

JUDGMENT SHEET
IN THE HIGH COURT OF BALOCHISTAN, QUETTA

Civil Revision Petition No. 274 of 2015
(CC # 21953)

Naimatullah and others
Versus
Mir Jamal and others

JUDGMENT

Date of hearing: 29th November, 2022 **Announced on** 01st December, 2022.

Petitioners: by M/s Taj Muhammad Mengal and Zahoor Ahmed Mengal, Advocates.

Respondent: Nos. 1 to 19 by Mr. Muhammad Zahid Muqeem Ansari, Advocate and Mr. Changaiz Dashti, State Counsel for respondent No. 20.

GUL HASSAN TAREEN J. – This judgment disposes of a civil revision petition filed by the petitioners under section 115, the Civil Procedure Code, 1908 (“the Code”), from the judgment and decree dated 03rd September, 2015, whereby the Majlis-e-Shoora, Kharan (“Appellate Court”) has allowed the appeal of the respondent Nos. 1 to 19 and decreed their suit, after setting aside of the suit’s dismissal judgment and decree dated 07th November, 2014, passed by the Court of Qazi, Kharan (“Trial Court”).

2. Brief facts of the case are that the respondent No. 1, the predecessor of the respondent Nos. 2 to 18 and the respondent No. 19, (“respondents”) instituted a Civil Suit No. 91/2011, for declaration, cancellation of mutations, instruments dated 12th February, 2009 and 16th February, 2009, correction of entries and perpetual injunction. The suit was instituted against the petitioners, with the averments that the predecessor of the petitioner Nos. 11 to 15, Ameer Bibi was the owner

of land specifically described in para No. 5 of the plaint (“suit land”). The said sold out her land to the respondents in exchange for a price of Rs. 100,000/-. The sale was incorporated into a contract of sale dated 09th July, 2002 (“contract”) and they were physically placed in possession of the suit land on receipt of the price. After the death of the said vendor, her elder son, Muhammad Yousaf (petitioner No. 11) executed a Confirmation Deed dated 06th January, 2011, whereby, he on his behalf and while acting as attorney of the petitioner Nos. 12 to 15, acknowledged the contract. They made an application to the respondent No. 19 for entering mutation entry of the suit land in their names. The application was contested by the petitioner Nos. 1 to 10 by claiming that they are the owners of the suit land on the basis of mutation entries dated 2nd March, 2009 and 6th May, 2009, instruments dated 12th February, 2009 and 16th February, 2009. The respondent No. 19 advised them to approach a civil court. In the suit, the respondents prayed relief regarding declaration of their purchase of the suit land, cancellation of mutation entries and instruments, correction of revenue record in their names and perpetual injunction.

3. The petitioner Nos. 1 to 4 and the predecessor of the petitioner Nos. 5 to 10, submitted separate contesting written statements and defended their title upon the suit land on the basis of revenue record and the aforementioned two instruments. The petitioner Nos. 11 to 15, were, however, proceeded ex-parte. On such pleadings, the Trial Court framed following issues:

- i. *Whether suit is within time?*
- ii. *Whether proper court fees has been affixed?*

- iii. *Whether the entire Mouza Sherozai fell into the share of Mst. Amir Bibi daughter of Nawab Habibullah as legacy through a private partition (after decision of title from the Supreme Court of Pakistan)?*
- iv. *Whether plaintiffs have purchased the proprietary share of ownership of Ameer Bibi situated at Sherozai, Kaiwat No. 1, Khatooni No. 2 total 42 Qittat under tenancy of Faqir Muhammad, Muhammad Fazal, Balach Khan, Muhammad Hussain sons of Safar Khan Sherozai and Kaiwat No. 1 Khatooni No. 4 total 35 Qittat under tenancy of Dur Muhammad through contract of sale 09.07.2002 in exchange for Rs. One lac and took possession?*
- v. *Whether disputed Kaiwat, khatooni Nos. 42 Qittat and 35 Qittat are the purchased possessory ownership of the plaintiffs and before entering in the name of plaintiffs, the recording of mutation of the disputed land in the name of defendants by the Tehsildar Kharan is illegal and liable to cancellation? (OPP)*
- vi. *Whether Nawab Habibullah and Mir Sher Ali, the successors of Nawab Habibullah have no concern with the ownership of the disputed land? and entered incorrectly in the name of the successors of Habibullah Khan as owners and the defendants as hereditary tenants?*
- vii. *Whether the ownership of the disputed Kaiwat, khatooni numbers has never remained in the name of the Ameer Bibi?*
- viii. *Relief?*

4. The respondents examined the scribe and one marginal witness of the contract as PW-1 and PW-2, respectively. They also examined the scribe and one marginal witness of the confirmation deed (Ex: P/4-A) as PW-3 and PW-4 respectively. The representative of

Tehsildar appeared as PW-5, who tendered in evidence the revenue record of the Ameer Bibi (late) as Ex: P/5-A to Ex: P/5-C. The respondents through attorney, the respondent No. 1, made statement on oath. In rebuttal, the petitioner Nos. 1 to 10 examined six witnesses, apart from recording their statement through attorney. On conclusion of evidence, the Trial Court dismissed the suit, however, on appeal by the respondents, the suit was decreed by the Appellate Court.

5. Messrs. Zahoor Ahmed Mengal and Taj Muhammad Mengal, Advocates, counsel for the petitioners, contend as under:

- (i) the suit instituted on the basis of contract of sale dated 9th July, 2002 was barred by time;
- (ii) the two marginal witnesses of the contract and the confirmation deed were not produced by the respondents;
- (iii) the payment of the price was not proved;
- (iv) the vendors of the suit land or any one from them were not examined as a witness by the respondents in proof of purchased of the suit land;
- (v) the witnesses examined by the respondents admitted possession of the petitioner Nos. 1 to 10 on the suit land;
- (vi) the former owners of the suit land have not challenged the mutations of the petitioner Nos. 1 to 10 in respect of the suit land;
- (vii) the contract of sale was not formally brought on record through exhibition;
- (viii) the possession of the suit land was not sought in the suit; and

- (ix) the respondents have failed to prove the power of attorney of Ameer Bibi (late) and placed reliance on the following case laws:

Agra Cooperative Housing Society Limited v. Akhtar Ali
1994 MLD 1747

Jan Muhammad v. Abdul Rehman
PLD 1998 Qta 34

Mst. Shamim Akhtar v. Province of Punjab through
Collector/DOR
2019 YLR 870

6. Conversely, Mr. Muhammad Zahid Muqem Ansari, Advocate, counsel for the respondents contends as under:

- (i) the issue of limitation was decided by the Trial Court in negative, however, the petitioners had not impugned such finding through cross-objections;
- (ii) the petitioner Nos. 1 to 10 have failed to prove execution of documents they defended upon;
- (iii) the petitioner Nos. 11 to 15 from whom's predecessor, the respondents claimed purchase of the suit land, had not contested the suit;
- (iv) the respondents proved the execution of the sued upon documents through scribe and marginal witnesses;
- (v) in case of conflicting judgments, the judgment of the Appellate Court should be given preference; and
- (vi) the jurisdiction under section 115, the Code is limited.

Finally, he requests for dismissal of the petition.

7. I have heard both sides and have gone through the record of the case. The suit instituted by the respondents was held to be within time by the Trial Court and the petitioners had not impugned the

findings of the Trial Court by filing an appeal, cross appeal or cross-objections, before the Appellate Court under Order XLI rule 22, the Code. A party cannot be allowed to object, before an Appellate Court or Revisional Court, upon the findings on any issue of a subordinate court, without filing cross objections. Reliance is placed on the case of Khairati and 4 others v. Aleem-ud-Din and another, reported in PLD 1973 SC 295, wherein the Hon'ble Apex Court has held as under:

“It is no doubt true that a respondent can support a decree even on points decided against him, but a respondent cannot attack a decree or ask for its variation without a cross objection. In the present case, the trial Court had found as a fact that the suit for specific performance was not barred by time. Therefore, by contending that the suit was so barred, the respondent in this case was not seeking to support the decree as it was but rather to attack a finding in the decree; and this he could not do without filing any cross objection.”

Accordingly, the contention of the petitioner's counsel is not correct. However, the petitioners' counsel are correct in saying that respondents have failed to prove execution of the contract and the confirmation deed (Ex: P/4-A). According to Article 17(2)(a), the Qanoon-e-Shahadat Order-X, 1984 (“Q.S.O”), in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two witnesses. In case of Mst. Rasheeda Begum and others v. Muhammad Yousaf and others, (2002 SCMR 1089), the Hon'ble Apex Court has held as under:

“Unquestionably, an agreement to sell involves future obligations, therefore, if reduced to writing and after coming into force of Qanun-e-Shahadat Order, 1984, it is required by sub-Article 2(a) of Article 17, thereof to be attested by two male or one male and two female witnesses as the case may be.”

The contract, relied by the respondents, is in respect of the suit land which is recorded in the name of the petitioner Nos. 1 to 10 in the revenue record. The petitioner No. 11 is the executant of the Ex: P/4-A. Though he alongwith the petitioner Nos. 12 to 15 were proceeded against an ex-prate order, and the respondents had sought cancellation of the mutations of the petitioner Nos. 1 to 10 on the basis of the said contract, therefore, they should have proved execution of the contract through two marginal witnesses in accordance with Article 79, the Q.S.O. The respondents merely examined the scribe (PW-1) and one marginal (attesting) witness (PW-2) of the contract of sale. In this case, the scribe cannot be considered as marginal witness as he has not stated in his examination in chief that the parties executed (put signatures) on the contract of sale in his presence. He merely recognized his handwriting and signature on the contract. During his cross-examination, the PW-1 has stated as under:

“6. It is correct that the sale price was not paid in my presence.”

“11. At the time of writing, I had not gone through any power of attorney of Ameer Bibi in the name of Muhammad Azam.”

Hence, the scribe (PW-1) has not qualified the test of an attesting witness. The sole marginal witness of the contract of sale, the PW-2, has not stated in his examination in chief, that the parties executed the contract in his presence. He merely recognized his signature on the contract. The PW-2 in his cross-examination stated as under:

“2. It is correct that no payment was made in my presence.”

“10. It is correct that the lands of Faqir Muhammad are being cultivated by the Faqir Muhammad and his brothers from the time of their father till yet.”

“11. It is correct that the usufruct (crops) is being taken by the Faqir Muhammad and his brothers.”

“15. It is correct that since 1999, four tube wells have been installed on the disputed land. Abdul Rashid Siapad, Mukhtar Bangulzai etc used to cultivate crops as lessees and are paying the proprietary share (حق مالکانه) to the Faqir Muhammad and his brothers and to the successors of Dur Muhammad.”

The PW-3 is scribe of the confirmation deed, but he has not stated that the same was executed by the petitioner No. 11, before him. Same is the position of the marginal witness of this instrument i.e. PW-4. He has not mentioned that the petitioner No. 11 had put signature on Ex: P/4-A in his presence. The respondents have failed to prove execution of the Ex: P/4-A through two marginal (attesting) witnesses. The term “attested” has been expressly defined in section 3, the Transfer of Property Act, 1882 (“T.P.A”) as follows:

“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 executants 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 executants, or has received from the executants a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants; but it shall not be necessary that more than one of such witness shall have been present at the same time, and no particular form of attestation shall be necessary;”

Since, the respondents have failed to prove execution of the contract, therefore, the Ex: P/4-A executed in continuance thereof is of no legal effect. Hence, the respondents have failed to prove execution of the contract, therefore, the Appellate Court has committed material illegality by decreeing the suit on the basis of unproved documents.

8. The respondents appeared through attorney, the respondent No. 1. The respondent No. 1 deposed that the Ameer Bibi (late) had sold out the suit land through contract. The contract was not exhibited on record, however, a copy of it available on record reveals that the same was not executed by the deceased Ameer Bibi, but was executed on her behalf by her husband Muhammad Azam. However, the respondents have failed to bring on record any such power of attorney of Ameer Bibi (late). The attorney of respondents has not mentioned in his examination in chief, that he had paid Rs. 100,000/- to the Ameer Bibi (late) at the time of contract. In the suit, the respondents claimed that they purchased the entire share of the deceased Ameer Bibi while in Court's statement, he has stated that they had purchased 1/4th share of the land under tenancy of the petitioner Nos. 1 to 10. During his cross-examination, the respondent No. 1 stated as under:

“22. It is correct that the descendants of Ameer Bibi have not challenged the mutations on the name of defendants. Vol: stated that we have challenged.

The respondents have failed to prove sale of the suit land by the deceased Ameer Bibi. They failed to examine the two marginal witnesses of the contract of sale and failed to prove payment of Rs. 100,000/- to the Ameer Bibi (late). The witnesses examined by the

respondents have admitted that the petitioner Nos. 1 to 10 are in the long standing possession of the suit land from the time of their forefathers. The private respondents have not formally brought on record the contract. The petitioner Nos. 11 to 15 are the former owners of the suit land. They are the legal heirs of Ameer Bibi (late), but they have not ever, raised any objection in relation to mutation of the suit land in the names of the petitioner Nos. 1 to 10. The weaknesses of the evidence of the petitioner Nos. 1 to 10 do not entitle respondents for out-right decretal of their suit. Reliance is laced on the case of Agha Co-operative Housing Society Limited v. Syed Akhtar Ali and others, (1994 MLD 1747). In this case, the respondents failed to discharge burden of proof of purchase of the suit land through a contract, therefore, they cannot refer to the weaknesses of the petitioners' side. The respondents also failed to prove fraud in relation to the mutations in the names of the petitioner Nos. 1 to 10.

9. The respondents instituted suit and claimed ownership on the basis of an un-registered contract. The contract is not a sale deed but a contract of sale. The expression 'contract of sale' and its legal effect has been defined in section 54, the T.P.A, as under:

“Contract of sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself create any interest in or charge on such property.”

Since, the same does not create any right and or an interest in immovable property, therefore, suit for declaration on the basis thereof is not maintainable under section 42, the Specific Relief Act,

1877. The Hon'ble Apex Court in the case of Shah Muhammad v. Atta Muhammad, (2005 SCMR 969) has held as under:

“An agreement to sell being not a document of title cannot form the basis for the grant of a declaration under section 42 of the Specific Relief Act.”

10. The Appellate Court appears to have overlooked the aforementioned facts and legal position, hence committed material illegality while decreeing the suit of the respondents.

For the foregoing discussion, the impugned judgment and decree dated 3rd September, 2015 passed by the Majlis-e-Shoora Kharan in Civil Appeal No. 05/2015 is set aside. The judgment and decree dated 07th November, 2014 passed by the Court of Qazi Kharan in Civil Suit No. 91/2011 is resorted.

Parties shall bear their own costs.

Announced in open Court
Quetta: 01st December, 2022

Judge