ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

IInd. Appeal No. 03 of 2010.

DATE	ORDER WITH SIGNATURE OF JUDGE

For Katcha Peshi.
For hearing of CMA-40/10.
For hearing of CMA-920/10.

Date of hearing : 5.08.2014.
Date of decision: 08.09.2014.

Mr. Jhamat Jethanand, Advocate for the appellants.
Mr. Aijaz Ali Hakro, Advocate for the Respondent No.1.
Mr. Muhammad Hashim Memon, Advocate for Respondents No.2(a) to 2(d).

===

NAZAR AKBAR,J- The appellants after dismissal of their F.C. Suit No. 362 of 1994 vide judgment and decree dated 28.8.2005 and 02.9.1997 respectively passed by the Court of Senior Civil Judge, Umerkot, preferred Ist. Appeal No.110 of 1997 (re-numbered 04 of 2005), which was also dismissed by learned Additional District Judge, Umerkot on 06.01.2010 and therefore, they have preferred this second appeal for setting aside the concurrent findings of the Courts below.

2. On 22.2.2010 Mr. Muhammad Hashim Memon, Advocate appeared on behalf of Respondent No.1 and undertook that the appellants will not be dispossessed till the next date of hearing, therefore, an interim order was passed which is still in the field. Mr. Aijaz Ali Hakro, Advocate, has been engaged by respondent No.2. On 24.01.2011 by consent it was ordered that this appeal may be disposed of at katcha peshi stage and ultimately on 05.8.2014 all the counsel advanced their arguments.

3. This being second appeal, I need not to reproduce the lengthy facts as narrated in the plaint and the written statement. However, very briefly the facts are that the appellants on 4.10.1994 filed a Suit for Specific Performance of Contract between the appellants and Respondent No.1 in respect of the property bearing S.Nos.55, 56,94 to 102, 104 to 118 admeasuring 144-32 acres deh Kharoro Jagir, Taluka and District Umerkot. Respondent No.1 in her written statement denied execution of sale agreement and claimed that she had already sold her property to Respondent No.2, therefore, at the trial stage

Respondent No.2 was also impleaded as an interested and necessary party and the plaint was amended to implead the Respondent No.2. However, no relief was claimed against the Respondent No.2 and only cause title was amended. The trial Court from the pleadings have framed as many as 12 issues and issues No.1,2,3,and 4 being interconnected regarding the execution of sale agreement dated 27.5.1993, (issue No.1) forgery and fabrication of the agreement, (issue No.2) payment of Rs.6,50,000/- to the respondent No.1 (issue No.3) and that the balance consideration was payable on 25.12.1993 in terms of the agreement (issue No.4) were decided jointly against the appellants. The issues No.5 and 6 that whether the appellant had deposited Rs.3,85,344/- towards loan outstanding against the respondent No.1 and her son and that at the request of husband of respondent No.1, payment of remaining amount of sale consideration was deferred till registration of the sale deed were also decided in negative. The issue No.7 regarding payments of Rs.17,000/- and Rs.50,000/-to munshi Ladhu Singh on behalf of husband of respondent No.1 was also answered in negative. Therefore, in view of the findings on issues No.1 to 7, the remaining issues No.8 and 9 regarding compliance of terms of agreement by the plaintiff/ appellants and implication of MLR 115 were also decided against the appellants. Issue No.10 was not pressed. The issue No.11 was framed once the respondent No.2 was impleaded as party before the trial Court and this issue was also decided in negative and ultimately the plaintiff`s suit was dismissed by judgment dated 28.8.1997. The appellants have preferred Civil Appeal No.110 of 1997 which was renumbered as Civil Appeal No.04 of 2005 and this appeal was also dismissed by the Ist. appellate Court on 06.01.2010, whereafter instant second appeal has been filed.

4. I have heard the learned counsel for the parties and examined the Court file.

5. Learned counsel for the appellants has mainly contended that the learned trial Court and the appellate Court have decided the issues No.1 to 4 against the appellants merely on the basis of discrepancies in the evidence of the appellants whereby according to him, the agreement of sale was proved through the said witnesses. He has contended that the discrepancies in the evidence of witnesses regarding the place of execution of sale agreement was Umerkot or village Kharoro Jagir and the discrepancies to the effect that agreement was executed on 23.5.1993 or 27.5.1993 were not serious contradictions. He further asserted

that nothing has been controverted and the evidence of appellant No.2 Chagan, who examined himself and produced original agreement of sale dated 27.5.1993 has gone un-rebutted since the respondent No.1 has not appeared in the witness box. The witnesses of the sale agreement namely Ladhuji Singh and Ghansham have supported the execution of the sale agreement, therefore, the findings of learned Courts below that sale agreement has not been proved was contrary to evidence. He further contended that the payment of initial amount of Rs.6,50,000/- was also proved through the same agreement of sale, as the payment to the respondent No.1 was also mentioned in the agreement to sell. He has further contended that the payment of Rs.17,000/- and Rs.50,000/- to the husband of Respondent No.1, and Munshi Ladhu Singh was also established, when her munshi has also come in the witness box and has admitted the said payment through receipts Ex.112 and 113. The other payment of Rs.3,85,344/- paid by the appellants as loan to ADBP vide receipts as Ex.108 to 111 at the instance of the husband of the respondent No.1 were also admitted and there is no denial of these payments, therefore, in the above circumstances the discretion of Court should have been exercised in favour of the appellants for specific performance of contract.

6. Learned counsel for the appellants has further contended that the judgment of appellate Court was not inconformity with the requirement of Order XLI Rule 31, CPC, as according to him, the points for determination were not mentioned in the impugned judgment. In support of his contentions, he has relied upon following case laws:-

(i).	2004 SCMR 1001	Ghulam Muhammad v. Ghulam Ali.
(ii).	2004 SCMR 1668	Habib khan v. Mst. Bakhtmina.
(iii).	2003 SCMR 286	Muhammad Bux v. Ellahi Bux.
(iv).	1995 CLC 43	Mst. Noor jehan v. Muhammad Rafiq.
(v).	2006 MLD 518	Water& Power Development Authority V. Mst.Shamim Akhtar.
(vi).	2001 CLC 138	Ghulam Rasool v. Bashir Ahmed.
(vii).	1982 CLC 2625	NBP v. Bawany Industries Ltd.
(viii).	2007 CLC 1885	Fateh Muhammad v. Fida Hussain Shah.
(ix).	2001 MLD 553.	Muhammad Ramzan v. Jan Muhammad.
(x).	1995 CLC 1061	Muhammad Aslam v. Muhammad Tufail.
(xi).	1987 SCMR 1211.	Muhammad Hussain v. Mehr Din.

7. In rebuttal, Mr. Muhammad Hashim Memon, Advocate, for respondent No.2 while vehemently asserting that all the contradictions which have been minutely discussed by the trial Court and the appellate Court had sufficiently

disproved the execution of agreement to sell. He has also drawn my attention to certain contradictions in the evidence of the appellants discussed by the Ist. Appellate Court in addition to the contradictions found by the trial Court to come to the conclusion that the execution of agreement to sale dated 27.5.1993 was not proved. The learned Ist. Appellate Court has very categorically observed from the evidence of appellant No.2 namely Chagan that in examination-in-chief Chagan has claimed to have offered entire sale consideration to the Respondent No.1 on 5.5.1993 whereas the alleged agreement of sale was executed on 27.5.1993. He has further contended that possession of the appellants was not pursuant to the agreement to sell. In fact they were haries/tenants of respondent No.1 who were already in possession of the suit land as admitted by the appellant in para-3 of the plaint. However, before any alleged sale in favour of the appellants, respondent No.1 had already sold the suit property to respondent No.2 as categorically stated by her in her written statement. He has further contended that this is second appeal and the concurrent findings of the facts of the Courts below cannot be set aside by second appellate Court even if in the opinion of the second appellate Court, the conclusion drawn by the two Courts below could be different. The findings of the second appellate Court should only be based on legal infirmities in the Judgment.

8. The Respondents counsel has relied upon the following case laws in support of his contentions.

(i).	1996 SCMR 1729	Haji Sultan Ahmed v. Naeem Raza.
(ii).	1986 SCMR 1814	Fazal Rahman v. Amir Haider & another.
(iii).	2009 SCMR 254	Syed Rafiul Qadri v. Syeda Safia Sultana.
(iv).	2002 SCMR 1089	Mst. Rasheeda v. Muhammad Yousif.
(v).	2000 SCMR 1647	Azizullah v. Gul Muhammad.
(vi).	2006 SCMR 185	Muhammad Amir v. Muhammad Sher.
(vii).	1992 MLD 2515	Maj(Retd) Syed Baqar Hussain Shah v. Mst. Rashida Begum.
(viii).	2004 SCMR 877	Mst. Zaitoon Bibi v. Dilawar Muhammad.
(ix).	2007 YLR-875	Haji Abdul GHafoor v. Muhammad Hayat.
(x).	2002 CLC-22	Muhammad Aslam Khan v. Muhammad Anwar
(xi).	1992 CLC- 2524	Chilya Corrugated Board Mills Ltd. v. Muhammad Ismail.

9. I have examined the case law relied upon by the parties during arguments. The case law mentioned at S.No. (i) to (iii) in para-6 above and relied upon by the appellants are on the point that no sanctity can be attached to the concurrent findings of two Courts below if the same is suffering from

misreading and non-reading of the evidence. Indeed there is no cavil to this proposition. The gist of the arguments of the appellants was that the conclusion drawn by the two Courts below on reading of the evidence was not to their liking as each and every contradiction in the evidence of appellant discussed by the trial Court and the appellate Court was of no serious consequences. This argument of learned counsel for appellant is contrary to case law relied upon by him. In the light of case law he was required to show the instances of misreading and non-reading of evidence and the learned counsel has to proved that the courts below have read the evidence and referred to the evidence on record in support of their reasoning to conclude that the agreement of sale was not proved. I am afraid if the contentions of the learned counsel for the appellants is accepted it would mean that the Court may substitute its reasoning with reasoning advanced by Courts below on the basis of the same piece of evidence which was read and examined by lower courts and reverse the findings of both the trial Court as well as the appellate Court. This is not permissible in exercise of power by this court and Section 100 of C.P.C. In this context the case law referred by the learned counsel for respondent and mentioned at S.No.(i) to (iii) in para-8 above is a perfect answer to the contention raised by the counsel for appellant on the powers of High Court to deal with finding of facts by courts below while exercising jurisdiction under Section 100 CPC. In the case in hand, I have not been able to find the error or misreading and non-reading of evidence by courts below. Nor the appellants have shown any misreading or non-reading of evidence.

10. The counsel for the appellant has also contended that the lower appellate court has not complied with the mandatory requirement of Order XLI Rule 31, CPC. I have examined the impugned judgment of the lower appellate court and found that all the issues framed by the trial court have been reappraised by the appellate Court. The appellate Court has also discussed the evidence and affirmed the findings of trial Court. It was sufficient compliance of the provisions of Order XLI Rule 31, CPC. The learned counsel for Respondent has relied on **2004 SCMR 877** (Mst. Zaitoon Bibi b. Dilawar Muhammad) and it fully supports the contention of respondent that the impugned judgment of lower appellate Court has complied with the requirement of law. The relevant part of the judgment is reproduced below:-

> "We do not agree with the learned counsel when he states that learned Additional District Judge was under statutory duty to discuss each issue separately and record findings separately discussing evidence thereon. We are of the view that in case the appellate Court decides to affirm the findings of the trial Court, it would be sufficient compliance with the provisions of law if the evidence is essentially discussed and findings recorded. At any rate if would not amount to violation of law, if some issues are discussed and decided together. Real question for deciding an appeal should be whether a party has been prejudiced and there has been gross miscarriage of justice, which does not appear to have been occasioned in the case in hand."

11. In the most recent judgment reported in 2010 SCMR 1868 (Muhammad Iftikhar v. Nazakat Ali), this principle has been reiterated when the Honourable Supreme Court held that the appellate Court is not always required to discuss each issue unless the same is reversed by the first appellate Court. The relevant part of the judgment is reproduced below:-

> "It appears from the perusal of the impugned judgment and that by the first appellate Court, in substance compliance of the provisions of Order XLI Rule 31, CPC was made and it is not always required that in each case the appellate Court would deal with each of the issue and to resolve the same separately in the light of the evidence available on the record unless the same had caused any serious violation of the law or resulted into a grave miscarriage of justice to any of the parties to the suit.
>
> In the instant case, the findings of facts recorded by the learned trial Court on the issues were maintained by the learned first appellate Court, therefore, unless the findings are reversed by the first Court of appeal which is not so in the present case, decision on each issue may not be distinctly and essentially recorded, provided in substance compliance of the Order XLI Rule 31 CPC has been made."

12. Besides the above, this case has one legal aspect which seems to have been missed by the courts below as well as the counsel for respondents. The missing aspect of the case emerges on reading the plaint. I have examined the plaint. I was suit for specific performance of contract and the burden was on the appellants / plaintiffs to first establish that they have fully complied with all the terms and conditions of the agreement to sell prior to seeking specific performance of the agreement on the part of respondent No.1. The relevant terms from the alleged sale agreement are as under with translation of English:-

> عيوض وارن پئسن مان سوتيءَ بابت پئسا اندازن -/6,50,000 اکرين ڇھ لک پنجاھ هزار روپيا فقط اڄوڪ روڪڙا نوٽن جي صورت ۾ روبرور هيٺ ڏيکاريل معتبر شاهدن جي وڻي سندن ٿي چڪي آهيان جن پئسن جي نه ملڻ يا وري ملڻ لاءِ ڪوبه عذر يا بهانو نه ڪندس جي ڪيم ته رد ۽ باطل رهندو.

باقي رهيل عيوض پئسا اندازن Rs.15,22,000/- اکرين پندرهن لک ٻاويهه هزار روپيا فقط وڪري جي دستاويز رجسٽر ڪري ڏيڻ مهل وٺندس ۽ خريدار ڏيڻ لاءِ ٻڌل آهن ۽ رهندا، جنهن مان پئسا اندازن -/8,50,000 روپيا تاريخ 26.6.1993 تي وٺندس ۽ باقي 25.12.1993 تي وڻي رجسٽر دستاويز ڪري ڏيندس.

> "Out of amount of consideration, I have received Rs.6,50,000/- in words Rs.Six lac Fifty thousand in shape of currency notes in advance from purchasers in presence of witnesses shown below for which I shall not lay claim or advance any excuse of non-payment thereof and if raised any claim, the same will remain valid.
>
> I shall receive balance of consideration amounting to Rs.15,22,000/-in words Rs. Fifteen lac twenty two thousand at the time of registration of sale deed which purchasers are bound to pay and will remain so bound. Out of said amount, I shall receive Rs.8,50,000/- on 26.6.93 and balance on 25.12.93 and execute the sale deed and get the same registered."

13. The appellants in terms of agreement of sale reproduced above were required to tender balance consideration of Rs.15,22000/-to respondent No.1 on or before **25.12.1993** which included a payment of a sum of Rs.8,50,000/- to be paid on or before **26.6.1993**. Even in their plaint, the appellants have failed to establish such payments to Respondent No.1. In para-6 of the plaint the appellants have allegedly deposited a sum of Rs.3,85,344/- towards loan amount of Respondent No.1 and her son and in para-7 they have shown a payment of Rs.17,000/- and another amount of Rs.50,000/- paid to the husband of Respondent No.1 on unspecified dates and the receipt has been issued by munshi of respondent No.1. It was breach of their duty under the agreement to sale. Payment claimed to have been made by the appellant to husband of respondent No.1 or towards outstanding loan of her son and even her own loan was not stipulated in the agreement sought to be enforced by appellant through Civil Court. Interestingly enough, the perusal of agreement shows that neither the husband of respondent No.1 / owner of the suit property, shrimati Kuku nor her son was witness to the sale agreement. Therefore, any payment made by the appellants to the husband of respondent No.1 and acknowledged by herself-styled munshi could not be treated as tender of part payment towards balance sale consideration in terms of agreement of sale reproduced above. The aggregate of total amount shown to have been paid in para-6 & 7 of plaint comes to Rs. 4,52,344/- against the amount of Rs.8,50,000/- which was payable to Respondent No.1 on or before **26.6.1993**. Thus from their own showing in

plaint, the appellants were short of payment of more than Rs.4,40,000/- on 26.6.1993 in breach of above reproduced terms of sale agreement, therefore, the most crucial issue No.8 that whether the plaintiffs (appellants herein) have complied with terms of agreement and become entitle to specific performance of contract even without recording evidence of the parties ought to have been decided in negative.

14. As discussed above, the issue No.8 even on reading of the plaint ought to have been decided in negative. The terms and conditions of the agreement has been breached admittedly by the appellants themselves. The appellants have never offered to tender so called balance sale consideration nor they have deposited the sale consideration in Court since 1994 despite the fact they are in possession of suit land as Haris/tenant as admitted by them in para-3 of the plaint. The conduct of the appellants was such that whatever amount is claimed to have been paid by them towards sale consideration has not been proved as held by the two courts below, therefore, in terms of Section 22 of the Specific Relief Act, 1877 the appellants were not entitled to the discretionary relief of Specific Performance of Contract. The concurrent findings recorded by the courts below that the appellants have failed to prove the existence of sale agreement and even the terms and conditions of the agreement to sell have not been complied with by them cannot be interfered in second appeal. The appellants have failed to show the orders/judgments of Courts below were (a) contrary to law or to some usage having the force of law (b) Courts have failed to determine material issue of law; and / or (c) suffer from error or procedure provided by C.P.C.

15. In view of the above discussion, this second appeal is dismissed along with listed applications with cost throughout.

JUDGE