IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Civil Petition No. 962 of 2016
(Against the order dated 11.01.2016 passed by the Lahore High Court, Lahore in Regular Second Appeal No. 104 of 2010)

Sheikh Muhammad Muneer *...Petitioner*

Versus

Mst. Feezan *...Respondent*

For the petitioners:	Mr. Muhammad Munir Piracha, ASC Mr. Mehmood A. Sheikh, AOR
For the respondent:	N.R.
Date of hearing:	25.02.2021

ORDER

Qazi Faez Isa, J. The learned Mr. Munir Piracha submits that the petitioner had filed a suit on 8 March 1999 seeking specific performance of an agreement dated 3 August 1998 through which he had agreed to buy the respondent's house for three hundred and fifty thousand rupees, of which an amount of one hundred and fifty thousand rupees was paid, but since the respondent refused to receive the balance sale consideration and to convey the house to the petitioner the suit was filed. The agreement is shown to be witnessed by three persons, namely, Muhammad Ali, the husband of the respondent, Allah Ditta and Muhammad Nawaz.

2. The learned counsel states that Muhammad Ali was not produced as a witness because the petitioner apprehended that he would not admit witnessing the execution of the agreement because he was the respondent's husband. Another witness Allah Ditta was not produced because he could not be found. However, Muhammad Nawaz (PW-8) was produced and so too the scribe of the agreement, namely, Muhammad Iqbal (PW7). The learned counsel submits that a scribe can be an attesting witness and in support of his contention refers to Article 79 of the Qanun-e-Shahadat, 1984[1] ('**Qanun-e-Shahadat**') and section 3 of the Transfer of Property Act, 1882[2] ('**Act**'). He says that reading these two provisions together permits a scribe to be an attesting witness. Therefore, since two persons in their testimony had said that the agreement was signed before them the requirement of Article 79 of the Qanun-e-Shahdat had been met and the agreement stood proved. Learned counsel submits that neither the learned Judges of the Subordinate Courts nor the learned Judge of the High Court appreciated this point and dismissed the petitioner's suit by holding that two attesting witnesses of the agreement had not been produced to confirm its execution.

3. To appreciate the learned counsel's point it would be appropriate to reproduce hereunder the cited provisions:

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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[1] President's Order No. 10 of 1984 promulgated on 28 October 1984.
[2] Act IV of 1882, enacted on 17 February 1882.

Section 3 of the Transfer of Property Act, 1882:

> **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.

4. The respondent-defendant denied the execution of the agreement and denied agreeing to sell her house. Therefore, the said agreement was required to be proved as mandated by Article 79 of the Qanun-e-Shahadat. If precedent is required for this trite contention reference may be made to the decision in the case of *Nazir Ahmed v Muzaffar Hussain*[3] 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.[4]

The aforesaid was also stated in the case of *Maqsood Ahmad v Salman Ali*.[5]

5. The learned counsel says that the scribe who wrote the agreement was an attesting witness of its execution. A scribe may be an attesting witness provided the agreement itself mentions/nominates him as such. The agreement mentioned three attesting witnesses by name and the scribe (Muhammad Iqbal) was not one of them. In the case of *Tassaduq Hussain v Muhammad*

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[3] 2008 SCMR 1639.
[4] Ibid, p. 1642.
[5] PLD 2003 Supreme Court 31, para 9, p. 35-36.

Din[6] this Court had held that a scribe is not an attesting witness in terms of Articles 17 and 79 of the Qanun-e-Shahadat:

> Therefore, in my considered view a scribe of a document can only be a competent witness in terms of Article 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.[7]

To state that the scribe (Muhammad Iqbal) was an attesting witness is contrary to the contents of the said agreement.

6. Oral evidence in contradiction of the contents of a document cannot be led as stated by Article 70 of the Qanun-e-Shahadat, which is reproduced hereunder:

> **70. Proof of facts by oral evidence**. All facts, except the contents of documents, may be proved by oral evidence.

However, oral evidence to the contents of a document may be lead in certain limited cases and then strict compliance is required to made with Article 35 of the Qanun-Shahadat, reproduced hereunder:

> **35. When oral admissions as to contents of documents are relevant**. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Permission was not sought, let alone given, to lead secondary evidence. Therefore, evidence contrary to the contents of the said agreement could not be led; the said agreement had to be proved by producing two attesting witnesses. However, only one out of three attesting witnesses was produced.

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[6] PLD 2011 Supreme Court 241.
[7] Ibid, p. 249E.

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

> **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.

8. The agreement was with a lady (the respondent) 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 to the petitioner 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, only one attesting witness was produced. 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, we turn to the Holy Qur'an to seek guidance.

9. 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** (*katibun*) 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 (your contract) 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. [the words *scribe* and *witness/es* have been highlighted]

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 she forgets). However, in the present case only one attesting witness was produced. Therefore, compliance was also not made with Article 17(1) and (2) of the Qanun-e-Shahadat and with the injunctions of Islam.

10. The translator and exegete Abdullah Yusuf Ali explaining the above verse writes the following under his translation of it:

> Commercial morality is here taught on the highest plane and yet in the most practical manner, both as regards the bargains to be made, the evidence to be provided, the doubts to be avoided, and the duties and rights of scribes and witnesses. Probity even in worldly matters is to be, not a mere matter of convenience or policy, but a matter of conscience and religious duty.

> Even our everyday transactions are to be carried out as in the presence of Allah.[8]

11. Radical awakening was brought about by the Holy Qur'an and hitherto before unfamiliar women's rights were established for the first time in scripture. A woman's right to own and dispose of her property; her right to retain, both before and after her marriage, her income and property; her ability to do business without permission of her father or husband and keep and spend what she earns. '*Men shall have the benefit of what they earn and women shall have the benefit of what they earn*.'[9] Her entitlement to inherit from her parents and husband is also precisely ordained in the fourth chapter (*an-Nisa*) of the Holy Qur'an.[10] A woman also does not need permission to acquire or dispose of property; what she inherits is hers and hers alone; neither her husband, father, brother or son has any entitlement to it; '*Do not eat up* (consume) *one another's property*'.[11] The bridal gifts given at the time of marriage are the wife's property, and remains hers. They can be added to but not taken away.[12] It is also recommended that husbands make wills to provide for their wives.[13] Her right to enter into contracts and to witness contracts[14] the Holy Qur'an mentions in great detail. In this case the respondent lady denied having entered into the said agreement which the petitioner, an attesting witness and the scribe testified that she had, however, her solitary testimony was to be accepted because this is what the law and the injunctions of the Holy Qur'an mandate.

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*.[15] We noted that, '*A chasm existed*

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[8] Note 333, *The Holy Qur'an, Translation & Commentary*, 1934.
[9] *An-Nisa* (4) verse 32.
[10] Ibid, verses 7, 11 and 12.
[11] Ibid, verse 29.
[12] *An-Nisa* (4) verses 24 and 25, *Al-Maidah* (5) verse 5 and *Al-Mumtahanah* (60) verse 10.
[13] *Al-Baqarah* (2) verse 240.
[14] *Al-Baqarah* (2) verse 282.
[15] PLD 2020 Supreme Court 269.

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.'[16] 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

[16] Ibid, para 15, p. 280.

> power into his hands". Harriet Beecher Stowe was another campaigner for women's rights, observing that, "[T]he 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. ... [I]n 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 learned Mr. Piracha says that prudence dictated that the petitioner should not produce or summon Muhammad Ali, who was an attesting witness, because he was the husband of the respondent and it was apprehended that he will deny witnessing his wife signing the said agreement. Merely because a witness is related to either party does mean he/she stops being a witness nor that he/she should not be produced/summoned as a witness. The above quoted verse of the Holy Qur'an states that it is the religious duty of a Muslim to come forward to testify when called upon to do so - '*The witnesses should not refuse when they are called on*' (for evidence). An attesting witness remains a witness irrespective of his or her relationship to the parties to an agreement. If a witness does not agree to testify he/she can be summoned through the court. In the present case two attesting witnesses namely, Muhammad Ali and Muhammad Nawaz, were not produced nor compelled to give evidence by being summoned through the court.

14. As regards the scribe he was not shown or described as a witness in the said agreement, therefore, he could not be categorised as an attesting witness. The cited verse of the Holy Qur'an mentions three times the word scribe (*katib*) and five times the witness/es (*shahid*) but does not use these words interchangeably, instead separately and distinctively. Therefore, a scribe and a witness cannot be the same. In *Tassaduq Hussain v Muhammad Din*[17] this Court considered Article 17 of the Qanun-e-Shahadat 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".[18]
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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

[17] Op. cit.
[18] Ibid, p. 247.

> 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.[19] [emphasis has been added]
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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.[20]

And, in an earlier case, *Nazir Ahmad v Muzaffar Hussain,*[21] it was held, that:

> Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984, provides that "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".'

15. The petitioner presumably was not able to locate a witness (Allah Ditta). The burden to produce or summon him lay upon the petitioner, which is not alleviated merely by saying he could not be found. Article 80 of the Qanun-e-Shahadat provides, that:

> **80. Proof where no attesting witness found**. If no such attesting witness can be found, it must be proved that the witnesses have either died or cannot be found and that the document was executed by the person who purports to have done so.

The Article states that it *must be proved* that the witness had either died or could not be found. Simply alleging that a witness cannot

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[19] Ibid, p. 248.
[20] Ibid, p. 248.
[21] Op cit.

be found did not assuage the burden to locate and produce him. The petitioner did not lead evidence either to establish his death or disappearance, let alone seek permission to lead secondary evidence.

16. Therefore, for the reasons mentioned above we are of the considered opinion that the learned Judge of the High Court and the learned Judges of the Subordinate Courts correctly dismissed the petitioner's suit as the petitioner had failed to establish that the said agreement had been executed by the respondent and/or that she had agreed to sell her house to the petitioner. Consequently, leave to appeal is declined and this petition is dismissed.

Judge

Judge

Islamabad,
25 February 2021.
Arif *Approved for reporting.*