

JUDGMENT SHEET
HIGH COURT OF SINDH, KARACHI

IInd Appeal No. 33 of 2016

APPELLANT : Muhammad Tariq through Mr. Abdul
WajidWyne, Advocate

RESPONDENT : Afzal Hussain through Mr.
IftikharJavaidQazi, Advocate

DATES OF HEARING : 27.07.2016, 01.08.2016 and 03.08.2016

DATE OF JUDGMENT : 03.08.2016

JUDGMENT

Muhammad Humayon Khan, J: This second appeal under Section 100 CPC is filed against the Judgment and Decree dated 17.12.2015 passed by the learned Vth Additional District Judge, Karachi-Central, in Civil Appeal No.179 of 2012, whereby, the learned Additional District Judge dismissed the appeal of the appellant and upheld the Judgment dated 03.12.2012 and Decree dated 05.12.2012 passed by the learned IVth Senior Civil Judge, Karachi- Central, in Suit No. 173 of 2007.

2. The relevant and material facts of the case for the disposal of this appeal are that the respondent filed suit for declaration, specific performance of contract and injunction against the appellant on 24.02.2007. The case pleaded in the plaint is that the respondent entered into an Agreement to Sell dated 09.07.2003 with the appellant to purchase House No. R-283-284, Block-9, Federal 'B' Area, Karachi (hereinafter referred to as "the said property") for the total sale consideration of Rs.17,50,000/-. It is further pleaded that on the date of agreement i.e. 09.07.2003, the respondent paid Rs.1,00,000/- being part payment to the appellant and the balance sale consideration of Rs.16,50,000/- was to be paid within 90 days from the date of signing of the said agreement at the time of handing over complete original documents and execution of sale deed of the said property in favour of the respondent. It is further pleaded that subsequently the sum of Rs. 4,00,000/- was paid on 03.09.2003 and Rs.7,00,000/- on 21.09.2003 for which the appellant executed receipts. It is further pleaded that thereafter the respondent published public notices in daily "Jasarat" and daily "Aman" both dated 15.10.2003 regarding purchase of the said

property from the appellant and invited objections, if any. It is further pleaded that earlier to the said agreement, the said property was in the possession of Mukhtar Hussain son of Mir Babu Ali, maternal uncle of the respondent, as a tenant, who was leaving for abroad and had to vacate the said property and since the appellant intended to sell the said property, the said maternal uncle of the respondent introduced him with the appellant. It is further pleaded that the respondent paid Rs.40,000/- to his maternal uncle Mukhtar Hussain at the instructions of the appellant, which amount was lying with the appellant as security deposit. It is further pleaded that on 05.07.2003 the said Mukhtar Hussain vacated the said property and the appellant handed over physical possession of the said property to the respondent under an oral sale agreement, which was reduced in writing on 09.07.2003. It is further pleaded that again on 29.09.2003 the respondent paid further amount of Rs.1,00,000/- to the appellant, who received the same but did not issue any receipt. It is further pleaded that the respondent paid the total sum of Rs.13,40,000/- to the appellant upto 29.09.2003 and Rs. 4,10,000/- remained towards balance sale consideration. It is further pleaded that since the appellant was not ready to adjust the sum of Rs.1,40,000/-, he did not receive the balance sale consideration of Rs. 4,10,000/-. It is further pleaded that subsequently in the month of January/February 2005, the respondent was served with the notice of Rent Case No. 657 of 2004 filed by the appellant against the respondent for ejection from the said property falsely claiming the respondent as his tenant. It is further pleaded that the respondent was always ready to pay the balance sale consideration but the appellant did not receive the balance sale consideration and created dispute regarding the amount of balance sale consideration. It is further pleaded that the cause of action arose when the respondent was served with the notice of Rent Case No. 657 of 2004 in January 2005, which is a notice to the respondent that the appellant refused to perform the said sale agreement and therefore the respondent filed the instant suit, wherein, the respondent claimed the following reliefs:-

- i) A Decree declaring that since the month of July 2003, the Plaintiff is in physical possession of the suit property i.e. House No. R-283-284, Block-9, F.B. Area, Karachi, in consequence of the Agreement to Sell dated 09.07.2003, in the right and under the title of the Vendee/Purchaser, vide the aforementioned Agreement dated 09.07.2003, entered into and executed by the parties hereto.

- ii) A Decree further declaring that the Plaintiff was never/is not the tenant of the Defendant in respect of the Suit property i.e. House No. R-283-284, Block-9, F.B. Area, Karachi, under any Agreement of Tenancy with the Defendant.
- iii) A Decree declaring that the Defendant had filed Rent Case No. 657/2004, against the Plaintiff for his eviction from the Suit property malafidely, without there being any relationship of Landlord and Tenant in between the parties hereto in respect of the Suit property i.e. House No. R-283-284, Block-9, F.B. Area, Karachi and all proceedings initiated therein are void and of no legal effect.
- iv) A Decree directing the Defendant to receive the balance amount of Rs.4,10,000/- from the Plaintiff towards total sale consideration of the Suit property, in consequence of Agreement to sell dated 09.07.2003, execute and get registered the proper Sale Deed/Conveyance Deed in favour of the Plaintiff in respect of the Suit Property i.e. House No. R-283-284, Block-9, F.B. Area, Karachi, and also hand over all the original title documents of the same to the Plaintiff. On failure of the Defendant to do so, appoint Nazir of this Hon'ble Court to receive the balance amount of Rs.4,10,000/- from the Plaintiff on behalf of the Defendant, execute and get registered with the Sub-registrar concerned, the proper Sale/Conveyance Deed in respect of the Suit property, in favour of the Plaintiff.
- v) A Decree restraining the Defendant, his agents, employees, representatives, and anybody else claiming in his name and acting on his behalf from selling, transferring, gifting, disposing off the aforementioned Suit property, creating any third party interest in respect thereof, so also from dispossessing the Plaintiff from the same i.e. from the suit property i.e. House No. R-283-284, admeasuring 240 Sq. yards, Block-9, Federal "B" Area, Karachi, in any manner whatsoever, including under the cover of eviction order/Judgment dated 03.10.2005, passed in Rent Case No. 657/2004, entitled as Muhammad Tariq Vs. Afzal Hussain, by learned IVth Rent Controller, Karachi, Central.
- vi) Cost of the Suit.
- vii) Any other relief or relieves which this Hon'ble Court may deem fit and proper under the circumstances of the case.

3. The appellant filed his written statement, wherein, the appellant raised legal objections regarding jurisdiction of Court, maintainability of suit and limitation. The appellant admitted the execution of Agreement to Sell dated 09.07.2003 but pleaded that in December 2001, the maternal uncle of the respondent obtained the said property on monthly rental basis from the appellant and in June 2003 the said maternal uncle of the respondent vacated the said property and the respondent became tenant, who paid rent for

June and July 2003 and thereafter sale agreement was executed. It is further pleaded that since the respondent illegally stopped to pay monthly rent, a compromise meeting was held in January 2004 and Iqrarnama was executed whereby, the respondent admitted the tenancy and outstanding rent from August 2003 to January 2004. It is denied that respondent ever paid Rs. 40,000/- to the appellant as initial payment. It is also denied that the respondent paid Rs.1,00,000/- on 05.07.2003 to the appellant and on that day he was put in physical possession of the said property. It is further pleaded that the respondent was in possession as tenant since June 2003 and sale agreement was prepared on 09.07.2003 but it was signed and attested on 16.07.2003 and on the same day the respondent paid the sum of Rs.1,00,000/- for which a separate receipt was signed by the appellant on 16.07.2003. It is denied that the balance sale consideration is Rs.4,10,000/-. It is pleaded that the respondent paid the total amount of Rs. 12,85,000/- out of which receipts of Rs. 12,00,000/- were issued and the remaining amount of Rs. 85,000/- was acknowledged in Iqrarnama dated 01.01.2004. It is further pleaded that the balance sale consideration is Rs.4,65,000/-. It is denied that the respondent was ready to pay the balance sale consideration to the appellant. It is pleaded that upon failure to pay balance sale consideration, the appellant send a legal notice dated 18.02.2004 which was duly received by the respondent on 19.02.2004 but he did not reply the same. It is further pleaded that the said sale agreement was cancelled and there is no agreement of sale between the parties anymore and therefore the question of its performance does not arise. In the end, the appellant prayed for the dismissal of the instant suit.

4. The learned Senior Civil Judge framed the following issues:-

- i) Whether the suit is not maintainable?
- ii) Whether after execution of sale agreement by Defendant, the possession of suit property was handed over to the Plaintiff?
- iii) Whether Defendant has received Rs.13,40,000/- out of total sale consideration from Plaintiff?
- iv) Whether Defendant has failed perform his part of contract?
- v) Whether Maternal Uncle of Plaintiff had obtained the suit property from Defendant on monthly rent?
- vi) Whether after proceedings abroad Mukhtar, the tenancy was transferred in the name of Plaintiff?

- vii) Whether Iqarnama dated 01.01.2004 was executed by Plaintiff?
- viii) Whether the Plaintiff is entitled for relief as claimed?
- ix) What should the Decree be?

5. The respondent examined himself and one witness namely Razia Iqbal and produced documents. On the other hand, the appellant examined his attorney and produced documents.

6. The learned Senior Civil Judge by his Judgment dated 03.12.2012 decreed the instant suit for specific performance of contract against the appellant.

7. Against the aforesaid Judgment, the appellant filed Civil Appeal No. 179 of 2012, which was dismissed by the learned Additional District Judge vide Judgment dated 17.12.2015.

8. Against the concurrent findings of both the Courts below, the appellant has filed this second appeal under Section 100 CPC.

9. I have heard the learned counsel for the parties and perused the material available on the record.

10. The learned counsel for the appellant raised the following contentions:-

- i) Time was fixed in the Sale Agreement dated 09.07.2003 for completion of the contract and hence the time was essence of the contract and accordingly the instant suit comes within the ambit of first part of Article 113 of the Limitation Act, which should have been filed within three years i.e. upto 15.10.2006 but the instant suit was filed on 24.02.2007, after the expiry of limitation and hence it was time barred. In support of this contention, he relied upon the cases of (i) Haji Muhammad Yaqoob through Legal Heirs Vs. Shah Nawaz (1998 CLC (Karachi) 21), (ii) Abdul Ghani Vs. Muhammad Shafi and 4 others (2007 SCMR 1186) and (iii) Liaqat Ali Khan and others Vs. Falak Sher and others (PLD 2014 Supreme Court 506);
- ii) Since the respondent has not proved his case that he was ready and willing to perform his part of the contract in time as stipulated in the said sale agreement, the respondent was not entitled for specific performance and accordingly the discretion under Section 22 of the Specific Relief Act was exercised arbitrarily by both the Courts below. In support of this contention,

he relied upon the cases of (i) Zahid Rahman Vs. Muhammad Ali Asghar Rana (2007 CLC (Lahore) 1814) and (ii) Mst. Mehmooda Begum Vs. Syed Hassan Sajjad and 2 others (PLD 2010 Supreme Court 952);

- iii) Second appeal is maintainable against the concurrent findings of both the Courts below and the High Court has power to re-appraise the evidence and can set-aside the concurrent findings of both the Courts below. In support of this contention, he relied upon the cases of (i) Abdul Salam alias Abul Khair and another Vs. Alah Miah Serang and another (PLD 1971 Supreme Court 189), (ii) Sabir Hussain and others Vs. Afrasayyab and others (1989 CLC (Lahore) 1591), (iii) Muhammad Siddiq Hashim Vs. Muhammad Anwar (1991 CLC (Karachi) 1616), (iv) Fazal Muhammad and others Vs. Mst. Zainab Bibi and others (2001 MLD (Lahore) 2012) and (v) Atta Muhammad and others Vs. Imtiaz Ali (2001 MLD (Lahore) 2027).

11. On the other hand, the learned counsel for the respondent raised the following contentions:-

- i) No specific time was fixed in the Sale Agreement dated 09.07.2003 for completion of the contract and hence the time was not the essence of the contract and accordingly the instant suit comes within the ambit of second part of Article 113 of the Limitation Act and therefore the instant suit was filed within limitation. In support of this contention, he relied upon the cases of (i) Faqir Muhammad and 8 others Vs. Abdul Momin and 2 others (PLD 1995 Lahore 405) and (ii) Ghulam Mustafa and others Vs. Muhammad Shafi and others (2005 YLR (Lahore) 2768);
- ii) Since the respondent has proved his case that he was ready and willing to perform his part of the contract in time as stipulated in the said sale agreement, the discretion under Section 22 of the Specific Relief Act was rightly exercised by both the Courts below;
- iii) Second appeal against the concurrent findings of both the Courts below is not competent and the High Court has no power to re-appraise the evidence and cannot set-aside the concurrent findings of both the Courts below. In support of this contention, he relied upon the cases of (i) Habibullah, etc. Vs. Mst. Aziz Bibi (NLR 1981 AC (Lahore) 3), (ii) Roshan Din and others Vs. Muhammad Maqbool (1994 CLC (Lahore) 677), (iii) Muhammad Iqbal and others Vs. Khushi Muhammad through Legal Heirs and others (1995 MLD (Lahore) 1886), (iv) Haji Sultan Ahmad through Legal Heirs Vs. Naeem Raza and 6 others (1996 SCMR

1729), (v) Haji Sher Muhammad and others Vs. Atta Muhammad and others (2001 YLR (Lahore) 2072), (vi) Ahmed Zaman Khan Vs. Ch. Nazeer Ahmed and others (2003 MLD (Lahore) 1292), (vii) Muhammad Idrees Jag Vs. Mst. Unezah Shahid and another (2004 MLD (Lahore) 1033), (viii) Charagh Begum and others Vs. Raj Muhammad and others (2004 YLR (Azad J&K) 1421), (ix) Muhammad Iqbal and another Vs. Mukhtar Ahmad through L.Rs.(2008 SCMR 855), (x) Asifa Khanum through L. Rs. Vs. Sheikh Abdul Ghafoor through L. Rs. (2009 CLC (Lahore) 1089), (xi) Safdar Ali Khan Vs. Azad Government of the Jamu and Kashmir through Chief Secretary and 2 others (2010 MLD (Supreme Court) (AJ & K) 1980) and (xii) Muhammad Aslam and 3 others Vs. Mushtaq Ahmed and 2 others (PLD 2012 (Lahore) 132).

12. The first important point for consideration in this appeal is that what is the scope of the second appeal under Section 100 CPC and in which cases and under what circumstances the High Court can interfere in the concurrent findings of both the Courts below and in which cases and under what circumstances the High Court cannot interfere in the concurrent findings of both the Courts below and whether the High Court has power under Section 100 CPC to re-appraise the evidence or not.

13. In the case of Abdul Majid and others Vs. Khalil Ahmad (PLD 1955 Federal Court 38), the Hon'ble the than Federal Court (Now Hon'ble Supreme Court)has held that:-

“It is obvious that what the learned Judges intended to say was that for the reasons stated by then the Courts below should not have accepted the evidence which they did, and they seem to have assumed that a fallacious method of approaching the evidence is, in second ‘appeal, a good ground for upsetting a finding of fact based on such evidence. **With great respect, I am unable to agree with this view, because a fallacy in appraising the evidence as to a fact, unless it amounts to a material mistaken assumption, is merely an error in coming to a finding as to that fact, and such error has never been held to be an error of law justifying interference in second appeal.** I had the occasion to examine this question recently in the Lahore High Court in Nadir Shah v. Lai Shah and others (P L R (1954) 595=P L D 1954 Lah. 447) where referring to the leading authorities of the Privy Council on this subject I held that **the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross and inexcusable the error may seem to be, unless there is an error in the procedure provided by law, which may possibly have produced an error or defect in the decision of the case on the merits.** I adhere to that opinion which was based on the Privy Council decisions in DurgaChowdhri v. Jewahir Singh Chowdhri (1 L R 18 Cal. 23) and Wall Muhammad v. Muhammad Bakhsh (11Lah. 199) which lay down this proposition in clear and unmistakable term. **It is not suggested that there was in the present case any "error in the procedure provided by law", nor that there is any rule of law prescribing the manner in which evidence in such cases has to be judged which was contravened by the Court of First Appeal which is the final**

judge of facts. The circumstances that the sale deeds contained no recital as to necessity, that the alienations were old sales, that the alienee was dead at the time of the suit and that the vendor was leading the life of a country gentleman and not that of a debauch or wastrel, had all been duly considered by the Courts below in arriving at their conclusions, **and assuming that the High Court did not agree with the lower Courts appreciation of the evidence, that could not be a ground for it to reverse the concurrent findings of fact of the lower Courts. In my opinion, the High Court had no jurisdiction to entertain the second appeal on this ground, and it exceeded its functions in interfering with those findings.**”

14. In the case of Madan Gopal and 4 others Vs. Maran Bepari and 3 others (PLD 1969 Supreme Court 617), the Hon’ble Supreme Court has held that:-

“The legal position does not admit of any doubt that a concurrent finding of fact reached by the lower Courts will not be disturbed by the High Court in a second appeal even if it disagrees with that finding on its own view of the evidence, although the concurrent finding of the lower Courts may appear to be grossly erroneous, unless, as laid down in subsection (c) of section 100, the error or defect discovered is of a substantial character pertaining to the procedure as provided by the Code or by any other law for the time being in force which may possibly have produced an error or defect in the decision of the case upon its merits. Interference would also be justified if the decision of the lower Courts is found to be contrary to law or some usage having the force of law or has failed to determine some material issue of law or usage having the force of law.”

15. In the case of Sikandar Hayat and 4 others Vs. Master Fazal Karim (PLD 1971 Supreme Court 730), the Hon’ble Supreme Court has held that:-

“I have already discussed the oral evidence produced by the appellants in support of the plea of estoppel and waiver. In my opinion, the oral evidence produced by the appellants is reliable and trustworthy and the learned Single Judge was not justified to reject it only on the ground of omission of the plea of estoppel and waiver in Exh. D. 1. In law, **he had no jurisdiction to reverse the concurrent finding of fact of the Courts below and by doing so he has fallen into an error.** I would, therefore, set aside the order of the High Court and restore the judgments of the Courts below.”

16. In the case of Mst. Bibi Jan Vs. Habib Khan and another (PLD 1975 Supreme Court 295), the Hon’ble Supreme Court has held that:-

“There is considerable substance in these contentions. In the first instance, it would be appreciated that it was not a case of concurrent finding by the two Courts below but the findings arrived at by the trial Court on both the issues were reversed by the District Judge which were upheld in second appeal by the learned Single Judge on the technical ground that both pertaining to questions of fact had attained finality and could not be challenged. It was on this technical view of the matter that the appellant’s appeal was dismissed by the High Court. No doubt, it has been consistently held in a chain of authorities starting from DurgaChowdhry v. Jewahir Sing Choudhry (I L R 18 Cal. 23 (P C)), up to Bharpura v. Diwan Chand (A I R 1940 Lah. 329), **unexceptionally followed by the superior Courts of India and Pakistan that the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous**

finding of fact howsoever gross or inexcusable the error may be, yet there are ample authority for the proposition that no sanctity attaches even to a concurrent finding of fact based on misreading or misrepresentation of evidence as this would clearly bring the case within the scope of Clause (c) of section 100, C. P. C. This view, which was equally based on a number of authorities, was reiterated by my learned brother Muhammad Yaqoob Ali, J in *Fatima v. Khuda Bux and others* (PLD 1959 Lah. 826), as a Judge of the former High Court of West Pakistan. In this elaborate judgment referred to with approval in a recent judgment of this Court *Nazar Muhammad and another v. Mst. Shahzada Begum and another* (PLD 1974 S C 22).”

17. In the case of *Fazal Rahman Vs. Amir Haider and another* (1986 SCMR 1814), the Hon’ble Supreme Court has held that:-

“We have examined the contentions raised by the learned counsel and would agree with him that the concurrent findings arrived at by the two Courts below was after considering the case from every possible angle. As no plea, at any stage, was raised nor any issue was framed to the effect that the respondent had become owner by afflux of time, it is considered unnecessary to re-open the case on this ground. **The High Court will not interfere with an erroneous finding, however, gross and inexcusable the error may be except on strong legal ground which can be held to tantamount to interference on a question of law concurrent finding of fact reached by the lower Courts will not be disturbed by the High Court in a second appeal even if it disagrees with that finding on its own view of the evidence.**”

18. In the case of *Mst. Nishadah Begum and 3 others Vs. Muhammad Ayub Khan* (PLD 1988 Supreme Court (AJ &K) 203), the Hon’ble Supreme Court has held that:-

“With the object to put an end to litigation at some stage, the Legislature restricted the scope of second appeal, in the shape of section 100 of the Code. Second appeal was, thus, made permissible in the following cases: -

- (i) When the decision was against law;
- (ii) Some material point of law was left undecided; or
- (iii) Some substantial error, or procedural defect occurred, that resulted in error or defect in decision on merits.

Misreading, misinterpreting and non-reading of evidence was termed as a substantial error resulting in miscarriage of justice. This is how in a case of misreading, misinterpreting and non-reading of evidence, High Court was allowed to interfere in second appeal.”

19. In the case of *Mst. Kapoori and 4 others Vs. Man Khan and 6 others* (1992 SCMR 2298), the Hon’ble Supreme Court has held that:-

“We do not share this opinion. The learned Judge in the High Court had clearly held that the issue between the parties was one of fact had had been decided after due appraisal of the evidence and went on to add that **it is well-established that even though the finding of the Courts below may be erroneous such finding cannot be interfered with in the second appeal.**”

20. In the case of Abdul Rashid Vs. Bashiran and another (1996 SCMR 808), the Hon'ble Supreme Court has held that:-

“Again we are inclined to agree with the proposition raised on behalf of the appellant that from the perusal of the grounds mentioned in section 100 of Civil Procedure Code, 1908, a second appeal does not lie on the ground of an error on question of fact. It only lies on the ground of error of law, or, an error in the procedure; which may have affected the decision of the case upon the merits. In the case of Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) this Court had specified the following grounds on which a second appeal is permissible under section 100:-

- (i) The decision being contrary to law.
- (ii) The decision being contrary to usage having force of law.
- (iii) Failure to determine some material issue of law.
- (iv) Substantial error or defect in the procedure provided by the Code or by any other law for the time being in force which may possibly have produced an error or defect in the decision of the case upon merits.

Applying this test, we are of the considered view that the decision rendered by the two Courts below was based on judicial consideration of evidence adduced in the case. On the contrary, the decision arrived at by the two Courts below was not shown to be either based on irrelevant or inadmissible evidence or further that the evidence had, in any way, been mis-read by them. **It is thus clear that the High Court in second appeal had wrongly interfered with the concurrent findings of fact simply because some other view point could also be taken This view of the High Court is not in accord with the decision of this Court in (i) Pathana v. Mst. Wasai (PLD 1965 SC 134), (ii) Khera Din v. Fazal Din (1968 SCMR 1027) and (iii) Azhar Saleem v. Muhammad Anwar Khan (1974 SCMR 484) besides Abdul Majid's and Naseer Ahmad's cases supra.”**

21. In the case of Haji Sultan Ahmad through Legal Heirs Vs. NaeemRaza and 6 others (1996 SCMR 1729), the Hon'ble Supreme Court has held that:-

“From the above discussed legal position, it is quite obvious that the concurrent finding recorded by the Courts below cannot be interfered with by the High Court while exercising jurisdiction under section 100, C.P.C. how so erroneous that finding may be, unless such finding has been arrived at by the Courts below either by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence. The point, therefore, which arises for consideration in the present appeals is, whether the reversal of the concurrent findings of the Courts below under issue No.5 by the learned Judge in Chambers was on account of any misreading of evidence by the Courts below or omission on the part of Courts below to take into consideration any material piece of evidence on record or the appreciation of evidence by the two Courts below was perverse or arbitrary. We have already reproduced the relevant observations of the learned Judge in Chambers which persuaded him to interfere with the concurrent finding of fact. A careful examination of the reasons given by the learned Judge to justify interference with the concurrent finding of fact would show that the learned Judge was of the view that Sufi HidayatUllah, one of the D.W. examined in the case was person whose evidence should not have been discarded by the trial Court. It was also the view of the learned Judge in Chambers that the defendants were not bound to call the ‘Patwari’ or Tehsildar in evidence to prove the presence of the

deceased at the time of recording of mutation in favour of respondents. The learned Judge, therefore, concluded that mere absence of the name of the deceased in the proceedings through which mutation was recorded in the name of vendee-respondents, was not material to determine the controversy. The learned Judge in Chambers further observed that the view expressed by the Courts below that the entries of the sale mutations had a presumption of truth attached to them and, therefore, in the absence of documentary evidence, the oral evidence cannot be safely relied upon on the point of waiver, was not a correct view. **The above observations of learned Judge in Chambers related to appreciation of evidence and not to any misreading or non-consideration material piece of evidence on record by the Courts below. Similarly, the observation of the learned Judge that the contradiction in the evidence of defence witnesses were minor in characters and therefore, should not have been discarded on that ground, also fell within the scope of appreciation of evidence. In fact, the entire process of reasoning by the learned Judge in Chambers in upsetting the concurrent finding of facts was the result of reappraisal of evidence on record in the case which was not permissible under section 100, C.P.C.”**

22. In the case of Muhammad Iqbal and another Vs. Mukhtar Ahmad through L.Rs (2008 SCMR 855), the Hon’ble Supreme Court has held that:-

“Such were the circumstances when the two Courts below came to the conclusion that they arrived at and rightly so. **This perfectly sound conclusion should not have been interfered with by the High Court in the exercise of its second appellate jurisdiction.** This also has been deprecated by a Full Bench of this Court in Karamat Ali v. Muhammad Yunus Haji PLD 1963 SC 191.”

23. In the case of Safdar Ali Khan Vs. Azad Government of the Jammu and Kashmir through Chief Secretary and 2 others (2010MLD(Supreme Court (AJ&K) 1980), the Hon’ble Supreme Court has held that:-

“We are persuaded that the Courts below have rightly held that the plaintiff-appellant failed to file objections within prescribed period of limitation, thus the trial Court has rightly made the award of Arbitrator as decision of the Court. As has been observed in the preceding paras that admittedly this is second appeal and **the scope of second appeal is confined only to the grounds stated in section 100 C.P.C. The appellant has failed to make out any valid ground according to statutory provisions. The factual points which are agitated on behalf of appellant have been concurrently resolved by Courts below. This Court has always declined to interfere with the concurrent findings recorded by the subordinate Courts. This principle has consistently been followed.”**

24. After carefully analyzing the above referred reported Judgments of the Hon’ble Supreme Court of Pakistan as well as Supreme Court of Azad Jamu & Kashmir, I came to the conclusion that:

(i) to attract the provisions of Section 100 CPC, the appellant has to satisfy this Court that the Court subordinate to this Court has:-

- a) based its decision contrary to law or some usage having the force of law;
 - b) failed to determine some material issue of law or usage having the force of law;
 - c) committed a substantial error or defect in the procedure provided by CPC or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits;
- (ii) this Court has no jurisdiction to entertain second appeal on the ground of an erroneous finding of fact, however gross and inexcusable the error may be unless there is an error or defect in the procedure provided by law, which may possibly have produced error or defect in the decision of the case upon the merits;
 - (iii) concurrent findings of facts will not be disturbed by this Court in a second appeal even if this Court disagrees with that findings on its own view of the evidence;
 - (iv) second appeal does not lie on the ground of an error on question of fact, it only lies on the ground of error of law or an error in the procedure, which may have affected the decision of the case upon the merits;
 - (v) this Court has no jurisdiction to re-appraise the evidence in second appeal, which is not permissible under Section 100 CPC;
 - (vi) misreading, misinterpreting and non-reading of evidence as a substantial error resulting in miscarriage of justice and therefore this Court can interfere against the concurrent findings in second appeal;
 - (vii) this Court can also interfere against the concurrent findings in second appeal on the ground of misinterpretation of law, ignorance of reported Judgments of Superior Courts and misinterpretation of reported Judgments of Superior Courts;
 - (viii) as per Section 101 CPC, no second appeal shall lie except on the grounds mentioned in Section 100 CPC.

25. However, the learned counsel for the appellant in support of his contention that the second appeal is maintainable even against the concurrent findings of both the Courts below, relied upon the cases of (i) Abdul Salam alias Abul Khair and another Vs. Alah Miah Serang and another (PLD 1971 Supreme Court 189), (ii) Sabir Hussain and others

Vs. Afrasayyab and others (1989 CLC (Lahore) 1591), (iii) Muhammad Siddiq Hashim Vs. Muhammad Anwar (1991 CLC (Karachi) 1616), (iv) Fazal Muhammad and others Vs. Mst. ZainabBibi and others (2001 MLD (Lahore) 2012) and (v) Atta Muhammad and others Vs. Imtiaz Ali (2001 MLD (Lahore) 2027) to show that in all these reported cases the concurrent findings were set-aside by the High Court. No doubt, in all these reported cases, the concurrent findings of both the Courts below were set-aside by the High Court but on the principle of law that the concurrent findings were based upon misreading of evidence and misinterpretation of law. Accordingly, the cases relied upon by the learned counsel for the appellant, in fact, do not support his arguments but on the contrary all are against him.

26. The second important point for consideration in this appeal is that what is the correct interpretation of Article 113 of the Limitation Act and in what circumstances the first part of Article 113 of the Limitation Act applies and in what circumstances the second part of Article 113 of the Limitation Act applies.

27. Accordingly, to understand the provisions of Article 113 of the Limitation Act, it is necessary to re-produce the same as under:-

“113.For specific performance of [Three years] a contract.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.”
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28. Article 113 of the Limitation Act clearly contemplates two situations namely (i) when the date fixed for the performance of the agreement and (ii) when the agreement does not specify any date. In the former case, starting point of limitation is three years from the date fixed in the agreement but in the latter case, the period starts running from the date when specific performance is refused by the defendant/appellant.

29. To decide the important point of limitation whether the instant case comes within the ambit of first part or the second part of Article 113 of the Limitation Act, it is essential firstly to refer agreement of sale dated 09.07.2003, which contemplates that the balance sale consideration of Rs.16,50,000/- shall be paid by the purchaser/respondent to the seller/appellant within 90 days from the date of signing of this agreement at the time

of handing over complete original documents and execution of sale deed of the said property in the name of purchaser/respondent or his/her nominee.

30. According to the learned counsel for the appellant that time was fixed in the sale agreement for completion of the contract and hence the time was essence of the contract and therefore the instant case comes within the ambit of first part of Article 113 of the Limitation Act and since the instant suit was filed after more than three years from the date fixed in the agreement, it was time barred. On the other hand, the learned counsel for the respondent contended that no specific time was fixed in the sale agreement and hence the time was not the essence of the contract and therefore the instant case comes within the ambit of second part of Article 113 of the Limitation Act and since the instant suit was filed within three years from the date of notice of refusal, it was filed within time.

31. In these circumstances, the primary point for determination in this appeal is that whether the time fixed in the agreement of sale dated 09.07.2003 was the essence of the contract or not.

32. This essence of the law has been embodied in Section 55 of Contract Act, which reads as follows:-

“55. Effect of failure to perform at fixed time, contract in which time is essential.When a party to a contract promises to do a certain thing at or before a specified time, or before a specified time or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as had not been performed, becomes voidable at the option of the promisee, **if the intention of the parties was that time should be of the essence of the contract.**

Effect of such failure when time is not essential.If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so."

The words “if the intention of the parties was that time should be of the essence of the contract” used in the first part of Section 55 of the Contract Act, need to be kept in

mind because neither the language of a contract nor any particular circumstance of a case has been mentioned in this section as specifically indicative of the importance of time. If the parties stipulated in a contract that time was of the essence of agreement but there were sure indications of the contrary intention, then inspite of the language, their intention would prevail. Accordingly, it is necessary to discover the intention of the parties and not merely relying upon on any particular aspect of the transaction.

33. Accordingly, it is necessary and essential to discuss the intention and conduct of the parties at the time of sale agreement and after execution of the said sale agreement in view of the admitted or proved facts, which are as follows:-

- a) Agreement of Sale dated 09.07.2003 was signed and executed on 16.07.2003;
- b) Earnest money of Rs.1,00,000/- was paid on 16.07.2003 at the time of execution of sale agreement;
- c) Balance sale consideration of Rs.16,50,000/- was payable within 90 days i.e. upto 15.10.2003;
- d) Rs.4,00,000/- was paid on 03.09.2003;
- e) Rs.7,00,000/- was paid on 21.09.2003;
- f) Public Notice in News Papers dated 15.10.2003;
- g) Rs.85,000/- was paid on 01.01.2004;
- h) Time for payment of remaining amount of Rs.4,65,000/- was extended upto 10.01.2004 by the appellant;
- i) Appellant served legal notice dated 18.02.2004 upon the respondent for payment of balance sale consideration of Rs.4,65,000/- within seven days i.e. upto 25.02.2004;
- j) In January 2005, the respondent was served with notice of Rent Case No. 657 of 2004 and acquired knowledge of refusal to perform the said sale agreement by the appellant;
- k) On 24.02.2007, the respondent filed the instant suit.

34. Apart from this, the attorney of the appellant has admitted in his cross examination that the appellant received payments from time to time even after lapse of 90 days and did not forfeit the earnest money. It is further admitted by him that there was no

any time factor mentioned in the sale agreement to conclude the deal and the appellant even after lapse of 90 days continued the said agreement of sale with the respondent and received payment from him. It is relevant to mention here that the attorney of the appellant has categorically admitted in his cross examination that the appellant with malafide intention refused to receive the balance sale consideration from the respondent. He further admitted that no notice for cancellation of the sale agreement was served by the appellant upon the respondent. He further admitted that the appellant has received the sum of Rs.12,85,000/- from the respondent towards sale consideration.

35. In view of the above discussion, I am of the view that time was never treated by the parties of much importance and hence the time fixed in the said sale agreement was not the essence of the contract.

36. Even otherwise, it is well settled that in the matter of sale of immovable property, time is never to be the essence of a contract in spite of the fact that time was mentioned in the sale agreement. Reliance can be placed upon the cases of (i) Abdul Hamid Vs. Abbas Bhai-Abdul Hussain Sodawaterwala (PLD 1962 Supreme Court 1), (ii) Haji Abdullah Khan and others Vs. Nisar Muhammad Khan and others (PLD 1965 Supreme Court 690), (iii) Ghulam Nabi and others Vs. Seth Muhammad Yaqub and others (PLD 1983 Supreme Court 344), (iv) Mrs. Mussarat Shaukat Ali Vs. Mrs. Safia Khatoon and others (1994 SCMR 2189), (v) Sandoz Limited and another Vs. Federation of Pakistan and others (1995 SCMR 1431), (vi) Faqir Muhammad and 8 others Vs. Abdul Momin and 2 others (PLD 1995 Lahore 405), (vii) Raja Nasir Khan Vs. Abdul Sattar Khan and another (PLD 1998 Lahore 20), (viii) Mst. Amina Bibi Vs. Mudassar Aziz (PLD 2003 Supreme Court 430), (ix) Mst. Mehmooda Begum Vs. Syed Hassan Sajjad and 2 others (2004 YLR (Lahore) 845), (x) Ghulam Mustafa and others Vs. Muhammad Shafi and others (2005 YLR (Lahore) 2768) and (xi) Muhammad Hussain and others Vs. Dr. Zahoor Alam (2010 SCMR 286).

37. However, the learned counsel for the appellant in support of his contention that time was fixed in the sale agreement and hence it was the essence of the contract and therefore the instant suit comes within the ambit of the first part of Article 113 of the Limitation Act and since the instant suit was filed beyond the period of three years, it was time

barred, relied upon the cases of (i) Haji Muhammad Yaqoob through Legal Heirs Vs. Shah Nawaz (1998 CLC (Karachi) 21), (ii) Abdul Ghani Vs. Muhammad Shafi and 4 others (2007 SCMR 1186) and (iii) Liaqat Ali Khan and others Vs. Falak Sher and others (PLD 2014 Supreme Court 506).

38. In the case of Haji Muhammad Yaqoob through Legal Heirs Vs. Shah Nawaz (1998 CLC (Karachi) 21), only earnest money was paid and no further amount towards sale consideration was paid. There was a specific time fixed in the sale agreement. No correspondence took place between the parties after the sale agreement till the filing of suit. In this context, it was held that first part of Article 113 of Limitation Act applies. This case-law is not at all applicable to the facts and circumstances of the instant case.

39. In the case of Abdul Ghani Vs. Muhammad Shafi and 4 others (2007 SCMR 1186), the facts of this case though are totally different from the instant case but the principle of law laid down in this case is that if time is not expressly provided then time is not essence of contract and therefore limitation will start from the date of refusal. Further, in this reported case, concurrent findings of Courts below were maintained. This reported case is indirectly against the appellant.

40. In the case of Liaqat Ali Khan and others Vs. Falak Sher and others (PLD 2014 Supreme Court 506), the facts of this case are totally different from the instant case and therefore this reported Judgment is not applicable to the facts and circumstances of the instant case.

41. In view of the facts, circumstances, conduct of the parties and settled law discussed hereinabove, I came to the definite conclusion that the parties at no stage treated the time as the essence of the contract and therefore the instant case does not come within the ambit of first part of Article 113 of the Limitation Act.

42. So far as the second part of Article 113 of the Limitation Act is concerned, it is well settled that the defendant/appellant before invoking the bar of limitation under second part of Article 113 of the Limitation Act, he has to prove affirmatively that more than three years before filing of suit, he had unequivocally, unconditionally and clearly refused to perform his part of the contract, which is lacking in the instant case. Reliance

can be placed upon the Judgment of the Hon'ble Full Bench of 5 Hon'ble Judges of the Hon'ble Supreme Court in the case of Inam Naqshband Vs. Haji Shaikh Ijaz Ahmad (PLD 1995 Supreme Court 314).

43. Admittedly, there was no direct refusal of the appellant to perform his part of the contract but the respondent acquired the knowledge of his refusal upon service of notice of Rent Case No. 657 of 2004 in January/February 2005 and thereafter the respondent filed the instant suit on 24.02.2007, which was within limitation as provided in second part of Article 113 of the Limitation Act, which is applicable to the instant case. Reliance can be placed upon the case of Mst. Bibi Khatoon and 7 others Vs. Abdul Jalil (PLD 1978 Supreme Court 213).

44. The last point for consideration in this appeal is that whether the discretion under Section 22 of the Specific Relief Act was exercised by the Courts below on sound reasons or arbitrary.

45. According to the learned counsel for the appellant that since the respondent has not proved his case that he was ready and willing to perform his part of the contract in time as stipulated in the said sale agreement, the respondent was not entitled for specific performance and accordingly the discretion under Section 22 of the Specific Relief Act was exercised arbitrary by both the Courts below. In support of this contention, he relied upon the cases of (i) Zahid Rahman Vs. Muhammad Ali Asghar Rana (2007 CLC (Lahore) 1814) and (ii) Mst. Mehmooda Begum Vs. Syed Hassan Sajjad and 2 others (PLD 2010 Supreme Court 952). On the other hand, the learned counsel for the respondent contended that since the respondent has proved his case that he was ready and willing to perform his part of the contract in time as stipulated in the said sale agreement, the discretion under Section 22 of the Specific Relief Act was rightly exercised by both the Courts below. However, he has not cited any case-law in support of his arguments.

46. I have carefully gone through the pleadings and evidence of the parties and both the Judgments of the Courts below and I came to the conclusion that both the Courts below have exercised discretion under Section 22 of the Specific Relief Act on sound reasons, which is neither perverse nor arbitrary nor inequitable. It is well settled that specific performance, by no means, absolute right but one which rest entirely in judicial

discretion and always with reference to the facts of a particular case and where Trial Court has exercised its discretion in one way and that discretion has been judicially exercised on sound principles and the decree is affirmed by the Appellate Court, the High Court in second appeal will not interfere with that discretion, unless same is contrary to law or usage having the force of law. Reliance can be placed upon the cases of (i) Ghulam Nabi and others Vs. Seth Muhamamd Yaqub and others (PLD 1983 Supreme Court 344) and (ii) Naseer Ahmed Siddique through Legal Heirs Vs. AftabAlam and another (PLD 2011 Supreme Court 323).

47. However, the learned counsel for the appellant in support of his contention that since the respondent has not proved his case that he was ready and willing to perform his part of the contract in time as stipulated in the said sale agreement, the respondent was not entitled for specific performance and accordingly the discretion under Section 22 of the Specific Relief Act was exercised arbitrary by both the Courts below, relied upon the cases of (i) Zahid Rahman Vs. Muhammad Ali Asghar Rana (2007 CLC (Lahore) 1814) and (ii) Mst. Mehmooda Begum Vs. Syed Hassan Sajjad and 2 others (PLD 2010 Supreme Court 952).

48. In the case of (i) Zahid Rahman Vs. Muhammad Ali Asghar Rana (2007 CLC (Lahore) 1814), time was fixed in the agreement, which was neither extended nor any request was made for extension by the Plaintiff and it was proved that the Plaintiff was not ready and willing to perform his contractual obligation and this fact alone disentitled the plaintiff to claim specific performance. This case-law is not at all applicable to the facts and circumstances of the instant case.

49. In the case of Mst. Mehmooda Begum Vs. Syed Hassan Sajjad and 2 others (PLD 2010 Supreme Court 952), the facts of this case though are totally different from the instant case but the principle of law laid down in this case is that to exercise discretion under Section 22 of the Specific Relief Act, the Court has to consider the conduct of the parties. In fact, this reported case is indirectly against the appellant.

50. It is well settled that where the defendant/appellant committed breach of the contract, it is not obligatory on the plaintiff/respondent to prove his willingness to

perform the contract in a suit for specific performance. Reliance can be placed upon the case of Seth Essabhoy Vs. Saboor Ahmad (PLD 1972 Supreme Court 39).

51. The learned counsel for the appellant has not been able to satisfy me that this second appeal under Section 100 CPC is maintainable in law in view of the embargo contained in Sections 100 and 101 CPC.

52. In view of the above discussion, this second appeal was dismissed with costs by short Order dated 03.08.2016, which was inadvertently dated 01.08.2016, which may be read as dated 03.08.2016 and the above are the reasons for the said short order.

J U D G E