ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 239 of 2019

Date	**Order with Signature of Judge**

M/s. Sidat Hyder Morshed Associates (Pvt) Ltd. ……..……Appellant

Versus

Trade Development Authority of Pakistan and others.....Respondents

Date of hearing :23.05.2025

Date of announcement of order :30.05.2025

Mr. Khalid Mehmood Siddiqui, Advocate for the Appellant.
Mr. Abdullah Bhatti, Advocate for the Respondent.
Mr. Irshad Ali, Asstt. Attorney General.

J U D G E M E N T

1. Instant IInd Appeal has been preferred by the Appellant against the Impugned judgment and decree dated 26.10.2019 and 30.10.2019, respectively, passed by the XII-Additional District Judge (MCAC), Karachi South, in Civil Appeal No.170 of 2016. The above-mentioned Civil Appeal was preferred against judgment and decree dated 09.09.2016 passed in Civil suit No.1116/2012, passed by the learned VIIth Senior Civil Judge, Karachi South.

2. Brief facts of the case are that the Appellant preferred the above-mentioned suit for the recovery with the following prayers: -

> A) "Judgment and decree in favour of the Plaintiff and against the Defendant for a sum of Rs.14,950,000/- being the outstanding amount against the Contract along-with mark-up at bank rate and compensation at the rate of 5% per annum from the date of filing of the suit till the date of actual payment.
>
> B) Costs of the suit.
>
> C) Any other relief which this Honorable Court deems fit in the circumstances of the case."

3. After hearing the parties, framing of issues and recording of evidence the suit of the Appellant was dismissed vide judgment and decree dated 09.09.2016. Thereafter, the Appellant preferred the above noted Civil Appeal, which was dismissed vide impugned judgment and decree as noted above. Learned counsel has therefore impugned the concurrent findings of the Courts below.

4. The crux of the dispute between the parties is the consultancy assignment **("Contract")** admittedly executed between the Appellant and the Respondent. Learned counsel in this regard, has stated that the Contract was entered into by the parties on 26.05.2007. Learned counsel has further contended that in compliance of the above noted Contract, the Respondent paid the mobilization advance payable. Thereafter, the Appellant duly completed the given tasks and submitted the deliverables on 24.10.2007 and 23.01.2008. Thereafter, various meetings were held to review the progress and deliverables. Learned counsel has further invited my attention to letter dated 02.11.2007 in which the CEO of the Respondent has appreciated the work undertaken by the Appellant. Thereafter, it is contended by the learned counsel for the Appellant that invoices for the work done, under the above noted work, were dispatched to the Respondent, including reminders. The same, according to the learned counsel, remained un-responded and no dissatisfaction was ever expressed by the Respondent. The last meeting, according to the learned counsel, took place on 20.04.2010 and no dissatisfaction was expressed by the Respondent in the said meeting. Thereafter, it was argued by the learned counsel, that the Respondent was completely silent in regard to the invoices, which were dispatched and duly received by the Respondent. After a lapse of over two (2) years the Appellant was compelled to send a legal notice dated 03.12.2012 to the Respondent. Expectedly, the said notice was not responded to by the Respondent. Subsequently, the Appellant had no option but to file the above

noted suit. Learned counsel has contended that all the deliverables were delivered under the Contract noted above, in a timely manner, and the Appellant is entitled for the remaining amount under the Contract to be released.

5. Conversely, learned counsel for the Respondent has argued that the work of the Appellant was not satisfactory and therefore, the remaining amount under the Contract was not released to the Appellant. Learned counsel further stated that the burden of proof was upon the Appellant and he failed to discharge the same. The invoices, it was contended by the learned counsel, were not submitted in accordance with the relevant clauses of the Contract, as no satisfaction certificate was ever furnished by the Respondent to the Appellant. Lastly, it was argued by the learned counsel that the scope of Section 100 CPC is restricted and the concurrent findings of the courts below require no interference.

6. I have heard the learned counsels for the parties and perused the record. Order 41, Rule 31 C.P.C. mandates an appellate court to determine points for determination, the decision on those points, and the reasons for the decision. The said principle was also expounded in the case of ***Meer Gul vs. Raja Zafar Mehmood through legal heirs and others***[1]. The points for determination are set out below: -

    1. **Whether the Appellant is entitled to the remaining amount of Rs.14,950,000/- under the Contract?**
    2. **Whether the impugned judgment and decree is liable to be set-aside?**

POINT No.1

7. The dispute between the parties emanates from the Contract as mentioned above. Therefore, it will be expedient to reproduce certain clauses of the

[1] 2024 SCMR 1496

Contract, which will inevitably assess the competing claims of the respective parties. The relevant clauses are reproduced below: -

> ***"6.3 Mode of Invoicing/Billing and Payment***
> *Billing and payments in respect of the Services shall be made as follows: -*
> *(a) As soon as practicable and preferably within fifteen (15) days after the completing the milestone as given in Appendices D of the Contract, the Consultants shall submit to the Client, invoices / bills in duplicate, accompanied by appropriate supporting materials (including the particulars of the approved reports as satisfactory by the Client and the deliverables approved by the Client), of the amounts payable pursuant to Clauses 6.1 for such bills.*
>
> *(b) The Client shall cause the payment of the Consultants' invoices / bills within twenty-eight (28) days for amounts in local currency after the receipt by the Client of such invoices / bills with supporting documents. Only such portion of an invoice / bill that is not satisfactorily supported may be withheld from payment. Should any discrepancy be found to exist between actual payment and costs authorized to be incurred by the Consultants, the Client, after seeking clarification in writing from the Consultants, may add or subtract the difference from any subsequent payments.*
>
> *(c) The final payment under this Clause shall be made only after the final report and a final invoice/bill/statement, identified as such, shall have been submitted by the Consultants and approved as satisfactory by the Client. The Services shall be deemed completed and finally accepted by the Client and the final report and final statement shall be deemed approved by the Client as satisfactory ninety (90) calendar days after receipt of the final report and final statement by the Client unless the Client, within such ninety (90) day period, gives written notice to the Consultants specifying in detail deficiencies in the Services, the final report of final statement."*(Emphasis added)

8. It is evident from the bare perusal of the above noted clauses that it was the obligation of the Appellant to dispatch the invoices to the Respondent along with reports of satisfaction, which were to be furnished from the Respondent to the Appellant. It is admitted that no such report was forthcoming from the Respondent and the Appellant over a period of time submitted various invoices, some of which were duly processed by the Respondent without such report. Further, it is also noteworthy that no letter or response was ever furnished by the Respondent expressing dissatisfaction with the work done by the Appellant.

9. I have also examined the termination clause in the said agreement which reads as follows: -

> *"2.9.1The Client may terminate this Contract, by not less than thirty (30) days written notice of termination to the Consultant, to be given after the occurrence of any of the events specified in paragraphs (a) through (e) of this Clause 2.9.1 and sixty (60) days in the case of the event referred to in (f):*
> *(a) if the Consultant does not remedy a failure in the performance of their obligations under the Contract, within thirty (30) days after being notified or within any further period as the Client may have subsequently approved in writing;"*

10. It is evident that the Respondent in presence of the above noted clause had the option to terminate the Contract if the obligation and the performance of the Appellant were found wanting under the said Contract. It is admitted between the parties that no such termination was opted for by the Respondent. Further the examination of the Respondent witness will reflect that no such dissatisfaction was ever expressed. Relevant excerpts are reproduced below: -

> *"I do not remember if plaintiff submitted draft report of on compensation and denied on 20.2.2008. Vol. says I do not remember the date. It is correct to suggest that no payment was made to the plaintiff after submission of draft report on compensation and defined. Vol. says because the same was not approved by the defendant therefore no payment was made. It is correct to suggest that various meetings were held between them and defendant on the assignment up to 20.4.2010.I do not remember the exact date if final legal notice was served by the plaintiff upon the defendant on 03.04.2012. I have no knowledge if defendant has not sent any communication to the plaintiff explaining any dissatisfaction on the work performed by the plaintiff. Vol. says however in the meeting it was clearly mentioned that their reports were not satisfactory. It is correct to suggest that whatever I have deposed as vol. has not mentioned in my affidavit in evidence. It is incorrect to suggest that plaintiff submitted the assignment/deliverable on compensation structure (HR) service rules, training needs, analysis, management, development plan. To the defendant satisfactory. Vol. says the plaintiff has not submitted repot satisfactory as desired by the defendant. I have no knowledge if defendant never disapproved any of the assignment the payment will be made after transfer of each assignment. It is correct to suggest that defendant has not produced any evidence of any dissatisfying on service of the plaintiff. Vol. says every assignment was subject to approval by defendant and payment after approval by defendant. I have no knowledge therefore I cannot point out any letter or reminder sent by the plaintiff to the defendant which was not received by the defendant. It is correct to suggest that defendant never responded any letter sent by the plaintiff to the defendant and failed to ask any response to the letter/reminder sent by the plaintiff to the defendant however meeting were held between defendant and plaintiff. It is correct to suggest that all the invoices sent by the plaintiff were received by the defendant. Vol. says each invoice was subject to the submission of satisfactory report/deliverable after which the payment would be made. It is Correct to suggest that defendant has to filed any documentary evidence in order to show that the services of the plaintiff were satisfactory. It is correct to suggest that invoices against which payment of Rs.28,50,000/- was made as the same were approved by the defendant. It is correct to suggest that all the invoices*

> *sent by the plaintiff were not returned by the defendant to the plaintiff. I have been work with the defendant as assistant director since 2012. It is correct to suggest that in the year 2007 I was not employee in the bank. I am aware about the facts of the case after perusing the record of defendant provided by the admin department of the defendant. It is correct to suggest that personally I have no knowledge about the case facts and circumstances of the case. It is incorrect to suggest that I am deposing falsely."*(Emphasis added)

11. It is evident from the bare perusal of the cross-examination of the Respondent's witness, that the said witness had limited knowledge about the dispute between the parties. It is most noteworthy, that the said witness could not identify any letter or reminder sent by the Respondent pertaining to the deliverables under the Contract. The said witness has also admitted that no communication was ever made about the said Respondent being dissatisfied with the work undertaken under the Contract by the Appellant. However, the said witness has made a nonspecific statement about the said dissatisfaction, but the same is not corroborated by any documents. It is further astounding to note that the Affidavit-in-Evidence of the said witness did not annex a single document to corroborate to claim made therein.

12. The question now before me is whether the invoices ought to have been processed and cleared by the Respondent in light of the fact that no satisfaction report was ever furnished in that respect. It is held that the Respondents were *estopped* from raising the objection at a belated stage for the reason that admittedly some invoices were processed and payments were duly made, without the said satisfaction report been furnished by the Respondent. Even if certain invoices were not processed by the Respondent, it will be evident hereinafter that the payment ought to have been made to the Appellant.

13. Article 114 of the Qanun-e-Shahadat Order 1984 **("Order")** sheds light on the equitable doctrine of estoppel. The said principle was expounded in the case of ***Sardar Ali Khan Versus State Bank of Pakistan and others***[2] in the following words: -

[2] 2022 SCMR 1454

> *"8. Article 114 of the Qanun-e-Shahadat Order, 1984 defines the doctrine of estoppel under which when a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. In fact this principle is founded on equity and justness with straightforward objective to prevent fraud and ensure justice though it is described as a rule of evidence but may have effect of constituting substantive rights as again the person estopped being well-defined legal precept that impedes someone from averring a truth that is defined as contradictory to an already established truth. The catchphrase "Estoppel" is derived from the French word "estoupe" from which the word estopped in English language emerged. A man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (Lord coke in Co. Litt 352 (a) as cited in the case of B.L. Sreedhar v. K.M. Munireddy (2003) 2 SCC 355 at 365). Whereas the doctrine of acquiescence is grounded upon a conduct that if a person sighted another person about to commit an act infringing upon his rights who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. In the case of Ramsden v. Dyson L.R. 1 E & I, Ap. 129 (140) (1865), it was held that the common case of acquiescence is where a man, who has a charge or encumbrance upon certain property, stands by and allows another to advance money on it or to expend money upon it. Equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain willfully passive in order to profit by the mistake which he might have prevented. While in the case of Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846), the court held that the proper sense of the term acquiescence and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it and is no more than an instance of the law of estoppel by words or conduct."*

14. It is further held, that it was not upon the Respondent toprocrastinate on the issuance of such certificate and the alleged dissatisfaction and its lack of communication to the Appellant, can only be classified as *deemed satisfaction* i.e. acquiescence by the Respondent. The Respondent through its conduct i.e. silence and more particularly his omission to respond to the claims of the Appellant, caused the Appellant to believe that the work done was satisfactory. The concept of acquiescence was elaborated upon by the Hon'ble Supreme Court in the case of ***Messrs Dadabhoy Cement***

Industries Limited and others v. Messrs National Development Finance Corporation[3] wherein it was held as under: -

> *"Article 114 of the Qanun e Shahadat Order deals with waiver or acquiescence and describes it as intentional relinquishment of a known right or such conduct as would warrant an inference of relinquishment of such right; implying consent to dispense with or forgo something to which a person is entitled; an agreement to release or not to assert a right; to constitute waiver there must be some conscious giving up of a right and a person cannot be held bound unless he is aware of what exactly he was waiving and what right he was giving up with knowledge of all the facts."*

15. For the purposes of present adjudication, it can safely be held that the *"intentional relinquishment of a known right"* was in essence, the discretion of the Respondent to convey its dissatisfaction to the Appellant, which admittedly was never done. Such failure can only be classified as acquiescence.

16. The meaning and nature of *estoppel by silence* has been elaborated in the invigorating professional treatise i.e. Chitty on Contracts[4]in the following words: -

> *"Although this statement was made with reference to wholly different circumstances, it could also be applied to certain cases in which an offeror had, to the offeree's knowledge, acted in reliance on the belief that his offer had been accepted by silence. The liability of the offeree would then be based on a kind of estoppel. But the application of this doctrine to cases of alleged acceptance by silence gives rise to the difficulty that such an estoppel can arise only out of a "clear and unequivocal" representation. For this purpose, mere inactivity is not generally sufficient, so that silence in response to an offer will not normally give rise to an estoppel. It is likely to do so only in cases of the kind discussed above, in which there are special circumstances which give rise to a "duty to speak," and in which it would be unconscionable for the party under that duty to deny that a contract had come into existence."* (Emphasis added).

17. It is specifically held that the Respondent, in the present circumstances had a *"duty to speak*" and raise concerns about the work tendered by the Appellant.

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[3]2002 SCMR page-1761

[4] Chitty on Contracts, Sweet & Maxwell , 32nd edition.

18. It is further pertinent to hold that the rationale of the courts below in dismissing the claim of the Appellant is the withholding of the certificate of satisfaction. The courts below in adjudicating the said issue paid no heed to the provisions of Section 46 of the Contract Act 1872. The same is reproduced below: -

> *"46. Time for performance of promise where no application is to be made and no time is specified. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.*
> *Explanation.— The question "what is a reasonable time" is, in each particular case, a question of fact."*

19. It is evident from the perusal of the relevant terms of the contract reproduced above, that there was no specific timeline stipulated for the grant of the certificate of satisfaction under clause 6.3 (a). In that regard, it is held, that the Respondent could not have held the same indefinitely and the same ought to have been furnished within a *"reasonable time"*. It has already been held above that the Respondent was within its rights to terminate the Contract if it was dissatisfied with the performance of the Appellant. In the context of the present appeal, it is evident that the legal notice was dispatched after two (2) years of the invoices being submitted to the Respondent. The said period can safely be construed as *"reasonable"*.

20. Further in assessing *"reasonable time"* the courts below ought to have perused clause 6.3 (c) of the Contract, reproduced above, which stipulates a period of ninety (90) days, after which if no deficiencies are expressed in the final report than it *"shall be deemed approved by the client as satisfactory"*. The Courts below ought to have deduced reasonable time from the above-noted clause and therefore erroneously dismissed the suit of the Appellant on the grounds which have already been noted above.

21. To further augment the deliberation above, reliance is placed on the case of ***Rafiq Dawood and 4 others Versus Messrs Haji Suleman Gowa Wala & Sons Ltd. through Director and others***[5] wherein it was held as under: -

> *"Section 46 of the Contract Act provides for such eventuality. Therefore, even if parties have not specified any time for the performance of a contract, the same does not make it unenforceable in law. A Court can read into such contracts a time such it deems reasonable for its performance, keeping in view the circumstances of each contract."*

22. The scheme of entire Contract envisages that the Respondent shall either issue certificate of satisfaction upon which invoices shall be cleared, or in case of any dissatisfaction, the Respondent as noted above, had the option to terminate the Contract, which admittedly was never done. It is further held that once the Appellant stepped into the witness box and exhibited the work done and the relevant invoices, the burden shifted to the Respondent to satisfy that the tasks undertaken by the Appellant, under the contract, were not satisfactory. This was the burden of proving a particular fact under Article 119 of the Order. Whilst the initial and even the general burden was on the Appellant under Articles 117 and 118 of the Order, the said burden was discharged as noted above and the burden shifted to the Respondent.

23. I have perused the judgments of the Courts below thoroughly. Whilst the judgments, more particularly, the judgment of the learned trial Court correctly recorded the examination and the relevant admissions of the Respondent witness, however, the same went on to hold that the Appellant was not entitled to the recovery of the amount cited under the Contract. Further, the observation and the view of the learned trial Court that the Appellant did not satisfactorily perform his Contractual obligations is unfounded and finds no support in the evidence that has been led by the respective parties. The learned trial Court rendered its view without analyzing the work and the deliverables actually done by the Appellant and neither was the exercise permissible within the scope of the subject suit.

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[5] 2009 C L C 1070

24. I am mindful of scope of Section 100 C.P.C. The principles pertaining to the said section have been expounded in several judgments of the Hon'ble Supreme Court and it is held that the instant appeal falls well within the narrow scope outlined by the Hon'ble Supreme Court in the case of ***Sheikh Akhtar Aziz Versus Mst. Shabnam Begum and others***[6] wherein it was held as under: -

> *"14. As far as the argument of the learned counsel for the appellant that the learned High Court had travelled beyond the parameters of section 100, C.P.C., the same in the facts and circumstances of the case has been found by us to be totally misconceived. Although in second appeal, ordinarily the High Court is slow to interfere in the concurrent findings of fact recorded by the lower fora. This is not an absolute rule. The Courts cannot shut their eyes where the lower fora have clearly misread the evidence and came to hasty and illegal conclusions. We have repeatedly observed that if findings of fact arrived by Courts below are found to be based upon misreading, non-reading or misinterpretation of the evidence on record, the High Court can in second appeal reappraise the evidence and disturb the findings 52019 SCMR 524 9 which are based on an incorrect interpretation of the relevant law. We have examined the record and found that the issues have not properly been determined by the lower fora and there are material and substantial errors and defects in the reasoning and conclusions drawn by the trial as well as the first appellate Court which materially affected the outcome of the case on merit. The High Court was therefore, in our opinion, quite justified in interfering with this matter and correcting the errors of the lower fora in order to do complete justice."* (Emphasis added)

25. The learned counsel for the Appellant has successfully made out a case for interference. For the foregoing reasons the instant appeal is allowed. The Impugned judgment and decree are set-aside and the suit of the Appellant is decreed in the sum of Rs.14,950,000/- with mark-up at bank rate. Office to prepare decree accordingly.

JUDGE

Nadeem

[6] 2019 S C M R 524