IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL APPEALS NO.39-K TO 40-K OF 2021
(Against the judgment dated 30.09.2019 passed by the High Court of Sindh in R.A Nos. 134 & 135 of 2013)

Khudadad — Appellant

Versus

Syed Ghazanfar Ali Shah @
S. Inaam Hussain and others — Respondents

For the Appellant: Syed Shahenshah Hussain, ASC
Mr. Mazhar Ali B. Chohan, AOR

For Respondent No.1: Mr. Ghulam Mustafa Lakhani, ASC
Mr. Ghulam Rasool Mangi, AOR

For Respondent No.2-9: Ex-Parte

Date of Hearing: 15.02.2022

JUDGMENT

MUHAMMAD ALI MAZHAR, J. These Civil Appeals by leave of the Court are directed against a common judgment dated 30.6.2019 passed by learned High Court of Sindh, in Revision Applications No.134 to 135 of 2013, whereby both the Revision Applications were dismissed.

2. The short-lived facts of the case are as under: -

> The land in question was owned by Syed Gul Hasan Shah who died in 1998, thereafter, the land devolved on his legal heirs i.e. respondents No. 1 to 6. The appellant alleged that he was lessee of the land since 1996 for a period of five years on oral terms. After expiry of lease, the respondents No.1 agreed to sell the land to the appellant vide agreement to sell dated 27.2.2001 in consideration of Rs.50,69,750/-, out of which a sum of Rs.41,95,000/= was paid through cheques and some amount by cash till 15.3.2002. Despite

> willingness of the appellant to pay the balance sale consideration, the respondents No.1 to 6 were not coming forward to execute the sale deed, hence the appellant filed F.C.Suit No.12 of 2008 for specific performance of contract. The respondent No.1 to 6 also filed a F.C.Suit No.42 of 2008 against the appellant in the same court for possession, ejectment and mesne profits. The learned trial Court vide consolidated Judgment dated 29.11.2019, dismissed the Suit of the appellant whereas the suit filed by the respondent No. 1 to 6 was decreed. Being aggrieved, the appellant filed Civil Appeals No.5 and 6 of 2013 which were also dismissed by the Appellate Court vide consolidated Judgment dated 19.09.2013.

3. Leave to appeal was granted vide order dated 08.07.2021 in the following terms:

> "Learned ASC for the petitioner submits that while holding that the petitioner has not been able to prove the execution of the subject agreement, evidence of Muhammad Umar, who appeared before the Trial Court and categorically deposed that he also witnessed the execution of the document and the document was signed in the presence of attesting witness has been ignored. He further submits that the evidence of Muhammad Umar along with evidence of one of the attesting witnesses was good enough to prove the document, however, such aspect of the case was not considered by the Trial Court as well as the Appellate Court, while rendering their judgments.
>
> 2. The point requires consideration. Leave is granted inter alia to consider the same..."

4. The learned counsel for the appellant argued that the appellant in his evidence proved his possession in the capacity of a lessee and also produced sale agreement and "Faisla" dated 4.5.2003 along with land revenue receipts and some other documents to justify his lawful occupation which aspect was not considered by the courts below. The suit for possession and mesne profit was filed by the respondents to frustrate the claim of specific performance of the agreement to sell. He further pleaded that pursuant to agreement, possession was handed over but nothing was addressed by the learned counsel on the point of limitation despite the position that the Trial Court and the Appellate Court both concurrently held that the suit for specific performance filed by the appellant was time barred. He further argued that the witness, Khaliq Dino, appeared in evidence who was one of the attesting witnesses to the sale agreement. It was further contended that the appellant also produced a copy of "Faisla of Taj Muhammad Shah" wherein respondents No. 2 agreed to refund the amount of sale consideration to the appellant and since he failed to pay the already received amount within the cutoff date as mentioned in the Faisla, therefore, the respondents No.1 and 2 both orally agreed again to sell

out the land in question to the appellant independent of the agreement to sell. It was further averred that on 24.10.2010, an order was passed by the Trial Court for sending sale agreement dated 27.2.2001, receipts, Faisla and other documents to a handwriting expert to verify the signatures of respondents No.1 & 2, but the said Order was not complied with by the Trial Court.

5. The learned counsel for the respondents argued that neither the appellant was lessee nor in occupation of land in question. It was further contended that after the death of Syed Gul Hassan Shah, there was no implied authority by the legal heirs to sell the land. The respondent No.1 neither issued receipts of any payment, nor agreed to sell the land to the appellant. The learned counsel further argued that the appellant never paid any amount through postdated cheques nor any private Faisla (decision) agreed between the parties before Syed Taj Muhammad Shah or Syed Iqbal Hussain Shah on 04.05.2003 and all such documents are forged and fabricated. He further argued that neither the respondent No.2 signed or agreed to return any amount pursuant to the alleged private Faisla, nor the respondent No.1 ever signed any agreement to sell thus, on the face of it, his signature on alleged agreement to sell is forged. It was further averred that the respondent No.1 and respondent No.2 are co-sharers to the extent of 25 paisa share each and the remaining 50 paisa share belongs to respondents No.3 to 6, therefore the respondent No.1 was not lawfully entitled to sell the entire land as the land in issue is a joint property of the respondents which has not been partitioned.

6. Heard the arguments. According to the sale agreement dated 27.1.2001 (Ex.69/J), the suit land was sold out to the appellant by the respondent/defendant No.1 for self, and on behalf of the respondents/defendants No.2 to 6 and the agreed date for execution and registration of sale deed was 15.3.2002. The appellant in his evidence deposed that he paid Rs.2,00,000/-, Rs.6,00,000/- and Rs.21,75,000/- to respondent/defendant No.1 and Rs.20,20,000/- to the respondent/defendant No.2 through some cheques dated 24.03.2001 and 08.06.2001. He also produced some land revenue receipts, electricity bills, private Faisla dated 14.02.1998 and 4.5.2003, Sale agreement (Ex.69/J) and photocopy of legal notice dated 10.05.2006. In order to support his case, the appellant also

examined Abdul Khalique, Muhammad Umar Abro and Zaheer Ahmed Abro. Whereas the respondent No.1 deposed that the appellant was appointed as Munshi to look after the suit land who had forcibly occupied the land and usurped the crops. He also deposed that the Sale Agreement and Faisla both are forged and fabricated documents and did not bear his signature. He also denied to have received any sale consideration. The respondent No.2 also denied his signature on the alleged Faisla dated 4.5.2003. The record reflects that no independent witness was examined by the appellant. PW Khalique Dino was brother of appellant whereas the PW Muhammad Umar was stamp vendor, who deposed that agreement was written by his son PW Zaheer Ahmed Abro. However, it is clear that Ex.69/J does not bear the signature of PW Zaheer Ahmed Abro as well as signature of Muhammad Umer Abro, being author of agreement to sell but he only identified the parties. The agreement to sell does not bear the CNIC numbers of attesting witnesses. Further there is no endorsement of the Assistant Mukhtiarkar, who is alleged to have attested the said agreement to sell on 27.02.2001 for which the parties appeared before him and put their signatures in his presence. The appellant also failed to examine Assistant Mukhtiarkar and marginal witness Hashim Behrani, as well as Syed Taj Muhammad Shah in whose presence Faisla was held between the parties and Syed Sajjad Shah to prove the veracity of the letters produced by the appellant in support of his case. The appellant tried to prove the payment of sale consideration which he made allegedly through cheques for which he only produced some counter foils which could not be treated as evidence of payment. Neither he produced any bank statement to prove encashment of said cheques, nor called any person from bank to verify such payments, if any, made against the alleged cheques.

7. One more important aspect that cannot be lost sight of is that the alleged agreement to sell was executed on 27.2.2001 in which a specific date was fixed for execution and registration of sale deed i.e. 15.3.2002 and the suit for specific performance was filed in the year 2008 whereas the suit should have been filed within three years from 15.3.2002. According to Article 113 of the Limitation Act 1908, a suit for specific performance may be filed within three years. For the ease

of convenience, Article 113 of the Limitation Act is reproduced as under:-

Description of suit	**Period of limitation**	**Time from which period begins to run**
113. For specific performance of a contract.	**[Three years]**	**The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.**

8. The starting point of limitation under Article 113 of Limitation of Act, 1908 for institution of legal proceedings enunciates two limbs and scenarios. In the first segment, the right to sue accrues within three years if the date is specifically fixed for performance in the agreement itself whereas in its next fragment, the suit for specific performance may be instituted within a period of three years from the date when plaintiff has noticed that performance has been refused by the vendor. Obviously, the first part refers to the exactitudes of its application when time is of the essence of the contract, which means an exact timeline was fixed for the performance arising out of contract/agreement, hence in this particular situation, the limitation period or starting point of limitation will be reckoned from that date and not from date of refusal, however, if no specific date was fixed for performance of agreement and time was not of the essence, then the right to sue will accrue from the date of knowledge about refusal by the executant. The learned counsel made much emphasis that a legal notice was tendered to the vendor on 10.05.2006 and, in the reply, the respondent No.1 denied the execution hence the starting point of limitation will commence from the date of refusal which argument is not based on a correct exposition of the law. It was further articulated by him that, in the part performance of alleged agreement, the possession was handed over hence the suit could not be treated as time barred, but again this argument is also misconceived. The plea of part performance could not be established by the appellant in the Trial Court that the possession was handed over in terms of alleged agreement to sell. Throughout the proceedings, the respondents put forward a clear defence that the agreement to sell was forged and neither any part payment was received nor the possession was handed over pursuant to alleged sale agreement. The respondents had also instituted their own civil suit against the appellant for restitution of

possession of the land in question which was forcibly occupied by the appellant and also prayed for mesne profit from October 2007 till the ejectment of appellant. It is a well settled exposition of law that each case is to be decided on its own facts. It is also a ground reality that the respondent No.1 was not the sole owner of the land, but the respondents No.2 to 6 are also co-owners. The appellant in his suit for specific performance prayed for directions against the respondents No.1 to 6 to execute the sale deed in his favour. Nothing produced on record to show that the respondent No.1 was authorized to sign any agreement without the consent or authority of other co-owners for selling the entire land or even his own share in the un-partitioned land which is in joint ownership of respondents No. 1 to 6, hence the alleged agreement was *prima facie* beyond the mandate and spirit of Section 44 of the Transfer of Property Act 1882. A co-sharer cannot bind other co-sharers of the property and if a co-sharer enters into any deal or agreement for the entire land without the consent and authority of other co-sharers, then any such agreement would be illegal to the extent of the shares of the rest of the co-sharers. Adverting to the aforesaid situation, the unsubstantiated plea of part performance of contract by means of alleged possession of land also does not apply, nor is it helpful to the appellant's case which otherwise cannot vitiate the law of Limitation or the period provided therein in order to enroute legal proceedings including the claim for specific performance of contract, nor does it extend the period of limitation for an unlimited period being unregulated or unhindered.

9. The objective and astuteness of the law of Limitation is not to confer a right, but it ordains and perpetrates an impediment after a certain period to a suit to enforce an existing right. In fact this law has been premeditated to dissuade the claims which have become stale by efflux of time. The litmus test therefore always is whether the party has vigilantly set the law in motion for the redress. The Court under Section 3 of the Limitation Act is obligated independently rather as a primary duty to advert the question of limitation and make a decision, whether this question is raised by other party or not. The bar of limitation in an adversarial lawsuit brings forth valuable rights in favour of the other party. In the instant case, a specific issue on the question limitation was framed by the Trial Court and a similar

question was also included in the Appellate Court's judgment as one of the crucial points for determination and not only the learned Trial Court but the Appellate Court both have concurrently held that the suit filed by the appellant was time barred and both the judgments were also affirmed by the learned High Court.

10. Despite holding the suit of the appellant as time barred by the courts below, he made much emphasis that the Trial Court had passed an order that after recording evidence of parties, the documents will be sent to hand writing expert for his opinion but that order was not complied with and noncompliance of the said order vitiates the entire proceedings. We have scanned the record and also gone through the impugned judgments which put on view that the Trial Court in exercise of powers conferred under Article 84 of Qanun-e-Shahadat Order, 1984 compared the signatures appearing on Ex.69/J and found certain dissimilarities. The Appellate Court in order to reach a just and proper conclusion, also compared the documents allegedly signed by the respondents No.1 and 2 with the signatures appended by them on the written statement, amended written statement, counter affidavit and Vakalatnama and found them to be different. The Trial Court, while exercising powers under Article 84 of Qanun-e-Shahadat Order, 1984 (Section 73 of the Evidence Act 1872), may compare the disputed signature of any person to the suit with his admitted signature on the documents available on record. The learned Trial Court found differences and dissimilarities between the disputed signature and admitted signatures. The learned Appellate Court also compared the disputed signature with that of admitted signature and found variations and incongruities between the disputed signature and admitted signature. Article 84 of Qanun-e-Shahadat Order, 1984 divulges and articulates wide-ranging and all-embracing powers to the Court to compare or match the disputed handwriting with admitted writings. Section 107 C.P.C. provides the power of Appellate Court which includes the power to determine a case finally; to remand the case; to frame issues and refer them for trial; to take additional evidence or to require such evidence to be taken and under Sub-section 2, subject as aforesaid, the Appellate Court has same powers to perform as nearly the same duties as are conferred and imposed by CPC on courts of original jurisdiction in respect of suits

instituted therein. An Appeal is continuation of proceedings wherein entire proceedings are again left open for consideration by the Appellate Court and these powers are co-extensive with the powers and obligations conferred upon the original jurisdiction in respect of suits. So the Appellate Court was competent to undertake the exercise of comparison of signature without any reluctance if such comparison was indispensable or crucial to appreciate the other evidence available on record on the question of writings. It is the foremost obligation of the Court to make a decision as to whether the disputed signature and the admitted signature were signed by one and the same person and form its opinion. However, if the court comprehends that exercise of comparison of signature on the disputed document by the Court itself is too complicated, difficult or impossible and requires some skilled assessment, then obviously, the Court may have recourse to the opinion of a handwriting expert.

11. Article 84 of the Qanun-e-Shahadat Order, 1984 is an enabling stipulation entrusting the Court to reassure itself as to the proof of handwriting or signature. The Court has all the essential powers to conduct an exercise of comparing the handwriting or signature to get hold of a proper conclusion as to the genuineness of handwriting or signature to effectively resolve the bone of contention between the parties. The real analysis is to ruminate the general character of the inscriptions/signatures for comparison and not to scrutinize the configuration of each individual letter. It is an unadorned duty of the Court to compare the writings in order to reach at precise conclusion but this should be done with extreme care and caution and from dissimilarity and discrepancy of two signatures, Court may legitimately draw inference that one of these signatures is not genuine and when the Court is satisfied that the signature is forged and feigned then nothing prevents the Court for pronouncing decisions against the said documents. In the case of *Ghulam Rasool v. Sardar-ul-Hassan* **(1997 SCMR 976),** the petitioner contended that the Trial Court was not justified recording its finding on the question of signature by comparing the signature in dispute with the admitted signature as it was required to refer the matter to the handwriting experts which contention was found untenable by this Court and it was held that it is within the power of Court to compare the disputed

signature with the admitted signature and to form its view though it is advisable to refer the matter to the handwriting expert. However, the fact that the same was not referred would not render the order/judgment legally infirm as to warrant interference. While in the case of Messers Waqas Enterprises V. Allied Bank of Pakistan and 2 others **(1999 SCMR 85),** the Court held that it is settled principle that in certain eventualities the Court enjoins plenary powers to itself to compare the signature along with other relevant material to effectively resolve the main controversy. The learned counsel for the appellant referred to the case of Rehmat Ali Ismailia vs. Khalid Mehmood **(2004 SCMR 361),** in which, while recording the contention of the counsel for the petitioner that the Court was not competent to compare the signature of the petitioner on the agreement of sale under Article 84 of Qanun-e-Shahadat, the Court held that the above provisions do empower the Courts to make the comparison of the words or figures so written over a disputed document to that of admitted writing/signature and the Court could exercise its judgments on resemblance of admitted writing on record. It is true that it is undesirable that a Presiding Officer of the Court should take upon himself the task of comparing signature in order to find out whether the signature/writing in the disputed document resembled that of the admitted signature/writing but the said provision does empower the Court to compare the disputed signature/writing with the admitted or proved writing. Reference may be made to (i) Ghulam Rasool and others v. Sardar-ul-Hassan and another 1997 SCMR 976; (ii) Mst. Ummatul Waheed and others v. Mst. Nasira Kausar and others 1985 SCMR 214 and (iii) Messrs.' Waqas Enterprises and others v. Allied Bank of Pakistan and others 1999 SCMR 85.

12. Article 79 of the Qanun-e-Shahadat Order 1984, (Section 68 of the Evidence Act, 1872) is germane to the proof of execution of document required by law to be attested which cannot be used as evidence until "*two attesting witnesses"* at least are 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. In fact this Article is reproduction of Section 68 of the Evidence Act, 1872 with the difference that, under it only one attesting witnesses was required to prove the document rather than two. The evidence recorded in the

Trial Court reflects that the appellant produced his brother PW Khaliq Dino as attesting witness of the agreement to sell but another attesting witness Hashim S/O Allah Warrayo Behrani was not produced nor any justification or reason of not calling him was assigned. The PW Muhammad Umar, the vendor, only identified the parties whereas the Ex.69/J does not bear the signature of PW Zaheer Ahmed Abro. The omission or oversight of not calling both the attesting witnesses is detrimental and adversative to the admissibility of the document. The attestation and execution both have distinct characteristics. The execution of document attributes signing in presence of attesting witnesses including all requisite formalities which may be necessary to render the document valid. While the fundamental and elemental condition of valid attestation is that two or more witnesses signed the instrument and each of them has signed the instruments in presence of the executants. This stringent condition mentioned in Article 79 is uncompromising. So long as the attesting witnesses are alive, capable of giving evidence and subject to the process of Court, no document can be used in evidence without the evidence of such attesting witnesses. The provision of this Article is mandatory and non-compliance will render the document inadmissible in evidence. If execution of a document is specifically denied, the best course is to call the attesting witnesses to prove the execution. When the evidence brought forward by a party to prove the execution of a document is contradictory or paradoxical to the claim lodged in the suit, or is inadmissible, such evidence would have no legal sanctity or weightage. In the case of Hafiz Tassaduq Hussain vs. Muhammad Din through Legal Heirs and others (**PLD 2011 SC 241)**, the Court held in paragraph 8 that the command of the Article 79 of the Qanun-e-Shahadat Order, 1984 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. It was further held that the 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 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. In the case of Nazir Ahmad and another v. M. Muzaffar Hussain (2008 SCMR 1639), the Court held that: "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, if he had signed the document as a witness (Emphasis supplied) No legal inherent incompetency existed in the writer of a document to be an attesting witness to it". Whereas in the case of N. Kamalam and another v. Ayyasamy and another (2001) 7 Supreme Court cases 507), it was held that: "Evidence of scribe could not displace statutory requirement as he did not have necessary intent to attest." In Badri Prasad and another v. Abdul Karim and others (1913 (19) IC 451), it was held: "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."

13. The Trial Court and Appellate Court rightly held that the appellant failed to prove the agreement to sell and Faisla in terms of Article 79 of Qanun-e-Shahadat Order 1984. The High Court has a narrow and limited jurisdiction to interfere in the concurrent rulings arrived at by

the courts below while exercising power under Section 115, C.P.C. These powers have been entrusted and consigned to the High Court in order to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities which cannot be invoked against conclusion of law or fact which do not in any way affect the jurisdiction of the court but confined to the extent of misreading or non-reading of evidence, jurisdictional error or an illegality of the nature in the judgment which may have material effect on the result of the case or the conclusion drawn therein is perverse or contrary to the law, but interference for the mere fact that the appraisal of evidence may suggest another view of the matter is not possible in revisional jurisdiction, therefore, the scope of the appellate and revisional jurisdiction must not be mixed up or bewildered. The interference in the revisional jurisdiction can be made only in the cases in which the order passed or a judgment rendered by a subordinate Court is found to be perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law.

14. The concurrent findings of three courts below are neither based on any misreading or non-reading of evidence nor suffering from any illegality or material irregularity affecting the merits of the case. As a result of above discussion, both the Civil Appeals are dismissed with no order as to cost.

Judge

Judge

Announced in open Court
On 7.4.2022 at Islamabad Judge
Khalid
Approved for reporting.