JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.S.A.No.09/2017
Arif-uz-Zaman
Versus
Mst. Sabir Jan and others

Dates of Hearing:	04.10.2018 & 25.01.2019
Appellant by:	Sardar Haroon Sami, Advocate.
Respondents by:	Mr. Ghulam Fareed Ch., Advocate for respondents No.1 to 8.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular second appeal, the appellant, Arif-uz-Zaman, impugns the judgment and decree dated 12.11.2016 passed by the Court of the learned Additional District Judge (East), Islamabad, whereby respondents No.1 to 8's appeal against the consolidated judgment and decree dated 30.05.2016 passed by the Court of the learned Civil Judge, Islamabad, was allowed and the said judgment and decree dated 30.05.2016 was reversed.

2. The facts essential for the disposal of the instant appeal are that vide allotment letter dated 28.04.1983 (Exh.P.11), plot No.19, Model Village Chak Shahzad, Islamabad ("the suit plot") was allotted by the Capital Development Authority ("C.D.A.") to Muzaffar Khan (predecessor of respondents No.1 to 8). Possession of the suit plot was taken over by Muzaffar Khan on 22.09.1986.

3. The appellant's case is that on 14.03.1988, an agreement to sell (Exh.P.9) was executed between Muzaffar Khan and Muhammad Arif-uz-Zaman (the appellant) whereby the former agreed to sell the suit plot to the latter for a total sale consideration of Rs.2,08,000/-. The sale consideration was said to have been received in full by Muzaffar Khan, and possession of the suit property was said to have been handed over to the appellant. The terms of the said agreement show that the appellant was to construct a house on the suit plot at his own expense after which Muzaffar Khan was responsible to execute a

registered sale deed regarding the suit plot in favour of the appellant or his nominee. Simultaneously with the execution of the said agreement to sell, Muzaffar Khan and the appellant are said to have executed a construction agreement (Exh.P.10) which was registered on 15.03.1988.

4. On 14.03.1988, Muzaffar Khan is also said to have executed two general power of attorneys (Exh.P.7 and Exh.P.8) in favour of the appellant authorizing the latter to construct a house on the suit plot and to correspond with the C.D.A. on matters regarding the construction of the house and the issuance of a completion certificate, etc. These general power of attorneys were registered on 15.03.1988.

5. Vide letter dated 01.06.1988 (Exh.P.15), the appellant informed the C.D.A. about the execution of the power of attorney and requested the C.D.A. to correspond with the appellant on matters pertaining to the suit plot. Vide letter dated 12.07.1989, the C.D.A. informed the appellant that as per the policy, a general power of attorney from the oustees of Islamabad is not acceptable. Nevertheless, C.D.A.'s letters dated 22.11.1999 (Exh.P.17), 30.06.2000 (Exh.P.18), 25.11.2002 (Exh.P.19) and 23.02.2004 (Exh.P.20) show that the C.D.A. corresponded with the appellant regarding the clearance of outstanding dues with respect to the suit plot.

6. It is not disputed that a house was constructed on the suit plot by the appellant. As per the contents of letter dated 02.10.2004 from the Design Wing of the C.D.A., a house on the suit plot was completed on 15.08.1989. It is also not disputed that ever since the year 1988, the appellant has remained in possession of the suit plot. After Muzaffar Khan's demise, the title of the suit plot was transferred in respondents No.1 to 8's name. This was done through C.D.A.'s letter dated 28.09.2006 (Exh.D.3). Vide letter dated 02.11.2007, the appellant requested the C.D.A. to transfer the suit plot to him and cancel the transfer made in favour of Muzaffar Khan's legal heirs.

7. On 06.12.2006, the appellant filed a suit for specific performance, permanent and mandatory injunction against Muzaffar Khan's legal heirs before the Court of the learned Civil Judge, Islamabad, seeking *inter-alia* a decree for specific performance of the agreement to sell dated 14.03.1988. Muzaffar Khan's legal heirs contested the said suit by filing a written statement on 10.09.2007. In the said written statement filed by Muzaffar Khan's legal heirs, the execution of the said agreement to sell and the construction agreement was denied.

8. On 08.07.2009, Muzaffar Khan's legal heirs filed a suit for possession, mandatory and permanent injunction against the appellant. In the said suit, Muzaffar Khan's legal heirs prayed that possession of the suit plot be handed over to them and for the construction raised on the suit plot to be removed. The appellant contested the said suit by filing a written statement.

9. Vide order dated 03.01.2013, the above-mentioned two suits were consolidated. From the divergent pleadings of the contesting parties, the learned Civil Court framed the following consolidated issues:-

> ***"1. Whether the plaintiff is entitled to decree for Specific Performance and Injunction as prayed for? OPP***
> ***1-A. Whether the suit of plaintiff for Specific Performance is barred by law? OPD***
> ***1-B. Whether the suit of plaintiff for Specific Performance is time barred? OPD***
> ***2. Whether the consolidated suit of the defendant is false, frivolous and liable to be dismissed? OPP***
> ***3. Whether the defendants are entitled to decree in consolidate[d] suit as prayed for? OPD***
> ***4. Whether the suit of plaintiff is false, frivolous and the plaintiffs has no cause of action? OPD***
> ***5. Relief."***

10. The appellant appeared as PW.2, whereas his brother, Muhammad Touseef-uz-Zaman, gave evidence as PW.1 and Tariq Mehmood as PW.3. Muhammad Arshad (respondent No.7) appeared as DW.1 and Zafeer Ahmed, Sub-Assistant, C.D.A., appeared on behalf of the C.D.A. and produced certain documents.

11. Vide consolidated judgment and decree dated 30.05.2016, the learned Civil Court decreed the suit for specific performance, etc. instituted by the appellant and dismissed the suit for possession, etc. instituted by Muzaffar Khan's legal heirs. Muzaffar Khan's legal heirs preferred civil appeals No.20/2016 and 21/2016 against the said judgment and decree before the Court of the learned Additional District Judge, Islamabad. Vide judgment and decree dated 12.11.2016, the said appeals were allowed; the suit for specific performance, etc. instituted by the appellant was dismissed whereas the suit for possession, etc. filed by Muzaffar Khan's legal heirs, was decreed. The said judgment and decree passed by the learned Appellate Court has been assailed by the appellant in the instant regular second appeal.

12. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the consolidated judgment and decree dated 30.05.2016 passed by the learned Civil Court was strictly in accordance with the law and the facts of the case; that the suit for possession, etc. instituted by Muzaffar Khan's legal heirs was grossly time barred; that even though on 10.09.2007, Muzaffar Khan's legal heirs had filed a written statement to the appellant's suit for specific performance, etc., they did not file the suit for possession, etc. until 08.07.2009; that as far back as 1988, the appellant had paid the entire sale consideration for the suit plot to Muzaffar Khan; that the appellant had remained in possession of the suit plot since 1988; that since the appellant had been given possession of the suit plot in part performance of the said agreement to sell dated 14.03.1988, he was entitled to be given the benefit of Section 53-A of the Transfer of Property Act, 1882 ("the 1882 Act"); that a house was constructed by the appellant on the suit plot with his own funds; that the appellant had corresponded with the C.D.A. regarding the clearance of outstanding dues with respect to the suit plot; that at no material stage, did Muzaffar Khan's legal heirs seek the cancellation of the agreement to sell dated 14.03.1988, registered

general power of attorneys dated 14.03.1988 or the registered construction agreement dated 14.03.1988; that although Muzaffar Khan's legal heirs had pleaded that the said agreement to sell dated 14.03.1988 was the result of *"fraud and forgery"* but they failed to give any particulars of fraud as required by Order VI, Rule 4, C.P.C.; that a presumption of truth was attached to the registered documents relied upon by the appellant; that Muzaffar Khan, during his lifetime, did not file a suit for possession against the appellant; and that it was obligatory upon Muzaffar Khan's legal heirs to have transferred the suit plot to the appellant after the issuance of the completion certificate dated 02.10.2004 by the C.D.A. Learned counsel for the appellant prayed for the judgment and decree passed by the learned Appellate Court to be set-aside and for the consolidated judgment and decree passed by the learned Civil Court to be restored.

13. On the other hand, learned counsel for respondents No.1 to 8 defended the judgment and decree passed by the learned Appellate Court by submitting that the appellant had been unable to prove the execution of the agreement to sell dated 14.03.1988; that the appellant did not produce the two attesting witnesses of the said agreement to sell in accordance with Article 79 of the *Qanoon-e-Shahadat* Order, 1984; that none of the appellant's witnesses had deposed whether the marginal witnesses of the said agreement were dead or alive; that the said agreement could not have been read in evidence by the learned Civil Court; that no explanation, whatsoever, had been given by the appellant for not producing the two attesting witnesses of the said agreement; that the said agreement could not have been executed by Muzaffar Khan since the suit plot was non-transferable until the construction of a house thereon; that since the execution of the said agreement to sell has not been proved, the appellant was not entitled to the benefit under Section 53-A of the 1882 Act; that the registered power of attorneys dated 14.03.1988 were not coupled with interest and had not empowered the appellant to sell the suit plot; that the appellant had also failed to prove the execution of

the said power of attorneys by producing their marginal witnesses; that there is no evidence of the sale consideration for the suit plot having been received by Muzaffar Khan; that the receipt (Exh.P.1) did not bear Muzaffar Khan's signature; that the appellant, in his evidence, had admitted that Muzaffar Khan was not present when the said receipt was written; that the appellant had also admitted that the entire sale consideration had been paid to one Maqsood Ahmed Qureshi; and that no power of attorney had been executed by Muzaffar Khan authorizing Maqsood Ahmed Qureshi to receive the sale consideration. Learned counsel for respondents No.1 to 8 prayed for the appeal to be dismissed.

14. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 11 above and need not be recapitulated.

15. Although it is well settled that findings of fact cannot be interfered with by the High Court in a second appeal, in the case of Karim Bakhsh through L.Rs and others Vs. Jindwadda Shah and others (2005 SCMR 1518), it has been held *inter-alia* that when the findings of the two Courts below were at variance, the High Court could appreciate the evidence in order to determine which of the two decisions was in accordance with the evidence on the record. In cases where the findings of an Appellate Court are not supported by evidence on the record and the same are found to be without logical reasoning or arbitrary or capricious, the same could be interfered with in a second appeal. Reference in this regard may be made to the law laid down in the case of Abbas Ali Shah and others Vs. Ghulam Ali and another (2004 SCMR 1342). Remaining within the bounds of these principles, I ventured to examine the evidence on the record to determine which of the two varying judgments and decrees passed by the learned Courts below was sustainable.

16. The appellant, in his suit for specific performance, etc., had clearly pleaded the factum as to the execution of the agreement to

sell dated 14.03.1988. However, Muzaffar Khan's legal heirs, in their written statement, denied the execution of the said agreement. Furthermore, it was pleaded that the said agreement was the result of *"forgery and fraud"*. Such denial by Muzaffar Khan's legal heirs made it obligatory upon the appellant to prove the execution of the said agreement in accordance with the law, i.e. Article 17 read with Article 79 of the *Qanoon-e-Shahadat* Order, 1984 ("the 1984 Order").

17. Through an agreement to sell, immovable property does not create any interest or charge on such property but creates a right to obtain another document conferring title in such property. Such an agreement is not compulsorily registerable. An agreement to sell immovable property can be oral or in writing. If such an agreement is in writing it has to be executed in accordance with the requirements contained in Article 17(2)(a) of the 1984 Order which provides that 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. It is well settled that an agreement to sell immovable property, if reduced into writing, has mandatorily to be attested in terms of Article 17(2)(a) of the said Order. Article 79 of the said Order provides that if a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence. It is also well settled that in order to prove the execution of an agreement to sell immovable property, the two attesting witnesses of such an agreement must be called for the purpose of proving its execution. In this regard reference may be made to the following case law:-

(i) In the case of Farzand Ali Vs. Khuda Bakhsh (PLD 2015 SC 187), the appellants had produced only one of the attesting witnesses of the agreement to sell in question. No explanation had been advanced by the appellants for the

vital omission to produce the second attesting witness of the agreement in order to prove its execution. It was held that such an omission was fatal to the appellant's case. Furthermore, it was held as follows:-

> ***"[I]t is settled law that an agreement to sell an immovable property squarely falls within the purview of the provisions of Article 17(2) of the Qanun-e-Shahadat Order, 1984 and has to be compulsorily attested by the two witnesses and this is sine qua non for the validity of the agreement. For the purposes of proof of such agreement it is mandatory that two attesting witnesses must be examined by the party to the lis as per Article 79 of the [Qanoon-e-Shahadat Order, 1984]."***

(ii) In the case of Farid Bakhsh Vs. Jind Wadda (2015 SCMR 1044), the Hon'ble Supreme Court interpreted Article 79 of the *Qanoon-e-Shahadat* Order, 1984, in the following terms:-

> ***"This Article in clear and unambiguous words provides that a document required to be attested shall not be used as evidence unless two attesting witnesses at least have been called for the purpose of proving its execution. The words "shall not be used as evidence" unmistakably show that such document shall be proved in such and no other manner. The words "two attesting witnesses at least" further show that calling two attesting witnesses for the purpose of proving its execution is a bare minimum. Nothing short of two attesting witnesses if alive and capable of giving evidence can even be imagined for proving its execution. Construing the requirement of the Article as being procedural rather than substantive and equating the testimony of a Scribe with that of an attesting witness would not only defeat the letter and spirit of the Article but reduce the whole exercise of re-enacting it to a farce. We, thus, have no doubt in our mind that this Article being mandatory has to be construed and complied with as such."***

(iii) In the case of Hafiz Tassaduq Hussain Vs. Muhammad Din (PLD 2011 SC 241), it was held *inter-alia* that an agreement to sell immovable property was required by Article 17(2)(a) of the *Qanoon-e-Shahadat* Order, 1984, to be attested by two men, or one man and two women. Furthermore, it was held that where such an agreement is not proved in accordance with Article 79 of the said Order, the same cannot be read in evidence. In this regard, paragraph 8 of the said report, is reproduced herein below:-

"8. The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koeri and others (AIR 1925 Allahabad 56). The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See Ram Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737). The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise."

(iv) In the case of <u>Rafaqat Ali Vs. Mst. Jamshed Bibi (2007 SCMR 1076)</u>, it was held as follows:-

> ***"According to Articles 17 and 79 of Qanun-e-Shahadat Order, 1984, petitioners had to produce two attesting witnesses of the agreement in question. As mentioned above, petitioners had produced only one witness to prove the agreement to sell, therefore, all the Courts below were justified to non-suit the petitioners as law laid down by this***

Court in various pronouncements. See Suleman Ali's case 2000 YLR 1983, Maqsood Ahmad's case PLD 2003 SC 31, Qazi Muhammad Saqib Khan's case 2003 MLD 131."

(v) **In the case of Mst. Rasheeda Begum Vs. Muhammad Yousaf (2002 SCMR 1089), it has been held as follows:-**

> *"11. An agreement to sell immovable property is a contract enforceable l by law. Section 54 of the Transfer of Property Act expressly provides that a contract of sale does not, of itself, create any interest in or charge on the immovable property which constitutes its subject-matter. As a matter of fact an agreement to sell only creates a right to obtain another document conferring title in respect of the immovable property mentioned therein and for that very reason it does not require registration. There is also no legal provision to the effect that an agreement to sell should only be in writing. Be that as it may, while determining the question whether an agreement to sell is required by law to be attested by witnesses a line of demarcation must be drawn between the agreements of sell executed before and after promulgation of Qanun-e-Shahadat Order, 1984. Unquestionably, an agreement to sell involves future obligations, therefore, if reduced to writing and executed after coming into force of Qanun-e-Shahdat Order, 1984, it is required by sub-Article (2)(a) of Article 17 thereof to be attested by two male or one male and two female witnesses, as the case may be."*
>
> **(Emphasis added)**

(vi) **In the case of Muhammad Arif Vs. Mahmood Ali (2003 MLD 954), only one of the two marginal witnesses of an agreement to sell gave evidence to prove its execution. Since no explanation had been given for not producing the second marginal witness, it was held by the Hon'ble Lahore High Court that since the execution of the agreement to sell had not been proved in accordance with the provisions of Article 79 of the *Qanoon-e-Shahadat* Order, 1984, it could not be relied upon as evidence. The Hon'ble Judge who authored that said judgment rose to grace the Hon'ble Supreme Court. Therefore, the said judgment deserves reverence and respect.**

18. It is an admitted position that the two attesting witnesses of the agreement to sell dated 14.03.1988, namely, Muhammad Ashraf son of Mansaf Khan, and Maqsood Anjum Qureshi son of Muhammad Yaqoob Qureshi, had not been produced by the appellant in order to prove the execution of the said agreement. Learned counsel for the appellant could not come up with any explanation for this monumental blunder on the appellant's part. Learned counsel for the appellant did not even know whether the two attesting witnesses of the said agreement were dead or alive. Since no explanation had been given for not producing the attesting witnesses of the said agreement, the presumption would be that if such witnesses were produced, their testimony would have been adverse to the appellant. Therefore, it can safely be concluded that the appellant had not discharged his burden of proving the execution of the agreement to sell dated 14.03.1988 in accordance with the law. The appellant cannot seek the specific performance of an agreement, the execution whereof he has not been able to prove.

19. On account of being in possession of the suit plot, the appellant has sought protection of Section 53-A of the 1882 Act. For ease of reference, the said section is reproduced herein below:-

> ***"53A. Part performance. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:***
>
> ***Provided that nothing in this section shall affect the rights of a***

transferee for consideration who has no notice of the contract or of the part performance thereof."
(Emphasis added)

20. Section 53-A was inserted in the 1882 Act through the Transfer of Property (Amendment) Act, 1929, and is said to have imported a modified form of the equity of part performance. It is well settled that a party can take shelter behind Section 53-A of the 1882 Act only when the following conditions are fulfilled:-

(i) The contract should have been in writing signed by or on behalf of the transferor;
(ii) The transferee should have got possession of the immoveable property covered by the contract;
(iii) The transferee should have done some act in furtherance of the contract; and
(iv) The transferee has either performed his part of the contract or is willing to perform his part of the contract.

21. Possession of immovable property in part performance of a contract is a right falling under Section 53-A of the 1882 Act and the transferee in possession of the property in part performance of the contract can defend his possession in case there is any attempt by the transferor or any person claiming through him to dispossess such a transferee. It has consistently been held that the right under Section 53-A of the 1882 Act can be used only as a shield and not as a sword. It protects a transferee who is willing to perform his part of the agreement and has been let in possession in pursuance of the agreement of sale, from an oppressive claim set up by the transferor. Reference in this regard may be made to the following case law:-

(i) In the case of Sardar Arshid Hussain Vs. Mst. Zenat un Nisa (2017 SCMR 608), it was held as follows:-

"If a person being in possession of an un-registered deed qua transfer of certain rights in property along with possession of the same he can legally protect his rights in the property and even a registered deed subsequent in time will not affect his/her rights. The first proviso to section 50 of the Registration Act, 1908 provides so that such rights in the property can be protected under section 53-A of the Transfer of Property Act, 1882."

(ii) In the case of Hikmat Khan Vs. Shamsur Rehman (1993 SCMR 428), it was held as follows:-

"There can be no cavil with the proposition that an unregistered document if it is compulsorily registrable under the Registration Act, cannot create title. However, section 53-A of the Transfer of Property Act, which is an exception, confers right on a person, who is holding possession of the property under an unregistered written document which required compulsory registration, to protect his possession against the vendor and all persons acting through or under him. It is true that section 53-A of the Transfer of Property Act cannot be utilized by a person in possession of immovable property under an unregistered document which is compulsorily registrable under the Registration Act, as weapon of offence to assert his title over the property but it is undoubtedly a complete defence in answer to a claim of possession by the vendor or any other person claiming through or under him."

(iii) In the case of Taj Muhammad Vs. Yar Muhammad Khan (1992 SCMR 1265), it was held as follows:-

"(6) Section 53-A of the Transfer of Property Act enunciates equitable principle to protect the rights of such purchasers who have entered into agreement and in pursuance thereof obtained the possession of the immovable property and have further either performed their part of the agreement or are agreeable to perform the same. In such circumstances, mere non-registration of a deed which requires registration under section 17 of the Registration Act, will not deprive him of the benefit which he is entitled to protect by virtue of section 53-A of the Transfer of Property Act. It is true that section 53-A does not confer or create any right but it provides a defence to a transferee to protect his possession. Reference can be made to the cases of Kalimuddin Ansari v. Director, Excise and Taxation, Karachi and another PLD 1971 SC 114 and Sri Kalulam Subranmanyam and another v. Kurra Subba Rao PLD 1948 PC 52. Section 53-A debars a transferor from enforcing any right other than rights specifically provided by the contract against a transferee who in part performance of a contract has taken possession. Reference may be made to the cases of Abdullah Bhai and others v. Ahmed Din PLD 1964 SC 106 and Mst. Ghulam Sakina v. Umar Bakhsh and another PLD 1964 SC 456."

22. The execution of a written contract pursuant to the provisions whereof possession of immovable property is obtained by a party/purchaser does not create title in such property in favour of a party/purchaser but only protects his possession against the seller or his successors-in-interest. The protection of possession under Section 53-A of the 1882 Act is consequential or dependent on the existence of a lawful, enforceable and proved contract. Possession of immovable property obtained pursuant to the provisions of a written contract signed by the transferor is a

sine qua non **for the applicability of Section 53-A of the 1882 Act. Reference in the regard may be made to the following case law:-**

(i) In the case of Ghulam Rasul Vs. Muhammad Hussain (1999 SCMR 2004), it was held that where a transaction was not reduced into writing and signed by the parties, the party in possession of the property in question, could not take the benefit of the principle of part performance under Section 53-A of the 1882 Act.

(ii) In the case of Fauja Vs. Mst. Karim Khatoon (1993 MLD 1078), it was held by the Hon'ble Lahore High Court that the writing of a contract was a must to invoke the benefit of Section 53-A of the 1882 Act.

23. In order for a purchaser in possession of the purchased property to be given the benefit of Section 53-A of the 1882 Act, such a purchaser must prove that there was a contract in writing or an instrument of transfer. In the case at hand, since the appellant has not been able to prove the execution of a written contract or an instrument of transfer, he cannot avail the benefit of Section 53-A of the 1882 Act. Had the two attesting witnesses of the agreement dated 14.03.1988 been produced as witnesses and had they given testimony consistent with that of the appellant regarding the execution of the said agreement, the appellant could have made out a case for the benefit of Section 53-A of the 1882 Act to be extended to him. Not having done so, the appellant has only himself to blame for the unsavoury consequences he now finds himself in.

24. A registered power of attorney coupled with interest becomes irrevocable by virtue of the provisions of Section 202 of the Contract Act, 1872. As regards the registered power of attorneys dated 14.03.1988 (Exh.P.7 and Exh.P.8), the same are not coupled with interest. These power of attorneys do not make any reference to any agreement to sell executed between the appellant and Muzaffar Khan. There is neither any reference in them to any consideration paid by the appellant to Muzaffar Khan nor has the appellant been authorized to sell the suit plot. There is

nothing provided in the said power of attorneys to indicate that the appellant had acquired ownership's rights or even an interest in the suit property. On the contrary, the following clauses of the General Power of Attorney (Exh.P-7) executed by Muzaffar Khan in the appellant's favour show that he was supposed to construct a house on the suit plot with funds provided by Muzaffar Khan and then transfer the suit plot in Muzaffar Khan's name in the C.D.A. records:-

> ***"To construct a house on the plot with the funds supplied by me and to do all acts, deeds and things necessary for the purpose e.g. submitting plans, getting them approved, getting water, electric and sui gas connections, engaging architects, engineers, planners contractors, masons, labour etc procuring and purchasing the materials etc.***
> ***To complete all formalities with the C.D.A. for issu[ance] of completion certificate and for execution of agreement in my favour and conveyance deed for getting the plot finally transferred in my name."***
> **(Emphasis added)**

25. The second power of attorney (Exh.P-8), however, authorizes the appellant to construct a house on the suit plot with the appellant's funds. Both the said power of attorneys have been executed on the same day. The discrepancy in the power of attorneys could not be explained by the learned counsel for the appellant. Be that as it may, since the said power of attorneys are not coupled with interest, they do not come to the appellant's aid in establishing his ownership over the suit plot.

26. As regards the construction agreement (Exh.P.10), its terms and conditions contradict the appellant's stance viz. the acquisition of ownership's rights by him in the suit plot by virtue of the agreement to sell dated 14.03.1988 and his possession of the suit plot pursuant to the terms of the said agreement.

27. The terms of the said construction agreement provided that the appellant would construct a building on the suit plot at the rate of Rs.300/- per square foot; and that upon completion of the building, Muzaffar Khan would pay the cost of construction along with an amount of Rs.2,08,000/-, which is said to have been deposited by the appellant with Muzaffar Khan as security, after which Muzaffar Khan would take possession of the completed

building. Furthermore, it was provided that if Muzaffar Khan failed to refund the said security or pay the cost of construction, the appellant would automatically become the owner of the suit plot and building constructed thereon, and the security amount would be considered as sale consideration for the suit plot. All this shows that the terms and conditions of the construction agreement were inconsistent with the provisions of the agreement to sell.

28. The appellant, neither pleaded in his suit not deposed while recoding his evidence that an amount of Rs.208,000/- was paid by him to Muzaffar Khan as security for carrying out construction on the suit plot. Furthermore, it was not even pleaded that since Muzaffar Khan did not pay the cost of construction to the appellant, the said amount of Rs.208,000/- was to be treated as the sale consideration for the suit plot. The evidence recoded by the appellant shows that he had based his case on the agreement to sell of which he had sought specific performance and not the construction agreement.

29. The marginal witnesses of the agreement to sell (Exh.P.9) were the same as the ones for the construction agreement (Exh.P.10). Since Muzaffar Khan's legal heirs had also denied the execution of the construction agreement, and since the appellant had not produced the marginal witnesses of the said agreement, the execution of the said agreement had also not been proved by him. The mere fact that the construction agreement was registered did not absolve the appellant from proving the same in accordance with the law. This is because, as mentioned above, the execution of the construction agreement had been denied by Muzaffar Khan's legal heirs. It is well settled that mere registration of a document in itself is not proof of its execution by a person who is alleged to have executed the same, if the execution of such a document is denied by any of parties in the litigation.

30. As per the C.D.A. records ownership in the suit plot vests in Muzaffar Khan's legal heirs. Since the appellant was not able to prove the execution of the agreement to sell dated 14.03.1988, he

cannot protect his possession of the suit plot as against Muzaffar Khan's legal heirs. Therefore, the learned appellate Court did not commit any illegality in decreeing the suit of possession etc., filed by Muzaffar Khan's legal heirs.

31. The appellant has also not been able to prove the sale consideration for the suit plot which had been paid by him to Muzaffar Khan or any other person authorized by the latter. The appellant gave evidence as PW-2 and deposed that earnest money had been paid to Maqsood Ahmed Qureshi and not Muzaffar Khan. Maqsood Ahmad Qureshi, who had not been produced as a witness, had not been authorized by Muzaffar Khan to receive any sale consideration/earnest money for the suit plot.

32. For the abovementioned reasons, I am not inclined to interfere with the appellate judgment and decree dated 12.11.2016. Consequently, the instant second appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019.

(JUDGE)

Qamar Khan ***APPROVED FOR REPORTING***