Stereo.HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

R.S.A. No.55 of 2013

Farooq Hanif
Versus
Muhammad Ibrahim

J U D G M E N T

Date of Hearing	**12.12.2018**
APPELLANT BY	**Ch. Khalil-ur-Rehman, Advocate.**
RESPONDENT BY	**M/s Mian Hamad Yaseen and Ch. Muhammad Tariq Rehman, Advocates.**

Rasaal Hasan Syed, J. This appeal impugns judgment dated 08.2.2013 of the learned Addl. District Judge Samundari, District Faisalabad whereby the judgment and decree dated 22.12.2011 of the learned Civil Judge Samundari in a suit for specific performance, was set aside, and the suit of the appellant was dismissed.

2. Facts material to decision of this appeal are that on 16.10.2008 the appellant, acting through his attorney, instituted a suit for specific performance seeking enforcement of the alleged agreement of sale dated 27.10.2006 in respect of

suit property that comprised 04 kanals of land. It was asserted that the respondent executed the agreement to sell the suit property in appellant's favor for a total price of Rs.770,000/-. A sum of Rs.150,000/- was allegedly paid through cheques dated 27.9.2006, 28.9.2006, 29.9.2006, 30.9.2006 and 1.10.2006. The date for the completion of the agreement as also the execution of the sale deed was allegedly fixed as 27.10.2007. The appellant alleged that further payment of Rs.300,000/- was made through cheques dated 11.1.2008 and 07.1.2008. In this backdrop it was alleged that a total sum of Rs.450,000/- had been received by the respondent, leaving the balance consideration as Rs.325,000/-. As per appellant the respondent did not execute the sale deed as contractually obligated, in result, the suit for specific performance was instituted.

3. In his written statement the respondent in addition to the legal objections, pleaded on factual side that there was no agreement of sale between the parties; he had never executed any such agreement of sale; he did not receive the alleged earnest money or the subsequent payments under

any agreement; and that the respondent had been lending certain amounts from time to time to appellant's father who had been reimbursing the same through cheques; and at the time of reimbursement of loan amounts he used to secure signatures on blank paper and that alleged agreement of sale was fictitious, forged and fabricated.

4. The learned Civil Judge after receiving evidence and hearing the parties decreed appellant's suit vide judgment dated 22.12.2011. In appeal filed by the respondent, the learned Addl. District Judge after consideration of entire evidence accepted the appeal, set aside the judgment and decree of the learned trial court, and dismissed the suit vide judgment dated 8.2.2013, which is being assailed in this appeal.

5. Learned counsel for the appellant argued that the learned Addl. District Judge failed to appreciate that the entire sale price was paid through cheques and that the receipt of the payment was admitted. Referring to para 3 of the written statement, learned counsel submitted that the signatures/thumb impression were not in issue and that the appellant

in the given circumstances was entitled to a decree. It was also argued that one marginal witness could not be produced as the other witness was the brother of respondent who was not willing to appear as witness in court; the appellant produced the scribe of the document to prove the agreement. Lastly it was urged that the respondent could not rebut or shake the credibility of the evidence of the appellant and that the appellate court illegally interfered with the findings of trial court.

6. Responding to the points raised, learned counsel for respondents submitted that the existence of the sale transaction as also the alleged agreement was specifically controverted; the appellant was under a statutory obligation to discharge the onus by proving the document and also the existence of the transaction; the appellant failed to produce two marginal witnesses which was a mandatory requirement of law, in result, the alleged agreement could not deemed to have been proved, the alleged cheques could not be shown to have any nexus with the alleged agreement, and that the learned appellate court reversed the findings of the learned trial court for sound reasons

and after scrutinizing the entire evidence on record, while the appellant could not identify any legally significant misreading or non-reading of evidence by the appellate court hence the findings of fact rendered by the appellate court did not call for any interference.

7. Points raised by the respective sides have been duly considered in the light of pleadings and evidence on record.

8. Appellant filed suit for specific performance claiming that the alleged agreement of sale was executed by respondent, a sum of Rs.150,000/- was paid through cheques, the total price was settled as Rs.750,000/-, the appellant allegedly made payments through cheques to the tune of Rs.300,000/- after the agreement, thereby making the total alleged receipts of Rs. 450,000/- leaving the balance sale consideration as Rs. 325,000/-, which was allegedly payable at the time of execution of the sale deed i.e. on or before 27.10.2007. The existence of the sale transaction, or the execution of any sale agreement as also the payment alleged to be made pursuant to it, was vehemently denied. In view of the stance taken in the reply, issues No. 6,

7, and 9 were framed which were to the effect that whether agreement to sell dated 27.10.2006 was entered into; whether Rs. 450,000/- was paid as advance through cheques; and whether the plaintiff was entitled to a decree of specific performance.

9. The appellant as plaintiff was under a legal obligation to prove that the agreement to sell was executed and that the respondent had agreed to sell suit property and that he received the advance amount on the alleged execution of the document or subsequent thereto. In law, the appellant was expected not only to prove the execution of the sale agreement but also to prove the existence of the intended transaction of sale. Article 79 of the Qanun-e-Shahadat Order, 1984 reads as under:

> *"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 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."*

10. The alleged agreement of sale, Ex.P1, shows that it was attested by Abu Bakar son of Muhammad Hanif and Muhammad Ismail son of Muhammad Suleman. In this case, Muhammad Abu Bakar, real brother of the appellant, appeared as PW3 while Muhammad Ismail son of Muhammad Suleman, the other attesting witness, was not produced or ever summoned. It was for this reason that the learned Addl. District Judge observed that the execution of the document was not proved in accordance with the mandate of Article 79 of Qanun-e-Shahadat Order 1984, and was thus inadmissible. As regards the deed writer Ghufran son of Sultan who appeared as PW1 and deposed that he had drafted the agreement and that the parties had allegedly executed the same; but he was not one of the attesting witness as per Ex.P1, and therefore he could not possibly make up the deficiency in evidence due to non-appearance of other attesting witness of Ex.P1.

11. In "*Hafiz Tasaddaq Hussain v. Muhammad Din through legal heirs and others*" (**PLD 2011 SC 241**) the August Supreme Court observed that:

'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 witnesses, 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 consequences 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. See Sheikh Karimullah. vs. Gudar Koeri and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See. Ram Samujh Singh vs. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. 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.'

12. As to the admissibility of statement of deed writer the August Supreme Court in above-mentioned case observed that:

> '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; the point on which leave was also granted. 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. The question however has been examined in catena of judgments and the answer is in the negative.
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> 10. It has been held in Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1939):-
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> > "Attesting witness was the one who had not only seen the document being executed by the executant but also signed same as a witness --- Person who wrote or was 'scribe' of a document was as good a witness as anybody else, <u>if he had signed the document as a witness</u> (Emphasis supplied). No legal inherent incompetency existed in the writer of a document to be an attesting witness to it"
>
> In N. Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 503), it has been held:-

> "Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest."
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> In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451, it is held:-
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> "The evidence of the scribe of a mortgage deed, who signed the deed in the usual way without any intention of attesting it as a witness, is not sufficient to prove the deed."
>
> An attesting witness is a witness who has seen the deed executed and has signed it as a witness. (Emphasis supplied)."

To the same effect are the judgments reported as Qasim Ali vs. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter vs. Abdul Kadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 if he has affixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witness, or in the eventuality those are conceived by Article 79 itself not as a substitute.'

13. In another case *"Farid Bakhsh v. Jind Wadda and others"* (**2015 SCMR 1044)** the August Supreme Court ruled as follows:

> '…This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The

words "shall not be used as evidence" unmistakably show that such document shall be proved in such and no other manner. The words "two attesting witnesses at lease" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving evidence can even be imagined for proving its execution. Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce. We, thus, have no doubt in our mind that this Article being mandatory has to be construed and complied with as such…

9. Another reason for no equating the testimony of a Scribe with that of an attesting witness is that both of them signed the document in a different capacity and with a different state of mind. They, as such, do not meet the requirements of Article 79 of Qanun-e-Shahadat Order. Scribe, however, could be examined by the party for corroboration of the evidence of the attesting witnesses but not as a substitute therefor. This aspect was also highlighted in the case *Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs (supra)* in the paragraph which reads as under:

> "*To the same effect are the judgments reported as Qasim Ali v. Khadim Hussain through legal representatives and others (PLD 2005 Lahore 654) and Shamu Patter v. Abdul Nadir Rowthan and others (1912 (16) IC 250). Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Articles 17 and 79 of the Qanun-e-Shahdadat Order, 1984 if he has fixed his signature as an attesting witness of the document and not otherwise; his signing the document in the capacity of a writer does not fulfill and meet the*

> *mandatory requirement of attestation by him separately, however, he may be examined by the concerned party for the corroboration of the evidence of the marginal witnesses or in the eventuality those are conceived by Article 79 itself not as a substitute'*

14. In view of the rule laid by the August Supreme Court in cases referred above, the argument that the statement of the deed writer shall be sufficient to prove the document along with the other marginal witnesses, is fallacious and cannot be entertained. Even otherwise, the statement of the deed writer is highly unconvincing and its credibility stood shaken in the cross-examination when he admitted that he did not earlier know the parties or the witnesses and that no payment was ever made in his presence and also that he did not ascertain the identity of the parties in the document from anyone. In this scenario where the witness did not know the parties and also did not get their identification from any independent person, his statement could hardly be of any value let alone to prove the execution or the existence of transaction.

15. As to the other argument that the second marginal witness was real brother of the respondent who had declined to appear, suffice it to say that

this argument is an afterthought and otherwise lacks any merit. The appellant never attempted to summon the witness through court nor availed the opportunity to produce him and to depose him before the court. There is no correspondence between the appellant or the other witnesses to verify that the witness even refused to record his statement. In these circumstances the plea was totally self-assumed. The non-adherence to the procedure, raises serious adverse inference against the appellant.

16. Even otherwise the procedure as contemplated by Article 82 of the Qanun-e-Shahadat Order, 1984 provides that if an attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. This placed strong onus on the appellant to have summoned the witness and if on appearance he denied the document, the course permissible in Article 82 could have been resorted to. The appellant could have made a request for the expert view on comparison of signatures of witness on the document with his specimen signatures, to satisfy

the court that he had unreasonably denied the execution of document.

17. In any case without following the legal course, the petitioner could not be allowed to raise the plea on the assumption that because he was related to the other side he would not have appeared as witness if summoned. Another notable fact is that the petitioner did not make any effort to get the specimen thumb impression and the signatures of respondent in the court. No request for an expert opinion was ever made nor any expert was ever summoned to prove the signatures so as to establish the execution of document.

18. It was a case in which the very existence of the document was in issue, the appellant should have summoned the stamp vendor as the respondent had denied to have ever purchased the stamp paper, but no attempt was ever made to produce the stamp vendor thus the best evidence was with-held raising serious adverse presumption against the appellant. In *"Manzoor Hussain v. Haji Khushi Muhammad"* **(2017 CLC 70**) a learned Single Judge of this Court observed that the non-production of the stamp

vendor would raise an adverse presumption under Article 129(g) of Qanoon-e-Shahadat Order, 1984.

19. Another aspect that has a material bearing on this case is that in the plaint the appellant claims that the alleged earnest money of Rs. 150,000/- was paid through cheques but perusal of the document Ex. P1 completely belies the plea and contradicts this stance, where it is so recorded that Rs.150,000/- was allegedly paid in cash. This contradiction demolished the appellant's case that the alleged earnest money was paid through cheques. It is also observed that the agreement was purportedly written on 27.10.2006 but the cheques were claimed to be dated 27.9.2006, 28.9.2006, 29.9.2006, 30.9.2006 and 01.10.2006 i.e. of date which were *prior to the date of the document* whereas it was not the case of appellant that any sale transaction was ever settled prior to this date; rather on being asked in cross-examination the appellant as PW 2 deposed that the agreement was made in October 2006 and that before the alleged intended transaction, he had never talked to Ibrahim respondent on telephone. He further admitted that he was in Belgium when the alleged

agreement was made and that his father purportedly arranged the alleged deal. Obviously plaintiff's own statement would not be insignificant i.e. that he did not claim to be present at the time of the alleged agreement. In the above scenario, the appellant miserably failed to prove any nexus between the cheques and the agreement nor the same could be assumed as payment of any correct amount; rather it supports the plea of the respondent that there was a loan arrangement between him and father of appellant and the cheques were towards the reimbursement of the amount, which father of appellant had received from him.

20. As to the arguments that the respondent did not deny the execution in the written statement at para 3, the same is not well-founded, and where it is not so recorded; rather the respondent denied the execution of any agreement and claimed that the alleged signature on the blank paper were for the acknowledgement of the repayment of loan amount. As DW1, the respondent, when asked in cross-examination about his signature on the document, categorically denied his signature or thumb

impression on Ex. P 1. This being so the objection raised by appellant's counsel is ill-founded.

21. The learned Addl. District Judge correctly appreciated the evidence, and declared that the appellant had failed to prove the existence of sale transaction or execution of sale agreement and in doing so no misreading or non-reading of record was observed.

22. For the reasons supra, this appeal lacks merit, which is accordingly ***dismissed*** leaving the parties to bear their own costs.

(RASAAL HASAN SYED)
JUDGE

Approved for reporting.

Announced in open Court on 04.1.2019.

Judge

Mian M. Rabbani