IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 220 of 2022

[M. Siddique ……v……Mst. Feroza Begum & others]

Date of Hearing	:	05.04.2023
Appellant through	:	Mr Kaleemul Hassan Siddiqui, Advocate
Respondent through	:	Respondent No.1 in person.

J U D G M E N T

Zulfiqar Ahmad Khan, J:- This Second Appeal moved under Section 100 of the Code of Civil Procedure, 1908 assails concurrent findings of the learned trial Court dated 12.03.2022 as well as those of the First Appellate Court dated 12.10.2022 which are against the appellant.

2. Pithily the facts of the case at hand is that the respondent No.1 filed a suit for declaration, possession, cancellation of documents, mesne profit and permanent injunction claiming that she is owner of House No. R-155 Sector 7-c, Surjani Town, Karachi which was allotted to her by KDA vide allotment Order dated 25.10.1993 ("subject house"). It is claimed by the respondent No.1 in the said suit that the appellant had encroached the said house and such complaint was also lodged with respondent No.2, nonetheless, the learned trial Court after framing of issues and recording evidence of the parties decreed the suit filed by the respondent No.1 vide Judgment & Decree dated 12.03.2022. The appellant impugned the said Judgment & Decree by filing Civil Appeal No.165 of 2022 before the First Appellate Court i.e. IX Additional District Judge West, Karachi which was dismissed vide Judgment & Decree dated 12.10.2022, hence this second appeal against the concurrent findings.

3. Learned counsel for the appellant introduced on record contending that the respondent No.1 was owner of the said house but she sold out the same to one Imran Ahmed on 20.11.1993 through sale agreement and also executed a General Power of Attorney in his favour. He further contended that the appellant purchased the subject house from said Imran Ahmed in presence of witnesses and that the soon after purchasing of the subject house, the appellant is residing in it without any impediment and hurdles. While concluding his submissions, he contended that the appellant has vested rights in the subject house while the respondent No.1 has no right, claim or title but the courts below failed to appreciate the documents as well as evidence placed before it and passed the impugned Judgments & Decrees which be set aside.

4. On the contrary, respondent No.1 in person submitted that she is owner of the subject house which was allotted to her by KDA in the year 1992. She further contended that the appellant is an encroacher and he occupied the subject house in the year 2019 for which she addressed a communication to respondent No.2 to taking stern action against the appellant but her efforts went in vain. She further submitted that appellant is relying on the power of attorney alleged to have been executed by her in favor of Ansar Ahmed is forged one, she neither signed the same nor executed it in favour of Ansar Ahmed and that the learned Senior Civil Judge being a fact finding Court reached to the right conclusion and went on to cancel the documents which are being relied upon by the appellant. She lastly submitted that the concurrent findings of the Courts below are upon correct appreciation of law and facts presented by her and concurrent

findings cannot be disturbed, therefore, the second appeal be dismissed.

5. I have heard the respective learned counsel and have also considered the record to which my surveillance was solicited. It is considered pertinent to initiate this deliberation by referring to the settled law in such regard. To start with, it is common knowledge that right to file Second Appeal provided under section 100 of CPC, which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law.

6. The respondent No.1 denied the execution of Sale Agreement dated 20.11.1993 (available at page 149), General Power of Attorney 21.11.1993 (available at page 193) as well as denied to have signed these documents. Therefore, the said agreement & Power of Attorney was required to be proved as mandated by Article 79 of the Qanun-e-Shahadat Order, 1984. If precedent is required for this trite contention, reference may be made to the decision in the case of Nazir Ahmed v Muzaffar Hussain (2008 SCMR 1639) which held, that *in case of denial of execution of document, the party relying on such document must prove its execution in accordance with the modes of proof as laid down in Qanun-e-Shahadat Order, 1984 and the party is required to observe rule of production of best evidence*. The Hon'ble Supreme Court recently in the case of Sheikh Muhammad Muneer v. Mst. Feezan (PLD 2021 S.C. 538) held the similar principle and would be conducive to reproduce the relevant excerpt which is delineated hereunder:-

> "Where the purported seller denied the execution of the agreement and denied agreeing to sell

> his/her immoveable property, the said agreement was required to be proved by the party relying on the same as mandated by Art.79 of the Qanun-e-Shahadat, 1984."

7. To appreciate above excerpt, it would be appropriate to reproduce hereunder Article 79 of the Qanun-e-Shahadat, 1984 and Section 3 of Transfer of Property Act, 1882:-

> Article 79 of the Qanun-e-Shahadat, 1984:
> 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:
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> 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.
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> Section 3 of the Transfer of Property Act, 1882:
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> 3. Interpretation clause.
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> "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature of mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; 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.

8. Perusal of Sale Agreement dated 20.11.1993 (available at page 149) reveals that it was signed by only one witness, however, the attached receipt of payment was not signed by any of the witnesses.

The question of the requisite number of witnesses to prove the execution of a document may be considered from the perspective of Article 17 of the Qanun-e- Shahadat, which is reproduced hereunder:

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

9. The agreement was with a lady (the respondent No.1) and under the agreement a certain amount was stated to have already been paid and the remainder was to be paid in the future and she was supposed to convey and deliver possession of her house upon receipt of the balance payment. Therefore, the agreement was in respect of "matters pertaining to financial or future obligations" in terms of Article 17(2)(a) of the Qanun-e-Shahadat and required that such an agreement to be attested "by two men, or one man and two women, so that one may remind the other". However, perusal of record shows that only one witness signed the same, however, the attached receipt was never signed by any of the witness. For proving a document Article 17(1) of the Qanun-e-Shahadat states that, '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 Quran and Sunnah.' Therefore, I turn to the Holy Qur'an to seek guidance.

10. Verse 282 of the second chapter, Al-Baqarah, of the Holy Qur'an comprehensively deals with agreements, including the kind under consideration:

> "O ye who believe! when you deal with each other, in transactions involving future obligations in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write: as Allah has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord Allah. And not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing for a future period, whether it be small or big: it is more just in the sight of Allah, more suitable as evidence and more convenient to prevent doubts among yourselves. But if it be a transaction which you carry out on the spot among yourselves, there is no blame on you if you reduce it not to writing. But take witnesses whenever you make a commercial contract; and let neither scribe nor witness suffer harm. If you do (such harm), it would be wickedness in you. So fear Allah; for it is Allah that teaches you. And Allah is well acquainted with all things.

11. The Holy Qur'an requires that the number of witnesses should be not less than two men or a man and two women (so that the one may remind the other if he/she forgets). However, in the present case only one witness signed the sale agreement. Therefore, compliance was also not made with Article 17(1) and (2) of the Qanun-e-Shahadat and with the injunctions of Islam.

12. It is of concern that in the Islamic Republic of Pakistan Qur'anic injunctions are at times relegated in favour of retrogressive practices; we have criticized this in the case of ***Fawad Ishaq v Mehreen Mansoor (PLD 2020 S.C. 269)*** the Hon'ble Supreme Court noted that '*A chasm existed between a woman's position in Islam to that which prevailed till a century ago in Europe and America where upon marriage a wife stood deprived of her property, which became that of her husband to do with it as he pleased*.' It may be useful to reproduce the following three paragraphs from the judgement as well:

> "10. We however find that the old European and American concepts at times permeate into the thinking even of judges in Pakistan. The doctrine of 'coverture' subsumed a married woman's identity. Sir William Blackstone described the doctrine of coverture: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme covert…". In her comprehensively researched book Amy Louise Erickson writes, "Under common law a woman's legal identity during marriage was eclipsed - literally covered - by her husband. As a 'feme covert', she could not contract, neither could she sue nor be sued independently of her husband. … The property a woman brought to marriage – her dowry or portion – all came under the immediate control of her husband". It was only on the passing of the Married Women's Property Act, 1882 that in England a married woman became, "capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee".
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> 11. The situation in the United States of America of married women was no better, they had no legal existence apart from their husbands. The reason for a married woman's servile status was sought to be explained by the Supreme Court of Illinois, "It is simply impossible that a married woman should be able to control and enjoy her property as if she were sole, without practically leaving her at liberty to annul the marriage". The unjustness of the laws was severely criticized. Elizabeth Cady Stanton listed in the Declaration of Sentiments "the injuries and usurpations on the part of man toward woman" – "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns… the law, in all cases, going upon a false supposition of the supremacy of a man, and giving all power into his hands". Harriet Beecher Stowe was another campaigner for women's

> rights, observing that, "The position of a married woman… is, in many respects, precisely similar to that of the negro slave. She can make no contract and hold no property; whatever she inherits or earns becomes at that moment the property of her husband. … In English common law a married woman is nothing at all. She passes out of legal existence."
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> 12. Discrimination against women pervaded in other areas too. It was only in 1960 that women in America could open bank accounts without their husband's permission and this right was acquired by women in the United Kingdom as late as 1975. The professions were also barred to women. Mrs. Myra Colby Bradwell had passed the bar examinations but was not allowed to practice law; she asserted her right to practice but in 1873 the United States Supreme Court held, that denying Mrs. Bradwell the right to practice law violated no provision of the federal Constitution and added, "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth".

13. The Hon'ble Supreme Court in Tasadduq Hussain v. Muhammad Din (PLD 2011 S.C. 241) considered and discussed the nitty-gritties of Article 17 of the Qanun-eShahadat and held, that:

> "7. … the provisions of Article 17(2)(a) encompasses in its scope twofold objects (i) regarding the validity of the instruments, meaning thereby, that if it is not attested by the required number of witnesses the instrument shall be invalid and therefore if not admitted by the executant or otherwise contested by him, it shall not be enforceable in law (ii) it is relatable to the proof of such instruments in term of mandatory spirit of Article 79 of The Order, 1984 when it is read with the later. Because the said Article in very clear terms prescribes "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".
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> 8. The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witness, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness

> alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, **the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. … And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence**. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise
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> 9. Coming to the proposition canvassed by the counsel for the appellant that a scribe of the document can be a substitute for the attesting witnesses … It may be held that if such witness is allowed to be considered as the attesting witness it shall be against the very concept, the purpose, object and the mandatory command of the law highlighted above.
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> [**emphasis added**]

14. The learned trial Court in its Judgment (*at page 9*) discussed the testimony of the appellant and it would be pertinent to reproduce the relevant excerpt of the testimony of the appellant which is delineated hereunder:-

> "**During cross-examination defendant No.1 admitted that no any agreement was executed between him and plaintiff. he has also admitted that he has not produced sale agreement showing that any agreement was executed between him and Ansar Ahmed pertains to suit property. Such admission of defendant No.1 clearly reveals that defendant No.1 has not produced any documentary evidence showing that he had purchased the suit proprety from Imran Ahmed S/o Ansar Ahmed (alleged purchaser or Ansar Ahmed S/o Haji Allah bux (Attorney on the basis of Irrevocable General Power of Attorney Exh. D/1-E). Defendant No.1 has not produced any documentary evidence showing that suit property was ever transferred in favour of Imran ahmed or Ansar Ahmed. As for as Sale Agreement dated 21.11.1993 Ex. D/1-B, Irrevocable General Power of Attorney Ex. D/1-L are concerned, in order to establish the claim pertains to purchase of the suit property under sale agreement, defendant No.1 being the beneficiary of said documents viz Sale Agreement Ex. D/1-B, Irrevocable General Power of Attorney Ex-D/1-E & General Power of Sub-Attorney Ex D/1-L is under obligation to prove the execution of said documents……"**

> 18……
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> 19…..
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> 20. The above dictum of Hon'ble Supreme Court **clearly reveals that defendant No.1 has failed to examine two attesting/marginal witnesses of such documents in order to prove executiong of the same. Therefore, defendant No.1 has failed to prove the execution of sale agreement ExD/1-B, Irrevocable General Power of Attorney Ex D/1-E & General Power of sub-Attorney Ex D/1-L as required under the law.**

15. It is manifestly clear from above constituent of the Judgment of the learned trial Court that the appellant admitted during the course of cross-examination that neither any sale agreement had been executed between him and respondent No.1 nor between him and Ansar Ahmed. It is also poignant to observe here that appellant had not produced any documentary evidence showing that he had purchased the subject house from Imran Ahmed or Ansar Ahmed. The appellant before the learned trial Court also went on to admit that he failed to examine the two attesting/marginal witnesses of documents which is being relied upon by him. It is well settled that the Trial Court (Senior Civil Judge) was the fact finding authority and the learned trial Court framed approximately 7 issues which were answered against the appellant. The First Appellate Court have also examined the record and proceedings. The purpose of appellate jurisdiction is to reappraise and reevaluate the judgments and orders passed by the lower forum in order to examine whether any error has been committed by the lower court on the facts and/or law, and it also requires the appreciation of evidence led by the parties for applying its weightage in the final verdict. It is the province of the Appellate Court to re-weigh the evidence or make an attempt to

judge the credibility of witnesses. The learned First Appellate Court having examined the entire record and proceedings made available to it went on dismiss the First Appeal filed by the appellant and held that appellant herein failed to examine Ansar Ahmed and the witnesses showing in the General Power of Attorney as marginal witnesses. It is considered expedient to reproduce the pertinent constituent of the impugned Judgment hereunder:-

> ***"For proving the executing of valid sale agreement and General Power of attorney, it was essential that two attesting witnesses should appear before the Court and state that the same were executed by the executant in their presence after getting sale consideration amount and the contents of the same were read over to her but the appellant failed to produce marginal witnesses which create serious doubt. According to Article 17, Qanoon-e-Shahadat Order document creating financial liability has to be attested by two witnesses and proved in the same manner.***
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> ***I have gone through the sale agreement dated: 20.11.1993 and from perusal of the same it appears that in the same only one person namely Ahmed Nadeem has been shown as witness but his NIC Number is not mentioned thereon. The NIC number of respondent No.1 and Imran Ahmed are also not mentioned in the agreement. The sale agreement shows that it was attested by Akhtiar Khan Notary Public Karachi but Akhtiar Khan was also not examined. The appellant failed to examine Imran Ahmed S/o Ansar Ahmed.***
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> ***I have gone through the power of attorney and from perusal of the same it appears that one Hamid Ali and Naeem Ahmed are shown as witnesses of such power of attorney but their NICs numbers are not mentioned thereon. The appellant failed to examine Ansar Ahmed S/o Allah bux and the witnesses shown in the General Power of attorney as marginal witnesses.***

16. To me, the concurrent findings are based upon the correct appreciation of law as well as on fact. When the findings are based

on mis-reading or non-reading of evidence, and in case the order of the lower fora is found to be arbitrary, perverse, or in violation of law or evidence, This Court while exercising jurisdiction under Section 100 C.P.C. can exercise its jurisdiction as a corrective measure. If the error is so glaring and patent that it may not be acceptable, then in such an eventuality the High Court can interfere when the finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where an unreasonable view on evidence has been taken. No such avenues are open in this case as both the judgments are well jacketed in law. It has been held time and again by the Apex Court that findings concurrently recorded by the courts below cannot be disturbed until and unless a case of non-reading or misreading of evidence is made out or gross illegality is shown to have been committed.[1]

17. In light of the above discussion, the instant IInd Appeal is dismissed alongwith pending applications.

Karachi
Dated:05.04.2023

JUDGE

Aadil Arab

[1] Farhan Farooq v. Salma Mahmood (2022 YLR 638), Muhammad Lehrasab Khan v. Mst. Aqeel un Nisa (2001 SCMR 338), Mrs. Samina Zaheer Abbas v. Hassan S. Akhtar (2014 YLR 2331), Syed Shariq Zafar v. Federation of Pakistan & others (2016 PLC (C.S) 1069).