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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

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RSA No.173/2005.

Muhammad Sharif Sadra (deceased) through Legal Heirs, etc.

Versus

Irfan Latif, etc.

JUDGMENT

Date of hearing: **03.03.2020.**

Appellants by:	Mr. Arshad Malik Awan Advocate.
Petitioner (C.R.1108/2006) by:	Mr. Ahmad Waheed Khan, Advocate
Respondents by:	M/s Syed Kaleem Ahmad Khurshid and Mian Javed Iqbal Arain, Advocates.

ASIM HAFEEZ, J. Through this single judgment, I propose to decide this RSA and Civil Revision No.1108/2006, both of which are against consolidated judgment and decree dated 13.10.2005 of learned Additional District Judge, Daska District Sialkot, whereby the appeals filed by the appellant and the revision petitioner (respondent No.2 in RSA No.173/2005) were dismissed, while upholding consolidated judgment and decree of the learned Civil Judge dated 11.12.2000, which decreed suit for specific performance of agreement to sell dated 10.11.1998, filed by the respondent No.1 against the appellant, and dismissed suit for

specific performance of agreement to sell dated 21.07.1998, filed by the revision petitioner against the appellant.

Facts in RSA No.173/2005.

2. Briefly the facts, necessary for adjudication of the matter at hand, are that respondent No.1 claimed to have negotiated agreement of sale dated 10.11.1998 with the appellant regarding the land, described in paragraph 2 of the plaint, against consideration of Rs.1,200,000/-, out of which Rs.430,000/- was stated to be paid in cash, as earnest money upon execution of agreement. And remaining amount of Rs.770,000/- was payable by the target date, i.e. 31.05.1999. As claimed, balance amount of Rs,770,000/- was paid on 01.03.1999, details whereof were endorsed at the back of the agreement, whereby possession was allegedly agreed to be delivered after harvesting standing crops. As narrated in the plaint, notice dated 03.05.1999 was issued by respondent No.1 to the appellant, seeking performance of contractual obligations and upon failure, respondent No.1 was constrained to initiate civil action. The suit was resisted by the appellant, who categorically denied the transaction, execution of the agreement and receipt of the consideration. Upon conclusion of the trial, learned trial court decreed the claim of the respondent No.1, which decree was unsuccessfully challenged before first appellate court. Hence this second appeal.

Facts in Civil Revision 1108/2006.

3. Revision Petitioner / Respondent No.2 – brother-in-law of the present appellant - also laid claim to the suit land by virtue of agreement to sell dated 21.07.1998, claimed to have executed by the appellant, against consideration of Rs.1,800,000/-, out of which Rs.200,000/- was paid in cash and balance was payable on or before 16.04.1999. Respondent No.2 alleged default and filed suit for specific performance on 14.05.1999, before the institution of the suit of the respondent No.1 on 28.06.1999. Conspicuously, appellant admitted execution of the agreement with respondent No.2 but pleaded default in timely payment of consideration amount. The suit of the respondent No.2 was dismissed, and appeal filed by the revision petitioner was also dismissed. Hence this Civil Revision. There are two claimants of suit land, each claiming alleged rights on the basis of two separate agreements to sell.

4. Learned counsel for the appellant submits that respondent No.1 failed to prove execution of the agreement; the courts below erroneously proceeded to decide the matter and upheld execution of the agreement by the appellant, solely upon carrying comparison of signatures, which mechanism adopted, without seeking expert opinion, is deprecated by superior courts for drawing conclusive opinions in matter relating to disputed

signatures. Per learned counsel, the evidence of the scribe of agreement to sell (PW-3) was unworthy of any consideration, who unbelievingly failed to recognize the appellant in the court during cross examination. Learned counsel submits that credibility of the agreement per-se becomes dubious, when despite payment of full consideration possession of the property was not procured. Adds that independence of the marginal witnesses per-se stood compromised, who were known to the respondent No.1. Lastly submits that alleged endorsement at the back of the agreement constitute an illegality, which subsequent writing has to be executed on a separate stamp paper. He referred to following judgments, reported as *SANA ULLAH and another V. MUHAMMAD MANZOOR and another* (**PLD 1996 Supreme Court 256)**, *REHMAT ALI ISMAILIA v. KHALID MEHMOOD* (**2004 SCMR 361),** *Major (Retd.) HAMID ALI KHAN v. Mian MUHAMMAD ANWAR* (**2006 SCMR 735)**, *ABDUL RASHEED through L.Rs. and others V. MANZOOR AHMAD and others* (**PLD 2007 Supreme Court 287)**, *KHAN MUHAMMAD v. MUHAMMAD DIN through LRs* (**2010 SCMR 1351)**, *ZAFAR IQBAL and others V. Mst. NASIM AKHTAR and others* (**PLD 2012 Lahore 386),** *Syed SHARIF UL HASSAN through L.Rs. V. Hafiz MUHAMMAD AMIN and others* (**2012 SCMR 1258)**, *PEER BAKSH through LRs and others V. Mst. KHANZADI, and*

others **(2016 SCMR 1417)** and *MANZOOR HUSSAIN v. Haji KHUSHI MUHAMMAD* (**2017 CLC 70).**

5. Learned counsel for the revision petitioner supported submissions by appellant's counsel and also questioned genuineness of alleged agreement dated 10.11.1998. He dispelled allegation of default in performance of its obligation qua the agreement with the appellant. He submits that disputed agreement between respondent No.1 and appellant was not confronted to the appellant, when it was specifically denied. Learned counsel has relied upon judgment reported as *Muhammad Ramzan V. Saif Nadeem Electro (Pvt.) Ltd. through Chairman and 5 others* (**PLD 2006 Lahore 571).**

6. Learned counsel for respondent No.1 submits that respondent No.1 had adequately established execution of agreement to sell; who produced scribe of agreement, marginal witnesses and proved the payment of consideration. Per learned counsel court has the power under Article 84 of the Qanoon-e-Shahadat Order 1984 to compare signatures; possession was not delivered due to standing crops at the time of payment of balance consideration, which fact was endorsed at back of agreement and accordingly witnessed. He submits that judgments referred are distinguishable, and not applicable to this case. Lastly submits that agreement of sale between the appellant and respondent No.2

was collusive and designed to counter the claim of the respondent No1, as respondent No.2 is appellant's brother-in-law. He referred the judgments reported as *Muhammad Ramzan and 4 others V. Mst. Masooda Hasan and 2 others* (**PLD 1993 Quetta 88),** *Abdul Ghaffar V. Muhammad Sharif* (**1993 CLC 1779)**, *Muslim Commercial Bank Ltd. through General Attorney and another V. Amir Hussain and another* (**1996 SCMR 464)**, *Abdul Rashid V. Bashiran and another* (**1996 SCMR 808)**, *Ghulam Rasool and others V. Sardar-Ul-Hassan and another* (**1997 SCMR 976),** *DISTRICT COUNCIL, SIALKOT V. CHAUDHRY NAZIR AHMAD KHAN and 2 others* (**2001 SCMR 1641),** *Manzoor Hussain V. Haji Khushi Muhammad* (**2017 CLC 70),** *Mukhtar Ahmad V. Returning Officer and others* (**2017 MLD 282),** *Sajjad Hussain and 4 others V. Muhammad Yousaf and another* (**2019 CLC 309)**, *Haji Abdul Majeed & Co. through Managing Partner V. Additional District Judge Burewala District Vehari and 10 others* (**2019 CLC 1693)** and *NAVEED v. NATIONAL DATABASE AND REGISTRATION AUTHORITY through Chairman NADRA and 3 others* (**2020 MLD 157)**.

7. Arguments heard. And record perused.

8. Essentially the appellant, through this second appeal, questions the legality of the conclusions reached, allegedly based on the inferences erroneously drawn and appreciation of,

otherwise, inadmissible evidence. In essence, the issue hinges on that whether the execution of alleged agreement to sell and consideration thereof was proved in accordance with the rules of evidence. Respondent No.1 was required to substantially prove the execution of agreement to sell dated 10.11.1998 and payment of consideration, when execution thereof was categorically denied by the appellant. Respondent No.1 produced scribe of the agreement PW-3, marginal witnesses PW-6 & PW-7, who testified in support of the agreement and affirmed payment of consideration.

9. There is no cavil to the principle that courts are eligible to compare disputed signatures/ thumb marks with admitted writing, which course is permissible under Article 84 of the Qanoon-e-Shahadat Order 1984 wherein discretion has been extended, to be exercised depending upon the facts of each case. Now, I proceed to examine the question of admissibility of evidence and decide that whether inferences drawn and conclusions reached, are sustainable in law. It transpires that courts below had overlooked some crucial *facets* of this case, which are critical for determining and resolving the controversy and complexities involved. Learned counsel for the revision petitioner has highlighted respondent No.1's failure to confront appellant with the disputed agreement to sell, execution whereof was denied by the appellant.

Let's examine this aspect. The pivotal question is that whether the disputed agreement could be treated as legal evidence when appellant was not confronted with said agreement, signatures thereupon and additional endorsement thereat?

10. Appellant appeared as DW-6, who denied execution of the agreement, its signatures thereupon, and receipt of consideration. During the course of testimony of the appellant, he was put a suggestion regarding execution of the agreement, which suggestion was denied and thereafter, appellant was neither confronted with the alleged agreement nor with alleged signatures thereupon and subsequent writing at the back of the agreement, relating to balance consideration and issue of possession. This constitutes gross violation of the principle of confrontation envisaged by Article 140 of Qanoon-e-Shahadat Order, 1984. This irregularity is fatal and goes to the root of the matter. Both the courts below failed to appreciate trite law that in the absence of confrontation, the agreement in question cannot be used as legal evidence against the appellant. Reference is made to the ratio decidendi of decision in the case of *Syed MUHAMMAD SULTAN v. KABIR-UD-DIN and others* (**1997 CLC 1580),** relevant portion whereof is reproduced hereunder; -

> *14. We are not impressed with this contention of the learned counsel for the various reasons. As already observed, agreement has not been exhibited and does not form part. of the evidence. The same is true about the*

writing appearing on the back of the alleged agreement which again has not been exhibited but has been marked as 'C' More importantly when the respondent appeared in the witness-box and denied having examined the agreement he was not confronted with the writing and the signatures on the back of the agreement. Though in the cross-examination it was suggested to the respondent that he had extended time for execution of the sale-deed through writing signed by him on the back of the agreement, but on his denial, he was not confronted with the writing. According to Article 140 of the Qanoon-e-Shahadat Order, 1984 which corresponds to Article 145 of the Evidence Act, 1872, such confrontation is mandatory. In Sikandar Hayat and 4 others v. Master Fazal Karim (PLD 1971 SC 730), it was ruled that:-

> *"Where a party has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box involves the denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with the specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in section 145, the admission contained in the previous statement cannot be used as legal evidence against that party. Where the statements relied on as admissions are ambiguous or vague, it is obligatory on the party who relies on them to draw in cross-examination the attention of opponent to the said statements before he can be permitted to use them for the purpose of contradicting the evidence on oath of the opponent."*

The Supreme Court in the cited case had approved the judgment of this Court in the case of Firm Malik Des Raj Faqir Chand v. Firm Piara Lal Aya Ram and others (AIR 1946 Lah. 65) in which it was held that

> *"Where a party has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in' the witness-box involves the denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention*of the witness during cross-examination was drawn to that statement and*

> *he was confronted with the specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in section 145, the admission contained in the previous statement cannot be used as legal evidence against that party."*

11. The disputed agreement to sell dated 10.11.1998, though exhibited, cannot be treated or used as legal evidence against the appellant in wake of non-compliance of Article 140 of Qanoon-e-Shahadat Order 1984.

12. This case has another peculiar feature, not discussed by the courts below. It is the case of the respondent No.1 that balance consideration of Rs.770,000/- was paid on 01.03.1999, which was even before the target date agreed in terms of the agreement dated 10.11.1998, wherein target date fixed was 15.05.1999. The controversy regarding payment of balance consideration and alleged endorsement at the back of the agreement assumes greater significance when contextualized in the context that no possession was delivered at the time of payment of balance consideration. It is the case of the respondent No.1 that appellant sought some time to harvest crop and agreed to deliver possession thereafter. Perusal of the plaint revealed that respondent No.1, in paragraph No.6, pleaded issuance of Notice dated 03.05.1999 to the appellant, asking him to complete the agreement to sell dated 10.11.1998. Factum of Notice was reiterated by PW-5, who appeared as witness for the respondent

No1. Notice dated 03.05.1999 is conspicuous by its absence and same was not produced on record. What would be the effect and implications of such conspicuous failure? The relevance of subject matter Notice increases manifold in view of the fact that balance payment was allegedly made on 01.03.1999, when statement of the appellant regarding delayed delivery of possession was reduced into writing at the back of the agreement, and Notice, alleging default, was issued on 03.05.1999. Whether Notice dated 03.05.1999 contained any assertion regarding payment of balance consideration on 01.03.1999 and endorsement regarding request to delay the matter of delivery of possession by the appellant till harvesting of standing crops? The production of Notice was crucial and failure thereof indicates conscious withholding of relevant and crucial evidence. In these circumstances, the Notice and contents thereof was a substantive piece of evidence, required to prove factum of alleged request to defer delivery of possession and balance consideration, which Notice was withheld by the respondent No.1 without any explanation. Mere production of envelope, alleging delivery of the notice to the appellant, would not substitute requirement of producing Notice The absence and failure to produce Notice would raise adverse inference against respondent No.1, in terms of Article 129 (g) of Qanoon-e-Shahadat Order, 1984.

13. The endorsement in writing, at the back of the agreement, regarding request to defer delivery of possession till cutting of standing crops and factum of balance payment, was neither shown nor said writing was confronted to the appellant.

14. In view of aforesaid fatal irregularities and lapses, there remains no requirement to discuss any other issue or advert to ocular evidence, which otherwise pale into insignificance. The respondent No.1 failed to prove the execution of the agreement to sell and admissibility thereof. The judgments referred may constitute authorities on their own facts but not applicable to this case, hence there is no need to discuss the ratio or reasoning therein for the purposes of adjudication of lis at hand.

15. Now I take up case of respondent No.2, regarding agreement to sell dated 21.07.1998, subject matter of Civil Revision. The appellant has admitted the execution of agreement in favour of respondent No.2. Appellant alleged that respondent No.2 failed to pay balance consideration, in terms of some verbal arrangement, which is contrary to the contents of written agreement. The assertion of appellant is contrary to the command of Articles 102 and 103 of Qanoon-e-Shahadat Order 1984, in terms whereof verbal assertion is immaterial when considered in the context of available documentary evidence, which too is admitted. The appellant failed to establish default on the part of respondent

No.2, who otherwise led cogent and convincing evidence to prove its claim.

16. In view of the above, the concurrent findings recorded and legal inferences drawn by the courts below, regarding the admissibility of evidence and proof of execution of the agreement dated 10.11.1998 are contrary to law, and conclusions reached on the basis thereof are per-se erroneous and illegal.

17. I allow RSA No.173 of 2005 and Civil Revision No.1108 of 2006 and set aside judgments and decrees dated11.12.2000 and 13.10.2005 by the courts below, dismiss the suit of the respondent No.1 and decree the suit of respondent No.2 accordingly. No orders as to the costs.

(ASIM HAFEEZ)
JUDGE

Announced in open Court on this 20th day of March, 2020.

(ASIM HAFEEZ)
JUDGE

Approved for reporting.

*Imran/**