

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
IInd Appeal No.10 of 2008

Dated: Order with signature of Judge(s)

For hearing of Main Case.

Date of Hearing : 5 May 2023.

Petitioner : Tahir Raza Qadri through Mr. Basim Raza, Advocate.

Respondent: : Nemo

J U D G E M E N T

MOHAMMAD ABDUR RAHMAN, J. - This is a Second Appeal that has been maintained under Section 100 of the Code of Civil Procedure, 1908 against the Judgement and Decree dated 27 October 2007 passed by Vth Additional District Judge Karachi (East) in Civil Appeal No.14 of 2005, upholding the dismissal of Suit No.1165 of 1994 by a Judgement dated 23 December 2004 and Decree dated 4 January 2005 passed by VIIIth Senior Civil Judge Karachi (East).

2. Suit No.1165 of 1994 was instituted by the Appellant claiming Specific Performance of a contract for the purchase of an industrial Plot bearing Plot No.2/14 and Plot 2/15, Sector 21 Korangi Industrial Area admeasuring 1200 square yards (hereinafter referred to as the "Said Property)". The Appellants basis for maintaining Suit No. 1165 of 1994 was that:

- (i) the Respondent had entered into an oral Agreement of Sale for the transfer of the Said Property on 29 September 1987 against a sale consideration of Rs. 300,000 (Rupees Three Hundred Thousand);

- (ii) on 29 September 1987 the Appellant paid a sum of Rs.100,000 (Rupees One Hundred Thousand) to the Respondent and a further sum of Rs. 200,000 (Rupees Two Hundred Thousand) was paid on 3 October 1987 each against receipts issued the Respondent and each confirming that the amounts were received by the Appellant through a Mr. Bahauddin Sarhandi who at that time was her husband;
- (iii) on account of the purported impending departure of the Respondent to the United States of America, the Respondent executed an unregistered General Power of Attorney dated 4 October 1987 attested by a "Assistant Commissioner and Additional City Magistrate First Class Court No. VIII Karachi East" in favour of Mr. Bahauddin Sarhandi to allow him to complete the transfer of the Said Property on behalf of the Respondent to the Appellant;
- (iv) in his capacity as an attorney of the Respondent Mr. Bahauddin Sarhandi on 12 October 1987 reduced the oral agreement into a written Agreement of Sale for the Said Property in favour of the Appellant enhancing the price to Rs, 400,000 (Rupees Four Hundred Thousand), obliging the Respondent to have a registered Indenture of Lease executed in her favour for the Said Property from the Karachi Development Authority (who is the lessor of the Said Property) and thereafter to receive the balance sale consideration of Rs.100,000 (Rupees One Hundred Thousand) against the registration of a Sale Deed; all of which was to be happen within a period of 4 years from the execution of the written Agreement of Sale i.e. by 11 October 1991;

- (v) that through an amendment to the Plaint on 29 July 1998 the Appellant brought onto the record of Suit No. 1165 of 1994, that he was put into possession of the Said Property by the Respondent through her attorney i.e. Mr. Bahauddin Sarhandi;

3. On 1 September 1988 Mr. Bahauddin Sarhandi divorced the Respondent and on account of which there was apparently an impasse as between the Respondent and Mr. Bahauddin Sarhandi caused by the Respondent not cooperating in having the Said Property leased into her name by the Karachi Development Authority and which she was unable to achieve herself as the original title documents of the Said Property were in the custody of Mr. Bahauddin Sarhandi. This compelled the Respondent to institute Suit No. 1579 of 1988 as against Mr. Bahauddin Sarhandi before the VIIth Senior Civil Judge Karachi (East) for the recovery of the title documents of the Said Property from the Respondent and which apparently was dismissed for non prosecution.

4. This impasse apparently continued until the year 1994 when the Appellant was informed that the Respondent was purportedly in Karachi and approached her to receive the balance sale consideration and to finalize the transaction. It is contended that at this time the Respondent demanded an extra amount of Rs. 200,000 (Rupees Two Hundred Thousand) which the Appellant refused to pay and which compelled him to institute Suit No.1165 of 1994 before the VIIIth Senior Civil Judge Karachi (East) on 19 September 1994.

5. The Respondent in her Written Statement has submitted that:
- (i) neither had she in her individual capacity entered into any Agreement of Sale for the transfer of the Said Property to the Appellant nor had she authorised Mr. Bahuddin Sarhandi to enter into any Agreement of Sale for the transfer of the Said Property to the Appellant;
 - (ii) without denying the receipts dated 29 September 1987 she “acknowledges the signature” of the Respondent on those documents;
 - (iii) she denied that she ever entered into an Agreement of Sale with the Appellant for the transfer of the Said Property and contends that the document was executed to frustrate her entitlement to the Said Property by Mr. Bahauddin Sarhandi post their divorce;
 - (iv) this Suit was part of a series of events which are ancillary to the divorce of the Respondent from the said Mr. Bahauddin Sarhandi and who has had Suit No. 1165 of 1994 instituted after a period of seven years through a third party to deprive the Respondent of her title to the Said Property;
 - (v) Suit No. 1165 of 1994 was barred under Article 113 of the First Schedule read with Section 3 of the Limitation Act, 1908;
 - (vi) that the General Power of Attorney dated 4 October 1987 was fraudulently executed and also was not admissible in evidence as having not been properly stamped nor was it

notarized and hence the same could not be relied on by the Appellant as the instrument on the basis of which he could claim specific performance for the transfer of the Said Property;

- (vii) that the possession that had purportedly been given by Mr. Bahauddin Sarhandi to the Appellant was managed to strengthen the Appellants contentions as to his claim to the title of the Said Property.

6. From the pleadings, the VIIIth Senior Civil Judge Karachi (East) framed the following issues:

1. Whether the suit is time barred under the Limitation Act?
2. Whether Respondent has executed Power of Attorney in favour of her ex-husband?
3. Whether the suit is under valued?
4. Whether possession of property had been handed over to Plaintiff by the Respondent?
5. Whether any contract was performed between Plaintiff and Respondent and Respondent is liable to perform her contractual liability?
6. Whether the advance earnest money was paid to the Respondent through her husband?
7. Whether the plaintiff is entitled for the relief of specific performance of contract regarding execution of registered sale deed in respect of suit property?
8. What should the decree be?

7. The matter was heard by VIIIth Senior Civil Judge Karachi (East) and was initially dismissed as being barred under Article 113 of the First

Schedule read with Section 3 of the Limitation Act 1908 by a Judgement dated 24 December 2002. Against that Judgement, Civil Appeal No.42 of 2003 was preferred before IVth Additional District Judge Karachi (East), who on 4 May 2004 was pleased to hold that Suit No. 1165 of 1994 was filed within time and remanded the matter to the VIIIth Senior Civil Judge Karachi (East) to decide the same afresh. No appeal was apparently preferred by the Respondent as against the Judgement dated 4 May 2004 passed by the IVth Additional District Judge Karachi (East) in Civil Appeal No.42 of 2003 and which issue, as to whether or not Suit No. 1165 of 1994 was instituted after the period mentioned in Article 113 of the First Schedule of the Limitation Act, 1908 had expired, had therefore attained finality and therefore should not have been considered any further.

8. Suit No.1165 of 1994 was reheard by the VIIIth Senior Civil Judge Karachi (East), who vide Judgement dated 23 December 2004 was once again pleased to dismiss the Suit holding that:

- (i) the General Power of Attorney dated 4 October 1987 issued by the Respondent in favour of her husband was not valid as:
 - (a) it had not been registered under Section 17 of the Registration Act 1908 and was fraudulently executed as it failed to disclose the relationship as between the Respondent and Mr. Bahuddin Sarhandi.
 - (b) Mr. Bahuddin Sarhandi and the Respondent admittedly had a strained relationship, the General Power of Attorney dated 4 October 1987 *ipso facto* was to be considered as not being "genuine".

- (c) the General Power of Attorney fails to indicate that Mr. Bahuddin Sarhandi is the husband of the executant of the Power of Attorney indicating that the document was not executed by the Respondent in favour of Mr. Bahuddin Sarhandi.
- (ii) the General Power of Attorney dated 4 October 1987 was not proved by the Appellant as he failed to examine the attesting witnesses to that document to prove that document and the document remaining unproved could not be relied on to prove the execution of the Agreement of Sale dated 12 October 1987;
- (iii) the possession of the Said Property had been delivered to the Appellant by Mr. Bahudddin Sarhandi in breach of his fiduciary obligation to the Respondent in her capacity as her husband and for which, on account of the relationship as between the Appellant and Mr. Bahuddin Sarhandi, required the Respondents consent and which not having been provided vitiated such an action;
- (iv) the fact as to whether possession of the Said Property had been delivered to the Appellant was not proved through independent witnesses and the evidence between the Appellant and Mr. Bahuddin Sarhandi being collusive could not be treated as being credible;
- (v) the payments of the amount of Rs. 300,000 (Rupees Three Hundred Thousand) pursuant to an Oral Agreement could not be believed as the signature was apparently forged by Mr. Bahuddin Sarhandi;

- (vi) that the payment of the sum of Rs. 300,000 (Rupees Three Hundred Thousand) having been made in cash could not be believed and therefore remained unproved;
- (vii) that no rights under Section 53 A of the Transfer of Property Act, 1882 could have been deemed to have been created in favour of the Appellant, as the requirements of that section were not met;
- (viii) that the suit was barred under Article 113 of the First Schedule of the Limitation Act, 1908 as the Appellant had admitted that the Respondent had refused to perform on the contract in 1989;
- (ix) that Mr. Bahuddin Sarhandi should have been impleaded as a defendant and the suit was therefore barred for misjoinder;
- (x) that the Suit had been incorrectly valued under the Suits Valuation Act, 1887.

9. The Appellant preferred Civil Appeal No.14 of 2005 against the Judgement dated 23 December 2004 and Decree dated 4 January 2005 before the Vth Additional District Judge Karachi (East) and who was pleased to hold that:

- (i) the issue as to whether or not Suit No. 1165 of 1994 was instituted after the period mentioned in Article 113 of the First Schedule of the Limitation Act, 1908 had expired had been settled in the Judgement dated 4 May 2004 passed by the IVth Additional District Judge Karachi (East) in Civil Appeal No.42 of 2003 and had actually not been decided by the

VIIIth Senior Civil Judge Karachi (East) in the Judgement dated 23 December 2004;

- (ii) the version of the events as stated by the Appellant in respect of the transaction of sale, execution of power of attorney and receipts of payment, acknowledging the sale consideration paid was full of contradictions and did not inspire confidence;
- (iii) That the Agreement of Sale dated 12 October 1987 was based on a General Power of Attorney dated 4 October 1987 and two receipts which were not proved as:
 - (a) the payment of Rs. 100,000 (Rupees One Hundred Thousand and Rs. 200,000 (Rupees Two Hundred Thousand) had been noted on the receipts as having been made to Mr. Bahuddin Sarhandi was in conflict with the pleadings and evidence wherein it had been stated that the payment had been made directly to the Respondent and which contradiction created a doubt on the credibility of the Appellants case;
 - (b) the receipts were prepared on the same day as the interpolations that existed on both the documents were identical in nature giving an indication that the receipts were "manufactured" by the Appellants and Mr. Bahuddin Sarhandi;
 - (c) the receipts indicate the total sale consideration payable to be Rs. 300,000 (Rupees Three Hundred Thousand) while the Agreement indicated that a total amount of Rs. 400,000 (Rupees Four Hundred Thousand) was payable by the Appellants and which could not be reconciled by Mr. Bahuddin Sarhandi during cross examination;
 - (d) as no registered Indenture of Lease had been issued by the Karachi Development Authority in respect of the Said Property, the General Power of Attorney dated 4 October 1987 could not and did not require to be registered under Section 17 of the Registration Act, 1908;

- (e) the General Power of Attorney dated 4 October 1987 was not notarized and not executed on a stamp paper of proper value and therefore inadmissible;
 - (f) the General Power of Attorney dated 4 October 1987 had a clause authorizing Mr. Bahuddin Sarhandi to take possession of the Said Property which could not be reconciled against the fact that possession of the Said Property had been handed over by the Karachi Development Authority to the Respondent on 15 September 1987 and the possession having been handed over by the Karachi Development Authority to the Respondent prior to the execution of the General Power of Attorney dated 4 October 1987 would cast doubt as to the need to mention such a clause in the power of attorney thereby questioning the veracity of the execution of the General Power of Attorney dated 4 October 1987;
 - (g) that the attesting witnesses to the General Power of Attorney dated 4 October 1987 having not been called to verify the contents of that document rendered it as not being proved and consequentially the capacity of Mr. Bahuddin Sarhandi to execute the Agreement of Sale dated 12 October 1987 on the basis of a General Power of Attorney dated 4 October 1987 had not been established vitiating that document,
- (iv) the fact that the Respondent did not adduce evidence personally and that the evidence that was adduced by her attorney having not been adduced in accordance with law was inconsequential as the burden fell on the Appellants to prove all the issues that had been settled by the VIIIth Senior Civil Judge Karachi (East) in Suit No.1165 of 1994 and not the Respondent.
 - (v) the valuation of the Suit had not been made in accordance with the market valued as required by the Suits Valuation Act, 1877.

10. That being aggrieved and dissatisfied by the judgment dated 27 October 2007 passed by the Vth Additional District Judge Karachi (East) in Civil Appeal No.14 of 2005 Mr. Basim Raza, on behalf of the Appellant contended that the entire case of the Appellant rested on proving the General Power of Attorney dated 4 October 1987. He stated that the attorney of the Appellant was not able to produce the original of the General Power of Attorney dated 4 October 1987 in the evidence as it had been lost and therefore he had produced a photocopy. He further contended that no objection was raised as to the production as to the photocopy of the General Power of Attorney dated 4 October 1987 and as such it was correctly admitted in evidence. He further contended that as per the terms of the General Power of Attorney dated 4 October 1987 the following clauses indicated the capacity of Bahauddin Sarhandi to sell and hand over possession of the Said Property:

“ ... (i) To receive possession of my property i.e. industrial plots 2/14 & 2/15 in Korangi Industrial Area and to enter on this property.

(ii) To sale the above property and for that purpose to execute a sale agreement dated 12 October 1987 and receive payment for it and pass on a valid receipt thereof.”

11. He contended that on the basis of such power the said Bahauddin Sarhandi was able to sell the Said Property to the Appellant and had received good consideration on behalf of the Respondent from the Appellant in this regard. He relied on the judgment reported as **Sahibzada Anwar Hamid vs. Messrs Topworth Investments (Mascau) Ltd.**¹ in support of his contention that once a Power of Attorney is authenticated in accordance with the provisions of Article 95 of the Qanun e Shahdat Order, 1984 a presumption of validity is to be attached to that document no further attesting witness would be required to prove that document. In that decision it was held that:

“ ... 25. As far as Contentions Nos.13 and 14 are concerned, power of attorney is not a document required by law to be attested by two witnesses and, therefore, Article 17 of the Qanun-e-Shahadat Order, 1984 was not applicable. As far as applicability of Article 95 is concerned it only raises a presumption if attested in accordance with the provisions of the said Article, but it does not require that a power of attorney to be valid must be attested by the persons mentioned in the said section. The powers of attorney of behalf of respondents Nos. 1, 3,

¹ 2003 YLR 2843

4 and 5 bear a notarial stamp but it is not the language which is not understandable because these were attested in a foreign country in a language other than English. In any case unless respondents Nos.1, 3 to 5 had disputed the authority of their counsel to represent them, the objection of the learned counsel for the petition eased on Article 95 is not sustainable. As observed above, since respondent No.1 was being duly represented by a recognized agent, and basically the claim of the petitioner-plaintiff was against respondents Nos.1 and 2, application for leave to appear and defend could be validly considered on behalf of respondents Nos.3 to 5.

25-A As far as Contention No.15 is concerned, merely because the powers of attorney did not bear the stamp, these4 were not invalid and the defect was curable under section 35 of the Stamp Act as observed by the Honourable Supreme Court in the case of *Sirbuland, supra*

26. As far as Contentions Nos.16 and 18 are concerned, the question whether respondents Nos.1 to 6 had duly been served is not relevant because of my findings that the application for leave to appear and defend was competently filed on their behalf.”

12. He also relied upon a decision reported as **Saifullah Khan vs. Javed Iqbal**² to support his contention that a Power of Attorney is not a document that is required to be attested. The Supreme Court of Pakistan in that decision has held that:

“ ... 5. We have gone through the provisions of Article 79 of the Qanun-e-Shahadat. It says that 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, that also if they are alive. In the instant case, no material was produced before us by the learned counsel for the petitioners showing that the powers of attorney compulsorily needed attestation of two witnesses at least. In such view of the fact the ground taken by the learned counsel for the petitioners also fails.

13. Finally, regarding the objection as to Suit valuation that had been taken by both the Courts, while admitting the deficiency in the Court Fees, relied upon the judgment titled **Anjuman-E-Khuddam-UI-Qur’an vs. Lt. Col. (R) Najam Hameed**³ in which it was held that an opportunity can be given at any stage to remedy the deficiency the Judgement stating that :

“ ... 8. The learned Trial Court also gave its findings on Issue No.4 with regard to the objection of the Court Fee where it was held that since it was not pressed therefore it was decided against the particular Defendants/Appellant. We find these observations of the learned Trial Court to be erroneous. It has been observed by this Court in the case reported as *Allah Yar v. Muhammad Riaz and others* (PLD 1984 SC4 489) wherein it has been held as under:

“6.....The mere fact that at the trial the defendant had not pressed the question of deficiency in the court-fee, does not relieve the Court of the obligation of looking into the matter, determining the correct amount of the court-fee and seeing

² 1997 SCMR 1210

³ PLD 2020 SC 390

that the deficiency is made up. In any case, the petitioner had the knowledge that he had grossly undervalued his plaint for purpose of court-fee and yet he did not make up the deficiency within time or even up to the date of final decision of the case, nor did he ever apply for extension of time under section 149 C.P.C. As such it is evident that he was not only negligent but also contumacious and his omission to make up the deficiency in the court-fee was deliberate and mala fide..."

In the instant case, the value for the purpose of Court Fee was fixed by the Plaintiff/Respondent No.1 himself as rupees two crore in Paragraph No.13 of the plaint where it was mentioned that the Court Fee will be paid; which he was also bound to pay under Section 7(iv)(c) of the Court Fees Act, 1870. But contumaciously the Plaintiff/respondent No.1 never paid the Court Fee before the learned Trial Court; before the First Appellant Court he paid Rs.15/- only; and in the learned Lahore High Court he also paid Rs.15/- only. Instead of paying Rs.15,000/- before the First Appellate Court as well as before the learned High Court, he cleverly managed to avoid the payment of Court Fee while wrongly relying upon the decision of the learned Trial Court on Issue No.4. However, we are conscious of the fact that for dismissal of the Suit on the basis of non-payment or deficiency of Court Fee, Plaintiff/Respondent No.1 was entitled to be granted at least one opportunity by the Trial Court as well as the First Appellate Court and the High Court, which opportunity never extended. Plaintiff/Respondent No.1 was bound to pay Rs.15,000/- Court fee before each Court, therefore, he is directed to pay the Court Fee of Rs.15,000/- before the Trial Court and make up the deficiency of Court Fee before the First Appellate Court and the High Court within two months from today, otherwise, if the Court Fee is not paid or deficiency is not made good within stipulated time his Suit, Appeal and Revision will be deemed to have been dismissed for non-payment of Court Fee."

14. I have heard the Counsel for the appellant and have perused the record. The Issues that required determination in this second appeal are as under:

- (i) As to whether the General Power of Attorney dated 4 October 1987 can be adduced in evidence on behalf of the Appellant so as to prove the capacity of Mr. Bahauddin Sarhandi to execute the Agreement of Sale dated 12 October 1987 on behalf of the respondent?
- (ii) As to whether the Agreement of Sale dated 12 October 1987 could have been executed by Mr. Bahauddin Sarhandi on the basis of the General Power of Attorney dated 4 October 1987?
- (ii) Whether the appellant is entitled to Specific Performance on the Agreement of Sale dated 12 October 1987?
- (iii) Whether the suit had been properly valued under the provisions of the Suits Valuation Act 1887?

A. Whether the General Power of Attorney dated 4 October 1987 can be adduced in evidence on behalf of the Appellant so as to prove the capacity of Mr. Bahauddin Sarhandi to execute the Agreement of Sale dated 12 October 1987 on behalf of the Respondent?

15. The General Power of Attorney that is being relied on by the Appellant was purportedly executed by the Respondent in favour of the Appellant on 4 October 1987. It is noted that a photocopy of the document was adduced in evidence by the Appellant as secondary evidence on the ground that the original had been lost. No objection seems to have been taken to it being adduced in evidence by the Respondent. I am in agreement with Mr. Basim Raza that as no objection was taken to the secondary evidence being adduced by the Appellant, it can be considered as having validly been adduced in evidence. Reliance in this regard may be made to the decision of the Supreme court of Pakistan reported as **Muhammad Aslam vs. Mst. Gulraj Begum**⁴ wherein it was held that:

“ ... He submitted that since the power of attorney (Ex. P/7) was not executed before a Notary Public or Court, therefore, no judicial notice could be taken thereof. It is correct that the Court could not take judicial notice of the power of attorney as it did not bear the seal of Notary Public or Court. It is also correct that under the provisions of section 67 of the Evidence Act, the power of attorney was required to be proved to be signed by the respondent without which it was inadmissible in evidence but the mode of proof of a document is a question of procedure and is capable of being waived. (See Principles and Digest of the Law of Evidence, by M. Munir, Pakistan Edition, page 740). Further, where the objection as to the manner of proof of a document is not taken at the time the document is sought to be proved in the lower Court and the document is freely referred to by the parties before the lower Court, it cannot be raised subsequently (Ibid). He, therefore, could not raise objection to the admissibility of Ex. P/7 for want of proof subsequently in the appeal. There is ample authority in support of this proposition. Reference may be had to Gopal Das and another v. Sri Thakurji and others (A I R 1943 P C 83), Abdullah and others v. Abdul Karim and others (P L D 1968 S C 140), Malik Din and another v. Muhammad Aslam (P L D 1969 S C 136) and Ghulam Muhammad and others v. Mehtab Beg and others I (1983 S C M R 849).”

With regard as to the presumptions regarding a Power of Attorney, Article 95 of the Qanun-e-Shahadat Order, 1984 provides that:

“ ... **95. Presumption as to powers-of-attorney.** The Court shall presume that every document purporting to be a power-of-

⁴ 1989 SCMR 1

attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, Pakistan Consul or vice-Consul, or representative of the Federal Government, was so executed and authenticated.

(Emphasis is added)

The provisions of Article 95 of the Qanun-e-Shahadat 1984 have been held to be mandatory⁵. Once a document has been claimed by any one of the class of persons indicated in that Article to have been executed before and authenticated by such a person, a presumption of validity is attracted to such document as to having been so executed and authenticated. Thereafter the burden of proving that the document has not been so executed and authenticated by the persons indicated in that document will pass onto the person exerting that the document has not been so executed or authenticated.⁶

16. It is noted that the General Power of Attorney dated 4 October 1987 has purportedly been attested by an “Assistant Commissioner and Additional City Magistrate First Clause Court No. VIII Karachi East”. While the expression Magistrate is not defined within the Qanun-e-Shahadat Order 1984, it is defined in Sub-Section (31) of Section 3 of the General Clauses Act, 1897 as under:

“ ... *“Magistrate” shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.*”

It seems that the expression “Magistrate” as defined in Sub-Section (31) of Section 3 of the General Clauses Act, 1897 is not exhaustive and does not only include “Magistrates” as exercising powers under the Code of Criminal Procedure 1898 and can include any Magistrate including, but not limited to, the “Assistant Commissioner and Additional City Magistrate First Clause Court No. VIII Karachi East” . Reliance in this regard may be

⁵ See Muhammad Ramzan vs. The Sate PLD 2007 Khi 1; Masood Ahmed Khan vs. Khalid Anwar Khan 2023 CLC 176.

⁶ See Ejaz Iqbal vs. Additional District Judge and others 2022 CLC 947

placed on the decision reported as In **Re: Panchanatham Pillai**⁷ in which it was held that:

“ ... The definition of Magistrate in the General Clauses Act is not confined to Magistrates exercising jurisdiction under the Criminal Procedure Code; it merely includes them.”

It would therefore, seem that prima facie the General Power of Attorney dated 4 October 1987 was **executed before and authenticated by** the Assistant Commissioner and Additional City Magistrate First Clause Court No.VIII Karachi East and to that extent a presumption of validity should be attached to it.

17. The question that is to be asked is once the document meets the requirement of Article 95 of the Qanun-e-Shahadat Order 1984 does its **attestation** still need to be proved under the provisions of Article 79 of the Qanun-e-Shahadat Order 1984 which reads as under:

“ ... 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.

(Emphasis is added)

This section may be read in conjunction with the provisions of Article 17 of the Qanun e Shahdat Order, 1984.

“ ... 17. *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,

⁷ AIR 1929 Mad 487

- (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."*

(Emphasis is added)

18. A Power of Attorney has been held by the Supreme Court of Pakistan to be a document that creates financial or future obligations and when reduced to writing must be attested. Reliance in this regard may be placed on the decision reported as **Noor Hasan vs. Ali Sher**⁸ wherein it was held that:

“ ... 7. *Insofar as the execution of the power of attorney is concerned, we are of the opinion that indeed it has not been proved in accordance with Article 79 of the Qanun-e-Shahadat Order, 1984 which enunciates that if a document is required by law to be attested, it must be proved through two attesting witnesses if they are alive and subject to the process of the Court and capable of giving evidence. In terms of Article 17(2)(a) of the said Order any matter pertaining to financial or future obligations, if reduced in writing, same would have to be attested by two men, or one man and two women.*”

This decision is apparently in conflict with the decision relied on by Mr. Basim Raza reported as **Saifullah Khan vs. Javed Iqbal**⁹ wherein the Supreme Court of Pakistan had opined that as they had not been assisted as to a law that confirmed that a Power of Attorney required attestation, the Court had apparently dispensed with enforcing such requirement. I note that this decision is an order of two Judges of the Supreme Court of Pakistan and which is also an order refusing Leave to Appeal and therefore does not have any binding authority. This is in contrast with the decision reported as **Noor Hasan vs. Ali Sher**¹⁰ which aside from being a decision of the Supreme Court of Pakistan as opposed to an order refusing Leave to Appeal was also a Judgement authored by three Judges of the Supreme Court of Pakistan and on both counts must be followed.

⁸ 2015 SCMR 452

⁹ 1997 SCMR 1210

¹⁰ 2015 SCMR 452

19. On the basis of the decision of the Supreme Court of Pakistan I have considered as to whether there is a distinction to be made with regards to the attestation of document as required under Sub-Clause (a) of Clause (2) of Article 17 read with Article 79 of the of the Qanun e Shahdat Order, 1984 as compared with its authentication and execution under Article 95 of the Qanun e Shahdat Order, 1984. Two distinctly separate words being contained in the same statute would immediately imply that a difference is being made between the expressions “Execution” and “Attestation” in that statute. The word “Attestation” and “Execution” have been defined in Blacks Law Dictionary to mean

“ ... *Attestation: The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness*”

“ ... *Execution: The signing, sealing, and delivery of a deed*”

While noting that a difference has been made between the expressions “Execution” i.e. an action of signing the document and “Attestation” i.e. the action of the witnessing of a document, it would seem that under Article 95 of the Qanun e Shahdat Order, 1984 the presumption is as to the validity of the execution by the signatory of that document and also as to the authentication by the official specified in Article 95 of the Qanun e Shahdat Order, 1984, the presumption however does not go as far as to the “attestation” of the Power of Attorney. There are two interpretations that naturally follow, the first is that when a Power of Attorney having been produced by a person in evidence inconformity with the provisions of Article 95 of the Qanun e Shahdat Order 1984, is denied by the opposing side, either the attestation of the document would independently need to be verified by the person relying on the Power of Attorney under the provisions of sub-clause (a) of Clause (2) of Article 17 read with Article 79 of the of the Qanun e Shahdat Order, 1984, in effect stating that despite the presumption of validity created by Article 95 of the Qanun e Shahdat Order 1984, the requirements of Sub-Clause (a) of Clause (2) of Article 17

read with Article 79 of the of the Qanun e Shahdat Order, 1984 would still be required to be complied with rendering the presumption at nought. In the alternative an interpretation could be cast that there was no need to prove the attestation of Power of Attorney under the provisions of Sub-Clause (a) of Clause (2) of Article 17 read with Article 79 of the of the Qanun e Shahdat Order, 1984, in effect stating that that the provisions of Article 95 of the Qanun e Shahdat Order, 1984 would override those provisions. Where two interpretations are available and keeping in mind that the former interpretation would render the entire purpose of the presumption of the provisions of Article 95 of the Qanun e Shahdat Order, 1984 as redundant, I am of the opinion that the latter interpretation must be adopted.

20. I am therefore of the opinion that the General Power of Attorney dated 4 October 1987 having been adduced by the Appellant in evidence, albeit as secondary evidence, with no objection having been made to the production of that document by the Respondent and as the General Power of Attorney dated 4 October 1987 had been authenticated by a Magistrate in conformity with the provisions of Article 95 of the Qanun e Shahdat Order, 1984 a presumption of its execution must be upheld, there being no secondary requirement on the part of the person relying on that document to prove its attestation. The presumption as to the validity of the document having been established by the Appellant, the burden therefore lay on the Respondent to disprove its attestation.

21. It is interesting to note that the Respondent instead of deposing herself has adduced evidence through an attorney. The validity of such evidence through an attorney has been considered by the Supreme Court of India in the decision reported as **Man Kaur vs. Hartar Singh Sangha**¹¹ and in which it was held that:

¹¹ 2010 10 SC 512

“ ... 12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such

attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

The attorney who has adduced evidence on the part of the Appellant admittedly having no personal knowledge about the execution of the General Power of Attorney dated 4 October 1987 could not have therefore adduced evidence on behalf of the Respondent as to the circumstances regarding the execution of the document and his testimony must be regarded as hearsay evidence and would be inadmissible. That being the case the Respondent would have failed to adduce any valid evidence to rebut the presumption of the validity of the General Power of Attorney dated 4 October 1987 rendering that document as having been proved by the Appellant as having been validly executed and adduced in evidence confirming the capacity of the Appellant to execute the Agreement of Sale dated 12 October 1987 on behalf of the Respondent.

22. I am therefore of the opinion that both the Judgment and Decree of the Additional District Judge Karachi (East) in Civil Appeal No.14 of 2005, who upheld the Judgement and Decree passed by VIIIth Senior Civil Judge Karachi (East) have erred in holding that the General Power of Attorney dated 4 October 1987 had not been attested properly, as they each failed to consider the impact of that document having been authenticated by a magistrate in accordance with Article 95 of the Qanun e Shahdat Order, 1984. The document having been authenticated in accordance with Article 95 of the Qanun e Shahdat Order, 1984 raises a presumption of the validity of the General Power of Attorney dated 4 October 1987 and such presumption was not rebutted by the Respondent in her evidence. I am therefore inclined to hold that the General Power of Attorney dated 4 October 1987 was validly executed and authenticated and is a valid

document authorising Mr. Bahauddin Sarhandi to act on behalf of the Respondent.

B. Whether the Agreement of Sale dated 12 October 1987 could have been executed by Mr. Bahauddin Sarhandi on the basis of the General Power of Attorney dated 4 October 1987?

23. It has come on record that on basis of the General Power of Attorned Mr. Bahuddin Sarhandi had executed an Agreement of Sale dated 12 October 1987 in favour of the Appellant purporting to transfer the Said Property to the Appellant. The Agreement of Sale dated 12 October 1987 was preceded by an oral agreement and two receipts for Rs. 100,000 (Rupees One Hundred Thousand) and Rs, 200,000 (Rupees Two Hundred Thousand) dated 29 September 1987 and 3 October 1987 respectively and which were all subsequently recorded in a written agreement. The rules of evidence regarding the impact of an oral agreement being subsequently reduced into writing by a written agreement are contained in Article 102 of the Qanun e Shahdat Order, 1984 and which states that:

“ ... 102. Evidence of terms of contracts, grants and other disposition of property reduced to form of document:

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. ”

The Article codifies a common law doctrine referred to as the “Parol Evidence Rule” and which is a rule that preserves the integrity of a written document.¹² The rule prohibits the parties from amending the meaning of the written document through the use of previous oral declarations that are

¹² See Muhammad Shafi and other vs. Allah Dad Khan PLD 1986 SCMR 519; Ilam Din vs. Mubarik Ali 1989 SCMR 1001; Faqir Muhamamd vs. Abdul Momin PLD 2003 SC 594;

not stated in the document itself. Similarly, if a party had discussed or negotiated terms of a contract, the reduction of those discussions and negotiated terms into a written document means that they had intended to integrate those oral terms into that written document and which must be considered to be the receptacle of the entire agreement as between the parties. The rule has found itself to have been adopted in legal colloquial parlance in our courts by the expression “the document speaks for itself”. The rule and the exception to the rule was succinctly clarified by the Supreme Court of Pakistan in the decision reported as **Muhammad Shafi and other vs. Allah Dad Khan**¹³ wherein it was held that:

“ ... Before I advert to the factual aspect of the case it would be prepare to resolve the legal controversy. In support of his first contention as to the inadmissibility of the oral evidence Mr. A. R. Sheikh relied on a passage in the Principles and Digest of the Law of Evidence by M. Monir at page 887 which runs as under:

“ The Privy Council has distinctly held that in construing a document oral evidence of the intention of the parties to the document is inadmissible and that the express terms of a document cannot be contradicted by any oral evidence of the intention of the parties.”

(Balkishen Das vs. Legge 22 A 149 (PC) and K.S. Feroz Shah vs. Sohbat Kha etc. AIR1933 PC 178)

“ The general rule “ says Chief Justice Tindal in *shore v. Wilson* “ it Take to be that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves, and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument it is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument nor any party in taken under it, for the ablest advice would be controllers and the clearest title undermined if, at some future parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.”

It may here be said that the principle cited is applicable only where both the parties rely on the document in which case there is prohibition to admit oral evidence qua the intention of the parties to the document. ...

¹³ PLD 1986 SC 519

There cannot be any cavil with this principle. But in *Balikshen Das and others (supra)*, the Privy council while construing section 92 of the Evidence Act nevertheless said that this was subject to the provisos. In effect therefore, whether the case is one where the validity of the sale itself is in question either because of misrepresentation, fraud, mistake or failure of consideration, the evidence led is not intended to alter the terms of the documents but to prove its invalidity."

To summarise the Supreme Court of Pakistan has held that once the agreement has been reduced into writing, the written document is not to be contradicted by oral evidence unless the validity of the document itself is in question in which case the proviso to Article 102 of the Qanun e Shahdat Order 1984 will permit oral evidence to be led.

24. In the circumstances it would be apparent that the purported oral agreement as entered into between the Appellant and the Respondent through Bahuddin Sarhandi would incorporate all that preceded it i.e. the oral agreement, the receipt dated 29 September 1987 and the receipt dated 3 October 1987 and should be considered as the receptacle of the final agreement as between the parties. The execution of the Agreement of Sale dated 12 October 1987 is admitted by all the parties who were signatories to the document i.e. the Appellant and Mr. Bahuddin Sarhandi and therefore would not need to be proved through any attesting witnesses as would otherwise would have been required to have been proved on account of the requirements of sub-clause (a) of Clause (2) of Article 17 read with Article 79 of the of the Qanun e Shahdat Order, 1984. The sole question that remains is on the basis of the evidence led by the parties is as to whether the Agreement of Sale dated 12 October 1987 can be held invalid.

25. The Appellant in his deposition states as under:

" ... *I have family terms and good relations with the husband of Defendant namely Mr. Bahauddin Sarhandi. I used to visit and the residence of Mr. Bahauddin Sarhandi. Mr. Bahauddin Sarhandi Told me that his wife namely Tanveer Amna, the Defendant in this suit wants to sell the two Industrial plots bearing No. 2/14 and 2/15 sitaute at KDA Karachi*

Measure 1200 square yards. Mrs. Tanveer Aman through her husband namely Bahuddin settled the sale transaction orally and the Defendant agreed to sell the both plots for an amount of Rs.4,000,000. I paid an amount of Rs. 1,00,000 on 29-9-1987 and second advance amount of Rs. 2,00,000/- on 03-10-1987 and the defendant herself executed the receipt of the amount. The advance amount of Rs, 3,00,000/- of the total sale consideration was received by the Defendant. ... Bahauddin Sarhandi being attorney of the Defendant entered into a sale agreement with the Plaintiff. In view of the above payment the husband of the Defendant handed over all the original title documents to me. The husband of the Defendant delivered the possession of the suit plots to me which is still with me.

In his deposition on behalf of the Appellant Mr. Bahauddin Sarhandi had stated that:

“ ... 3. *I say that on the very second day after receiving the money the defendant disclosed to me that she was leaving on 4.10.1987 for U.S.A via Cairo, when I asked her about the sale of these plots, and transfer/mutation of these plots in the name of plaintiff, she informed me that I am ready to execute the power of attorney in your favour and in my absence you execute/sign the written sale agreement on my behalf. She further disclose to me leaving the Pakistan that you may enter in written agreement for the sale of these two plots for Rs.400,000/-. When plaintiff approached me for execution of sale agreement, and I informed him that plaintiff had backed out from her words, and informed him about he change of price, plaintiff with the words that in her absence he had no alternate and decided to enter in agreement for Rs.400,000/- for the sale of these two plots. After execution of sale agreement in writing I also handed over the physical possession of the suit plots to the plaintiff.”*

In his cross examination Mr. Bahauddin Sarhandi has stated as follows:

“ ... *It is incorrect to suggest that the General Power of Attorney was executed by me in back date. It is also incorrect that the sale agreement was also prepared after thoughts in back date.”*

26. The evidence led by both the Appellant and his witness i.e Mr. Bahuddin Sarhandi prima facie shows that:

- (i) the entire transaction was conducted by Mr. Bahuddin Sarhandi purportedly on behalf of the Respondent;
- (ii) the benefit that was to be received by the Respondent i.e. the sale consideration of Rs. 300,000 (Rupees Three Hundred Thousand) as indicated in the two receipts was received by Mr. Bahuddin Sarhandi;

- (iii) the fact that the sale consideration of Rs. 300,000(Rupees Three Hundred Thousand) as indicated in the two receipts was received by Mr. Bahuddin Sarhandi is contradicted by the Appellant in his deposition where he states that *“the advance amount of Rs, 3,00,000/- of the total sale consideration was received by the Defendant”*;
- (iv) it is admitted that the Mr. Bahuddin Sarhandi has without receiving the entire sale consideration transferred both the title documents of the Said Property and the Possession of the Said Property to the Appellant who was a “close family friend” to the detriment of the Respondent;
- (v) from the oral evidence it is apparent that neither the Appellant nor Mr. Bahuddin Sarhandi had made any attempt to get the written consent of the Respondent or to ensure that the transaction was in any way documented by the Respondent personally;
- (vi) the receipts that were purportedly signed by the Respondent and which recorded that cash had been handed over to Bahuddin Sarhandi which could not be corroborated as having been received by the Respondent and which fact was also contradicted by the Appellants in their evidence further casting a doubt on the veracity of payments of such amounts having been made to the Respondent.

27. Under Section 215 of the Contract Act, 1872 it has been held that:

“ ... 215. *Right of principal when agent deals, on his own account in business of agency without principal's consent.-*

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him."

(Emphasis is added)

The Section has been interpreted by the Supreme Court of Pakistan in the decision reported as **Haq Nawaz and others vs. Banaras**¹⁴ to state that:

" ... since long it is well established that an attorney cannot lawfully make transfer of a property under agency in his own name, or for his benefit, or in favour of his associates, without explicit consent of the principal, and in the event he does so, the principal, under the mandate of section 215 of the Contract Act, has a right to repudiate such transaction. Mst. Channan Jan having disowned the subject transaction, the same was rightly annulled as noted above."

Similarly, the Supreme Court of Pakistan in the decision reported as **Muhamamd Ashraf vs. Muhammad Malik**¹⁵ has been held that:

" ... The consistent view of this Court is that if an attorney on the basis of power of attorney, even if "general" purchases the property for himself or for his own benefit, he should firstly obtain the consent and approval of principal after acquainting him with all the material circumstances.

(Emphasis is added)

As is apparent these decisions of the Supreme Court of Pakistan an obligation is placed on an Attorney to act in a transparent manner when taking an action apparently to the detriment of the Executant of that Power of Attorney i.e. his principal. If the actions of the Attorney are found to be otherwise, any actions taken by the Attorney can be repudiated by the principal.

28. The oral testimony of both the Appellant and Mr. Bahuddin Sarhandi to a reasonable person would indicate that the Agreement of

¹⁴ 2022 SCMR 1068

¹⁵ PLD 2008 SC 389

Sale dated 12 April 1987 which was purportedly entered into by Mr. Bahuddin Sarhandi on behalf of the Respondent was entered into collusively with an intent to defraud the Respondent of her right to the Said Property. The entire transaction from the Power of Attorney dated 4 October 1987 to the execution of receipts dated 29 September 1987 and 3 October 1987 and the execution of the Agreement of Sale dated 12 April 1987 were planned by the Appellant and Mr. Bahuddin Sarhandi in a manner that the transfer of the Said Property could be made without the knowledge of the Respondent and to each of their personal advantage. This being done without the knowledge of the Respondent was prima facie in violation of the provisions of Article 215 of the Contract Act, 1872 and which would have given the Respondent the right to maintain a *lis* to repudiate the transaction. For whatever reason the Respondent did not avail the opportunity to invalidate the Agreement of Sale dated 12 October 1987 and until the same was maintained by her the Agreement of Sale dated 12 October 1987 would remain valid.

29. I am therefore of the opinion that the both the Vth Additional District Judge Karachi (East) and the VIIIth Senior Civil Judge Karachi (East) have erred in holding that the Agreement of Sale dated 12 October 1987 had not been proved as it had been executed by Mr. Bahuddin Sarhandi who had lacked the capacity to enter into the Agreement of sale dated 12 October 1987 on the basis of the General Power of Attorney dated 4 October 1987. The Agreement of Sale while prima facie collusive and perpetuating a fraud on the Respondent having not been repudiated by her under Section 215 of the Contract Act, 1872 remains a valid document.

C. Whether the Appellant is entitled to Specific Performance on the Agreement of Sale dated 12 October 1987?

30. The perimeters for granting Specific Performance of an Agreement are codified in Section 22 of the Specific Relief Act, 1877 as under:

“ ... Discretion as to decreeing specific performance

22. The jurisdiction to decree specific performance is *discretionary*, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.”

The Supreme Court of Pakistan in the decision reported as **Muhammad Abdur Rehman Qureshi vs. Sagheer Ahmad**¹⁶ in respect of the discretion that vests in the court to grant specific performance has held that:

“ ... 16. *Perusal of Section 22 of the Specific Relief Act, 1877 as interpreted by this Court makes it abundantly clear that the Court has discretion to decline specific performance of an agreement even in the absence of an obvious impediment in this behalf and despite the fact that such agreement may possess all necessary particulars entitling the specific performance of the contract. It declares that specific performance is essentially an equitable relief which can lawfully be declined if the Court comes to the conclusion that it is unjust and inequitable to do so. For determining where the relief of specific performance is to be granted, the circumstances under which the contract is executed and the conduct of the parties at that time and thereafter may be taken into consideration. The illustrations given in section 22 of the act pertain to unforeseen circumstances and hardships that may be inflicted upon a party through specific performance in contradistinction to lack of such hardships as a consequence of failure to specifically perform the contract. Illustrations are not exhaustive but are indicative of the discretion available with the Court which must be exercised on the basis of settled judicial principles. It may be emphasized*

¹⁶ 2017 SCMR 1696. See also **Ghulam Nabi vs. Muhammad Yaqoob** PLD 1983 SC 344; **Arif Shah vs. Abdul Hakeem Qureshi** PLD 1991 SC 905; **Mussarat Shukat Ali vs. Safia Khatoon** 1994 SCMR 2189; **Rab Nawaz vs. Mustaqeem Khan** 1999 SCMR 1362; **Liaqat Ali Khan vs. Falak Sher** PLD 2014 SC 506; **Muhammad Riaz Hussain vs. Zahoor ul Hassan** 2021 SCMR 431; **Muhammad Jamil vs. Muhammad Arif** 2021 SCMR 1108

that the discretion must be relatable to the circumstances in which the agreement came about, subsequent conduct of the parties and the consequences of grant or refusal of the relief of specific performance."

31. The perimeters set by the Supreme Court of Pakistan in its decision indicates that even where an Agreement of Sale may be found to be validly subsisting, Specific Performance of that agreement may be declined by this court in the circumstances where it is "unjust and inequitable" to do so. Having come to the conclusion that:

- (i) the Agreement of Sale dated 12 October 1987 was prima facie a collusive act on the part of the Appellant and Mr. Bahuddin Sarhandi to deprive the Respondent of her title to the Said Property;
- (ii) the Agreement of Sale dated 12 October 1987 has been executed by Mr. Bahuddin Sarhandi without first obtaining the consent of the Respondent;
- (iii) the Agreement of Sale dated 12 October 1987 has been executed by Mr. Bahuddin Sarhandi without acquainting her with all material circumstances each of which has been dishonestly concealed from her; and
- (iv) that the Agreement of Sale dated 12 October 1987 was clearly disadvantageous to the Respondent;

Each of which facts would have established the right of the Respondent to repudiate the Agreement of Sale dated 12 October 1987 under Section 215 of the Contract Act, 1872, I have no hesitation in holding that I am not inclined to grant use my discretion under Section 22 of the Specific Relief Act, 1877 to order specific performance of the Agreement dated 12

October 1987. To do so would not only be unjust and inequitable” it would enforce a fraud which this Court cannot and will not do. The relief of Specific Performance is therefore declined and the Judgement and Decree dated 27 October 2007 passed by Vth Additional District Judge Karachi (East) in Civil Appeal No.14 of 2005, upholding the dismissal of Suit No.1165 of 1994 by a Judgement dated 23 December 2004 and Decree dated 4 January 2005 passed by VIIIth Senior Civil Judge Karachi (East) is to this extent upheld.

D. Whether the Suit had been properly valued under the provisions of the Suits Valuation Act 1887

32. On account of my findings that Suit No. 1165 of 1994 is liable to be dismissed, I am of the opinion that this issue while germane to the proceedings falls by the side and need not be decided.

33. For the foregoing reasons and while disagreeing with various findings that have been made in the Judgement and Decree dated 27 October 2007 passed by Vth Additional District Judge Karachi (East) in Civil Appeal No.14 of 2005 and in the Judgement dated 23 December 2004 and Decree dated 4 January 2005 passed by VIIIth Senior Civil Judge Karachi (East) in of Suit No.1165 of 1994 I am inclined to dismiss this Second Appeal within the discretion granted to this Court under Section 22 of the Specific Relief Act, 1877 with no order as to costs.

JUDGE

Karachi dated 3 August 2023