

**Mst. NAZAR BIBI and 8 others---Appellants**

**Versus**

**IMTIAZ HUSSAIN---Respondent**

Regular Second Appeal No.9 of 2004, heard on 26th January, 2011.

**NASIR SAEED SHEIKH, J.**---This Regular Second Appeal is directed against the judgment and decree dated 5-12-2003, passed by the learned Additional District Judge, Narowal, whereby an appeal preferred by the respondent against the judgment and decree dated 17-12-1997 of the learned Civil Judge, Narowal dismissing the suit of the appellants, was accepted and the decree for specific performance was passed in favour of the respondent as prayed for.

2. Briefly stating the facts of the case are that Imtiaz Hussain respondent on 18-12-1995 instituted a suit before the learned Senior Civil Judge, Narowal for possession through specific performance of an agreement to sell dated 17-4-1994 of land measuring 77 Kanal 8 Marla described in Para No.1 of the plaint. The respondent contended that the agreement to sell dated 17-4-1994 has been entered by Sardar Khan son of Chote Khan, the predecessor-in-interest of present appellants for a sum of Rs.341,875 and an amount of Rs.335,000 has been paid at the time of execution of agreement to sell and a sum of Rs.6,875 was to be paid more at the time of execution of sale deed in favour of the respondent. This balance amount was also claimed by the respondent to have been paid to the defendant of the suit Sardar Khan subsequently but on the failure of the defendant of the suit to execute a valid transfer deed in favour of the plaintiff, this suit was instituted for possession and specific performance by the respondent. The suit was contested by the predecessor-in-interest of the appellants. The agreement to sell was totally denied by him in his written statement and it was further contended in the written statement that the defendant was an illiterate person and the plaintiff was a retired Girdawar in the revenue department and was a tenant under defendant and the plaintiff obtained the signature and thumb impression of the defendant on a stamp paper on the pretext of representing the defendant of the suit in a litigation with one Saeed Ahmad and that all the entries were made on the stamp paper subsequently making it an agreement to sell, which was a fabrication and forgery and all the signatures of the witnesses were also subsequently entered to give this document a look of an agreement to sell.

3. The learned Civil Judge framed the following issues:--

**ISSUES.**

- (1) Whether the defendant agreed to sell the suit-land for a consideration of Rs.341,875? OPP
- (2) Whether the defendant received a sum of Rs.335,000 as earnest money and executed agreement to sell dated 17-4-1994? OPP
- (3) If the above issues are proved in affirmative whether the plaintiff is entitled to the decree for specific performance of the contract? OPP
- (4) Whether the plaintiff has no cause of action and locus standi to file this suit? OPD
- (5) Whether the impugned agreement is fictitious, based on fraud and without consideration? OPD
- (6) Whether the plaintiff has not come to the court with clean hands and the defendant is entitled to special cost under section 35-A of C.P.C.? OPD
- (7) Relief.

4. The parties produced their respective evidence and the learned Civil Judge recording crucial finding on Issues Nos.1, 2 and 5 held that the execution of the agreement to sell Exh.P1 claimed by the plaintiff is doubtful and that the witnesses produced by the plaintiff in his evidence made contradictory statements and that the agreement to sell Exh.P1 was result of fraud and collusion and was without consideration and the plaintiff failed to prove the making of payment of sale price to the defendant Sardar Khan and thus the suit was dismissed vide judgment and decree dated 17-12-1997.

5. The appeal was preferred by the respondent against the judgment and decree dated 17-12-1997 of the learned trial court, 'which appeal came up for hearing before the learned Additional District Judge, Narowal. The appeal was accepted by the learned Additional District Judge and the suit was decreed in favour of the respondent after setting aside the judgment and decree of the learned trial court. The instant RSA assails the judgment and decree dated 5-12-2003 of the learned first appellate court.

6. It is contended by the learned counsel for the appellants that entering of the agreement to sell by the petitioner with respondent Sardar Khan is not established before the trial court nor payment of any consideration is proved through any of the witness. The learned

counsel then contended that version put up in the plaint seeking specific performance of the agreement is not supported by evidence produced by the respondent during the trial. It is contended by the learned counsel for the appellants that the version put by respondent No.1 in Paragraph No.2 of the plaint is that on 17-4-1994 at the time of executing of agreement to sell, an amount of Rs.3,35,000 was paid out of the total consideration arrived at between the parties, on which date the respondent is also alleged to have made the transaction. The learned counsel for the appellants contends that none of the witnesses deposed that the transaction was arrived at between the parties on the date on which the alleged agreement to sell dated 17-4-1994 was executed. The learned counsel contends that none of the witness has stated that the transaction was entered at between the parties before any of the witness or any portion of the earnest money as claimed by the respondent has been paid in the presence of any of the witnesses. The learned counsel contends that making of the payment by the respondent as earnest money is not specified as to on which date it took place nor there is mentioning of the fact in the agreement to sell or in the plaint that the payment was made through any cheque. The learned counsel further contends that in his statement as P.W.6, the respondent/plaintiff has claimed to have made payment of the earnest money on different occasions, which fact has not been pleaded in the plaint nor in the agreement to sell. The learned counsel contends that the respondent produced P.W.3 Muhammad Majeed, Head Cashier, National Bank of Pakistan, Narowal and through him it was proved that a payment of Rs.1,10,000 was made by the respondent to the petitioner through cheque dated 19-4-1993. The learned counsel contends that the transaction was never pleaded to have been arrived at between the parties either on 19-4-1993 or prior to the date of the alleged agreement to sell dated 17-4-1994. The learned counsel contends that the scribe of the agreement Exh.P1 has appeared as P.W.4 and he admitted certain facts that the signatures of Rehmat Khan and cutting under the name of Rehmat Khan is not in the handwriting of the P.W.4. The learned counsel further contends that he also admitted that signatures of Rehmat Khan on the agreement Exh.P1 were also not obtained in his presence. The learned counsel submits that the said witness further stated that the thumb impression of Khurshid witness was also not got impressed in his presence and that the date under the name of the witness Khurshid was also not written in his presence. It is further contended that writing of 9 acre 5 kanal and 8 marla in the agreement Exh.P1 was also admitted by the said scribe P.W.4 not to be in his handwriting. The learned counsel submits that the witness P.W.4 admitted that the date "17-4-1997" is in his handwriting and none of the other dates in the agreement has been scribed by him. The learned counsel further contends that the witnesses produced by the respondent were mutually contradictory on material aspect of the matter and the statement of the scribe particularly knocks down the entire version put by the respondent about the valid execution of the agreement Exh. P.1. The learned counsel contends that out of the remaining marginal witnesses, only P. W.1. Muhammad Aslam has been produced and his statement is also not confidence inspiring whereas the other witness Rana Muhammad Aslam has not been produced. It was admitted by the scribe P.W.4 that the two witnesses Khurshid and Rehmat Khan did not sign in his presence upon the agreement Exh. P1, thus, the learned counsel has argued that making of the transaction is not proved by the respondent specifically nor the making of payment by the respondent to the appellant is proved through any witness and the execution of agreement Exh.P1 has thus not been proved through a convincing evidence by the respondent and therefore he was not entitled to the 'decree as prayed for.

7. Conversely, the learned counsel for the respondent contends that the parties as well as the scribe are residents of the same village. The learned counsel contends that the scribe in this case has appeared in addition to Muhammad Aslam P.W. 1 and can be treated as a marginal witness. Reliance has been placed upon Muhammad Tufail v. Muhammad Younas and others (2006 CLC 779) and Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639). The learned counsel contends that son of the appellant whose name is Khushi Muhammad has signed the agreement Exh.P1 and there is no

denial of this fact by the respondent. However, the learned counsel admitted that the signature of Khushi Muhammad has not been admitted by any of the parties of the agreement Exh. P. 1. The learned counsel explains that scribe has admitted that Khushi Muhammad has signed the agreement Exh.P1 and this agreement is established. The learned counsel further contends that P.W. Muhammad Aslam also proved the signing of the Exh. P1 by Khushi Muhammad, son of the present appellant. The learned counsel contends that a specific plea of fraud has been raised by the appellants but no evidence was produced upon the plea by them. It is contended that when plea of fraud was taken by the defendants then the version of the opposite side that is the plaintiff of the suit has to be given due value and credence. Reliance has been placed upon *Yasin alias Muhammad Hussain and 7 others v. Muhammad Siddique and 5 others* (1994 CLC 836). It is next contended after relying upon *Mst. Farrukh Jabin v. Maqbool Hussain through Legal Representatives and others* (PLD 2004 SC 499) that where the scribe gives some concession to the other side in his evidence, then such a concession has to be considered as inferences drawn by the witness and not to be acted upon and has no effect upon the fate of the instant case. The learned counsel has contended that the view expressed by the first appellate court is to be given preference over the view expressed by, the trial court. Reliance has been placed upon *Muhammad Hafeez and another v. District Judge, Karachi East and another* (2008 SCMR 398) and *Muhammad Iqbal and another v Mukhtar Ahmad and L.Rs.* (2008 SCMR 855). The learned counsel finally concluded that the court of revision as the present Court is, has the power to decide the case on the basis of consideration of probabilities in order to do complete justice in the matter. Reliance has been placed upon *Fazle Ghafoor v. Chairman, Tribunal Land Disputes, Dir, Swat at Chitral at Mardan and 6 others* (1993 SCMR 1073). The learned counsel contends that the plea taken by the appellant in his evidence is not convincing and deserves to be discarded as against the positive evidence produced by the present respondent, who was appellant in the lower first appellate court. The learned counsel thus argued that the second appeal of the appellant deserves to be dismissed.

8. I have considered the arguments of learned counsel for the parties and have gone through the record with their able assistance.

9. Although it is correct that the judgment and decree passed by the first appellate court has some preference at RSA/Civil Revision preferred against the judgment at variance passed by the two courts below in a matter as argued by learned counsel for the respondent but this Court has ' all the powers to examine and analyse as to whether the judgment and decree passed by the first appellate court is in accordance with the evidence or not and is legally sustainable. The agreement to sell Exh. P.1 dated 17-4-1994 has been disputed by the defendant Sardar Khan, who was predecessor-in-interest of the present appellants. This document Exh.P1 is scribed by Arif Hussain, who appeared as P.W.4. The agreement to sell Exh.P1 is further witnessed by four persons, whose signatures are affixed on it and these four persons are Rana Muhammad Aslam, an ex-councillor of the locality, Muhammad Aslam son of Raj Din, Khurshid Ahmad son of Muslim Din and Rehmat Khan son of Haider Khan. In addition to those four witnesses, one Khushi Muhammad, who is stated to be son of the defendant Sardar Khan is also shown to be signatory of the agreement to sell Exh.P1. The plaintiff Imtiaz Hussain himself appeared as P.W.6 in his evidence and in his examination in chief built up a story that Exh.P1 dated 17-4-1994 was written down between him and the defendant Sardar Khan and as a part payment, a sum of Rs.1,00,000 was paid by the plaintiff through a cheque dated 19-4-1993 to the defendant, which was got en-cashed by the defendant. Out of the total sale price of Rs.341,875, the plaintiff Imtiaz Khan further stated in his statement that he paid a sum of Rs.2,35,000 in cash to the defendant. The plaintiff further contends that agreement to sell Exh.P1 was thumb marked by the defendant Sardar Khan and his son

Khushi Muhammad at his house in presence of Rana Muhammad Aslam, ex-councillor, Muhammad Aslam son of Raj Din, Khurshid and Rehmat Khan other two witnesses and that the agreement was written down by Munshi Arif. All the witnesses and scribe signed the document Exh.P1 then and there and it was read over to the parties. This Munshi Arif has appeared as P.W.4 and in his cross-examination admitted that he does not personally know Rehmat Khan witness. He further stated that under the name of Rehmat Khan witness, there is a cutting in the document Exh.P1, which is not in the handwriting of the scribe Muhammad Arif. He also admitted that under the name and signatures of Rehmat Khan, the date 17-4-1994 is also not in his handwriting and he categorically stated that Rehmat Khan did not sign in his presence rather he stated that even he does not know whether the signatures upon the agreement are that of Rehmat Khan or not. In cross-examination the said scribe further admits that the other witness of agreement Exh.P1 Khurshid did not affix his thumb impression in his presence and that the date 17-4-1994 mentioned against the name of Khurshid is also not in his handwriting. This scribe further admits that a writing in the Exh.P1 describing the land 9 Acre 5 Kanal and 8 Marla is also not in his handwriting and he further stated that the date shown as "17-4-1997" is in his handwriting and none of the other dates written on the agreement are in his handwriting. The scribe further admitted in his cross-examination that the transaction was not entered in his presence nor any amount was paid in his presence. The statement of the scribe, who appeared as P.W.4., creates very serious doubts about the authenticity of agreement to sell and admittedly on the basis of his statement, it can be concluded that Rehmat Khan and Khurshid neither signed the document Exh.P1 in presence of the scribe nor thumb marked the same in his attendance. This leaves the agreement to sell with two other marginal witnesses namely Rana Muhammad Aslam, the ex-councillor and Muhammad Aslam son of Raj Din, out of these witnesses Rana Muhammad Aslam was not produced and only Muhammad Aslam son of Raj Din appeared as P.W.1. This witness namely Muhammad Aslam son of Raj Din, who appeared as P.W. 1 has also admitted in his cross-examination that the transaction was not struck in his presence. This witness P.W.1 further admitted that the scribe Muhammad Arif did not make any cutting on the agreement in question whereas the witness admitted that there was a cutting (overwriting) on the agreement along with the name of Rehmat Khan. He also admitted that no amount was paid in his presence to the defendant and that the said Muhammad Aslam son of Raj Din was an illiterate person. Another witness produced by the respondent is P.W.5 Khurshid, who stated in his examination-in-chief that Sardar Khan defendant told him at the time of execution of agreement that a sum of Rs.350,000 has been received by him from the plaintiff and the remaining amount will be paid at the time of execution of the sale deed. The respondent also produced P.W.3 Muhammad Majeed, Head Cashier of the National Bank to prove that a cheque dated 19-4-1993 for amount of Rs.110,000 was got issued by the plaintiff Imtiaz Hussain in the name of Sardar Khan and reverse portion of the cheque bears the thumb impression of Sardar Khan. He admitted in his cross-examination that the thumb impression attributed to Sardar Khan on the reverse side of the cheque was not got affixed in his presence and that the date 19-4-1993 was not legible and it was got entered again under the signature of the executant of the cheque i.e. the plaintiff.

10. The cumulative effect of all the above circumstances is that the respondent/plaintiff failed to prove the execution of the agreement Exh.P1 through convincing evidence. The story put forward in the evidence by him that he paid a part payment of Rs.1,10,000 out of the sale price to the defendant Sardar Khan was not at all projected in the plaint nor it is mentioned in the agreement to sell Exh.P1. The scribe as stated above, denied the affixing of the signatures and thumb impression by two important witnesses namely Rehmat Khan and Khurshid in his presence. The third witness Rana Muhammad Aslam did not appear in the witness box to support the case of the plaintiff and Muhammad Aslam son of Raj Din the only witness admitted to have placed the signatures over the agreement to sell Exh.P1 by the scribe is not a witness of the transaction as such the

learned Civil Judge after analysing the entire evidence produced by the parties came to the conclusion that the agreement to sell Exh. P.1 appears to be a fraudulent document and this finding of the learned Civil Judge analyzed in the light of the facts noted by this Court as well find full support from the record. The learned Additional District Judge by overlooking all these facts, circumstances and evidence set aside the judgment and decree of the learned trial court.

11. I, therefore, find the judgment and decree of the learned first court dated 5-12-2003 as not sustainable in the eye of law. The case-law cited by the learned counsel for the respondent is distinguishable on its own facts and does not strengthen the case argued by the learned counsel for the respondents in view of the peculiar facts noted by me from the contents of the evidence produced by the parties. Resultantly, the instant R.S.A. is accepted. The judgment and decree dated 5-12-2003 passed by the first appellate court is set aside and that of the learned Civil Judge dated 17-12-1997 of dismissing the suit of the respondent/plaintiff is restored. Parties to bear their own costs.

A.R.K./N-14/L

Appeal accepted.