appellant that both the Sale Agreement dated 15 September 2006 and the Supplementary Agreement dated 8 July 2009 did not need to be proved on account of a purported admission in the cross examination where the Respondent states that:

“ ... *I own each and every word of rent agreement at Exh:D/1*”

While, the Respondent alleges that a page of the rent agreement that was attached as Exhibit D/1 was replaced, it is not disputed that the document that was exhibited as D/1 in the evidence contained a clause which averred to the existence of the Sale Agreement dated 15 September 2006 and which the Respondent had “owned”. However, critically as the document that was exhibited as D/1 was executed on 1 May 2008 it does not aver to any admission of the Supplementary Agreement dated 8 July 2009. Hence, even if the contentions of the Appellant are to be accepted i.e. that on the basis of the admission made by the Respondent he is absolved from adducing evidence of the attesting witnesses to the Sale Agreement dated

¹ 2020 SCMR 197

15 September 2005, this would not absolve him of adducing evidence of the attesting witnesses to the Supplementary Agreement dated 8 July 2009. This was not done and as such this document having been denied by the Respondent had to be proved under the provisions of clause (a) of Sub-Section (2) of Article 17 read with Article 79 of the Qanun e Shahdat Order, 1984. The Appellant having failed to adduce evidence of the existence of a document that he is seeking specific performance on would disentitle him from maintaining a suit for Specific Performance. I am therefore of the opinion that both the Illrd Additional District Judge Karachi (East) in the Judgement dated 7 March 2019 and Decree dated 11 March 2019 passed in Civil Appeal No. 214 of 2017 and the 1st Senior Civil judge Karachi (East) in the Judgement and Decree dated 2 August 2017 that has been passed in Civil Suit No. 939 of 2012 had correctly declined to grant specific performance on the Supplementary Agreement dated 8 July 2009 as the same had not been proved within the perimeters of clause (a) of Sub-Section (2) of Article 17 read with Article 79 of the Qanun e Shahdat Order, 1984.

12. In addition, it has also come on record that the Said Property was owned by the mother of the Respondent i.e. Aisha Riaz. There is also no dispute as to the fact that after her demise the Said Property was inherited by her seven children including the Respondent. The Said Property having never been solely owned by the Respondent, it is apparent that the Respondent did not have the requisite capacity to sell the Said Property. While, there are various Power of Attorneys on record from various siblings of the Respondent none of them have been attested by a consular officer of the Pakistan Embassy or of Pakistan High Commission so as to give those documents the presumption of validity under the provisions of Article 95 of the Qanun e Shahdat Order, 1984 read with Section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948. Each of those documents has only been attested by a Notary Public of the United

States of America and who cannot be treated as Notary Public under Section 3 of the Notaries Ordinance, 1961 and thereafter gain the cover of Article 95 of the Qanun e Shahdat Order, 1984.

13. On the basis of the reasoning as stated above, I am of the opinion that the Respondent lacked the capacity to execute either the Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009 could not affect the transfer of the Said Property on behalf of his mother and his siblings to the Appellant and which would also prevent the grant of a Decree for Specific Performance in respect of the right, title and interest of the mother of the Respondent while she was alive and after her demise as to the Specific Performance of the undivided share held by the siblings of the Respondent after their mothers demise in favour of the Appellant.

14. The final issue that had been pressed by the Appellant was that the Illrd Additional District Judge Karachi (East) in the Judgment dated 7 March 2019 and Decree dated 11 March 2019 passed in Civil Appeal No. 214 of 2017 had illegally denied him the right to:

- (i) produce a Memorandum of Deposit of Title Deed dated 17 September 2009;
- (ii) a Promissory Note of Rs. 5,500,000; and
- (iii) adduce the evidence of the attesting witnesses to the Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009.

15. Order XLI Rule 27 of the Code of Civil Procedure, 1908 states that:

“ ... 27. (1) *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the appellate Court, But if -*

a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or,

b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

The Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court the Court shall record the reason for its admission."

The provisions of this Rule have been interpreted by the Supreme Court of Pakistan in the decision reported as **Muhammad Siddique vs. Gul Nawaz**² wherein it was held that:

" ... *as to the production of additional evidence, the powers of the appellate court under Order XXI, Rule 27, C.P.C. are not absolute but are structured by the provisions of rule 27 itself and could only be exercised in cases where (i) the Court whose decree is under appeal has refused to admit a piece of evidence which ought to have been admitted or (ii) the Appellate Court requires any document to be produced or any witness to be examined to enable it pronounce judgment or (iii) for any substantial cause and that too after recording reasons."*

The circumstances under which an appellate court can adduce further evidence is therefore limited to:

- (i) reviewing the decision of a trial court when it has denied evidence to being adduced;
- (ii) the requirement of an Appellate Court to examine a document or witness to write a proper judgment; and
- (iii) Any "substantial cause" which has to be determined by the Appellate court by the passing of a speaking order justifying the cause

I cannot see how the Appellant can contend that the IIIrd Additional District Judge Karachi (East) in the Judgment dated 7 March 2019 and Decree dated 11 March 2019 passed in Civil Appeal No. 214 of 2017 had erred in refusing the Appellant the right to adduce evidence at the Appellate stage. Each of the documents referred to in the application were available with the Appellant at the time of adducing evidence in Civil Suit No. 939 of 2012 before the 1st Senior Civil judge Karachi (East) and clearly the failure on

² 2021 SCMR 1480

the part of the Appellant to adduce the evidence of the attesting witnesses to the Sale Agreement dated 15 September 2006 or the Supplementary Agreement dated 8 July 2009 can only be attributed to the Appellants own negligence. The evidence if adduced would clearly be filling a lacuna in the evidence of the Appellant that he failed to adduce in evidence in Civil Suit No. 939 of 2012 and which to my mind has correctly been refused by the Illrd Additional District Judge Karachi (East) in the Judgment dated 7 March 2019 passed in Civil Appeal No. 214 of 2017.

16. For the foregoing reasons, I see no infirmity or illegality in either the Judgment dated 7 March 2019 and Decree dated 11 March 2019 passed by the Illrd Additional District Judge Karachi (East) in Civil Appeal No. 214 of 2017 upholding the Judgement and Decree dated 2 August 2017 that has been passed by the 1st Senior Civil judge Karachi (East) dismissing Civil Suit No. 939 of 2012. This Appeal therefore being misconceived is dismissed along with all listed applications with no order as to costs.

JUDGE

Karahi dated 10 August 2023