JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. No.47 of 2006

Syed Nisar Hussain Bukhari

Versus

Mehmood Akhter and others

Date of Hearing	:	02.03.2022
Appellant by	:	Raja Muhammad Anwar-ul-Haq, Advocate.
Respondent by	:	Mr. Zulfiqar Ali Abbas, Advocate.

ARBAB MUHAMMAD TAHIR, J. This Regular First Appeal is directed against the judgment and decree dated 10.06.2005, passed by the Court of the learned Civil Judge, Islamabad, whereby the suit for specific performance, declaration, permanent injunction, etc., instituted by the appellant, was dismissed.

2. The facts leading to the filing of the present appeal are that respondents No.1 to 14 as per the revenue record were the owners in possession of the land situated in Khasra No.259, Mouza Jandala, Tehsil and District Islamabad. On 17.09.1995, respondent No.1 (Mehmood Akthar) and respondent No.5 (Sher Ahmed) entered into an agreement to sell with the appellant for a sale consideration of Rs.5000/- per kanal. Since the suit property was in the nature of a joint property, thus, the said respondents took the responsibility of the remaining co-owners to the effect that they would also transfer the suit land in the appellant's favour. The appellant paid an amount of Rs.50,000/- as earnest money through a receipt to the said respondents viz respondents No.1 and 5. Furthermore, an amount of Rs.5,20,000/- was paid to the said respondents through one Muhammad Fazil. The said respondents are also said to have witnessed the transaction. It is pleaded that after purchase of the suit land, the appellant spent a huge amount for leveling the suit land and planted around 6000 saplings in the suit land. It was asserted in the plaint that now respondents No.1 to 14 are trying to deprive the appellant by re-selling the suit land to respondent No.15 (Aurangzeb Khan). The inaction on the part of respondents No.1 and 5 to perform their part of obligation under the

said agreement to sell dated 17.09.1995 caused the appellant to institute a suit for specific performance (*supra*). The said suit was dismissed by the learned Court below vide impugned judgment and decree dated 10.06.2005. Hence the present appeal.

3. Learned counsel for the appellant, after narrating the facts leading to the filing of the present appeal, contended that after the purchase of the said land, the appellant is now the absolute owner of the suit property; that in pursuance of the said agreement to sell, the appellant had paid the entire sale consideration to the respondents, which sums up to Rs.5,20,000/-; that the learned trial Court did not give due credence to the documents and cash receipts produced by the appellant; that the suit was contested only by respondent No.8 (Ali Anwar) whereas rest of the respondents did not contest the suit; that the learned trial Court had not decided the appellant's application with respect to handwriting expert; that the learned trial Court did not requisition the record from the revenue authorities nor verified from Halqa Patwari in order to ascertain the ownership of the suit land; that the impugned judgment is not sustainable in the eye of law; that the learned trial Court did not appreciate the appellant's oral as well as documentary evidence. Furthermore, it was contended that the learned Court below did not resolve the substantial and controversial issue involved in the matter; that the learned trial Court was under an obligation to give its issue-wise findings separately. Finally, it was contended that the impugned judgment and decree passed by the learned Court below suffer from material irregularity. Learned counsel for the appellant prayed for the present appeal to be allowed in terms of the relief sought therein.

4. On the contrary, learned counsel for respondents No.1 to 14 has vehemently opposed the present appeal by contending that no bargain in respect of the suit land was ever struck between the appellant and respondents No.1 to 14; that at no material stage, was any oral or written agreement to sell executed between the appellant and respondents No.1 to 14; that the suit of the appellant was not proceedable under the provisions of the law governing the subject; that the appellant had no cause of action to institute the said suit; that the learned trial Court has rightly dismissed the appellant's suit; that the learned trial Court did not commit any illegality in dismissing the

appellant's suit; and that the judgment and decree passed by the learned Court below do not suffer from any illegality calling for interference by this Court. Learned counsel for respondents No.1 to 14 while supporting the impugned judgment and decree prayed for the present appeal to be dismissed with costs.

5. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts necessitating the filing of this appeal have already been discussed in paragraph No.02 above and need not be reiterated.

6. The record shows that on 17.09.1995, a purported sale agreement bearing No.4421 (Exh.P/3) was executed between the appellant and respondents No.1 and 5 in respect of the land bearing khasra No.259 (1956-57 *bandobasti*) situated in Mauza Jandala, Tehsil and District Islamabad (hereinafter referred to as the "**suit land**"). A sale consideration of Rs.5,000/- per kanal was agreed upon by the parties. It is apt to mention that the said land is not only owned by respondents No.1 and 5 rather it is a joint property having twelve other co-owners including respondents No.1 and 5. The appellant asserts that out of total 2857 kanals of land, he purchased 1122 kanals of land from the predecessors in interest of Maqbool Khan and in this regard, he had paid Rs.50,000/- as earnest money to respondents No.1 and 5 through a receipt (Exh. P/1), whereas 5,20,000/- was paid through Fazil and at the time of the said transaction, respondents No.1 and 5 were also present. Perusal of the said receipt reflects that earlier the name of the recipient had been typed as Zafar Mahmood, whereafter the word "Zafar" had been cut off and was replaced by "Mahmood Ali", who put his signatures on the said document. Furthermore, there are two witnesses to the said receipt, but the same has only been attested by one witness i.e. Raja Muhammad Fazil. As per the version of the appellant, the respondents are trying to sell the suit land to a third party thus transgressing upon his legal rights. The appellant being aggrieved by the inaction on the part of the respondents, instituted a suit for specific performance of the said agreement to sell. The respondents contested the said suit by filing a written statement. The stance taken by the respondents was that they are the real owners of the suit land; that they did not enter into a sale agreement with the appellant; that no oral or written agreement was ever executed between the appellant and the

respondents. Out of the divergent pleadings, the learned trial Court framed the following issues:

i. Whether the plaintiff has no cause of action to file this suit? OPD.
ii. Whether the plaintiff has come to the Court with unclean hands ? OPD.
iii. Whether the suit is not proceed able under the law? OPD.
iv. Whether the suit is false, frivolous baseless and as such the defendants are entitled to special costs U/S 35-A of CPC? OPD.
v. Whether the plaintiff has been estopped by his own words and conduct to file this suit? OPD-15.
vi. Whether the suit is bad due to mis-joinder of necessary parties? OPD.
Vii. Whether the plaintiff is entitled to decree for specific performance, declaration and permanent injunction as prayed for? OPP.
8. Relief.

7. The record further shows that the appellant appeared as PW-2 and in his examination-in-chief, he deposed that at the time of the alleged execution of the said agreement, only respondents No.1 and 5 were present on the occasion. However, during the course of cross-examination, he deposed that respondents No.1 and 5 had shown him the power of attorney on behalf of the other co-owners authorizing the formers to enter into an agreement to sell with the latter. The alleged sale agreement has been tendered in evidence as Ex.P/3, which is said to have been witnessed by Muhammad Fazil and Abdul Rahim. Out of the said two witnesses, only Muhammad Fazil had appeared as PW-1 and produced in evidence the payment receipt (Exh.P/1). The said agreement to sell (Exh.P/3) is an un-registered document and two individuals are cited to be marginal witnesses of the said agreement. Out of the two marginal witnesses, only one Muhammad Fazil s/o Muhammad Yousaf appeared as PW-1. However, the second marginal witness had not been produced. The respondents denied the execution of the said agreement and also denied agreeing to sell the suit land. Therefore, the said agreement was required to be proved as mandated by Article 79 of the Qanoon-e-Shahadat Order, 1984. 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. The execution of Exh.P/3 had not been proved in accordance with Article 79 of the Qanoon-e-Shahadat Order, 1984 (herein after referred to as the "**the 1984 Order**"). Article 79 of the 1984 Order provides that if a document is required by law to be attested, it shall not be used as evidence unless at least two attesting witnesses thereto have been called for the purpose of proving the execution of the said document, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.

8. Similarly, Article 17(2) (a) of the 1984 Order provides that in matters pertaining to financial or future obligations, if reduced to writing, the instrument/document 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. Article 79 of the 1984 Order reads thus:-

> *"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. 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."*

9. Furthermore, the said agreement to sell is also not registered in accordance with the provisions of the Registration Act, 1908. In the case of ***Sheikh Muhammad Muneer versus Mst. Feezan (P L D 2021 Supreme Court 538)***, the Hon'ble Supreme Court of Pakistan has inter-alia held as follows:-

> *"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:*
> *(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law, -*
> *(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*
> *(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".*

10. Furthermore, it was held that "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,t 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.'".

11. Additionally, in the case of Muhammad Qasim Tareen Versus Abdul Karim Baryalai and 3 others **(P L D 2021 Balochistan 116),** it was held as under:-

> *"Mere annexing document with the plaint does not ipso facto the proof of execution of document tendered in evidence without producing two attesting witnesses would not stand. **For proving the document attesting witnesses have to be compulsory examined as per requirement of above referred to Article, otherwise such document is not to be taken as proved. The petitioner/ plaintiff was duty bound to prove the sale deed in case of denial by the respondent/ defendant. The petitioner/ plaintiff neither produced a single witness nor any reason thereof for non-production of attesting witnesses**.*
>
> *Reliance is placed on case **Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs PLD 2011 SC 241**, wherein it was held:*
> *"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 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 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 v. Gudar Koeri and others (AIR 1925 Allahabad 56)****. The purpose and object of the attestation of a 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 v. 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. Reliance is also placed on case ***Sheikh Muhammad Muneer v. Mst. Feezan PLD 2021 SC 538.*** *It was held therein:*

"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 not 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 categorize 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*** *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 two fold 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 terms 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".

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 v. Gudar Koeri and others (AIR 1925 Allahabad 56)***. *The purpose and object of the attestation of a 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 v. 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. This Court in the case reported as **2021 CLC 2031 Islamabad** has held as follows:-

> *"Under section 17 of the Order an agreement pertaining to financial or future obligations, if*

reduced to writing, must be attested by two men and under section 79 of the Order such agreement cannot be used as evidence until two attesting witnesses have been called for the purpose of proving its execution. The Agreement was not a registered document and consequently the proviso of section 79 is not relevant. It was held by the august Supreme Court in ***Hafiz Tassaduq Hussain v. Muhammad Din [PLD 2011 SC 241]*** *that even a scribe of the document could not be a substitute for testimony of witnesses to such document for purposes of Article 79 of the Order even though he could be examined by a concerned party for corroboration of evidence of marginal witnesses, as when law required an act to be in a particular manner and it had to be done in such manner and not otherwise. In* ***Farzand Ali and another v. Khuda Bakhsh and others [PLD 2015 SC 187],*** *the august Supreme Court held that "an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is sine qua non for the validity of the agreement. For purposes of proof of such agreement it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the Order". **In Muhammad Iqbal Khan v. Mst. Farhat Nisa [PLD 2017 Lahore 727],** the learned Lahore High Court held that Article 79 of the Order does not envisage admission of execution of a document by implication in relation to a defendant who is not before the court and has made no statement with regard to the validity and execution of such document and that a court can make no assumption regarding the execution of the document only because the defendant if not before the court and has not controverted assertions in the plaint.*

12. In view of the provisions of the Order and settled principles of law, the appellants have failed to establish the execution of the Agreement to the extent of respondent No.8 or that respondent No.8 owes any legal obligation to the appellants the performance of which should have been ordered by the learned trial court".

13. Law to the said effect has also been laid down in the judgments reported as **2020 SCMR 197 Supreme Court, 2021 CLC 54 Karachi and 2020 CLC 756 Peshawar.**

14. In view of what has been discussed above, the impugned judgment and decree dated 10.06.2005 having been based on sound reasons, do not call for any interference by this Court, the instant appeal stands **dismissed** with no order as to costs.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in open Court on _____03.2022.

JUDGE

//Kamran//*