JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

R.F.A. NO. 861 OF 2021

JAHNGIR KHAN

VERSUS

RAJA MUHAMMAD RAFIQUE AND OTHERS

Appellant by	**:**	**Mr. M. Arbab Alam Abbasi, Advocate.**
Respondents No.1 to 3 by	**:**	**Syed Haider Shah, Advocate.**
Respondent No.4	**:**	**Ex-parte.**
Respondent No.5 by	**:**	**Mr. Iqbal Hassan, Advocate.**
Date of Hearing	**:**	**11.05.2022.**

SAMAN RAFAT IMTIAZ, J. Through the instant Regular First Appeal, the Appellant [Jahngir Khan] impugns the Judgment and Decree dated 13.11.2021 ("**Impugned Judgment and Decree**"), whereby his suit for Specific Performance of Agreement and Permanent Injunction was decreed as prayed to the extent of Respondents No.1 to 3 but was dismissed against Respondent No.4.

2. The necessary facts as per the Plaint, Memo of Appeal, and the record are that (late) Muhammad Zaman (**"Original Owner"**) was the owner of Plot No.1982 situated at Street No.71, Sector I-10/1, Islamabad, measuring 25x50 sq. yards ("**Suit Property"**). On the death of the said Original Owner, the Suit Property devolved upon his legal heirs listed as follows,

a. Muhammad Parvaiz
b. Muhammad Irfan
c. Muhammad Javed
d. Jamila Bibi
e. Zaib-un-Nisa
f. Sughra Bibi

3. The Appellant entered into Agreements to Sell for the Suit Property with the said legal heirs vide Deed No.3380 dated 06-10-2018 and Deed No.7548 dated 24-04-2019 for a total consideration of Rs. 5,000,000/-. At such time, the

legal heir listed at serial No. (e) in the preceding paragraph herein above namely Zaib un-Nisa (**"Deceased Legal Heir"**) had already died on 22.06.2018. As such to the extent of her share in the Suit Property, the Appellant entered into an Agreement dated 17-06-2019 (**"Subject Sale Agreement"**) with her legal heirs i.e., Respondents No.1 to 4. All legal heirs except Respondents No.1 to 4 executed a General Power of Attorney dated 24.04.2019 in favor of Appellant for submitting before Respondent No.5 [Capital Development Authority] for acceptance and transfer of suit plot in the name of the Appellant produced as Mark-A. A Special Power of Attorney dated 30.05.2019 is also on the record as Ex-P-3 which was executed by the Respondents No. 1 to 3 in favor of the Appellant.

4. Further that the Deceased Legal Heir's share in the Suit Property had not been transferred in the names of the Respondents No. l to 4 after her death. Therefore, the Respondents No.1 to 4 approached the court of competent jurisdiction for declaration and on 22-05-2019, the learned Civil Court passed Decree dated 22-05-2019 wherein it was held that the Respondents No.1 to 4 are the only legal heirs of the Deceased Legal Heir and entitled to inherit the property left by the said deceased. Thereafter, the Appellant entered into the Subject Sale Agreement with Respondents No.1 to 4 to the extent of their share in the Suit Property which had devolved upon them after the death of the Deceased Legal Heir of the Original Owner in consideration of Rs.550,000/-. The Subject Sale Agreement records that the Appellant paid Rs.20,000/- as earnest money whereas an amount of Rs.320,000/- was to be adjusted against expenditure in respect of legal fees, etc., to be incurred by the Appellant before CDA and other forums. The remaining sale consideration of Rs.215,000/- was to be paid at the time of transfer of the Suit Property before the Respondent No.5.

5. According to the Appellant, he contacted the Respondents time and again for performance of their part of the sale agreement but Respondents No. 1 to 4 kept delaying the matter on one pretext or another. As such, on 01-09-2020, the Appellant filed a civil Suit for Specific Performance of Agreement and Permanent Injunction against the Respondents in respect of the Subject Sale Agreement. On 21-09-2020, Respondents No. 1 to 3 appeared before the court

and admitted the claim of the Appellant by recording their statement before the Court on oath without filing the written statement. However, the Respondent No. 4 did not appear and was therefore proceeded against ex-parte on 03.12.2020. On 29.09-2020 the Appellant submitted the remaining sale consideration on the order of the learned Trial Court as evidenced by the deposit slip produced as Exhibit P-7. On 29-01-2021 the Respondent No. 5, as custodian of record, submitted written statement before the Trial Court.

6. After recording of evidence and hearing the final arguments, the learned Trial Court passed the Impugned Judgment and Decree whereby the suit of the Appellant was decreed as prayed to the extent of Respondents No.1 to 3 but was dismissed to the extent of Respondent No.4 on account of failure of the Appellant to fulfill the mandatory requirement of Article 17 of the Qanun-e-Shahadat Order, 1984. It was held that since the Appellant has already deposited remaining sale consideration i.e. Rs.215,000/- with the Nazir of the Court, therefore, the Respondents No.1 to 3 are at liberty to withdraw Rs.53,750/- each with permission of the Court, whereas due to dismissal of suit to the extent of Respondent No.4, the Appellant is also at liberty to withdraw an amount of Rs.53,750,/- with permission of the Court.

7. The learned counsel for the Appellant argued that the Impugned Judgment and Decree to the extent of Respondent No.4 is based on misreading of evidence and an incorrect appreciation of the applicable law. He submitted that the learned Trial Court failed to appreciate that the Subject Sale Agreement was admitted by Respondents No.1 to 4; that the admission of the co-respondents is binding upon Respondent No.4 who even otherwise did not appear before the learned Trial Court and as such the contentions of the Appellant remained unchallenged and un-rebutted by Respondent No.4; that both PWs 2 and 3 specifically stated in their respective cross-examination that they were present at the time of the execution of Subject Sale Agreement produced as Ex.P-2 and PW-3 further stated that the sale consideration was exchanged in front of him. The learned counsel, therefore, contended that the requirements under Article 17 of the Qanun-e-Shahadat Order, 1984 stood satisfied and as such the suit of the Appellant was liable to be decreed in his favor against the Respondent No. 4 as well. He relied on *Syed Azhar Hussain Vs. Muhammad Aslam*, 2010 MLD 1162;

Mst. Zainab Khatoon Vs. Amir Abdullah Khan, PLD 2004 (Lahore) 330; *Mst. Sughran Begum Vs. Haji Mir Qadir Bakhsh*, PLD 1986 (Quetta) 232; *Abdullah Vs. Abdul Karim*, PLD 1968 SC 140 and *Aminar Rahman Vs. Shaukat Ali*, PLD 1958 Dacca 356.

8. Learned counsels for Respondent No.1 to 3 submitted that the said Respondents have no objection if the appeal is allowed as prayed for. Respondent No.4 was proceeded against ex-parte on 25.03.2022.

9. Arguments on behalf of learned counsel for the parties have been heard and the record available before this Court has been perused.

10. Admittedly the Suit Property belonged to the Original Owner i.e., (late) Muhammad Zaman, whose date of death is not available on the record. In any event the agreements to sell with the legal heirs of the deceased Original Owner are stated to be dated 06.10.2018 and 24.04.2019. Neither of the two agreements was produced in evidence. Be that as it may, it has not been alleged that the legal heirs of the Original Owner (except for the legal heirs of the Deceased Legal Heir of the Original Owner) had refused to sell their share in the Suit Property and no suit for specific performance of the said agreements against such legal heirs was instituted by the Appellant, therefore, non-production of such agreements is irrelevant for our purposes.

11. The only issue before this Court is whether specific performance of the Subject Sale Agreement dated 17.06.2019 can be granted in respect of Respondent No.4. The facts relevant for such purpose are that the Deceased Legal Heir, who was one of the legal heirs of the Original Owner of the Suit Property, died on 22.06.2018 before her share in the Suit Property could have been mutated in her favour. Examination of the Subject Sale Agreement produced as Ex.P-2 shows that it was purportedly executed by and between the Appellant and the legal heirs of the Deceased Legal Heir of the Original Owner of the Suit Property i.e., Respondents No.1 to 4 in respect of the Deceased Legal Heir's share in the Suit Property. However, the spaces provided for the signatures for the witnesses are blank. On the other hand, PWs 2 and 3 stated in their cross-examination that they were present at the time of the execution of Subject Sale Agreement produced as Ex.P-2 and PW-3 further stated that the

sale consideration was exchanged in front of him. It is also pertinent to note that Respondents No.1 to 3 have not challenged the Appellant's claim.

12. From the foregoing facts, the following points of determination arise:

(i) Whether the admission of the co-owners i.e., Respondents No. 1 to 3 who were co-executants of the Subject Sale Agreement in respect of the Suit Property is binding upon co-defendants/co-owners/co-executant i.e., Respondent No. 4; and

(ii) Whether the Subject Sale Agreement dated 17.06.2019 stands proved on the statement of PWs- 2 and 3 claiming to have witnessed the execution thereof despite their names not appearing as witnesses on the said agreement.

13. The learned counsel for the Appellant relied upon the case of *Aminar Rahman (Supra)* to assert that admission by one defendant when jointly interested is binding upon the co-defendant. However, close examination of the said ruling reveals that not only are the facts of the case different from the instant case but even otherwise the court in such case held that an admission of a co-defendant does not become conclusive unless it can be shown to amount to an estoppel and even then it only raises a presumption which is rebuttable by the other side.

14. In the case at hand I find that the judgment rendered by a Division Bench of the Honourable Lahore High Court in the case of *Muhammad Ramzan Vs. Saif Nadeem Electro (Pvt.) Ltd.*, PLD 2006 Lahore 571 is more relevant as that too was in respect of a suit for specific performance in which case the execution of the subject agreement was denied by one of the defendants but was admitted by the remaining defendants and in such circumstances it was held that admission of a co-defendant is not binding on other defendants as follows:

> *7. From the above evidence, we are not convinced, if the appellant has been able to prove the agreement to sell in terms of Articles 79 and 17(2) of the Qanun-e-Shahadat Order, 1984, which they were obliged to prove through examining the two attesting witnesses; Muhammad Shall, the other marginal witness of the instrument has not been examined for any valid reason. There is no independent proof, if such a substantial amount of advance consideration of Rs.21,07,270 was paid by the appellant to respondents Nos.2 to 6, this could have been easily done by the appellant through summoning the record of the bank, in which the transaction of payment is alleged to have taken place, but surprisingly this was not done, which omission to our mind has serious reflection upon the genuineness of the transaction.* ***The argument that as defendants Nos. 2 to 6, who are the***

> ***executants of the agreement have admitted the same*** *and the payment thereof as well, thus it was not required to examine the other marginal witness; the summoning/production of the record/registers of the Stamp Vendor and the scribe, or the bank record for the purposes of proving the advance payment,* ***suffice it to say that the admission of a co-defendant is not binding upon the others****; respondent No. 1 in its written statement had disputed the genuineness of the said agreement and had impugned fraud and collusion between the appellant and respondents Nos.2 to 6;* ***thus in this peculiar situation, it was incumbent upon the appellant to have proved the agreement in accordance with the mandatory provision of Article 79****; besides, to have corroborated the proof through the summoning and production of the record of the Stamp Vendor, the deed writer and the bank documents of the payment of advance consideration, but this all is conspicuously missing in the case. Above all, P.W.8, who is key witness of the appellant, has departed and deviated from the contents of the plaint; it is stated by him that he has entered into the agreement to sell with respondents Nos. 2 to 6, whereas, this is not the case set out in the plaint of the appellant, resultantly, we are not convinced, if the appellant has proved his case about the execution of the agreement as against respondent No.l. However, as respondents No.2 to 6, have admitted the said document and also the receipt of payment of the advance money, such admission is binding upon them, therefore, the Court below has rightly directed in the decree for the return of the amount of earnest money received by them from the appellant.*

15. I find great wisdom in such conclusion of the Honorable Lahore High Court. This is because the requirement as per Article 17(2)(1) of the Qanun-e-Shahdat Order, 1984 is that the instrument described therein is to be "attested". As held in *Muhammad Qasim Ali Vs. Mst. Surayya Masood,* 2013 CLC 553, the *"word "attestation" means the act of witnessing the actual execution of document subscribing one's name as witness to that effect. It also means signing of the document to testify that the attester is a witness to the execution of the document. One who signs the documents in the presence of the executant after seeing the execution of the document is called an "attesting witness".*

16. Viewed from such perspective I am unable to conclude that the co-defendants/co-owners/co-executants i.e., Respondents No. 1 to 3 could qualify as "attesting witnesses". The record reflects that they stated on oath that they have no objection if the suit filed by the Appellant is decreed in his favour. However, there is no evidence that they witnessed the execution of the Subject Sale Agreement by the Respondent No.4 nor have their names been subscribed as witness to that effect. In the absence of any such evidence it cannot be presumed that the Subject Sale Agreement would have been executed by each of the Respondents No.1 to 4 at the same time and in the presence of each other thereby witnessing each other's signatures.

17. Similarly, the Honourable Supreme Court in the case of *Nazir Ahmad Vs. M. Muzzafar Hussain*, 2008 SCMR 1639 stated that an attesting witness is the one who has not only seen the document being executed by the executant but also signed the same as a witness whereas in the instant case the Respondents No.1 to 3 have not signed the Subject Sale Agreement as witnesses. In fact as observed above the space for signatures of the witness was left blank in the Subject Sale Agreement.

18. This brings me to the second point for determination as mentioned in paragraph 12 herein above with the result that PWs 2 and 3 can also not qualify as witnesses to the Subject Sale Agreement notwithstanding their statement in cross-examination that they witnessed the execution thereof as neither their names nor their signatures are appearing on the said agreement as witnesses.

19. In light of the above discussion, I find myself in agreement with the learned Trial Court that the Appellant failed to prove the execution of the Subject Sale Agreement by the Respondent No.4 in accordance with Article 17 of the Qanun-e-Shahdat Order, 1984 and as such the suit for Specific Performance filed by the Appellant was rightly dismissed against the Respondent No.4.

20. Consequently, the instant appeal stands **dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on 30th of June, 2022.

JUDGE

JUNAID