

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

IInd Appeal No. 09 of 2008

Date of hearing : 13.03.2013.

Applicant : Malik Muhammad Yasin through
Mr. Qammer Mehmood Baig, Advocate.

Respondents : Syed Raza Hyder through
Mr. Pirbhulal-U-Goklani, Advocate.

J U D G M E N T

NADEEM AKHTAR, J.- The appellant filed F.C. Suit No.352/2004 against the respondent for specific performance of contract, possession, and injunction, which was decreed as prayed by the appellant vide judgment delivered on 27.01.2006 by the 1st Senior Civil Judge, Nawabshah. Against the said judgment and decree, the respondent filed Civil Appeal No.27/2006, which has been allowed by the 1st Additional District Judge, Nawabshah, through the impugned judgment delivered and the decree passed / signed on 04.08.2008. Being aggrieved with the impugned judgment and decree of the lower appellate court, the appellant has preferred this second appeal.

2. Briefly stated, the facts of this case are that the parties entered into an agreement for sale dated 11.11.2003 (**the Agreement**), whereby the respondent agreed to sell to the appellant his Shop bearing Survey No.1072/1, measuring 37-3 sq. yds., situated in Ward 'B', Market Road No.1, Nawabshah, (**the suit property**), and the appellant agreed to purchase the same from the respondent. The sale consideration was agreed at Rs.1,150,000.00. The appellant paid a sum of Rs.350,000.00 to the respondent as part payment, out of which Rs.300,000.00 was paid at the time of the Agreement and Rs.50,000.00

was paid subsequently at the request of the respondent. The sale was to be concluded by 20.11.2004, when the appellant was required to pay the balance sale consideration of Rs.800,000.00 to the respondent, and the respondent was required to execute the sale deed in respect of the suit property in favour of the appellant and also to hand over to him the vacant and peaceful possession thereof. The execution of the Agreement, the amount of sale consideration, the part payment of Rs.350,000.00 by the appellant, and the date of completing the sale, are not disputed.

3. It was the case of the appellant before the trial court that, by making the part payment of Rs.350,000.00 to the respondent at the time of the Agreement, he performed his initial part of the contract. It was averred by the appellant that he was always ready and willing to perform his remaining part of the contract, and for this purpose, he requested the respondent a number of times to accept from him the balance sale consideration of Rs.800,000.00 and to complete the sale in his favour on or before 20.11.2004. It was also the case of the appellant that the respondent was required to obtain such documents and certificates that were required for transferring the marketable title of the suit property in his favour, but the respondent failed to obtain the same within time. The appellant sent a legal notice dated 28.10.2004 to the respondent calling upon him to complete the sale in his favour, but the respondent did not respond to the same. It was alleged by the appellant that the respondent finally refused to complete the sale in his favour and informed him that he will sell the suit property to a third party. In the above background, the appellant filed F.C. Suit No.352/2004 against the respondent for specific performance of contract, possession, and injunction.

4. In his written statement, the respondent admitted the execution of the Agreement, the amount of sale consideration, the part payment of Rs.350,000.00 by the appellant and the date of completing the sale. It was, however, denied by the respondent that the appellant had been ready and willing to pay the balance sale consideration to him on 20.11.2004. It was alleged by the respondent that the appellant failed to pay the balance sale consideration to him despite his requests. It was averred by the respondent that the documents required for execution of the sale deed were obtained by him before 20.11.2004, and as per

his commitment, he went to the office of the Sub-Registrar concerned on 20.11.2004 and waited there for the appellant, but the appellant failed to appear there. It was further alleged by the respondent that the breach of the Agreement was committed by the appellant and not by him, therefore, the Agreement was cancelled by him and the part payment made by the appellant was also forfeited by him. The respondent prayed for the dismissal of the Suit.

5. The trial court framed the following six issues on the basis of the pleadings of the parties :

- “1. Whether suit is not maintainable ?*
- 2. Whether plaintiff have (!) no cause of action ?*
- 3. Whether the plaintiff has committed violation of terms and conditions of the sale agreement dated 11.11.2003, rendering the same liable to cancellation ?*
- 4. Whether the defendant No.4 is liable to specifically perform the sale agreement dated 11.11.2003 ?*
- 5. Whether the plaintiff is entitled to the relief sought for ?*
- 6. What should the decree be ?”*

6. The parties led their respective evidence. The appellant examined himself and produced a number of documents in support of his claim. The respondent also produced a number of documents, and examined himself as well as two other witnesses ; namely, Tahir Ahmed and Ghulam Farid, who were working with him as his colleagues at the General Post Office (GPO) at the relevant time. After examining the evidence produced by the parties and after hearing them, the suit filed by the appellant was decreed as prayed by him vide judgment delivered on 27.01.2006 by the trial court. The respondent filed Civil Appeal No.27/2006 against the judgment and decree passed by the trial court, which has been allowed by the lower appellate court through the impugned judgment and decree. Since both the courts below have given conflicting findings and I have two divergent views before me, it has become necessary for me to minutely examine and evaluate the evidence that resulted into completely opposite and contrary findings.

7. In his examination-in-chief, the appellant / plaintiff reiterated the contents of the plaint. He stated that he approached the respondent two months prior to the date of completion of the sale and requested him to receive the balance payment, but the reply of the respondent was evasive. Therefore, he sent a legal notice dated 28.10.2004 to the respondent through registered post A.D., calling upon him to complete the sale within time. In addition to the original Agreement, the appellant produced a copy of the legal notice, and the originals of the postal A.D. receipt and a certificate from the post office concerned. The appellant further stated that the respondent did not acknowledge his legal notice, nor did he receive the balance payment offered by the appellant. He also stated that, as the respondent had refused to complete the sale in his favour and had shown his intention of selling the suit property to a third party, he filed the Suit on 18.11.2008, that is two days prior to the date of completion of the sale, in order to safeguard his vested rights and interest in the suit property. He specifically stated that he did not commit breach of the Agreement, and that he had always been ready and willing to perform his part of the contract.

8. In his cross examination, the appellant admitted that he did not go to the Sub-Registrar's office on 20.11.2004, but voluntarily said that he approached the respondent two months prior to the agreed date of completion of the sale, when he demanded from the respondent the documents required for completing the sale and informed the respondent that he was ready to perform his part of the contract by paying the balance amount. It was further stated by the appellant that he visited the respondent four times with the same demand and request, and the last meeting was held on 16.11.2004 when the respondent promised to execute the sale deed within three to four days ; despite promise, the respondent not only failed in delivering the requisite documents to him, but he also started negotiations for the sale of the property to a third party ; and the balance payment was arranged by him ten days prior to the agreed date for completing the sale. The appellant specifically denied the suggestions put to him by the respondent's counsel that the respondent was ready to perform his part of the contract till the agreed date for completing the sale ; the respondent had obtained the requisite document ; he (the appellant) had failed to arrange the balance payment till the agreed date for

completing the sale, or no legal notice was issued by him to the respondent ; and he (the appellant) infringed the terms and conditions of the Agreement.

9. In his examination-in-chief, the respondent admitted the Agreement, the terms and conditions thereof, and that he received the part payment of Rs.350,000.00 from the appellant. He also admitted that on 16.11.2004, when the appellant visited him at the GPO, he informed the appellant that he will execute the sale deed for which the stamp paper should be purchased by the appellant. It was stated by the respondent that the time mentioned in the Agreement was of the essence of the contract ; he was entitled to receive the balance sale consideration on 20.11.2004, which was the “final date” for execution of the sale deed in favour of the appellant ; the balance sale consideration was not received by him on 20.11.2004 ; he was liable to execute the sale deed in favour of the appellant and to deliver possession of the property to him only after receiving the balance sale consideration ; there was a penalty clause in the Agreement that provided for cancellation of the Agreement and forfeiture of the appellant’s part payment in case of failure on the part of the appellant in paying the balance amount on the agreed date ; there was no breach on his part ; he had obtained the requisite document for completing the sale ; he asked the appellant to come to the Sub-Registrar’s office on the “due date” with the balance amount, and informed him that the keys of the property would be handed over by him to the appellant ; he took leave from his office and went to the Sub-Registrar’s office with two witnesses for execution of the sale deed and waited there from 11:00 am to 4:00 pm, but the appellant did not turn up ; he neither refused to execute the sale deed, nor was he trying to sell the property to a third party ; and he was not bound to execute the sale deed in favour of the appellant.

10. In his cross examination, the respondent once again admitted the Agreement and the part payment of Rs.350,000.00 made by the appellant to him. It was also admitted in his cross examination by the respondent that he did not give any written notice to the appellant to perform his agreed part of the contract ; and he did not produce his “short leave application” and the “short leave order” for the leave taken by him on 20.11.2004 for going to the Sub-Registrar’s office. The

respondent denied the suggestions put to him by the appellant's counsel that the balance sale consideration was offered to him by the appellant from time to time, or the appellant approached him to execute the sale deed, or he avoided to execute the same ; a legal notice was issued to him by the appellant calling upon him to receive the balance amount and to execute the sale deed ; the appellant visited him on 17.11.2004 when he was requested by the appellant to complete the sale, but he refused ; he did not take leave on 20.11.2004, or he and his colleagues / witnesses did not go to the Sub-Registrar's office on that date ; the appellant did not violate the terms and conditions of the Agreement ; and he (the respondent) refused to perform his agreed part of the contract.

11. The other two witnesses produced by the respondent were Tahir Ahmed and Ghulam Fareed, who were working with him as his colleagues at the GPO at the relevant time. In their examination-in-chief, both these witnesses admitted that the appellant visited the respondent at the GPO in their presence on 16.11.2004, and asked the respondent to execute the sale deed, and further that the respondent asked the appellant to bring the balance amount on 20.11.2004 at the time of execution of the sale deed. These witnesses stated that they went to the Sub-Registrar's office on 20.11.2004 with the respondent at about 12:00 noon for execution of the sale deed ; they waited there for the appellant, but the latter did not appear. Tahir Ahmed stated that they waited for "*half an hour and 2 an hour*" (!), and Ghulam Farid stated that they waited for "*about 1 and half hours*". In his cross examination, Tahir Ahmed admitted that he could not leave his office without prior permission and leave, and that he did not produce the proof of his short leave. Both the witnesses admitted that they were not summoned by the court. It was admitted by Ghulam Farid that he came to give evidence at the request of the respondent. Both the witnesses admitted that they saw the C.S. Extract with the respondent on 20.11.2004, but they did not see the sale clearance certificate with him on that date. These witnesses stated that the respondent prepared a notice at about 4:00 pm on 20.11.2004, but they did not remember the place where the said notice was prepared.

12. The first two issues regarding the maintainability of the suit and the cause of action accrued to the appellant / plaintiff, were decided by

the trial court in favour of the appellant by holding that the suit was maintainable and cause of action had accrued to him. Such findings were given by the trial court as the Agreement was an admitted transaction between the parties, and also in view of the specific averments made by the appellant in the plaint regarding part performance of the contract by him and the breach thereof committed by the respondent.

13. It was rightly held by the trial court that the burden to prove Issue No.3 was on the respondent / defendant as to whether or not the appellant had violated the terms and conditions of the Agreement rendering the same liable for cancellation. It was observed by the trial court that there was no dispute about the existence of the Agreement between the parties, and the main dispute was the failure on the part of the appellant to make the balance payment within the stipulated / agreed period. It was further observed by the trial court that the respondent as well as his witnesses had admitted not only that the appellant visited the respondent at the GPO on 16.11.2004 and requested the respondent to execute the sale deed in his favour, but also that the respondent told the appellant that he will execute the sale deed in favour of the appellant. In view of the above admissions, these important facts stood proved. Regarding the presence of the respondent's two witnesses in the Sub-Registrar's office on 20.11.2004, the trial court opined *inter alia* that admittedly both the witnesses did not produce any proof of the short leave claimed to have been taken by them ; they were the colleagues of the respondent and appeared to be interested in the respondent's case ; and there was no occasion for the respondent to take two witnesses with him to the Sub-Registrar's office. The conflicting statements of the respondent and his two witnesses about the duration for which they waited at the Sub-Registrar's office on 20.11.2004, was also noticed by the trial court. It was further observed by the trial court that even the respondent did not produce any material to prove that he took leave on 20.11.2004 or he was present on that date at the Sub-Registrar's office. The trial court also observed that the suit was filed by the appellant on 18.11.2004, that is two days prior to the date of completion of sale, as the respondent had refused to complete the sale in his favour and he was apprehending that the respondent will create a third party interest in the property. Finally, it was observed by the trial court that the

respondent had not filed any suit for cancellation of the Agreement ; the respondent had not produced the sale clearance certificate required for completing the sale ; and the respondent had admittedly received a handsome amount of Rs.350,000.00 from the appellant. In view of the above observations and findings, Issue No.3 was decided by the trial court in favour of the appellant by holding that the appellant did not commit any violation of the terms and conditions of the Agreement.

14. In view of the finding on Issue No.3 in favour of the appellant, Issue No.4 relating to the specific performance of the Agreement, was also decided by the trial court in favour of the appellant. It was held that the respondent was liable for the specific performance of the Agreement. On the basis of the findings on Issues No.3 and 4, Issue No.5 was decided by the trial court by holding that the appellant was entitled to the relief prayed for by him in the suit. Accordingly, the suit filed by the appellant was decreed as prayed by him.

15. The lower appellate court was fully aware that there was no dispute with regard to the Agreement, the part payment made by the appellant, and the promise made by the respondent to execute the sale deed in favour of the appellant, as the admission regarding these facts has been mentioned in paragraph 12 of the impugned judgment. It was observed by the lower appellate court that the points at issue between the parties were as to which party did not perform his promise on the specified date, and whether the time was of the essence of the contract or not. The lower appellate court further observed that the time for completion of the sale was 20.11.2004, but before that date, the appellant sent a legal notice dated 28.10.2004 to the respondent requiring him to obtain the requisite documents, execute the sale deed and deliver the possession of the property. It was also observed that the suit was filed by the appellant on 18.11.2004, two days prior to the specified date of payment, praying for execution of sale deed and delivery of possession. On the basis of these observations, the appellate court below came to the conclusion that these facts draw an inference that the appellant might not have arranged the balance amount, therefore, he filed a suit in order to linger on the matter and to keep the contract intact. Without giving any reason, the lower appellate court believed the version of the respondent that he went to the Sub-Registrar's office with witnesses on 20.11.2004, but the appellant did

not come forward. Similarly, without giving any reason, it was held by the lower appellate court that the appellant did not perform his promise whenever the respondent was ready to perform his promise. It was held by the lower appellate court that there was sufficient and undisputed evidence that time was of the essence of the contract. The case reported as 1994 SCMR 2189 was followed by the lower appellate court, wherein it was held that it was open to the parties while entering into an agreement for sale of an immovable property to provide that the time for performance of the agreement will be treated as the essence of the contract, and in such cases, if the party seeking enforcement of the contract is shown to be in breach of the contract, the court may refuse to enforce the contract. On the basis of the above findings and the aforementioned authority, it was held by the lower appellate court that the appellant failed in performing his part of the contract, and as such the respondent had rightly cancelled the Agreement and had rightly forfeited the part payment made by the appellant.

16. As noted above, an inference was drawn by the appellate court below that the appellant "*might not have arranged the balance amount*", therefore, he filed the suit in order to linger on the matter and to keep the contract intact. This inference was drawn in view of the facts that the time for completion of the sale was 20.11.2004, but before that date, the appellant sent a legal notice dated 28.10.2004 to the respondent requiring him to obtain the requisite documents, execute the sale deed and deliver the possession of the property, and then he filed the suit on 18.11.2004, two days prior to the specified date of payment, for execution of sale deed and delivery of possession. The inference drawn by the lower appellate court was presumptive, misconceived and uncalled for. Valuable and vested rights of a party cannot be decided or taken away, or a decree validly passed in favour of a party by a competent court cannot be set aside, in such a casual manner merely on the basis of a presumption or inference. The suit of the appellant could not be dismissed merely on the ground that he issued a legal notice to the respondent and filed the suit against him before the agreed date. In fact, the findings of the trial court in this context appear to be more logical, sound realistic and reasonable, as it was held by the trial court that the appellant filed the suit before the agreed date because the respondent had refused to complete the sale in his favour and he was apprehending that the respondent will create a

third party interest in the property. There was nothing on record to establish that the appellant had failed to arrange the balance amount on the agreed date, especially when the appellant had specifically denied the suggestion that he committed breach of his agreed part of the contract. On the contrary, the appellant had asserted that he had always been ready and willing to pay the balance amount, had offered the same to the respondent on a number of occasions, and had arranged the same ten days prior to the agreed date. The very fact that the respondent and his two witnesses admitted that the appellant visited the respondent at the GPO on 16.11.2004 and requested the respondent to execute the sale deed and accept the balance payment from him, clearly shows that there was sufficient evidence to establish that the appellant was not only ready to pay the balance amount, but in fact had also offered the same to the respondent. In view of the categorical admissions by the respondent and his witnesses, the above material facts stood proved, and as such the burden was not on the appellant to prove the same. The above findings of the lower appellate court were, therefore, arbitrary and contrary to the admitted facts and the evidence on record.

17. Much emphasis was given by the lower appellate court to the admission made by the appellant that he did not go to the Sub-Registrar's office on 20.11.2004, when he was called by the respondent. The lower appellate court failed to appreciate that the appellant had nowhere admitted that he was called by the respondent on 20.11.2004 at the Sub-Registrar's office. There was no evidence on record to prove that the appellant was actually called by the respondent, or that the respondent had actually gone to the Sub-Registrar's office on 20.11.2004. It is important to note here that the respondent did not examine the Sub-Registrar or any of his officials in support of this assertion. The lower appellate court also failed to appreciate that the appellant had already filed the suit on 18.11.2004 against the respondent, and the dispute was *sub judice* before the trial court. In such circumstances, the appellant was not obliged to go to the Sub-Registrar's office, if at all he was called by the respondent.

18. The respondent's appeal was allowed by the lower appellate court and the judgment and decree passed by the trial court in favour of the appellant were set aside, mainly on the ground that the time

mentioned in the Agreement was of the essence of the contract. This finding of the appellate court below was against the law laid down by the Superior Courts. In this context, some important reported cases are briefly discussed below :

A. PLD 1962 Supreme Court 01 (Larger Bench – 5 JJ)
Abdul Hamid V/S Abbas Bhai-Abdul Hussain Sodawaterwala.

In the above cited authority, the Larger Bench comprising of five (05) learned Judges of the Hon'ble Supreme Court was pleased to hold *inter alia* that an intention to make time as the essence of the contract must be expressed in unmistakable language ; it may be inferred from what passed between the parties before, but not after, the contract is made ; equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time ; where the vendor must procure Incometax clearance certificate and Custodian's certificate before a sale could be registered, the date when the vendee is informed by the vendor that such certificates had been procured, is the relevant date with reference to which the conduct of the parties has to be judged in respect of their willingness or otherwise of proceeding with the contract ; the previous correspondence exchanged between the parties can be of no avail in this behalf ; and a vendee is entitled to be satisfied that the vendor has obtained the requisite documents.

In the instant case, it was an admitted position that the respondent was required to obtain the requisite documents before the agreed date for completing the sale in favour of the appellant and for transferring the marketable title in his favour. Such admissions were made by the respondent in his written statement and evidence by stating that he had obtained the requisite document, which, according to him, was the Extract. Only the Extract was produced by him, and was purportedly seen with him by his witnesses at the Sub-Registrar's office on 20.11.2004. The sale clearance certificate required to complete the sale was not produced by the respondent, and his witnesses had admitted in their cross examination that they did

not see the said certificate with the respondent on 20.11.2004. Applying the cited Larger Bench authority, as the respondent was admittedly required to procure the sale clearance certificate before the sale could be registered, the date when the appellant was informed by the respondent that such certificate had been procured, would have been the relevant date with reference to which the conduct of the parties had to be judged in respect of their willingness or otherwise of proceeding with the contract. Following the cited Larger Bench authority, it can be safely said that the appellant was entitled to be satisfied that the respondent had procured the sale clearance certificate ; and since such certificate was neither procured or produced by the respondent, nor the appellant had the opportunity of being satisfied or to ascertain that the respondent had obtained the certificate, the respondent could not claim that time was of the essence of the contract or that the Agreement came to an end on 20.11.2004.

B. 2009 SCMR 114

Muhammad Taj V/S Arshad Mehmood and 3 others.

In this case, it was held *inter alia* by the Hon'ble Supreme Court that Section 55 of the Contract Act, 1872, stipulates the contracts where time is essence of the contract, which is generally not attracted to transactions involving sale of immovable property ; merely mentioning of a specific date for performance of the agreement would not make time the essence of the contract, but such intention is to be gathered from the terms agreed amongst the parties contained in the contract in the light of facts and circumstances of the case. In the cited case, no objection certificate was a pre-requisite condition for effecting transfer of the property, and in the absence of the same, transfer was not possible. The certificate was issued by the Capital Development Authority, but the vendee issued a notice calling upon the vendor to transfer the property and also filed a Suit. The suit was dismissed and the earnest money paid by the vendee was ordered to be forfeited. In appeal, the appellate court set aside the

judgment and decree of the trial Court mainly on the ground that the time was not the essence of the contract. Revision Application filed by the vendor was also dismissed by the High Court. The petition for leave to appeal filed by the vendor was dismissed by the Hon'ble Supreme Court. The facts of the cited case and the instant case are similar, as the appellant herein also issued a legal notice to the respondent and then filed the suit against him, and the respondent was obliged to procure the sale clearance certificate before the agreed date.

C. PLD 2010 Supreme Court 952 (Full Bench)
Mst. Mehmooda Begum V/S Syed Hassan Sajjad and 2 others.

It was held in this case by the learned Full Bench of the Hon'ble Supreme Court that it is well settled by now that time is not the essence of contract, performance whereof depends on various factors such as attending circumstances, unforeseen eventualities and intention of the parties which is to be ascertained from the contents of the agreement executed between the parties.

D. 1984 CLC 2159
Muhammad Ayyub Khan V/S Ch. Muhammad Aslam and others.

In this case, a learned Division Bench of the Lahore High Court was pleased to hold *inter alia* that mere mention of the period for completion of sale does not make the time essence of the contract, and presumption would be that the parties intended to perform the Agreement within a reasonable time. It was also held that the agreement cannot be revoked unilaterally.

E. PLD 1999 Lahore 193
Messrs Pioneer Housing Society (Pvt.) Limited V/S Messrs Babar & Company through Shakir Ali Khan and 2 others.

It was held *inter alia* in this case by a learned Division Bench of the Lahore High Court that in the matter of agreements pertaining to immovable property, the time is ordinarily not the essence of the agreement, and if the parties desire that strict adherence to

the time should be ensured, then the terms of the agreement should be so specific that would leave no room of doubt that any deviation from the time clause would entail penal consequences.

In view of the authorities discussed above, the findings of the lower appellate court that time was of the essence of the contract because it was mentioned in the Agreement ; the appellant committed breach of the Agreement by not making the payment within the time mentioned in the Agreement ; and the Agreement was rightly cancelled and the part payment made by the appellant was rightly forfeited by the respondent, are not sustainable in law.

19. Moreover, the respondent had no right to cancel the Agreement unilaterally as held by the learned Division Bench of the Lahore High Court in Muhammad Ayyub Khan (supra). Even otherwise, there was no provision in the Agreement for its cancellation by either of the parties. The Agreement simply provided that the payment made by the appellant would be forfeited by the respondent in case the balance sale consideration was not paid by the appellant on the agreed date.

20. I would like to discuss here very briefly the cases of Inayat Ali and others V/S Siraj Din, 1997 SCMR 552, and Muhammad Ayub through L.Rs. and others V/S Sheikh Muhammad Bashir and others, 2008 CLC 1704 (Lahore). In both the aforementioned cases, the suits for specific performance filed by the vendees were decreed as the vendors had admitted the execution of the agreements for sale in favour of the vendees and having received amounts from the vendees in pursuance of such agreements. No evidence was found that the sale agreements were executed with an intention other than the one disclosed therein. In view of the admission by the respondent that he had executed the Agreement in favour of the appellant and had also received a substantial part payment of Rs.350,000.00 from him, the suit of the appellant was rightly decreed by the trial court, and the judgment and decree passed by the trial court ought not to have been disturbed by the lower appellate court. Another case that is relevant for the purposes of the present appeal is Saleem Akhtar V/S Nisar Ahmad, PLD 2000 Lahore 385, wherein it was held by the Lahore High Court that it is a settled principle of law that the oral evidence cannot exclude the documentary evidence, and that a document can be rebutted only by a

document. In the instant case, except for the oral evidence by the respondent, which too was not sufficient to discharge his burden, no document was produced by him to rebut the Agreement produced by the appellant. This important aspect of the case was completely ignored by the lower appellate court.

21. The trial court had discussed the entire evidence and had given exhaustive findings on each and every issue after full application of mind. The lower appellate court committed a grave error in law by not giving the reasons for disagreeing with the findings of the trial court. The impugned judgment is vague and non-speaking. As the appellate court, it was the duty of the lower appellate court to give its own independent and logical reasons for setting aside the judgment and decree validly passed by the competent court. The version of the respondent that he went to the Sub-Registrar's office with witnesses on 20.11.2004, but the appellant did not come forward, was believed by the lower appellate court without giving any cogent reason. Similarly, without giving any justiciable reason, it was held by the lower appellate court that the appellant did not perform his promise whenever the respondent was ready to perform his promise. The above shows that the impugned judgment was passed without full application of mind and without appreciation of the evidence on record. The well-established principle of law that a judgment should be a speaking and well-reasoned one, was thus not followed by the lower appellate court.

22. In *Karim Bakhsh through L.Rs and others V/S Jindwadda Shah and others, 2005 SCMR 1518*, it was held by the Hon'ble Supreme Court that when findings of two courts below were at variance, the High Court was justified in appreciating the evidence to arrive at the conclusion as to which of the decisions was in accord with the evidence on record. After examining and appreciating the evidence, I have come to the conclusion that the findings of the trial court were in accord with the evidence on record, and those of the lower appellate court were contrary to the admitted facts and the evidence on record. In *Abbas Ali Shah and 5 others V/S Ghulam Ali and another, 2004 SCMR 1342*, the Hon'ble Supreme Court was pleased to hold that ordinarily the findings of the appellate court are not interfered with in second appeal if the same are found to be substantiated by evidence on record and are supported by logical reasoning ; if the findings of the two courts are at

variance, the conflict would be seen to assess the comparative merits of such findings in the light of the facts of the case and reasons in support of two different findings given by two courts on a question of fact ; and if findings of the appellate court are not supported by evidence on record and the same are found to be without logical reasons or are found arbitrary or capricious, same can be rejected in second appeal. I have already held that the findings of the lower appellate court were contrary to the admitted facts and the evidence on record ; no reasons were given in the impugned judgment by the lower appellate court for disagreeing with the findings of the trial court ; the impugned judgment is a non-speaking judgment as the findings given by the lower appellate court are vague and are not supported by reasons ; and that the impugned judgment is contrary to the law laid down by the Superior Courts. Thus, the impugned judgment, being not sustainable in law, cannot be allowed to remain in the field.

23. The upshot of the above discussion is that this appeal is allowed with no order as to costs. The impugned judgment and decree passed in the respondent's Civil Appeal No.27/2006 are set aside, and the judgment and decree passed by the trial court in the appellant's F.C. Suit No.352/2004 are maintained.

J U D G E

Ind Appeal 09-2008 Conflicting Findings.docx/Court Work/Hyderabad Cases/ARK/USB