IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE ANWAR ZAHEER JAMALI, CJ
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE SH. AZMAT SAEED
MR. JUSTICE MANZOOR AHMAD MALIK
MR. JUSTICE FAISAL ARAB

CIVIL APPEAL NO.56 OF 2011, CMA NO.6863 OF 2014 IN CIVIL APPEAL NO.56 OF 2011, CIVIL APPEAL NO.462-L OF 2009 AND CIVIL APPEAL NO.11-L OF 2013

(On appeal from judgment dated 30.11.2010, 19.10.2004 & 19.12.2012, passed by the Lahore High Court, Lahore & Lahore High Court, Bahawalpur Bench, in C.R. No.897/2009, R.S.A. No.41/1997 & C.R. No.347-D/2006 (BWP), respectively)

CA.56/2011	Muhammad Sattar Vs. Tariq Javaid and others
CMA.6863/2014 in CA.56/2011	Muhammad Sattar Vs. Tariq Javaid and others
CA.462-L/2009	Raja Muhammad Iqbal Vs. Muhammad Sadiq (decd) through L.Rs., etc.
CA.11-L/2013	Muhammad Anwar Vs. Muhammad Akram, etc.

For the Appellant (s)	:	Ch. Mushtaq Ahmed Khan, Sr. ASC Syed Rifaqat Hussain Shah, AOR (absent) (in CA.56/2011) Moulvi Anwar-ul-Haq, ASC (in CA.462-L/2009) Mian Allah Nawaz, Sr. ASC (in CA.11-L/2013
For Respondents No.1-4 and 6-8)	:	Malik Muhammad Kabir, ASC Mr. Ahmed Nawaz Ch., AOR (absent) (in CA.56/2011)
For Respondents	:	Sardar Muhammad Aslam, ASC (in CA.462-L/2009) Ch. Aamir Rehman, ASC (in CA.11-L/2013)

Date of Hearing : 15 and 16.06.2016

JUDGMENT

SH. AZMAT SAEED, J.- Civil Appeal No.56 of 2011, Civil Misc. Application No.6863 of 2014 in Civil Appeal No.56 of 2011 and Civil Appeals No.462-L of 2009 & No.11-L of 2013 have arisen out of Civil Suits, wherein the Plaintiffs therein variously claimed relief of Specific Performance of Agreements to Sell pertaining to immovable property. In each of the aforesaid cases, the Agreement to Sell in question was purportedly signed and executed by the Vendors but did not bear the signatures of the Vendees, who were the Plaintiffs in their respective Civil Suits. A common question which has arisen in all the aforesaid Civil Appeals is whether such Agreements to Sell not signed by the Vendees were valid and enforceable in law. The learned High Court in its judgment dated 30.11.2010 impugned in the Civil Appeal No.56 of 2011 and in the judgment dated 19.12.2012 by relying upon the judgment of this Court, reported as Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) held that such an Agreement to Sell not signed by the Vendee/Plaintiff was not enforceable in law. A similar argument was also canvassed at the bar in Civil Appeal

No.452-L of 2009. Reference was also made to another judgment of this Court, reported as Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187) to assert that the Agreement to Sell not signed by one of the parties was invalid.

2. The learned counsels appearing for both sides of aisle were brisling with arguments based upon the entire factual and legal spectrum of their respective cases but were asked to restrict themselves to the legal proposition noted above, as we initially propose only to decide the aforesaid question of law leaving the merits of the individual case, including all other issues of fact and law to be adjudicated upon separately on a case to case basis.

3. Mian Allah Nawaz, learned Sr. ASC leading the charge on behalf of the Appellant in Civil Appeal No.11-L of 2013 contended that the learned High Court has failed to take into consideration the provisions of Sections 8 and 9 of the Contract Act, 1872, and a bare reading thereof leaves no manner of doubt that a concluded enforceable agreement can come about, even in the absence of formal signatures by one of the parties. It was added that there is nothing in the Contract Act, 1872, which prohibits an oral agreement, which is obviously not signed by either party. It was further added that the learned High Court has failed to

take into consideration the law laid down by this Court in the judgment, reported as Messer's Jamal Jute Baling & Co, Dacca v. Messrs M. Sarkies & Sorts (Sons), Dacca (PLD 1971 SC 784), wherein it has been held that an Agreement reduced into writing and accepted by both the parties is enforceable in law, even if, one of the parties has not appended its signatures thereupon. The learned counsel further relied upon the judgment of this Court, reported as Karachi Gas Co, Ltd v. Dawood Cotton Mills Ltd. (PLD 1975 SC 193) to assert that a valid agreement can be based upon an implied proposal and acceptance and, in this behalf, writing is not necessary. The learned counsel also placed reliance upon the judgments, reported as RTS Flexible Systems Limited v. Molkerei Alois Muller GmbH and Co. KG (2012 SCMR 1027), Messrs Habib Bank Limited v. Abdul Wahid Khan (1996 CLC 698), Jugal Kishore Rameshwardas Vs. Mrs. Goolbai Hormusji (AIR 1955 SC 812) and Banarsi Das Vs. Cane Commissioner, Uttar Pradesh and another (AIR 1963 SC 1417). With regard to the judgments of this Court, reported as Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) and Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187), it was contended that the same are not only distinguishable on facts but also do not lay down the

entire law on the subject and cannot be construed to run contrary to the express provisions of Sections 8 and 9 of the Contract Act, 1872 and the settled law on the subject, as laid down by this Court, including in the judgments referred to above.

4. The other learned counsels adopted and supported the contentions raised on behalf of the learned counsel for the Appellants referred to above.

5. The learned counsel for the opposite side controverted the contentions raised by Mian Allah Nawaz, learned Sr. ASC by contending that mutuality is a *sine qua non* for an enforceable agreement and the absence of the signatures of one of the parties thereto for all intends and purposes conclusively determine the absence of such mutuality. It was further contended that the same is even more vital in an executory agreement containing reciprocal promises. The learned counsel placed reliance upon the judgments of this Court in the cases, reported as Sirbaland Vs. Allah Loke and others (1996 SCMR 575) Messrs M.A. Khan and Co. through Sole Proprietor Muhammad Ali Khan Vs. Messrs Pakistan Railway Employees Cooperative Housing Society Ltd. Through Principal Officer/Secretary, Karachi (2006 SCMR 721), Mst. Gulshan Hamid (*supra*), Alleged Corruption in Rental

Power Plants Etc. :In the matter of (Iftikhar Muhammad Chaudhry, CJ) (2012 SCMR 773) and Farzand Ali and another (*supra*).

6. Heard and perused the available record.

7. The primary and basic law relating to the contracts is obviously the Contract Act, 1872. The essentials of a valid contract are an offer communicated, the unconditional acceptance of such offer and consideration. There is nothing in the Contract Act, 1872 which requires that such offer and acceptance must necessarily be in writing or form a single document. The law i.e. the Contract Act, 1872 envisages a valid enforceable contract, which may even be oral. A perusal of the provisions of the said enactment also reveals that both the proposal and its acceptance may be expressed or implied, as is apparent from Section 9 thereof, which reads as under:

> "**9. Promises, express and implied.-** In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

8. Similarly, once an offer is communicated, the performance of the conditions of the proposal or the acceptance of any consideration or part thereof offered

with the proposal also constitutes an acceptance so as to bring about a valid binding contract between the parties, as is obvious from the bare reading of Section 8 of the Contract Act, 1872, which is reproduced hereunder for ease of reference:

> "**8. Acceptance by performing conditions or receiving consideration.-** Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

9. No doubt, the Contract Act, 1872 may not be the only law applicable to the transactions enumerating the requisite formalities. Various special laws pertaining to certain specified species of contracts also hold the field and the provisions thereof may envisage certain additional requirements to bring about a valid contract. An obvious example is Section 54 of the Transfer of Property Act, 1882, which requires that a contract of sale of immovable property of a value of more than one hundred rupees must necessarily be reduced in writing. This condition only applies where the Transfer of Property Act, 1882 is applicable through a Notification in terms of Section 1 thereof. The said provision of the Transfer of Property Act, 1882 is not applicable to the entire length and breadth of Pakistan and oral sales are recognized and enforced in

various parts of Pakistan. Be that as it may, there is nothing in the Transfer of Property Act, 1882 or any other law, which requires that an Agreement to Sell of immovable property must necessarily be reduced into writing or be signed by the parties thereto.

10. The Courts in Pakistan, while interpreting the various provisions applicable, more particularly, Sections 8 and 9 of the Contract Act, 1872, have repeatedly and consistently held that the contracts in general do not require to be reduced into writing (except where otherwise specifically provided by law) and the offer and acceptance can also be implied from the conduct of the parties in terms of Sections 8 and 9 *ibid* and the absence of formal signatures does not effect the validity or enforceability of the Contract Act, 1872.

11. This Court in the judgment, reported as Messer's Jamal Jute Baling & Co, Dacca v. Messrs M. Sarkies & Sorts (Sons), Dacca (PLD 1971 SC 784) held as follows:

> "Even if it be assumed for the sake of argument that the contract was not properly signed even otherwise in my opinion, the contract between the parties was quite valid and binding on them. It has been rightly pointed out by the Civil Judge that the appellant-sellers have accepted the contract. There is also evidence that after the conclusion of the contract the appellant-firm had partially acted upon it for supplying 125 bales of

jute. Mr. Bhattacharjee, learned counsel for the respondent has referred to two Indian decisions, *Jugal Kishore Rameshwardas* v. *Mrs. Goolbai Hormusji* (1) and *Banarsi Das* v. *Cane Commissioner, Uttar Pardesh and another* (2). It was held in these cases that even if signature is not there and acceptance is established it is a proper agreement between the parties. In the case of *Jugal Kishore Rameshawardas*, it was held as under :-

> "But it is settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties, and that it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established."

The same view was expressed in the case of *Banarsi Das.* If the fact of the present case is considered in the light of these principles, it is proved that the agreement between the parties was reduced to writing. Both the parties accepted its terms and have partially carried them out. In view of this the contract in dispute is established between them and the respondents are entitled to enforce it. Having regards to these facts, I am satisfied that there was a valid reference to arbitration and the Arbitrators were competent to enter on the reference in order to decide the dispute between the parties. I would, therefore, repel the contention of the appellant in this behalf."

(emphasis supplied)

In the case of Karachi Gas Co, Ltd v. Dawood Cotton Mills Ltd. (PLD 1975 SC 193), it has been observed as follows:

> "The customer did not raise any objection to this principle of charging interest. On the basis of these facts, the Privy Council

following the principle laid down in (1813) 3 Camp 487 observed at p. 23 as follows:-

> "... the fact that the defendant had not objected to a change of compound interest in accounts which for several years, he had annually received from the plaintiff bank offered sufficient evidence of a promise by him to pay interest in that manner."

In the case of Messers M. A. Khan & Co. through Sole Proprietor Muhammad Ali Khan v. Messers Pakistan Railways Employees Cooperative Housing Society Ltd. Through Principal Officer/Secretary, Karachi, (2006 SCMR 721), it was held as under:

> "... The acceptance of the offer may be express or implied or it can be gathered from the conduct of parties and the circumstance of the case. The acceptance of an offer would give rise to an agreement which if is enforceable in law is a valid contract and the contract is complete as soon as the offer is accepted and the terms of contract required to be reduced in writing would be only incidental to the completion of contract. In a contract by correspondence if the acceptance of offer is established through the letters, the non-execution of the formal agreement would not be essential to constitute a valid contract. The letters of offer and acceptance indicating the term agreed upon by the parties would constitute a valid contract which would not be affected by subsequent negotiation and the terms of the contract would necessarily be judged from the letter of acceptance."

12. The controversy with regard to the validity of the contract, which does not bear the signatures of one of the parties thereof also cropped up in the Indian Jurisdiction and was settled by the Supreme Court of India in the judgment, reported as Aloka Bose v. Parmatma Devi & Ors. (AIR 2009 SC 1527), it was held as follows:

> "All agreements of sale are bilateral contracts as promises are made by both – the vendor agreeing to sell and the purchaser agreeing to purchase. On the other hand, the observation in S.M. Gopal Chetty (supra) that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. ... Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone unless it is by a series of offers and counter-offers by letters or other modes of recognized communication. In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the

> vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale."

13. The aforesaid would make it clear that it is now a well settled proposition of law that for a valid contract, the same can be oral or it may be through exchange of communication between the parties. Once an offer is communicated, the acceptance thereof can be expressed or implied. Such acceptance of the offer would include accepting the consideration accompanying the offer or acting upon the said bargain. There is no requirement of a formal signature of both or either of the parties. All that is required is an offer and acceptance and consideration between the parties.

14. At this juncture, it may be pertinent to mention that all valid contracts are not specifically enforceable but nevertheless may give rise to rights and liabilities, and the breach thereof may entitle the offended party to seek compensation/damages in terms of Sections 73 and 74 of the Contract Act, 1872.

15. The question of Specific Performance of a contract is dealt with in the Specific Relief Act, 1877. The reference to this aspect of the matter has been

necessitated in view of the fact that in the judgments relied upon by the learned counsel i.e. Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) and Farzand Ali and another Vs. Khuda Bakhsh and others (PLD 2015 SC 187), a reference has been made to Section 22 of the Specific Relief Act, 1877. The aforesaid provision is reproduced hereunder for ease of reference:

> **"22. Discretion as to decreeing specific performance:** The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. The following are cases in which the Court may properly exercise a discretion not to decree specific performance:
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> I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.
>
> *Illustrations*
>
> (a) *A,* tenant for life of certain property, assigns his interest therein to *B*. *C* contracts to buy, and *B* contracts to sell that interest. Before the contract is completed. *A* receives a mortal injury from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact. *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*.

> (b) *A* contracts to sell to *B* the interest of *C* in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that *C's* interest is worth nothing. In fact, the value of *C's* interest depends on the result of certain partnership- accounts, on which he is heavily in debt to his partners. This indebtedness is known to *A*, but not to *B*. Specific performance of the contract should be refused to *A*.
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> (c) *A* contracts to sell and *B* contracts to buy certain land. To protect the land from floods, it is necessary for its owner to maintain and expensive embankment. *B* does not know of this circumstance, and *A* conceals it from him. Specific performance of the contract should be refused to *A.*
>
> (d) *A*'s property is put up to auction. *B* requests *C*, *A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should he refused to *B*."

16. A perusal of the aforesaid provision leaves no manner of doubt that it does not pertain to validity of the contract but to its Specific Performance. In fact it presupposes a lawful contract as mentioned therein. It also presupposes that the agreement/contract in question contains all the necessary attributes mentioned in Section 12 of the Specific Relief Act, 1877 entitling a party to its Specific Performance. It also presupposes that the said agreement does not suffer from any of the disabilities

mentioned in the preceding Section 21 of the Specific Relief Act, 1877, which prohibit its Specific Performance. Section 22 only comes into play as a residuary provision authorizing the Court to decline Specific Performance on equitable grounds.

The aforesaid provision has come up for interpretation regularly before this Court variously, included in the following cases.

In the case of Ghulam Nabi and others v. *Seth* Muhammad Yaqub and others (PLD 1983 SC 344), it was held as under:

> "19. And lastly it was urged that the jurisdiction of the Court to decree specific performance being discretionary under section 22 of the Specific Relief Act, the Court ought not to have, considering the plaintiff's conduct, granted such relief. The jurisdiction under section 22 is discretionary only in the sense that it cannot be claimed as a matter of right. As enjoined by the section itself, the exercise of the discretion is not to be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. The exercise of the discretion to grant or refuse to grant relief will, therefore, depend upon the circumstances of the case and the conduct of the parties. The Courts below have not found the circumstances of the case or the conduct of the plaintiff to justify a denial of the relief to him, and we see no reason to hold otherwise."

In the case of Syed Arif Shah v. Abdul Hakeem Qureshi (PLD 1991 SC 905), it was observed as under:

> "14. It may be noticed that according to the above-quoted section the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful. However, the discretion of the Court is not arbitrary but sound and reasonable and is to be guided by judicial principles which are amenable to correction by a Court of appeal. It may further be noticed that the above section gives two illustrations which are not exhaustive to demonstrate in which cases the Court may decline to exercise discretion of granting specific performance of a contract, namely, (i) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant though there may not be fraud or misrepresentation on the plaintiffs part; and (ii) where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would not involve such hardship on the plaintiff. It may also be pointed out that the above section provides that the Court may properly exercise discretion to decree specific performance where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance."
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> (emphasis supplied)

In the case of Mrs. Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others (1994 SCMR 2189) (at page 2209), it was observed as follows:

> "... It is true that grant of relief of specific performance is discretionary with the

> Court but this discretion cannot be exercised arbitrarily. The relief of specific performance being an equitable relief, it can be refused by the Court only if the equities in the case are against the plaintiff. The Court while refusing to grant a decree for specific performance to a plaintiff must find some thing in the conduct of plaintiff which disentitled him to the grant of equitable relief of specific performance, or the Court reaches the conclusion that on account of delay in seeking the relief, the circumstances have so materially changed that it would be unjust to enforce the agreement specifically. The specific performance of a contract cannot be refused merely because it is lawful for the Court to refuse it. Section 22 of the Specific Relief Act, though not exhaustive provides some instances in which the specific relief of a contract may be refused by the Court in its discretion. ..."

In the case of Rab Nawaz and 13 others v. Mustaqeem Khan and 14 others (1999 SCMR 1362), it was stated as under:

> "9. ... Undoubtedly there are many instances in which, though there is nothing that actually amounts to fraud there is nevertheless a want of equity and fairness in the contract which are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance. In judging of the fairness of a contract the Court will look not merely at the terms of the contract itself but at all the surrounding circumstances. ..."

In the case of Bashir Ahmed through L.Rs. and another v. Muhammad Ali through L.Rs and another

(2007 SCMR 1047), it was held as under:

> “5. It is a settled law that grant of specific relief is always discretionary in character and the Court is not always bound to decree the suit of specific performance in cases where the agreement is proved. It is a settled law that Court has to exercise discretion judicially and not arbitrarily. Reference can be made to the following judgments:-
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> > Arif Shah's case PLD 1991 SC 905, Mussarat Shaukat Ali's case PLD 1994 SCMR 2189, Ameena Bibi's case PLD 2003 SC 430 and Jethalal Nanshah Modi v. Bachu and another AIR 1945 Bom. 481.
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> > The ratio of the aforesaid precedents is as follows:--
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> > Where the circumstances under which a contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part or relief may be denied where the plaintiff has been negligent or as acquiesced in the injury."

In the case of Mst. Mehmooda Begum v. Syed Hassan Sajjad and 2 others (PLD 2010 SC 952), it was observed as follows:

> “7. ... Now here at this juncture the question would arise as to whether the amount of consideration can be enhanced or otherwise? Before dilating upon the said question, it may be kept in view that "section 22 provides that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the

> Court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal." (Abdul Karim v. Muhammad Shafi 1973 SCMR 225). It hardly needs any elaboration that "grant of decree for specific performance of a contract is a discretionary relief and the Court is not bound to decree such a suit merely because it is lawful. The Court has also to see the conduct of the person asking for such relief as also his readiness and willingness and capacity to make payment. "(Emphasis provided). Ali Muhammad v. Shah Mohammad PLD 1987 Lah. 607, Bank of Bahawalpur, Ltd. v. Punjab Tanneries, Wazirabad Ltd. PLD 1971 Lah. 199 and Sree Lal v. Hariram AIR 1926 Cal. 181).

17. A perusal of Section 22 of the Specific Relief Act, 1877 as interpreted by this Court in the judgments reproduced hereinabove makes it clear and obvious that the said provision has no bearing on the validity of the contract. It only recognizes the discretion vested with the Court to decline the Specific Performance of an Agreement even in the absence of any impediment, in this behalf, as enumerated in Section 21 of the Specific Relief Act, 1877 and in spite of the fact that such Agreement may possess the necessary attributes entitling the Specific Performance of Section 12 of the said Act of 1877. It declares that the Specific Performance is essentially an equitable relief which can be declined if it is unjust or inequitable to do so. For determining whether the Relief or Specific

Performance is to be granted the circumstances under which the contract is executed and the contract of the parties at that time and thereafter may be taken into account. The illustrated examples pertain to unforeseen circumstances and hardships which may be inflicted upon a party through Specific Performance in contradistinction to the lack of such hardships as a consequence of the failure to specifically perform the contract. The illustrations appended to the provision are not exhaustive but indicate the discretion available with the Court. Such discretion must necessarily be exercised on the basis of sound judicial principles. At the end of the day, the discretion must necessarily be relatable to the circumstances in which agreement came about or to the Specific Performance of the contract and the consequences of grant or refusal of the relief of specific performance. It does not appear possible to invoke Section 22 of the Specific Relief Act, 1877 to determine the validity of the agreement.

18. Furthermore, there is nothing in Section 22 nor its illustrations or the interpretation thereof as handed down by this Court in the various judgments referred to and reproduced hereinabove to indicate that the relief of Specific Performance is relatable to or has any connection

with quantity or quality of the evidence required to be produced by either of the parties seeking or resisting such Specific Performance. Obviously a valid enforceable agreement alongwith factors entitling a person to Specific Performance, would be required to be proved through relevant and admissible evidence in terms of the Qanun-e-Shahadat Order, 1984. In this behalf, reference was made to Article 17 of the Qanun-e-Shahadat Order, 1984, which is reproduced hereunder for ease of reference:

> "**17. Competence and number of witness.-**(1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah.
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> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law.
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> (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and
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> (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant."

This Court in the judgment, reported as Mst. Rasheeda Begum and others v. Muhammad Yousaf and others (2002 SCMR 1089), has been held as follows:

> "12. It is true that before promulgation of Qanun-e-Shahadat Order, 1984 an agreement to sell was not required by any law to be attested by witnesses. It is, however, a matter of common knowledge that during that period also the agreements to sell were by and large reduced to writing and attested by witnesses in spite of absence of a legislative provision and the mode attained the status of an established practice by efflux of time. This mode, in all probability, was adopted by way of abundant caution and to procure documentary evidence inasmuch as in a suit for specific performance of contract based on an agreement to sell the onus is on the plaintiff to prove the contract unless its existence is admitted by the defendant. The interest of justice, therefore, demands that the form of proof should be in line with the format of the document executed by the parties to the contract. It would thus follow that where an agreement to sell executed prior to promulgation of Qanun-e-Shahadat Order, 1984 has been reduced into writing and attested by witnesses its execution must be proved in accordance with the provisions of section 68 *(Article 79)* of the erstwhile Evidence Act notwithstanding the fact that the ` tame apply only to that document which is required by law to be attested.
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> Prop of the aforementioned legal vacuum cannot be taken to offset the effect of failure to prove the execution of an agreement to sell in accordance with the said mode. However, where an agreement to sell has been reduced to writing but not attested by witnesses its execution and the contract embodied therein can be proved by other strong evidence and attending

> circumstances which may vary from case to case. Needless to mention that such evidence can also be produced in the first category of cases as supporting evidence.

A perusal of the aforesaid provision as interpreted by this Court makes it clear and obvious that the rigors of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, would be attracted even if an Agreement to Sell is purportedly signed by both the parties but its execution is denied. Furthermore, the said provision pertains to the mode of proof of the document not its validity in terms of the Contract Act, 1872 nor its Specific Performance in terms of the Specific Relief Act, 1877. A failure to prove the existence of the Agreement would obviously deprive the Plaintiff of such relief but any difficulty, in this behalf, would not attract the provisions of Section 22 of the Specific Relief Act, 1877, as such difficulty may have no nexus with the circumstances under which the agreement came about or the conduct of the parties or the hardship flowing from the grant of such relief. The observations in the case of Mst. Gulshan Hamid v. Kh. Abdul Rehman and others (2010 SCMR 334) do not appear to be in consonance with the letter and spirit of Section 22 *ibid* and runs contrary to the judicial pronouncements of this Court.

19. A great emphasis was laid upon the judgment of this Court, reported as Farzand Ali and another *(supra),* in an attempt to persuade us to hold that an Agreement to Sell not signed by the Vendee was not enforceable in law. A close scrutiny of the aforesaid judgment reveals that no doubt a reference has been made to Section 22 of the Specific Relief Act, 1877 to reiterate the settled proposition of law that relief of Specific Performance of an Agreement to Sell is equitable in nature and the Court has the discretion to decline such relief. However, the judgment turns upon a finding of fact on the basis of the evidence discussed *in extenso.* In the said case there was an absence of "consensus *ad idem*". The heart of the judgment is embodied in para 9 thereof, the relevant portion whereof for ease of reference is reproduced hereunder:

> "In the above context, the first and the foremost aspect of the case is, if the agreement to sell of the appellants was valid because if it is not valid the question of its enforcement through the process of law and the exercise of discretion does not arise. It is an undisputed fact that appellants agreement has not been signed by them. .....
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> .....
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> the first, and the foremost requisite of a contract *(agreement)* is that the parties should have reached agreement, which

> unmistakably means, that an agreement is founded upon offer and acceptance. .....
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> .....
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> .....
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> but its proof is also dependent upon the execution of the contract by both the contracting parties i.e. by signing or affixing their thumb impression. .....
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> .....
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> .....
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> But in this case this is conspicuously lacking by virtue of non-execution *(non-signing)* of the agreement by the appellants, therefore in law and fact it is no contract *(agreement). ....*"

From the aforesaid, it is clear and obvious that the conclusion drawn was that in fact and in law no agreement had been arrived at between the parties. It has not been laid down that in each and every eventuality where an Agreement, not signed by one of the parties, irrespective of the provisions of the Contract Act, 1872 referred to above would be invalid in law. It has also been noticed that the settled proposition of law as laid down in the judgment of this Court, reported as Messer's Jamal Jute Baling & Co, Dacca v. Messrs M. Sarkies & Sorts (Sons), Dacca (PLD 1971 SC 784) has not been overruled. The relevant portion thereof in the same paragraph has been reproduced hereunder for ease of reference.

> "9. ... learned counsel for the appellants has relied upon the judgment reported as Messrs Jamal Jute Baling & Co., Dacca v. Messrs M. Sarkies & Sorts (Sons), Dacca (PLD 1971 SC 784) to argue to the contrary, wherein it has been held that "*terms of agreement reduced into writing and proved to have been accepted and acted upon by both parties---Agreement, proper and valid even if one party had not signed such agreement*". However the conditions are that the agreement should be accepted by the parties who are actually in dispute qua the validity thereof, and the agreement should have been acted upon. In this case as explained earlier in the light of the facts of the case the real dispute is between the appellants and the respondent, who *(respondent)* has never admitted the agreement and it has also not been acted upon. ..."

20. Thus, it appears that the proposition of law that an Agreement to Sell not signed by one of the parties if proved to have been accepted and acted upon would be a valid Agreement to Sell, is a valid contract enforceable in law has in fact been reiterated.

21. In view of the above, it is evident that the proposition that where an Agreement to Sell pertaining to immovable property is not signed by one of the parties thereto, in each and every eventuality, is invalid and not specifically enforceable is fallacious and contrary to the law. The existence and validity of the Agreement and it being specifically enforceable or otherwise would depend upon the proof of its existence validity and

enforceability in accordance with the Qanun-e-Shahadat Order, 1984, the relevant provisions of the Contract Act, 1872, the Specific Relief Act, 1877 and any other law applicable thereto.

Having settled the preliminary legal issues involved, let the above-mentioned Civil Appeals be set down for hearing to be decided separately on the basis of the evidence available on the record in terms of the observations made therein-above.

Chief Justice

Judge

Judge

Judge

Judge

APPROVED FOR REPORTING'
*Mahtab H. Sheikh/**

Announced on 11.11.2016 at Islamabad

Judge