F O R E W O R D

The ocean of legal history encompasses thousands of landmark judgments by the eminent jurists of the world which on the one hand provide guiding principles for the legislative bodies to promulgate new laws or to amend the existing ones according to the need of the society and on the other provide guidance for the Presiding Officers working in the lower strata to deal with cases of identical nature. It is universal truth that with the ever-changing social set up, the legislators sometimes feel handicap to find solution for a novel problem for which most of the time they take guidance from the precedent law to cope with the changing circumstances. Even in the advanced countries like United Kingdom and United States of America the precedent law has been acknowledged as one of the major sources of law for the policy makers.

I had an opportunity to have cursory glance over the compendium containing the important decisions rendered by my learned brother Justice Shahid Bilal Hassan, while serving as a Judge of the High Court. These judgments are blend of simple and beautiful language. The hallmarks of these decisions are their cohesion. These decisions cover multifaceted points of law relating to cases of criminal, constitutional, service, civil, environment, arbitration, revenue, family, banking, insurance and consumer categories. These decisions are mirror of the wisdom, competence and impartiality of the Hon'ble author Judge.

In my humble estimation, these judgments would serve as milestone for the legal fraternity on account of eloquence, brevity and cohesion. These would be a good addition to the galaxy of case-law laid down by the superior courts of the country. At the same time, these judgments would be a source of inspiration for the new entrants in the profession as member of the Bar or the Bench. The matchless efforts made by the Hon'ble author Judge while deciding these cases would be remembered forever.

May Allah Almighty bestow the Hon'ble author Judge with the courage to keep this spirit up during his career as Judge of the Apex Court of the country. Aameen.

SHUJAAT ALI KHAN
Senior Puisne Judge
Lahore High Court, Lahore

TABLE OF CONTENTS

PROFILE

Born to a noble family in 1965 at Lahore. Hon'ble Mr. Justice Shahid Bilal Hassan received his early education in Chiniot, District Chiniot, Punjab, Pakistan and thereafter migrated to Uganda, East Africa with his family and completed his secondary education there. During his subsequent sojourn in the heart of Africa, he frequented his visits to Kenya, Tanzania, Egypt and Saudi Arabia abroad and to Lahore in Pakistan till 1982, continuing his studies and accomplishing his academic benchmarks by completing his degrees in graduation from University of the Punjab in 1985, post-graduation in English as his major subject from Government College University in 1988, and LLB from Punjab law College, Lahore affiliated with University of the Punjab in 1993. His lordship had been endowed with versatile potentials that led him to the sports arena as well, excelling in the game of rowing by being in the Lahore Champions' team during his under-graduation tenure.

Prior to his lordship's elevation to the Bench as an Additional Judge of the Lahore High Court on 12.04.2013, his lordship had procured his licenses to practice law and had started as a practicing advocate in the Lower Courts in 1994, in the High Courts of Pakistan in 1996 and subsequently his ascendancy to be an Advocate in the Supreme Court of Pakistan in 2009 respectively. During his practicing span, his lordship established a law firm entitled Bilal and Buqsh, Advocates and Solicitors in Lahore and focused on his areas of expertise as a practicing Advocate specifically specializing in Civil, Criminal and Constitutional matters ranging in multidimensional perspective for nearly two decades, His legal profession also encompassed legal advisory as well as teaching, the noblest of any undertakings. The former was extended to many an institution like University of Education and the latter was executed as the visiting faculty of Punjab Law College.

His lordship has actively upheld the sovereignty and autonomous prevalence of rule of law in its entirety throughout his professional carrier, which is well exhibited in his professional achievements and associations. His lordship has been the Secretary Lahore Bar Association (2000-01); Executive Member, Lahore High Court Bar Association (1997-2003); Member, Punjab Bar Council (2005-10); Member Executive, Punjab Bar Council (2005-06, 2009-10); Life Member, Lahore Bar Association, Lahore; Life Member Lahore High Court Bar Association, Lahore; Life Member, Supreme Court Bar Association of Pakistan. Hon'ble Mr. Justice Shahid Bilal Hassan has also authored two books namely: Suits and Defenses published in 2008, and Appeal, Revision and Review of the Judgment published in 2010 respectively.

His lordship is happily married and bestowed with three offspring.

DUTIES PERFORMED AFTER ELEVATION:

In 2015:

- Member of Proforma Promotion Recommendation Committee for District Judiciary. (in 2016, 2017, 2018, 2019 & 2020 as well)
- Member of Enrolment Committee (constituted for grant of previous approval to the legal practitioners under section 27(c) of the Legal Practitioner and Bar Councils Act, 1973).

In 2016:

- Nominated Judge (amongst two other Judges) for hearing appeals of Members of the Establishment of District Judiciary.
- Member of Library Committee.
- Administrative Judge of Punjab Livestock Tribunal. (in 2017 as well)
- Member of Expunction of Adverse Remarks Committee.
- Monitoring Judge for preparation of Booklet of Privileges of the Hon'ble Judges.
- Chairman of Tribunal of the Punjab Bar Council (at Lahore) under the Legal Practitioners & Bar Councils Act, 1973. (in 2018, 2019 & 2020 as well)

In 2017:

- Member of ADR Committee (DJ&LCCI). (in 2018 as well)
- Senior Member of ADR Committee. (in 2018, 2019 & 2020 as well)

In 2018:

- Member of Bar & Bench Coordination Committee. (in 2019 & 2020 as well)
- Member of Punjab Subordinate Judiciary Service Tribunal.

In 2019:

- Member of Proforma Promotion Recommendation Committee for the District Judiciary.
- Member Bar and Bench Coordination Committee.
- Senior Member of ADR Committee.
- Chairman of the Tribunal of Punjab Bar Council under the Legal Practitioners and Bar Councils Act, 1973.

In 2020:

- Chairman of Examination Committee for Recruitment of District Judiciary Establishment. (in 2021 & 2022 as well)

- Chairman of Departmental Examination Committee for Lahore High Court Establishment and District Judiciary. (in 2021 & 2022 as well)
- Member of Committee for Recommendation/Implementation of Matters mentioned in Part-C of Chapter-3, Rules & Order of Lahore High Court, Volume-V.
- Member of Perks and Privileges/Pension Committee (for Permanent/ Confirmed Judges).
- Member of Syndicate & Selection Board of Pir Mehr Ali Shah Arid Agriculture University, Rawalpindi.
- Member of National Judicial Automation Committee (NJAC).

In 2021:

- Member of Administration Committee of Lahore High Court, Lahore (being Sixth Judge) and dealt with the following jobs:
    - Security of Principal Seat, Benches & District Judiciary
    - Contempt of Court Cases received from District Judiciary
    - Supervision of Purchase Committee
    - Procurements worth Rs.2,00,000/- and above
    - Monitoring/Administrative Judge of:
        - Control of Narcotic Substances Courts
        - Consumer Protection Courts
        - Drug Courts
        - Prisons/Jails in the Punjab
- Member of Board of Studies of Nadira Hassan Law Deptt. Kinnaird College for Women, Lahore. (In 2021, 2022 2023 & 2024 as well)

In 2022:

- Member of Administration Committee of Lahore High Court, Lahore (being Fifth Judge) and dealt with the following jobs:
    - Magisterial and Civil Powers to Judicial Officers
    - Copying Agencies of High Court and District Judiciary
    - Approval for the appointment of Local Commissions
    - Record of Maintenance, Preservation, Loss, Reconstruction and Destruction
    - Monitoring /Administrative Judge of:
        - Punjab Livestock Tribunal
        - Punjab Revenue Appellate Tribunal
        - LDA Tribunal
        - Labour Courts
        - Family Courts
        - Official Receivers
- Member of Administration Committee of Lahore High Court, Lahore (being Fourth Judge) and dealt with the following jobs:

- Re-imbursement of Medical Charges of High Court Judges/District Judiciary
- High Court (Banking & Fund Management)/Civil Courts Deposit Accounts
- Sheriff Petty Accounts
- Malkhana & Special Kanungos Accounts
- All cases relating to grant of NOC for Passport and Visa in respect of High Court Establishment (BS-19 and above) and Judicial Officers
- Rules of Procedure under Article 202 of the Constitution of the Islamic Republic of Pakistan, 1973
- Monitoring/Administrative Judge of:
    - Intellectual Property Tribunal
    - Punjab Environmental Protection Tribunal
    - Child Protection Courts
    - Museum, Lahore High Court, Lahore

In 2023:

- Performed same duties as in 2022.

In 2024:

- Member of Administration Committee of Lahore High Court, Lahore (being Third Judge) and dealt with the following jobs:

Buildings:

a. Construction, preservation, alteration and maintenance of buildings of the High Court at the Principal Seat as well as at the Benches;
b. Repair/maintenance of Rest Houses at Principal Seat, Benches and Murree;
c. Construction and maintenance of Buildings of District Judiciary;

High Court Establishment:

a. Matters of the Officers (BS-19 & above) other than those within the domain of Chief Justice or specifically entrusted to other Judges and to the Registrar, including Ex-Pakistan Leave up-to 21 days;
b. All matters, except those entrusted to the Registrar, relating to the Officers/Officials (up-to BS-18) of the High Court Establishment, including Ex-Pakistan Leave up-to 21 days;
c. Appeals of the Establishment of Lahore High Court against the orders passed by the Registrar as provided in Schedule-II to the Lahore High Court Establishment (Appointment and Condition of Service) Rules.

Audit:

- Lahore High Court, Lahore.

Monitoring/Administrative Judge:

a. Special Court Customs, Taxation and Anti-Smuggling
b. Banking Court (Recovery of Loans)
c. Special Court (Offences in Banks)
d. Special Court Central

REMAINED INSPECTION JUDGE OF FOLLOWING DISTRICTS:

Okara:	(from 14th December 2013 to 21st May, 2014 & again from 14th September, 2017 to 31st October, 2017)
Rahim Yar Khan	(from 22nd May, 2014 to 23rd September, 2016)
Faisalabad	(from 24th September, 2016 to 13th September, 2017 & again from 10th April, 2020 to 22nd July, 2021)
Khanewal	(from 1st November, 2017 to 9th April, 2020)
Gujranwala	(from 23rd July, 2021 (continuing till date i.e. 4.6.2024))

OFFICIAL TOURS OF ABROAD:

- **United States of America**:
  - In July, 2017 attended Conference on "Criminal Justice in 21st Century" at San Francisco, USA.
  - In July, 2021 joined "10-days Advance Mediation Study Tour as Part of the Asia Foundation's ADR Project" at New York City, USA.
- **Turkey:**
  - In November, 2019 attended "Core Group Meeting of the Asia Foundation's ADR Project" at Ankara, Turkey.
  - In March-April, 2021 attended "5th days Training of Trainers (TOT) of The Asia Foundation's ADR Project" at Istanbul, Turkey.

TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III

Government of Pakistan
Law and Justice Division
*****

Islamabad, the 11th April, 2013.

NOTIFICATION

No.F.5(1)/2013-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Additional Judges of the Lahore High Court for a period of one year with effect from the date they make oath of their office:-

1. Mr. Shoaib Saeed
2. Mr. Atir Mahmood
3. Mr. Shahid Bilal Hassan
4. Miss. Aalia Neelum
5. Mr. Shezada Mazhar
6. Mr. Abid Aziz Sheikh

Sohail Qadeer Siddiqui
Sr. Joint Secretary (Admn)

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

No.F.5 (1)/2013-AII

Islamabad the11th April, 2013

Copy to:-

1. Secretary General to the President, President's Secretariat, Islamabad.
2. Principal Secretary to the Prime Minister, Prime Minister's Secretariat, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Islamabad.
9. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. Sr. P.S. to Secretary, Law and Justice Division, Islamabad.
12. Record.

(Saeed Ahmed Rahoojo)
Section Officer

OATH OF ADDITIONAL JUDGE,
LAHORE HIGH COURT, LAHORE

(In the name of Allah, the most Beneficent, the most Merciful)

I, Shahid Bilal Hassan, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That*, as Additional Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

That *I will abide by the code of conduct issued by the Supreme Judicial Council:*

That *I will not allow my personal interest to influence my official conduct or my official decisions:*

That *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

And that*, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

(May Allah Almighty help and guide me (A'meen)

Shahid Bilal

ADDITIONAL JUDGE

OATH made before me, this 12th day of April, 2013.

CHIEF JUSTICE

TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III

Government of Pakistan
Law, Justice and Human Rights Division

Islamabad, the 13th March, 2015.

NOTIFICATION

No.F.5(1)/2013-A.II.- In exercise of the powers conferred by Article 193 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following Additional Judges of the Lahore High Court to be the Judges of the said Court with effect from the date they make oath of their offices:-

1. Mr. Justice Atir Mahmood
2. Mr. Justice Shahid Bilal Hassan
3. Justice Miss Aalia Neelum
4. Mr. Justice Abid Aziz Sheikh

Justice (R)
(Muhammad Raza Khan)
Secretary

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

No.F.5 (1)/2013-AII Islamabad the 13th March, 2015

Copy to:-

1. Secretary to the President, President's Secretariat, Islamabad.
2. Secretary to the Prime Minister, P.M's Office, Islamabad.
3. Secretary, Parliamentary Committee Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Principal Secretary to Governor Punjab, Lahore.
6. Chief Secretary, Government of Punjab, Lahore.
7. Attorney General for Pakistan, Islamabad.
8. Registrar, Supreme Court of Pakistan, Islamabad.
9. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges).
10. The Accountant General Punjab, Lahore.
11. Sr. P.S. to Secretary, Law, Justice and H.R. Division, Islamabad.
12. LIS Wing, Law, Justice and H.R. Division, Islamabad.
13. Record.

(Saadia Kanwal)
Section Officer

OATH OF JUDGE,
LAHORE HIGH COURT, LAHORE

(In the name of Allah, the most Beneficent, the most Merciful)

I, Shahid Bilal Hassan, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That*, as Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

That *I will abide by the code of conduct issued by the Supreme Judicial Council:*

That *I will not allow my personal interest to influence my official conduct or my official decisions:*

That *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

And that*, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

(May Allah Almighty help and guide me (A'meen)

JUDGE

OATH made before me, this 16 th *day of March, 2015.*

CHIEF JUSTICE

PLJ 2013 Cr.C. (Lahore) 976 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ.

STATE & other--Petitioners

versus

JARAY KHAN & others--Respondents

M.R. No. 15 and Crl. Appeal Nos. 162-J & 191 of 2010, decided on 17.9.2013.

Corroborative evidence--

----Corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. [P. 985] B

1997 SCMR 1279 & PLD 1971 SC 541, ref.

Recovery evidence--

----When there is no eye-witness to be relied upon, then there is nothing which can be corroborated by the recovery. [P. 985] C

1985 SCMR 410, ref.

Motive--

----Motive is always considered to be a double edge weapon as if on the one hand there is motive to commit the murder of the deceased by the accused and on the other hand it could also be a reason for false implication of the accused on suspicion. [P. 986] E

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Recovery of weapon of offence at the instance of the appellant was shown to have been effected from the house of the co-accused--Moreover, no person from the locality was joined to witness the said recovery and provisions of Section 103, Cr.P.C. were violated as the alleged recovery witness was admittedly residing 13/14

kilometers away from that place--Even otherwise the recovery of crime weapon is only a corroborative piece of evidence, which by itself is not sufficient to convict the accused in the absence of substantive evidence--ocular testimony and as such there is no substantive piece of evidence which requires to be corroborated through the recoveries--Thus, the recovery evidence in the present circumstances of the case has no weight--Eyewitnesses were not present at the spot--So the motive alone cannot be made basis for maintaining the conviction against the appellant without any other evidence and even otherwise the trial Court has already disbelieved the motive through the impugned judgment, which need not be further discussed by High Court--Appeal accepted. [P. 985 & 986] A, D & F

Mr. Sadiq Mehmud Khurram, Advocate for Appellant.

Mr. Asghar Ali Gill, D.P.G. for State.

Mr. Muhammad Aslam Khan Dhukkar, Advocate for Complainant.

Date of hearing: 17.9.2013.

Judgment

Shahid Bilal Hassan, J.--Jarray Khan appellant has filed Crl. Appeal No. 162-J of 2010/BWP through Jail, who on conclusion of the trial in case FIR No. 443 dated 21.10.2008 registered at PS Kotsabzal, vide judgment dated 7.4.2010 passed by the learned Additional Sessions Judge, Sadiqabad, was convicted for an offence under Section 302(b), PPC for committing `qatl-i-amd' of Umar Wada and was sentenced to death with direction to pay a sum of Rs. 2,00,000/- to the heirs of the above-said deceased by way of compensation under Section 544-A, Cr.P.C. or in default of payment thereof to undergo SI for six months. Through the same judgment, co-accused namely Mst. Fatima Bibi, Shah Nawaz and Qadir Bakhsh were acquitted of the charge by the learned trial Court while extending them the benefit of doubt. Ghulam Muhammad complainant has filed Crl. Appeal No. 191 of 2010/BWP against the acquittal of Mst. Fatima etc. Both these appeals have been heard by us along with Murder Reference No. 15 of 2010/BWP sent by the learned trial Court under Section 374, Cr.P.C. seeking confirmation of

the sentence of death passed by it against Jarray Khan appellant. We intend to decide all these matters jointly through the present consolidated judgment.

2. Succinctly the facts of the prosecution's case unfolded in the complaint (Ex.PD) reported by Ghulam Muhammad complainant (PW4) on the basis whereof the formal FIR was drafted are that he was resident of Mauza Kandair. Umar Wada father of the complainant about 9/10 years ago had contracted second marriage with Mst. Fatima Bibi (acquitted accused), who was not having good character and as such the whole family was worried due to which Umar Wada along with Fatima bibi shifted to Chak No. 200/P. According to the complainant Fatima Bibi did not leave her bad habits, who developed illicit relations with Jarra appellant as he was on visiting terms in the house of Umar Wada. On having knowledge about the said relations, Umar Wada passed such information to the complainant and forbade Jarra from visiting his house, but he continued to meet Mst. Fatima Bibi secretly. In the preceding night of 21.10.2008 the complainant (PW4) accompanied by Ghulam Mustafa (PW4) and Mehar Din (given up PW) arrived in Chak No. 200/P for shifting Umar Wada back to Mauza Kandair. All the PWs slept in the street outside the house of Umar Wada. After hearing hue and cry at about midnight they went inside the house and found that Mst. Fatima Bibi was not present at her cot. Then they were attracted to the adjacent room and saw that Jarra appellant, Chandi, Shah Nawaz, Fida Hussain and Qadir Bakhsh accused, causing injuries on the head of Umar Wada, who also hurled threats when the PWs attempted to catch hold of them. Mst. Fatima Bibi deceased was also found catching hold of Umar Wada from the legs. The complainant also alleged that they i.e complainant and P.Ws. could not go near the assailants due to fear of life, who while extending threats to them succeeded in fleeing from the spot. They attended Umar Wada, who was smeared with blood being unconscious and died at the spot due to the injuries.

3. The investigation of this case was conducted by Liaqat Ali, S.I. (PW-8), who reached the place of occurrence on having knowledge about the occurrence and the dead body was found lying in the house; he recorded the

statement of the complainant (Ex:PD) and sent it to the Police Station for drafting the formal FIR. Then during the investigation, the deadbody of the deceased was inspected, injury statement and inquest report were prepared, statements of the witnesses under Sections 161, Cr.P.C. were recorded, the place of occurrence was inspected, blood-stained earth was secured, rough site-plan of the place of occurrence was prepared, the deadbody was sent to the mortuary for autopsy, the last-worn clothes of the deceased were received, formal site-plan of the place of occurrences was got prepared, Jarray Khan appellant as well as the other co-accused were arrested and different recoveries were effected at their instance. Then after completion of the investigation challan was submitted in the Court.

4. At the commencement of the trial, the learned trial Court after supplying copies of the documents required under Section 265-C, Cr.P.C. to the appellant and his co-accused framed charge under Section 302/34, PPC on 22.10.2008 to which they pleaded not guilty and claimed a trial.

5. During the trial, the prosecution produced as many as, nine witnesses in support of its case. The ocular account of the incident in question was furnished by Ghulam Muhammad complainant (PW-4) and Ghulam Mustafa (PW3) while medical evidence was provided by Dr. Reham Din (PW5), who conducted the post-mortem examination on 22.10.2008 at 9.00 a.m. on the dead body of Umar Wada, who was an old man and post-mortem staining were present, eyes were closed and mouth open. Blood clotted on head with matted hair. The following injuries were found:--

"(1) A lacerated wound of 3 x 2« cm on right side of forehead. Wound was skin deep and was 5 cm above the right eye brow.

(2) A lacerated wound of 3 x 2 cm on left side of head. Wound was skin deep and was 11 cm above the left eye brow.

(3) A lacerated wound of 2« x 1« cm on the left side of forehead and was skin deep and 1 cm above left eye brow.

(4) A lacerated wound of 1« cm x 1 cm in front of left ear. Wound was skin deep.

(5) A swelling of 10x7 cm above the right ear blood was coming from the ear on dissection of skull There was heamatoma formation below the scalp on both side of head and heamatoma formation in the skull on right side. Skull was fractured on the right side."

6. According to the doctor, the death occurred due to shock and haemorrhage of head injury and all the injuries individually and collectively were sufficient to cause death in the ordinary course of nature, which were ante mortem having been caused by (sic). The hyoid bone of the deceased was sent to Histopath (sic) for ascertaining nature. The probable time between the injuries and death was within half to one hour and between death and post-mortem was within 10 hours. According to the doctor the hyoid bone section revealed bony-fragment and the final cause of death was head injury. The investigation of this case was conducted by Liaqat Ali SI (PW-8), who stated about the various steps taken by him during the process thereof. The remaining evidence produced by the prosecution was more or less formal in nature.

7. In their statements recorded under Section 342, Cr.P.C, the appellant and the co-accused had denied and controverted all the allegations of fact levelled against them by the prosecution and had professed their innocence. However, to a question that "Why this case against you and why the PWs deposed against you?" Jarray Khan appellant replied in the following terms:

"I have been involved in this case due to suspicion and enmity. The PWs are closely related to the deceased and also related inter se. They are tutored PWs and were not present at the spot at the time of occurrence. They were called later on and the present case was registered much later after the post-mortem examination and the story of the prosecution is concocted and fabricated one. No independent person of the locality has been produced by the prosecution in evidence."

In reply to the aforesaid question, Mst. Fatima bibi (acquitted accused) replied as infra:--

"The real facts of this case are that on the fateful night I along with my daughter aged about 8/9 years were sleeping near the deceased Umar Wada my husband in my house. The other accused persons of this case entered in my house with the intention of theft/dacoity and we woke up and my husband Umar Wada made hue and cry so the other accused of this case committed murder of my husband and fled away from the spot. I took my husband in my lap and my clothes were completely blood stained with the blood of my husband deceased. He died due to the said injuries. I also received injuries during the said occurrence from the other accused of this case. Police arrested me on the same day without any female police officer or female constable. The I/O also collected my blood stained earth from the spot, but he did not make the same part of the prosecution evidence and mala fidely implicated me in connivance with the complainant party in this case after receiving bribe from the complainant. The I.O. of this case also removed my blood stained clothes at P.S and taken in his possession, but the said clothes were not made part of prosecution evidence. During the course of investigation police seriously tortured me to get their desirable answer and my first statement regarding the occurrence was recorded by the I.O. himself against my real statement The I.O. of this case investigated me alone at Police Station without presence of any female police officer or constable. When the I.O. of this produced me before the Ilaqa Magistrate for permission to get me medically examined, I refused my medical examination under the threat of the I.O. that if I got myself medically examined, he would involve me in this false case. I have no immoral relations with any of the other co-accused persons. The complainant of this case is my step son. He was not happy with my marriage. He also wants to deprive me from the legal share of my husband. He also wants to sell my minor daughter so he falsely implicated me in this murder case, other prosecution witnesses are close relatives of the complainant"

The other acquitted co-accused also refuted the allegations. However, they did not opt to make statements on oath under Section 340(2), Cr.P.C. or produce the defence evidence except Mst. Fatima Bibi co-accused, who got

examined Abida Parveen her daughter aged about 8/9 years (DW-1) and Abdullah (DW-2).

8. Upon conclusion of the trial the learned trial Court after finding the prosecution's case against Jarray Khan appellant to have been proved beyond reasonable doubt, he was convicted and sentenced by it as mentioned and detailed above while three co-accused were acquitted. Hence, the present matters before this Court.

9. The learned counsel for Jaray Khan appellant contends that both the eye-witnesses were chance witnesses and also inimical towards the appellant as well as the acquitted accused due to previous enmity, who on the one hand cannot be relied upon without receiving corroboration from the independent source and on the other hand they were bound to give reasonable explanation for being present at the spot, which was not their usual place of residence or business; that there are contradictions in the statements of both the eye-witnesses; that motive part has already been disbelieved by the learned trial Court; that the eye-witnesses were not present at the spot, who later on were introduced as such being close relatives of the deceased; that co-accused with similar role of causing injuries to the deceased have already been acquitted by the learned trial Court and the appellant is also entitled to the same treatment as his case was not distinguishable, but the PWs made dishonest improvements for attributing specific injury on head to the appellant; that recovery evidence was planted against the appellant with mala fide intention; that the FIR was got lodged with delay and after conducting preliminary investigation which fact is proved from the factum that the post-mortem was conducted on 22.10.2008 at 9.00 a.m. with the delay of about 33 hours after the occurrence, which was alleged to have taken place during the midnight preceding to 21.10.2008; that the conduct of the eye-witnesses who were closely related to the deceased was unnatural as they did not make any effort to save the deceased from the clutches of the assailants, who were not armed with any firearm weapon and it also creates serious dent about their presence at the spot; that the occurrence was alleged to have taken place during odd hours of night, but no source of light was disclosed in the FIR and dishonest

improvement about the same was also made during the trial; that the medical evidence is in contradiction with the ocular account as only five injuries were observed on the body of the deceased, which were not found in consonance with the assailants, who were five in number and each of them was attributed at least two blows; that the prosecution has to stand on its own legs, which miserably failed to prove the charges against the appellant or the co-accused beyond any shadow of doubt; that the exculpatory statement of the co-accused cannot be taken into consideration having no evidentiary value and the appellant is liable to be acquitted.

10. On the contrary, the learned DPG assisted by learned counsel for the complainant has opposed the Criminal Appeal on the grounds that both the eye-witnesses have fully explained their presence at the spot, who were not previously inimical towards the appellant or the co-accused; that minor contradictions in their statements cannot be taken into consideration being the lapses of time and even otherwise each and every fact cannot be explained in the FIR, which is only a tool to put the criminal machinery into motion; that the FIR was got lodged with promptitude and the number of the injuries on the person of the deceased would show that the occurrence had taken place by several assailants, but the learned trial Court has wrongly acquitted the co-accused as all of them had committed the occurrence in connivance with Mst. Fatima Bibi widow of Umar Wada deceased, who had developed illicit relations with Jaray Khan appellant, which fact was in the knowledge of the other relatives; that the learned trial Court has wrongly disbelieved the motive part; that the appellant along with the acquitted co-accused had committed the murder of Umar Wada deceased in a brutal manner and the acquitted co-accused may also be awarded the legal sentence besides the appellant, who is not entitled for any leniency as the fatal injury on the head was attributed to him and the occurrence was committed in a premeditated manner, hence the death sentence is liable to be confirmed while dismissing appeal of Jaray Khan appellant and the appeal filed by the complainant against acquittal be allowed.

11. We have heard the learned counsel for the parties at length and have also gone through the record of this case with due care and caution.

12. The occurrence in the present case according to the prosecution had taken place during the midnight preceding to 21.10.2008 within the area of chak No. 200/P, which is situated at a distance of 14 kilometers from PS Kotsabzal whereas the matter was claimed to be reported by Ghulam Muhammad complainant (PW4) through statement (Ex.PD) recorded by Liaqat Ali, S.I. (PW9) at the spot on 21.10.2008 at 4.30 a.m. on the basis of which formal F.I.R. was drafted under Section 302/34, PPC the same day at 5.15 a.m. at the Police Station. However, it is found doubtful whether the F.I.R. had been recorded at the given time as according to the I.O. (PW8) after recording the statement of the complainant he had examined the deadbody of the deceased and sent it to mortuary for autopsy through Haq Nawaz, Constable (PW-6) after preparation of the necessary papers immediately. The post-mortem examination on the deadbody of the deceased had been conducted with the delay of about 33 hours on the next day i.e. 22.10.2008 at 09.00 a.m. without any explanation. This possibility cannot be ruled out that the police papers had not been prepared immediately as claimed by the Investigating Officer and the time was consumed in concocting the prosecution story, otherwise there was no reason for postponing the post-mortem examination till the next day. It casts serious doubt regarding registration of the F.I.R. at the time given by the prosecution. There is no second opinion that an FIR under Section 154, Cr.P.C. which has been lodged after conducting an inquiry loses its evidentiary value as held in the cases of Muhammad Hanif v. State PLD 1977 Lah. 1253, Mst Muhammadia v. Zari Bacha and another PLD 1982 Pesh. 85, Nazir Masih v. State 1997 MLD 48, Muhammad Javed v. S.S.P. Gujranwaia and others PLD 1998 Lah. 214 and Qazi Muhammad Javed v. S.S.P. Gujranwaia and others 1999 P.Cr.LJ. 1645. Hence, the F.I.R. in the present case cannot be used as a corroborative piece of evidence to the ocular account and the prosecution story has to be seen with utmost care and caution.

13. To prove the ocular account the prosecution produced Ghulam Muhammad complainant (PW4) and Ghulam Mustafa (PW3). The former was son and the latter was nephew as well son-in-law of the deceased. As such both the eye-witnesses were related inter se and with the deceased closely. It has come on the record that the complainant party was unhappy with the deceased Umar Wada as he had contracted second marriage with Mst. Fatima Bibi, acquitted accused. Admittedly, both the eye-witnesses were not residing at or near the place of occurrence. As per his own showing the complainant (PW4) was residing at Mauza Kandair Tehsil Sadiqabad whereas according to the NIC he was r/o Sakarand, province' of Sindh at the time of occurrence and the said card was issued on 25.8.2006 more than 2 years prior to the occurrence. PW4 also admitted during the cross-examination that he had been residing at the latter place for the last 12/13 years. Similarly Ghulam Mustafa (PW3) admitted that he was residing in Mauza Kandair, which is situated at a distance of 13/14 Kilometers from the place of occurrence. Both the said PWs were residents of different places, who failed to give any plausible justification for jointly coming to the place of occurrence except that they intended to shift back Umar Wada deceased to Mauza Kandair. PWs 3 and 4 appear to have made dishonest improvements and they were rightly confronted with their previous statements recorded by the police. Moreover, the I/O (PW8) has frankly conceded that he did not record statements of any residents of Chak No. 200/P showing the presence of the eye-witnesses at that place. PW4 claimed that they had shifted the dead body on a cot which was bleeding whereas the I/O (PW8) expressed that the clothes of the complainant were not stained with blood. It is also noteworthy that the I/O (PW8) during the cross-examination has conceded that he did not specify the names of the PWs in the site-plan Ex:PM or the Inspection Notes, which also leads to draw an inference that the eye-witnesses were introduced subsequently and the prosecution story was concocted after making preliminary investigation.

14. There is also another aspect of the case. The occurrence took place after the mid of the month of October, 2008 and in any case the nights are cold in

that season. It does not seem plausible that PWs 3 and 4, who were son-in-law and real son respectively of the deceased and had travelled from far off places would be made to sleep in the street outside the house in the cold night. PW3 also stated that they were sleeping in front of the main gate of the house and that the door of the shop was not in front of that place, which is totally opposed to site-plan (Ex:PM). PW4 during the cross-examination stated that they shifted the dead body on a cot while PW8 claimed that the deceased was on the cot when he died, but afterwards it was stated that there was no blood on the cot. Even otherwise the conduct of the PWs at the spot, who were closely related to the deceased, was unnatural and inhuman as there was only one door, but they did not make any effort to save the life of the deceased or catch hold of the assailants inspite of the fact that neither of the assailants was carrying any firearm weapon and none of the P.Ws. was injured by them. Moreover, it was a night occurrence, but no source of light was given in the FIR. The I/O (PW8) has admitted during the cross-examination that he did not mention the source of any light in the site-plan (Ex:PM) or the Inspection Notes and the PWs did not point out any bulb at the spot. The learned defence counsel has rightly pointed out that PWs 3 and 4 have made improvements regarding the availability of light at the spot at the time of occurrence, who were duly confronted in this respect with their previous statements. It is also pertinent to mention that PW3 was residing at Mauza Kandair while PW4 was r/o Sakarand province Sindh whereas the occurrence took place at Chak No. 200/P and the accused were residents of Chak No. 123/P, but how the PWs were able to identify them even during night time without any source of light is doubtful when they were not earlier known to each one of them. We have also found it strange that according to the doctor (PW5) the probable time between the injury and death of the deceased was within half to one hour, which means that he did not met with sudden death, but the PWs in spite of their close relationship with the deceased did not make any effort for providing first aid or shifting him to the nearby dispensary for saving his life and it also casts doubt about the presence of the PWs at the spot at the relevant time. We are in agreement

with the learned counsel for the appellant that PW-4 during the cross-examination has stated that it took them half an hour to complete the proceedings of tracing the foot prints of the accused, which fact alone is sufficient to draw an inference that the eye-witnesses were not present and they did not witness the occurrence, but all the story mentioned in the FIR was an afterthought and manipulated. The possibility cannot be ruled out that the eye-witnesses were not present at the spot, who were summoned subsequently by the police for introducing them as such being close relatives of the deceased and they nominated the appellant and the co-accused for the murder of the deceased on account of suspicion. The delay of 33 hours in conducting the post-mortem examination is very significant and it is inferred that till such time the police papers including inquest report wherein the story of the F.I.R. is reproduced were not prepared. Hence, we are confident to observe that the prosecution has failed to prove the ocular account by producing evidence of unimpeachable character and for maintaining conviction in a case of capital sentence inasmuch as no reliance can be placed on the evidence furnished by the eye-witnesses i.e.PW-3 & PW-4, who were admittedly the chance witnesses, but they failed to prove themselves as truthful witnesses.

15. The medical evidence is also not found in line with the ocular account as the total number of injuries observed by the doctor (PW-5) on the body of the deceased were five, which are not found in consonance with 6 number of accused nominated in the FIR and according to the complainant (PW4) each assailant had given 2 to 3 sota blows on the head of his father. Even otherwise the PWs also made improvements to attribute the specific fatal injury on the head of the deceased to Jarray Khan appellant as in the FIR he was only attributed the general allegation of inflicting sota blows along with the co-accused on the head of the deceased.

16. As regards the recovery evidence, it has been rightly pointed out by the learned counsel for the appellant that the recovery of weapon of offence at the instance of the appellant was shown to have been effected from the house of the co-accused situated in Chak No. 200/P whereas the appellant is

resident of Chak No. 123/P. Moreover, no person from the locality was joined to witness the said recovery and provisions of Section 103, Cr.P.C. were violated as the alleged recovery witness (PW3) was admittedly residing 13/14 kilometers away from that place. Even otherwise the recovery of crime weapon is only a corroborative piece of evidence, which by itself is not sufficient to convict the accused in the absence of substantive evidence. Reference is invited to Ijaz Ahmed v. State (1997 SCMR 1279). It was held in the case of Asadullah Muhammad Ali (PLD 1971 SC 541) that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In the case of Saifullah v. The State 1985 SCMR 410, it was held that when there is no eye-witness to be relied upon, then there is nothing which can be corroborated by the recovery. In the present case, we have already discarded the ocular testimony and as such there is no substantive piece of evidence which requires to be corroborated through the recoveries. Thus, the recovery evidence in the present circumstances of the case has no weight.

17. As far as the motive in the present case is concerned, it is settled law that the motive is always considered to be a double edge weapon as if on the one hand there is motive to commit the murder of the deceased by the accused and on the other hand it could also be a reason for false implication of the accused on suspicion. In the present case we have already observed that the eye-witnesses were not present at the spot. So the motive alone cannot be made basis for maintaining the conviction against the appellant without any other evidence and even otherwise the learned trial Court has already disbelieved the motive through the impugned judgment, which need not be further discussed by this Court.

18. For what has been discussed above, we have come to an irresistible conclusion that the prosecution had not been able to prove the case against the appellant beyond any shadow of doubt. Hence, Criminal Appeal No. 162-J of 2010, is hereby accepted, the impugned judgment of conviction and sentence recorded by the learned trial Court against Jarray Khan appellant is set aside and he is acquitted of the charge by extending the benefit of doubt,

who shall be released from jail forthwith, if not required in any other criminal case.

19. Consequently, the death sentence awarded to Jarray Khan appellant is not confirmed and Murder Reference No. 15 of 2010/BWP is replied in the negative.

20. Since the ocular account has already been disbelieved by us in the preceding paras and even Jarray Khan appellant, who was convicted and sentenced to death by the learned trial Court has been acquitted by this Court, we do not find any occasion to interfere with the acquittal of the co-accused recorded by the learned trial Court through the impugned judgment and resultantly Crl. Appeal No. 191 of 2010/BWP filed by Ghulam Muhammad complainant is also dismissed without having any force.

(A.S.) **Appeal accepted.**

PLJ 2013 Cr.C. (Lahore) 997 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ.

ABID HUSSAIN & others--Appellant

versus

STATE & others--Respondents

Crl. Appeal No. 338 of 2009 and M.R. No. 50 of 2009, heard on 16.9.2013.

Inter se Witnesses--

----Mere close relationship of the witnesses inter se and with the deceased is not sufficient to discard their evidence unless they are found to be interested witnesses. [P. 1002] A

Motive--

----Weakness of motive or even, its conspicuous absence might not be helpful to accused when unimpeachable ocular evidence is available. [P. 1004] B

PLD 1975 SC 227, ref.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Prosecution has been able to prove the charge of qatl-i-amd of deceased against appellant beyond any shadow of doubt through the ocular account of unimpeachable character, which was supported by the medical evidence and also corroborated by the recording of the FIR with promptitude--As such the conviction recorded by the trial Court against appellant u/S. 302(b), PPC was maintained--So far as the quantum of sentence is concerned, it was found that the occurrence had taken place at the spur of moment for some immediate cause as when the PWs attracted to the spot, both the deceased and the appellant were found

grappling with each other when the fire was made by the latter, but what happened immediately before the occurrence resulting into commission thereof could not be brought on the record by either side--The motive as well as the recovery also could not be proved--In such facts and circumstances awarding of the capital sentence of death to appellant by the trial Court through the impugned judgment was not warranted, which was converted to life, imprisonment. [P. 1004] C

Mr. Javeria Qureshi, Advocate for Appellant.

Mr. Ashar Ali Gill, D.P.G. for State.

Mr. Muhammad Umair Mohsin, Advocate for Complainant.

Date of hearing: 16.9.2013.

JUDGMENT

SHAHID BILAL HASSAN, J.--Abid Hussain appellant was booked vide FIR No.122 dated 01.05.2008 at Police Station Tranda Muhammad Panah Tehsil Liaqatpur District Rahimyar Khan for committing qatl-i-amd of Ghulam Shabbir with firearm and on conclusion of the trial thereof, vide judgment dated 29.10.2009 delivered by the learned Additional Sessions Judge, Liaqatpur, he has been convicted under Section 302(b), PPC and sentenced to death with a direction to pay compensation amounting to Rs.2,00,000/- to the legal heirs of both the deceased as required by Section 544-A, Cr.P.C. or in default of payment thereof to undergo SI for six months. Abid Hussain appellant has challenged his conviction and sentence through Criminal Appeal No. 338 of 2009/BWP which has been heard by us alongwith Murder Reference No. 50 of 2009/BWP, sent by the learned trial Court under Section 374, Cr.P.C. seeking confirmation of the sentence of death passed by it against Abid Hussain appellant. We intend to dispose of both these matters jointly through the instant judgment as the common questions of facts and law are involved therein.

2. Briefly the facts of the prosecution's case setup in the F.I.R. (Ex.PB) got lodged by Ashiq Hussain complainant (PW-2) are that on 30.04.2008 at about evening, he along with Abdul Malik (given up PW) and Bashir Ahmad (PW3) on having been called upon by Malik Abdul Ghaffar to work at the thrasher, reached in Mauza Miani Achha and when contacted, it was told that thrasher would start at about prayer time on the next morning. The complainant along with the PWs went to the house of his paternal cousin Ghulam Shabbir, who was residing in the same Mauza. They slept outside his house at an open place. At about 2/3.00 a.m. (midnight) between 30.4.2008 and 1.5.2008, the complainant along with PWs woke up after hearing the noise of Ghulam Shabbir whereupon they entered his residential room. In the light of torch it was seen that Abid Hussain appellant was grappling with Ghulam Shabbir near his cot. In their view, Abid Hussain appellant fired a shot with his pistol, which hit Ghulam Shabbir on the back of head, who fell on the cot in severe injured condition. They tried to apprehend Abid Hussain appellant, but he succeeded in fleeing from the spot while brandishing pistol in the air. Ghulam Shabbir was attended by the PWs, who succumbed to the injuries at the spot.

The motive behind the occurrence was alleged to be that Abid Hussain appellant had developed illicit relations with Nasrin Mai widow of Ghulam Shabbir deceased and to remove the latter from his way, the present occurrence was committed.

3. The investigation of this case was conducted by Munir Ahmad ASI (PW-10), who recorded the FIR on the statement of the complainant (PW-2) and proceeded to the spot. Then during the investigation, the dead body of the deceased was inspected, injury statement and inquest report of the deceased were prepared, statements of the witnesses under Section 161, Cr.P.C. were recorded, the place of occurrence was inspected, blood stained earth and an empty of the pistol .30 bore were taken into possession from the spot; rough

site-plan of the place of occurrence was prepared, the dead body along with the relevant papers was sent for autopsy, the last-worn clothes of the deceased were received, blood stained chadar, blood stained cot, blood stained Sarhana and blood stained shoes were also taken into possession from the spot; a formal site-plan of the place of occurrence was got prepared, on 4.5.2008 Abid Hussain appellant was arrested and on 6.5.2008 he led to the recovery of crime weapon i.e. pistol .30 bore (P9) on 29.6.2008 from inside his residential room through memo. (Ex:PF). Afterwards on completion of the investigation, the challan was submitted in the Court.

4. At the commencement of the trial the learned trial Court after supplying copies of the documents required under Section 265-C, Cr.P.C. to the appellant framed the charge under Section 302(b), PPC against him to which he pleaded not guilty and claimed a trial. During the trial, the prosecution produced as many as 10 witnesses in support of its case.

5. The ocular account was provided by Ashiq Hussain complainant (PW-2) and Bashir Ahmad (PW-3), who deposed about the motive as well. PW-3 Hazoor Bakhsh also attested the recoveries from the spot, i.e. blood stained earth, empty (P3) vide memo. (ExPC) as well as bed. Cot, pillow and the shoes of the appellant, all blood stained, vide memo. (Ex:PD). The medical evidence was furnished by Dr. Muhammad Wajid (PW-4) who conducted the post-mortem examination on the dead body of Ghulam Shabbir deceased on 1.5.2008 at 1.00 p.m. and found the following injuries:--

"1. A lacerated wound 2.00 cm x 1.5 cm brain deep situated on the right side of skull about behind the right ear. Tatooing was present. It was a wound of entry.

2. A lacerated wound 3 cm. x 2 cm situated on back of left pinna on mastoid process and the pinna was also ruptured. It was wound of exit."

According to the opinion of the doctor the deceased had died of haemorrhage and shock by both the injuries individually and collectively, which were ante

mortem and sufficient to cause death in the ordinary course of nature. The probable time that elapsed between the injuries and death was sudden while in the death and post-mortem examination was within 12 to 14 hours.

6. Munir Ahmad ASI (PW-10) carried out the investigation and stated about the various steps taken by him in the performance thereof. The other PWs are more or less formal in nature, who escorted the dead body to the hospital, placed different parcels of last worn clothes, blood stained earth, empty and pistol in Malkhana, which were then sent to the concerned offices and prepared the formal site-plan.

7. The learned Law Officer tendered in evidence the report of the Forensic Science Laboratory (Ex:PQ), report of the Chemical Examiner (Ex:PR) and that of the Serologist (Ex:PS) and closed the prosecution evidence. Then the appellant was examined under, Section 342, Cr.P.C., who denied and controverted all the allegations of fact levelled against him by the prosecution and he also professed his innocence. However, to a question that "Why this case against you?" Abid Hussain appellant replied as under:--

"The family of the deceased had abducted a woman of Baloch family. To take revenge, the Baloch family committed the murder of the deceased. The complainant had friendly relations with said Balochs and was also involved in this murder. I know this fact. Just to close my mouth, the complainant has involved me in this false case to save himself and his friends, said Baloch."

However, the appellant neither opted to make statement on oath under Section 340 (2), Cr.P.C. nor produced the evidence in his defence.

8. Upon conclusion of the trial, the learned trial Court while finding the prosecution's case against the appellant to have been proved beyond reasonable doubt convicted and sentenced him as detailed in Para No. 1 ante. Hence, the present appeal and the connected Murder Reference before this Court.

9. The learned counsel for the appellant contends that the appellant has been falsely implicated in the present occurrence due to suspicion whereas the occurrence was committed by the Baloch tribe, whose girl had been abducted by the brother of Ghulam Shabbir deceased; that the appellant has been made a scapegoat and the recovery of the pistol was planted upon him just to strengthen the prosecution version; that the witnesses were closely related to the deceased, who did not witness the occurrence and were chance witnesses, but they failed to utter any plausible explanation for being present at the spot; that widow of the deceased, who could be star witness of the prosecution being resident of the same house was neither joined during the investigation nor she was produced as a witness during the trial, which speaks volumes against the prosecution version; that the motive has been wrongly set up, which could not be proved as widow of Ghulam Shabbir deceased is still residing in the house of the deceased with his brothers, and that the prosecution has failed to prove the case against the appellant beyond any shadow of doubt and he is entitled to be acquitted by allowing this appeal.

10. On the other hand, learned Deputy Prosecutor General assisted by the learned counsel for the complainant has vehemently opposed the appeal on the ground that no previous enmity existed between the PWs and the appellant and their evidence cannot be brushed aside merely due to their relationship with the deceased; that the appellant was previously known to the PWs whose identity was not doubtful even at night time; that even otherwise the source of light was disclosed by the complainant and the other witnesses had identified the appellant in the light of torch; that it was the season of harvesting wheat on the day of occurrence and the presence of the P.Ws. at the spot for working at the thrasher was quite possible; that the appellant has committed premeditated occurrence in a brutal manner with firearm after entering the house of the deceased at night time, who is not entitled for any leniency in the quantum of sentence and this appeal is liable to be dismissed.

11. We have heard the learned counsel for the parties at length and also gone through the record of this case with due care and caution.

12. The occurrence in this case had taken place at about 2/3.00 a.m. (midnight) in between 30.4.2008 and 1.5.2008 in the area of Mauza Achha Tehsil Liaqatpur, which is situated at a distance of about 10 kilometers from PS Tranda Muhammad Panah while the matter was reported at PS by Ashiq Hussain complainant (PW-2) through FIR (Ex:PB), which was reduced into writing by Munir Ahmad ASI (PW-10) in the morning at 6.30 a.m. The post-mortem examination on the dead body of Ghulam Shabbir was conducted the same day at 1.00 p.m. by the doctor (PW-4) without any noticeable delay. It shows that the prosecution was not left with any time for concocting the story for false implication of the Abid Hussain appellant as a single accused and we have observed that the FIR was got lodged with promptitude, which can be used as a corroborative piece of evidence to the ocular account.

13. As per prosecution version, during the midnight of 30.4.2008 and 1.5.2008 at about 2/3.00 a.m., Abid Hussain appellant while armed with .30 bore pistol after entering the house of Ghulam Shabbir deceased situated in Mauza Achha inflicted a fire shot hitting in the back side of the head of Ghulam Shabbir, who died at the spot. The ocular account was furnished by Ashiq Hussain complainant (PW-2) and Bashir Ahmad (PW-3) while Abdul Malik PW was given up by the prosecution being unnecessary. Ashiq Hussain complainant (PW-2) was paternal cousin of the deceased while Bashir Ahmad (PW-3) was also their caste fellow. It is settled law that mere close relationship of the witnesses inter se and with the deceased is not sufficient to discard their evidence unless they are found to be interested witnesses. From the perusal of the record it is found that there was no previous enmity between the said eye-witnesses and the appellant, who cannot be termed as interested witnesses. The appellant has failed to bring on record any material to show any mala fide or enmity on the part of the PWs

for his false implication in the occurrence. The appellant was previously known to the PWs and there were no chances of his misidentification during night time. Even otherwise, it has been specifically stated by the PWs that the appellant was identified in the light of the torch and the same was also taken into possession by the I/O (PW-10) during the investigation.

14. We are also mindful that both the eye-witnesses were residing at a distance of about 12/13 kilometers from the place of occurrence and they were present there as per chance only. It is admitted position that the evidence of the chance witnesses cannot be relied upon unless they are able to tender plausible explanation for being present at the specific place at a particular time. The occurrence had taken place on the first day of May, 2008 and it was the season of harvesting wheat crop. It is a common practice in the village life that the people from the adjoining Abadies are also called upon to work at the thrasher and harvesting the crops. Thus there does not appear any improbability in the version introduced by the eye-witnesses that they had come to Mauza Achha after having been called upon by Abdul Ghaffar to work at the thrasher. It is also not found unusual that they slept outside the house of Ghulam Shabbir deceased, who was paternal counsel of the complainant (PW-2) as their residence was at a distance of 12/13 kilometers and the thrasher work was to start early in the morning. Even otherwise the defence has failed to bring on record any oral as well as the documentary evidence to show that as per their usual routine, during the time of occurrence the said eye-witnesses could have been present at any specific place other than the house of the deceased situated in Mauza Achha. On the other hand we have found that both the eye-witnesses have been able to establish their presence at the spot during the occurrence which finds corroboration from the factum that the FIR was got lodged with promptitude wherein the names of the eye-witnesses were duly mentioned and Abid Hussain appellant was also named as the single accused with the role ascribed to him.

15. Both the eye-witnesses while appearing in the witness box have made consistent statements regarding the place, time and the manner in which the occurrence was committed. The place of the occurrence was the residential house of Ghulam Shabbir deceased and the occurrence took place during night time when the other inmates i.e. widow and the children of Ghulam Shabbir were also present in the room along with him, which shows that the occurrence could not go unwitnessed. The prosecution version cannot be belied merely for the reason that widow of Ghulam Shabbir deceased was neither joined during the investigation nor produced at the trial as normally the people in the villages dislike to bring their womenfolk to the Police Stations or the Courts as a matter of prestige. We are also not influenced by the version put forward by the appellant that the brother of the deceased had abducted the girl of Baloch tribe and they committed the murder of Ghulam Shabbir as there was no direct enmity against him. It is also admitted position from the record that the said abducted girl was not returned even after the instant occurrence, but so far no untoward incident took place against the brother of Ghulam Shabbir deceased. The substitution of the real culprit is a rare phenomenon and after perusal of the evidence on the record we do not find any mala fide or enmity on the part of the eye-witnesses for false implication of Abid Hussain appellant by letting off real culprit. As such we have no doubt in our minds that the prosecution has been able to prove the ocular account, which is found trustworthy and reliable having been led by independent witnesses and the learned trial Court has rightly relied upon the same for recording conviction against Abid Hussain appellant.

16. The post-mortem examination on the dead body of Ghulam Shabbir deceased was conducted by Dr. Muhammad Wajid (PW-4) on 1.5.2008 at 1.00 p.m, who found the following injuries:--

"1. A lacerated wound 2.00 cm x 1.5 cm brain deep situated on the right side of skull about behind the right ear. Tatooing was present. It was a wound of entry.

2. A lacerated wound 3 cm. x 2 cm situated on back of left pinna on mastoid process and the pinna was also ruptured. It was wound of exit"

Injury No. 1 was an entry wound while Injury No.2 was its exit and tatooing was found at Injury No. 1. During the cross-examination the doctor has ruled out the possibility of it a case of suicidal death and specifically opined that the bullet at the deceased had been fired from a distance of 2 to 2« feet, which has also supported the prosecution version that both the appellant and the deceased had grappled with each other during the occurrence and the fire was made from close range. The medical evidence is found in line with the ocular account regarding the seat of the injuries and the nature of the weapon of offence and it is also sufficient to corroborate the prosecution version that firearm weapon was used during the incident.

17. So far as the recovery evidence is concerned, it is brought on the record that an empty of pistol .30 bore was collected by the I/O (PW-10) during the first inspection of the spot on 1.5.2008 and subsequently the appellant led to the recovery of pistol from his residential room on 6.5.2008. According to the report of the Forensic Science Laboratory (Ex:PQ) the empty collected from the spot had been fired from the pistol alleged to have been recovered at the instance of Abid Hussain appellant. After thrashing out the evidence on the record, we have found that no independent person was joined during the investigation to witness the recovery of pistol .30 bore on the pointation of the appellant and it was violation of Section 103, Cr.P.C. Moreover, the parcels of the empty and the pistol were sent to the office of the Forensic Science Laboratory jointly and no reliance can be placed even on the positive report of the Forensic Science Laboratory. As such the recovery evidence in

the present case is inconsequential, which cannot be used as a corroborative piece of evidence to the ocular account.

18. The motive set up by the prosecution was that Abid Hussain appellant had developed illicit relations with Nasrin Mai widow of Ghulam Shabbir deceased and to remove the latter from his way, the present occurrence was committed. The evidence led by PWs 2 and 3 regarding the motive is based on hearsay as the complainant (PW-2) has claimed that he was told about the said relations by Ghulam Shabbir deceased 15/20 days prior to the occurrence, but no direct evidence has been adduced by the is prosecution to prove the motive. It is also brought on the record during the cross-examination on the PWs that Mst. Nasrin Bibi widow of Ghulam Shabbir deceased is still living with the latter's brothers in the same house. Hence we have observed that the motive set up by the prosecution is not proved. However, it is not sufficient to discard the prosecution version straightaway as the motive is always between the victim and the assailant, which cannot be expected to have been known to others. In case of Abdul Rashid VS Umit Ali & 2 others PLD 1975 SC 227) it was held that weakness of motive or even, its conspicuous absence might not be helpful to accused when unimpeachable ocular evidence is available.

19. From the above discussion, we have no hesitation in holding that the prosecution has been able to prove the charge of qatl-i-amd of Ghulam Shabbir deceased against Abid Hussain appellant beyond any shadow of doubt through the ocular account of unimpeachable character, which was supported by the medical evidence and also corroborated by the recording of the FIR with promptitude. As such the conviction recorded by the learned trial Court against Abid Hussain appellant u/S. 302(b), PPC is maintained. So far as the quantum of sentence is concerned, it is found that the occurrence had taken place at the spur of moment for some immediate cause as when the PWs attracted to the spot, both the deceased and the appellant

were found grappling with each other when the fire was made by the latter, but what happened immediately before the occurrence resulting into commission thereof could not be brought on the record by either side. The motive as well as the recovery also could not be proved. In such facts and circumstances we are of the considered opinion that awarding of the capital sentence of death to Abid Hussain appellant by the learned trial Court through the impugned judgment is not warranted, which is converted to life, imprisonment. However, the amount of compensation and the sentence in default thereof awarded by the learned trial Court is maintained and the benefit as required u/S. 382-B, Cr.P.C. will be extended to Abid Hussain appellant. With the said reduction in the quantum of sentence only, the impugned judgment stands modified accordingly and Crl. Appeal No.338 of 2009/BWP is disposed of in the said terms.

20. Murder Reference No. 50 of 2009 is answered in the negative and the sentence of death awarded by the learned trial Court to Abid Hussain appellant is not confirmed.

(A.S.) Appeal disposed of.

2014 C L C 1689

[Lahore]

Before Shahid Bilal Hassan, J

HAFIZ IFTIKHAR AHMED and 3 others----Petitioners

Versus

KHUSHI MUHAMMAD and anther----Respondent

Civil Revision No.21 of 2010, heard on 5th May, 2014.

(a) Transfer of Property Act (IV of 1882)---

----S. 52---Civil Procedure Code (V of 1908), S.12(2)---Specific Relief Act (I of 1877), S.42---Suit for declaration---Transfer of property within limitation period of appeal---Lis pendence, principle of---Applicability---Application moved under S.12(2), C.P.C. was dismissed---Contention of applicants was that no lis was pending when they purchased suit property and they were bona fide purchasers---Validity---Appeal against judgment and decree of civil court was filed within time limitation---Suit of respondent had been decreed and gift mutation had been declared null and void---Transaction on the basis of said mutation would automatically become of no use to the applicants---Applicants purchased suit land during the time limit for filing appeal---No party could alienate or otherwise deal with the immovable property pending litigation to the detriment of his opponent---Any such transfer would be hit by S.52 of Transfer of Property Act, 1882---No need existed to implead applicants as party to the suit, appeal or revision when they were not party to the suit inter se the respondents as they were not necessary party and they could not claim as such---Rule of lis pendence would apply in the present case---Respondent could not lawfully transfer the suit property---Applicants would not be deemed to have acquired land in question and their application filed under S.12(2), C.P.C. was rightly

dismissed by the court below---No illegality or irregularity or wrong exercise of jurisdiction had been committed---Revision was dismissed in circumstances.

Commissioner of Income Tax, Companies Zone-IV, Karachi v. Hakim Ali Zardari 2006 SCMR 170; Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; Sahib Dad v. Province of Punjab and others 2009 SCMR 385; Bashir Ahmed v. Messrs Muhammad Saleem, Muhammad Siddique and Co. (Regd.) and others 2008 SCMR 1272; Malik Muhammad Iqbal v. Ghulam Muhammad and another 1990 CLC 670; Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905, Mukhtar Baig and others v. Sardar Baig and others 2000 SCMR 45; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Muhammad Naeem Butt v. Shaukat Ali and others 2008 SCMR 1024 ref.

Sahib Dad v. Province of Punjab and others 2009 SCMR 385; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Muhammad Naeem Butt v. Shaukat Ali and others 2008 SCMR 1024 rel.

(b) Maxim---

---"Ut lite pendente nihil innovetur"---Meaning---Pending litigation, nothing new should be introduced.

Chaudhary Ehsan Sabri for Petitioners.

Malik Abdul Wahid for Respondents.

Date of hearing: 5th May, 2014.

JUDGMENT

SHAHID BILAL HASSAN,-J.--- This revision petition calls into question order dated 31-10-2009 passed by learned Addl. District Judge, Kasur whereby application filed under section 12(2) of the C.P.C. by the present

petitioners has been dismissed.

2. Briefly, the facts leading towards this civil revision are as such that present petitioners by filing an application under section 12(2) of the C.P.C. have challenged the judgment and decree dated 5-5-2003 passed by learned Additional District Judge, Kasur whereby appeal filed against judgment and decree dated 1-2-2003, dismissing the suit, was accepted and the suit titled "Khushi Muhammad v. Rehmat Ali" for declaration was decreed. It has been contended that learned trial Court dismissed the suit on 1-2-2003 and on 6-2-2003 the petitioners purchased 16 kanals agricultural land from respondent No.2 through sale-deed No.471. On 28-2-2003, the respondent No.1 preferred an appeal against the judgment and decree dated 1-2-2003 before the learned Appellate Court, which was accepted vide judgment and decree dated 5-5-2003 and suit was decreed in favour of the respondent No.1, impugned gift Mutation No.1353 dated 8-7-1995 was declared null and void. The respondent No.2 filed a Civil Revision before this Court, which was ultimately dismissed vide judgment dated 6-6-2006. During pendency of the Civil Revision, the present petitioners filed a C.M. No.613-C of 2009 under section 12(2) of C.P.C. but by filing a C.M. No.5-C of 2009 withdrew the same vide order dated 15-7-2009 and filed application under section 12(2) of the C.P.C., which was contested by the respondents and ultimately same was dismissed vide impugned order dated 31-10-2009.

3. Learned counsel for the petitioners has contended that the petitioners are bona fide purchasers of the suit-land; further submits that when the petitioners purchased the suit-land, no lis was pending inter se the respondents; that the respondents being father and son in collusion with each other obtained the decree on the basis of fraud and misrepresentation; that despite having knowledge about sale and purchase of the land in dispute by

the petitioners, they were not made party to the appeal and revision, which shows mala fide on the part of respondents; that the learned court below ought to have obtained reply to application filed by the petitioners under section 12(2) of C.P.C., framed issues, recorded evidence and decided the same on merits, but in haphazard manner the petitioners have been non-suited, which is not the requirement of law, rather norms of justice have been defiled; that the impugned order is against facts and law; that the impugned order has been passed in a fanciful manner and without application of judicial mind; therefore, the impugned order is not sustainable in the eyes of law and liable to be set aside; resultantly, the matter may be remanded to the learned lower Court for decision afresh after framing of issues and recording of evidence on merits.

4. Conversely, learned counsel appearing on behalf of the respondent(s) by favouring the impugned order has opposed the instant revision petition with vehemence by maintaining that case of the petitioners hit by the principle of lis pendens as admittedly they purchased the suit land just after 5 days of passing of judgment and decree by learned trial Court i.e. within limitation period of filing of appeal, therefore, they cannot be said to be bona fide purchasers without notice; therefore, the impugned order is well-reasoned and does not call for any interference. Prayer for dismissal of the instant revision petition has been made. Relies on Commissioner of Income Tax, Companies Zone-IV, Karachi v. Hakim Ali Zardari 2006 SCMR 170, Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 Supreme Court 153, Sahib Dad v. Province of Punjab and others 2009 SCMR 385, Bashir Ahmed v. Messrs Muhammad Saleem, Muhammad Siddique and Co. (Regd.) and others 2008 SCMR 1272, Malik Muhammad Iqbal v. Ghulam Muhammad and another 1990 CLC 670 Muhammad Ashraf

Butt and others v. Muhammad Asif Bhatti and others PLD 2011 Supreme Court 905, Mukhtar Baig and others v. Sardar Baig and others 2000 SCMR 45, Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Muhammad Naeem Butt v. Shaukat Ali and others 2008 SCMR 1024.

5. Heard.

6. Admittedly, the petitioners purchased the suit land from the respondent No.2 during the time limit for filing appeal; therefore, the contention that when the petitioners purchased the suit land no lis was pending inter se the respondents as admittedly appeal was filed after purchase of suit land by the petitioners, has no weight, as section 52 of the Transfer of Property Act, 1882, embodies the equitable principle of "ut lite pendente nihil innovetur" (pending litigation, nothing new should be introduced), and stipulated that parties to a pending litigation, wherein rights to an immovable property were in question, no party could alienate or otherwise deal with such property to the detriment of his opponent. Any transfer so made would be hit by section 52 of the Transfer of Property Act, 1882; therefore, when the petitioners were not party to the suit inter se the respondents, there was no need to implead them as party to the suit, appeal or revision, because they were not necessary party and they could not claim as such; rule of lis pendens would apply. In this regard safer reliance can be placed on Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983, wherein it has been held that:---

"Contention of the alleged bona fide purchaser (petitioner) was that impugned sale transaction was relatable to a period when there was no lis pending as admittedly appeal was filed after the impugned sale---Validity---Section 52 of the Transfer of Property Act, 1882, enshrined the equitable principle of "ut lite pendente nihil innovetur" (pending litigation, nothing

new should be introduced), and stipulated that parties to a pending litigation, wherein right to an immovable property were in question, no party could alienate or otherwise deal with such property to the detriment of his opponent---Any transfer so made would be hit by S.52 of the Transfer of Property Act, 1882---Doctrine of lis pendens underpinned the rationale that no action or suit would succeed if alienations made during pendency of proceedings in the said suit or action were allowed to prevail----Effect of such alienation would be that the plaintiff would be defeated by the defendants alienating the suit property before the judgment or decree and the former would be obliged to initiate de novo proceedings and that too with the fear that he could again be defeated---Under S.52 of the Transfer of Property Act, 1882, if appeal against a judgment or decree had not been filed but the period of limitation to file appeal had not expired, the proceedings would be deemed to be pending----In the present case, appeal of the plaintiff against the judgment and decree of the Trial Court was filed within time and property in question was decreed in proceedings and squarely hit by the principle of lis pendens ."

Similar position is in the present case, because the appeal against judgment and decree of learned Civil Court was filed by the respondent No.1 within time limitation and not otherwise; therefore, when the suit of the respondent No.1 has been decreed and the gift mutation under question has been declared null and void, the transaction on basis of said mutation, would automatically become of no use to the vendee (petitioners). Further reliance in this regard can be placed on Muhammad Naeem Butt v. Shaukat Ali and others 2008 SCMR 1024 wherein it has invariably been held that:---

"Suit for specific performance of agreement to sell---Lis pendens, rule of---Decree passed in favour of plaintiff was challenged by defendant in

appeal---Application by subsequent purchaser of disputed property for his impleadment as party in appeal---Appellate Court dismissed application---Revision by subsequent purchaser was dismissed by High Court after taking into consideration that he, knowing well about passing of such decree, had purchased property at his own risk, thus, he was not a necessary party and rule of lis pendens would apply---Supreme Court dismissed petition and refused leave to appeal."

When the position is as such, findings recorded against defendant/vendor and judgment delivered against him would be binding on vendee in the same manner and to the same extent as it was binding on defendant/ vendor, as held in Mukhtar Baig and others v. Sardar Baig and others 2000 SCMR 45.

Further guideline can also be sought from Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 Supreme Court 905, wherein it has been held that:--

"S. 52---Rule of lis pendens---Virtual and true object---transferee of the suit property, even the purchaser for value, without notice of the pendency of suit, who in the ordinary judicial parlance is known as a bona fide purchaser, in view of the rule/doctrine of lis pendens shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound---Transferee, therefore, does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor in interest---Rule of lis pendens shall also be duly attracted and applicable during the period of limitation provided for an appeal or revision etc. to challenge a decree/order---If therefore an alienation of a suit property has been made by a party to the lis, who succeeds at one stage (such as trial), but the transfer is during the period of limitation available to the other (unsuccessful) party, to

challenge that decision and ultimately the decree/ order is over turned in its further challenge, such alienation made shall also be hit and shall be subject to the rule of lis pendens."

7. In view of above, when the respondent No.2 was incapacitated by rule of lis pendens, he did not have anything lawfully transferred and therefore, petitioners would not be deemed to have acquired land in dispute; therefore, the petitioners' application filed under section 12(2) of C.P.C. has rightly been dismissed by learned Court below and no illegality or irregularity even wrong exercise of jurisdiction has been committed. This Court finds no occasion to interfere in the well reasoned order of the learned Court below.

8. The crux of discussion above is that the petitioners have failed to point out any illegality or irregularity allegedly committed by learned Court below; resultantly by placing reliance on the judgments supra as well as on case of Sahib Dad 2009 SCMR 385, the instant revision petition having no force is hereby dismissed.

AG/I-17/L **Revision dismissed.**

2014 M L D 7

[Lahore]

Before Shahid Bilal Hassan, J

RAWAIDAH BIBI---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.770-B of 2013, decided on 22nd May, 2013.

(a) Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), Ss.406 & 506---Criminal breach of trust and criminal intimidation---Bail, grant of---Accused a female, with suckling baby---Case of civil nature---Further inquiry---Complainant alleged that his sister entrusted 291 Tolas of gold and Rs.56,00,000 to accused lady who had misappropriated the same---Validity---Sister of complainant was star witness of the case who since lodging of F.I.R. did not approach investigating agency or any other forum so as to support stance taken up by complainant, who happened to be her real brother---Issue, if any, between complainant and accused party was that of civil liability/contract---Offences levelled against accused did not fall within the ambit of prohibitory clause of S. 497 Cr.P.C.---Accused was mother of a suckling baby aged one year and two months confined with her in jail---Case lodged against accused fell within the ambit of further inquiry as no exceptional ground was made out by prosecution so as to deny accused her liberty, as she had been behind the bars since 13-10-2012 i.e. approximately seven months and there was no likelihood of conclusion of trial in near future---Bail was allowed in circumstances.

Mst. Nusrat v. The State 1996 SCMR 973; Ghulam Sakina and others v. The State 1991 PCr.LJ 1316; Mst. Irshad alias Mst. Waziran v. The State 2000 PCr.LJ 613; Mst. Latifan Bibi v. The State 2006 PCr.LJ 251; The State v. Farzana Kausar 2008 YLR 2600; Nasreen Bibi v. The State 2011 YLR

1028 and Mst. Kabela v. The State 2011 YLR 2975 ref.

(b) Criminal Procedure Code (V of 1898)---

----Ss. 497 & 498---Bail, grant of---Principle---In absence of any exceptional circumstances grant of bail to accused is a right which should be given and refusal is an exception.

Zafar Iqbal v. Muhammad Anwar and others 2009 SCMR 1488; Riaz Jafar Natiq v. Muhammad Nadeem Dar and others 2011 SCMR 1708 and Tariq Bashir and 5 others v. The State PLD 1995 SC 34 rel.

Ch. Riaz Ahmed for Petitioner.

Asghar Ali Gill, Deputy Prosecutor-General and Fayyaz, S.I.. for the State.

Malik, Mukhtar Ahmed for the Complainant.

ORDER

SHAHID BILAL HASSAN, J.---Petitioner claims post arrest bail in case F.I.R. No.471 of 2012 dated 18-9-2012 registered under section 406 read with section 506 of the Pakistan Penal Code, 1860 at Police Station City Ahmedpur, District Bahawalpur.

2. According to the prosecution story as narrated by the complainant of this case namely Farrukh Anwar son of Anwaar Ahmed is to the effect that sister of the complainant namely Mst. Shazia Bari wife of Abdul Bari was known to the petitioner and had good relation with her. The petitioner according to the prosecution story used to keep the belongings of the people as bailment and she is very popular in keeping the people belongings. In this regard there are several names given who have entrusted their belongings to the petitioner. One month earlier the sister of the complainant namely Mst. Shazia Bari had to travel to Bahawalpur and prior to the said she in presence of witnesses gave 291-tolas of gold ornaments and cash amounting to Rs.56,00,000 to the petitioner while saying they will get the said belongings back after returning from Bahawalpur. The complainant's sister remained

with him and returned to Ahmedpur East, from Bahawalpur, that is, where the petitioner and sister of the complainant used to live and demanded the entrusted property mentioned hereinbefore which the petitioner promised to return on the next day. On the next day the complainant's sister went to get her entrusted property back but the needful was not done. At the time of refusal there were many other claimants whose entrustment had also been misappropriated by the petitioner.

3. The learned counsel for the petitioner has maintained that no time, date and place of occurrence has been mentioned in this case by the complainant, simply stating that the occurrence took place one month prior without any explanation is not enough for the purpose of lodging of F.I.R. as delay of each and every day is to be explained and that is not the case under discussion. Further maintained that there is no calendar of witnesses in this case and no statement under section 161 of Cr.P.C., recorded either against the petitioner or any other co-accused in this case. Adds that the whole prosecution story revolves around Mst. Shazia Bari sister of the complainant, who gave the alleged amount and gold to the petitioner but did not join the investigation in support of the prosecution story being star witness rather, the only aggrieved person, therefore, according to the learned counsel for the petitioner no case is made out in the given circumstances against the petitioner as the complainant is not witness of the Crime and all which has been narrated by him is hear-say. Further adds that the petitioner joined the investigation and no recovery was effected from her, no criminal breach of trust has been made out. From the bare reading of the prosecution story and therefore, the case of the petitioner falls within the ambit of further inquiry under section 497(2) of Cr.P.C. The petitioner is behind the bars since her arrest i.e. 13-10-2012 and is mother of a suckling baby namely Mah Noor who was born on 10-4-2012 and as such the petitioner is entitled to the grant of post arrest bail.

4. On the other hand, the learned D.P.G. assisted by the learned counsel for the complainant has opposed the bail application and maintained that

section 406 of the P.P.C. duly attracted in this case and the statements of two witnesses are on the record so as to connect the petitioner with the commission of offence and as such the petitioner is not entitled for the grant of post arrest bail as she has committed the criminal breach of trust as defined in section 405 of the P.P.C. the punishment of which is given in section 406 of the said Act and there are threats of dire consequences to the life of the complainant's side by the petitioner.

5. Arguments heard. Record perused.

6. It is an admitted fact that the petitioner was arrested on 13-10-2012 and since then she is behind the bars, after arrest she joined the investigation of this case during which no recovery was got effected from the petitioner. It is an admitted fact that the petitioner is mother of a daughter who is a suckling baby aged one year and approximately two months old. Apart from the said, on the face of it the petitioner has not committed any crime with the complainant who is not a witness to the entrustment that he has alleged according to the prosecution story. It is the sister of the complainant namely Mst. Shazia Bari wife of Abdul Bari who allegedly entrusted the petitioner 291-tolas of gold and Rs.56,00,000 and admittedly Mst. Shazia Bari did not appear before the Investigating Officer or any other competent forum so as to support the stance taken up by the complainant. It will not be wrong to say that Mst. Shazia Bari is the star witness of this case who ever-since 18-9-2012, that is, the date of lodging of F.I.R. has not approached the investigating agency or any other forum so as to support stance taken up by the complainant who happens to be her real brother. Apparently on the face of it, it seems that the issue if any between the complainant and the petitioner party is that of civil liability/contract, the offences levelled against the petitioner do not fall within the ambit of prohibitory clause of section 497, Cr.P.C. Even otherwise there is no denial of the fact that the petitioner is mother of a suckling baby namely Mah Noor aged one year and approximately two months, presently confined in New Central Jail, Bahawalpur. Reliance in this regard has been made by the learned counsel

for the petitioner upon "Mst. NUSRAT v. THE STATE" (1996 SCMR 973), wherein it has been held by the Hon'ble Supreme Court of Pakistan as under:--

"Suckling child of accused was kept with mother in jail obviously for his welfare---Concept of "welfare of minor" was compatible with jail life---Instead of detaining the innocent child/infant in the jail for the crime allegedly committed by his mother, it was in the interest of justice as well as welfare of minor if the mother was released from jail.---"

Similar view has been adopted by this Court in a number of cases.

Reliance is placed upon "GHULAM SAKINA and others v. THE STATE" (1991 PCr.LJ 1316), "Mst. IRSHAD alias Mst. WAZIRAN v. THE STATE" (2000 PCr.LJ 613), "Mst. LATIFAN BIBI v. THE STATE" (2006 PCr.LJ 251), "THE STATE v. FARZANA KAUSAR" (2008 YLR 2600), "NASREEN BIBI v. THE STATE" (2011 YLR 1028), and "Mst. KABELA v. THE STATE" (2011 YLR 2975). In all the said verdicts of this Court, a mother of a suckling baby has been given the right to the concession of bail.

Though incomplete challan has been submitted in the trial court but there is yet to be any progress, which accordingly is at initial stage and as such in absence of any exceptional circumstances grant of bail to an accused is a right, which should be given and refusal is an exception as held by the Hon'ble Supreme Court of Pakistan in "ZAFAR IQBAL v. MUHAMMAD ANWAR and others" (2009 SCMR 1488), "RIAZ JAFAR NATIQ v. MUHAMMAD NADEEM DAR and others" (2011 SCMR 1708) and "TARIQ BASHIR and 5 others v. THE STATE" (PLD 1995 SC 34).

7. In the light of what has been discussed above and particularly keeping in view the fact that the petitioner is mother of suckling baby while following the dictum laid down by the Hon'ble Supreme Court of Pakistan in "Mst. NUSRAT (supra) and the case lodged against her falls within the ambit of further inquiry as no exceptional ground has been made out by the prosecution so as to deny the petitioner her liberty as she is behind the bars

since 13-10-2012 i.e. approximately seven months and there is no likelihood of the conclusion of trial in the near future, therefore, this petition is accepted and the petitioner is admitted to after arrest bail till the final decision of the case subject to furnishing bail bonds in the sum of Rs.10,00,000 (rupees one million only) with one surety in the like amount to the satisfaction of the learned trial court.

8. Before parting with this order, it is however, clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

MH/R-18/L **Bail allowed.**

2014 M L D 284

[Lahore]

Before Shahid Bilal Hassan, J

RWAIDAH BIBI---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.771-B of 2013, decided on 22nd May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.406, 420 & 506-B---Criminal breach of trust, cheating, criminal intimidation---Bail, grant of---Further inquiry---Ornaments were allegedly given to accused as investment against which profit was to be given to the complainant by accused and was not entrusted to hold in a fiduciary capacity---Provisions of S.406, P.P.C. were not made out from the bare reading of the F.I.R., as no entrustment was made by the complainant---Accused after arrest joined the investigation during which no recovery was made from accused---Accused was mother of a suckling daughter, aged one year and two months---Accused had not committed any crime---Incomplete challan had been submitted in the Trial Court, it was yet to progress, as same was at initial stage---In absence of any exceptional circumstances, grant of bail to accused was a right, and refusal was an exception---Case against accused fell within the ambit of further inquiry, as no exceptional ground had been made out by the prosecution, so as to deny liberty to her---Accused was behind the bars since seven months; and there was no likelihood of the conclusion of trial in the near future---Accused, was admitted to bail, in circumstances.

Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others 2006 PCr.LJ 1900; Muhammad Akram Lone Saeed v. The State 2008 PCr.LJ 1351; Muhammad Rizwan v. The State 2008 PCr.LJ 2169; Zahid Jameel v. S.H.O. and 2 others 2008 YLR 2695; Sajjad Azmat Chahal v. The State and another 2011 MLD 459; Ghulam Sakina and others v. The State 1991 PCr.LJ 1316; Mst. Irshad alias Mst. Waziran v. The State 2000 PCr.LJ 613; Mst. Latifan Bibi v. The State 2006 PCr.LJ 251; The State v. Farzana Kausar 2008 YLR 2600; Nasreen Bibi v. The State 2011 YLR 1028 and Mst. Kabela v. The State 2011 YLR 2975 ref.

Zafar Iqbal v. Muhammad Anwar and others 2009 SCMR 1488; Riaz Jafar Natiq v. Muhammad Nadeem Dar and others 2011 SCMR 1708 and Tariq Bashir and 5 others The State PLD 1995 SC 34 ref.

Ch. Riaz Ahmed, for Petitioner.

Asghar Ali Gill, Deputy Prosecutor-General and Fayyaz, S.I. for Respondent.

Malik Mukhtar Ahmed, for the Complainant.

ORDER

SHAHID BILAL HASSAN, J.---Petitioner seeks after arrest bail in case F.I.R. No.465 of 2012 dated 16-9-2012 registered under sections 406, 420 read with section 506-B of the Pakistan Penal Code, 1860 at Police Station City Ahmedpur, District Bahawalpur.

2. Allegations in brief as contained in the Crime Report against the petitioner are that she along with other co-accused misappropriated gold ornaments weighing 21-tolas and 8-masha belonging to the complainant and

on demand there are threats by the petitioner's side to the complainant of dire consequences.

3. The learned counsel for the petitioner has maintained that the provisions of section 406 of P.P.C. are not attracted from the bare reading of the F.I.R. and if at all any grievance of the complainant against the petitioner is made out i.e. of civil/contractual nature and in case the complainant is aggrieved he may approach the civil courts concerned so as to get his grievance redressed if so advised.

4. On the other hand, the learned D.P.G. assisted by the learned counsel for the complainant has vehemently opposed the bail application and stated that all offences levelled against the petitioner are made out and the prosecution evidence in this regard is intact. Since there has been misappropriation of gold ornaments hereinafter, therefore, the petitioner is not entitled to the concession of bail after arrest.

5. Arguments heard. Record perused.

6. Before discussing this petition on merits it is important to understand and comprehend section 405 of the P.P.C. as the case of the prosecution rests on section 406 P.P.C. Bare perusal of section 405 of the P.P.C. states that if a person gives money to another person for the purpose of investment in business and equal amount of money along with profit was to be returned by the latter such business transaction could not attract the provisions of section 405 of the P.P.C., such transaction for all intents and purposes was not entrustment of property but simply one of investment in property. The said view has been taken by this Court in the case of "SHAUKAT ALI SAGAR v. STATION HOUSE OFFICER, POLICE STATION BATALA COLONY, FAISALABAD and 5 others" (2006 PCr.LJ 1900), "MUHAMMAD

AKRAM LONE SAEED v. THE STATE" (2008 PCr.LJ 1351), "MUHAMMAD RIZWAN v. THE STATE" (2008 PCr.LJ 2169), "ZAHID JAMEEL v. S.H.O. and 2 others" (2008 YLR 2695) and "SAJJAD AZMAT CHAHAL v. THE STATE and another" (2011 MLD 459). Now coming to the prosecution story of this case, according to the F.I.R. as narrated by the complainant it was settled that the alleged ornaments i.e.21-tolas and 8-masha were given to the petitioner as investment against which profit was to be given to the complainant's side by the petitioner. It was not entrustment to hold a property in question in a fiduciary capacity. Therefore, I am in agreement with the learned counsel for the petitioner when he says that the provisions of section 406 are not made out from the bare reading of the F.I.R., as no entrustment was made by the complainant's side. Another admitted aspect of the case is to the effect that the petitioner has a suckling baby namely Mah Noor who was born on 10-4-2012 and the petitioner is behind the bar in this case since 9-10-2012. After arrest she joined the investigation during which no recovery was got effected from the petitioner. It is an admitted fact that the petitioner is mother of a daughter who is a suckling baby aged one year and approximately two months old. Reliance in this regard has been made by the learned counsel for the petitioner upon "Mst. NUSRAT v. THE STATE" (1996 SCMR 973), wherein it has been held by the Hon'ble Supreme Court of Pakistan as under:--

"Suckling child of accused was kept with mother in jail obviously for his welfare---Concept of "welfare of minor" was compatible with jail life---Instead of detaining the innocent child/infant in the jail for the crime allegedly committed by his mother, it was in the interest of justice as well as welfare of minor if the mother was released from jail.---"

Similar view has been adopted by this Court in a number of cases.

Reliance has also been placed upon "GHULAM SAKINA and others v. THE STATE" (1991 PCr.LJ 1316), "Mst. IRSHAD alias Mst. WAZIRAN v. THE STATE" (2000 PCr.LJ 613), "Mst. LATIFAN BIBI v. THE STATE" (2006 PCr.LJ 251), "THE STATE v. FARZANA KAUSAR" (2008 YLR 2600), "NASREEN BIBI v. THE STATE" (2011 YLR 1028), and "Mst. KABELA v. THE STATE" (2011 YLR 2975). In all the said verdicts of this Court, a mother of a suckling baby has been given the right to the concession of bail.

Apart from the said, on the face of it the petitioner has not committed any crime with the complainant and is not a witness to the entrustment that he has alleged according to the prosecution story. Though incomplete challan has been submitted in the trial court but there is yet to be any progress, which accordingly is at initial stage and as such in absence of any exceptional circumstances grant of bail to an accused is a right, which should be given to the accused and refusal is an exception as held by the Hon'ble Supreme Court of Pakistan in "ZAFAR IQBAL v. MUHAMMAD ANWAR and others" (2009 SCMR 1488), "RIAZ JAFAR NATIQ v. MUHAMMAD NADEEM DAR and others" (2011 SCMR 1708) and "TARIQ BASHIR and 5 others v. THE STATE" (PLD 1995 SC 34).

7. For what has been discussed above and particularly keeping in view the fact that the petitioner is a mother of suckling baby while following the dictum laid down by the Hon'ble Supreme Court of Pakistan in "Mst. NUSRAT (supra) and the case lodged against her falls within the ambit of further inquiry as no exceptional ground has been made out by the prosecution so as to deny the petitioner her liberty as she is behind the bars since 9-10-2012 i.e. approximately seven months and there is no likelihood of the conclusion of trial in the near future, therefore, this petition is accepted

and the petitioner is admitted to after arrest bail till the final decision of the case subject to furnishing bail bonds in the sum of Rs.10,00,000 (rupees one million only) with one surety in the like amount to the satisfaction of the learned trial court.

8. Before parting with this order, it is however, clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

HBT/R-19/L **Bail granted.**

2014 P Cr. L J 39

[Lahore]

Before Shahid Bilal Hassan, J

KHAYYAM BILAL---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.1063-B/BWP of 2013, decided on 3rd September, 2013.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S. 406---Criminal breach of trust---Pre-arrest bail, grant of---Case of civil nature---Deeper appreciation of evidence---Accused contended that matter between the parties was of rendition of accounts and of civil nature---Accused had allegedly returned a portion of amount to complainant and Trial Court would decide about application of S.406, P.P.C., according to facts and circumstances of the case after recording of evidence---Accused had joined investigation and there were two versions one put forth by complainant and the other by accused---Deeper appreciation of evidence was not warranted at bail stage and it was Trial Court to decide or pass any verdict that which was the correct version and the same required evidence---Complainant never gave any amount to accused, rather there was business bargain of "Ghee" inter se the complainant and accused for distribution purposes, which was based on profit---Matter was prima facie of civil nature and registration of case was an attempt to exert pressure upon accused to gain benefits---Pre-arrest bail was allowed in circumstances.

Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others 2006 PCr.LJ 1900; Shahid Imran v. The

State and others 2011 SCMR 1614 and Ghulam Ali v. The State and another 2013 MLD 891 rel.

Muhammad Rizwan v. The State 2008 YLR 2169; Shakeel Ahmad v. The State and another 2012 MLD 732; Kh. Zahid Ahmad and others v. The State 2010 YLR 526 and Khalil Ahmed v. The State and another 2013 PCr.LJ 389 distinguished.

Chaudhary Manzoor Ahmad for Petitioner.

Muhammad Umair Mohsin for the Complainant.

Khalid Parvez Uppal, DPG along with Dildar, ASI for the State.

ORDER

SHAHID BILAL HASSAN, J.---Being booked in case bearing F.I.R. No.297 of 2013, dated 15-5-2013, registered under section 406 of P.P.C. at Police Station B-Division, District Bahawalnagar on the complaint of Haji Muhammad Iqbal Saeed, the petitioner Khayyam Bilal son of Wali Muhammad implores for grant of pre-arrest bail in the said case, after having been declined by learned Additional Sessions Judge, Bahawalnagar vide order dated 28-5-2013.

2. The precise allegation as pervaded in the crime report lodged by the complainant is as such that complainant and petitioner were having business relation inter se, pursuant to said relation the distribution of Naimat Banaspati Ghee was handed over to the petitioner and this bargain remained in progress until and unless the petitioner delayed in making payments; an amount of Rs.19,72,000 was outstanding against the petitioner, which was demanded, but he (petitioner) shilly shallied, but on moral pressure paid Rs.500,000 on 26-1-2012 and had promised to pay the remaining Rs.14,15,918 after one year in presence of the witnesses, but ultimately refused; hence, he committed breach of trust.

3. The learned counsel for the petitioner inter alia maintains that the petitioner is innocent and has falsely been involved in this case with mala fide intention; that actually no occurrence as narrated in the F.I.R. has ever taken place nor has the petitioner obtained any distribution of Ghee, rather he deals in tobacco business; that if for the purpose of arguments the contents of the complaint are admitted to be true, even then it is a matter of rendition of accounts which is purely civil in nature; that there is delay of one year and four months in lodging of F.I.R. without any plausible justification; that the offence does not come within the ambit of prohibitory clause of section 497 of the Cr.P.C. Relies on Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others (2006 PCr.LJ 1900-Lahore), Shahid Imran v. The State and others (2011 SCMR 1614) and Ghulam Ali v. The State and another (2013 MLD 891-Lahore).

4. The learned Deputy Prosecutor-General assisted by the learned counsel for the complainant strongly opposed the bail application and argued that the petitioner is specifically nominated in the F.I.R.; that he committed breach of trust by not returning the amount of the Ghee supplied to him for distribution purposes, which is still outstanding against the petitioner; that no mala fide, ill-will or ulterior motive has been agitated or brought on record against the complainant or the police for false involvement of the petitioner in this case, which are pre-requisites in seeking extraordinary relief of pre-arrest bail. The petitioner has been declared guilty by the police during the investigation. Therefore, he is not entitled to the concession of extraordinary concession of pre-arrest bail. Relies on Muhammad Rizwan v. The State (2008 YLR 2169), Shakeel Ahmad v. The State and another (2012 MLD 732), Kh. Zahid Ahmad and others v. The State (2010 YLR 526) and Khalil Ahmed v. The State and another (2013 PCr.LJ 389).

5. I have heard the learned counsel for the parties as well as learned D.P.G. and perused the record carefully.

6. After hearing the arguments of both the sides and perusing the record carefully, it has become diaphanous that the matter in hand, ex facie, seems to be of civil nature, as it is evident from the contents of the F.I.R. that petitioner has allegedly returned a portion of amount i.e. Rs.500,000 to the complainant and the learned trial Court would decide about the application of section 406 of P.P.C. according to the facts and circumstances of the case after recording evidence. The petitioner has joined the investigation. Moreover, there are two versions: one put-forth by the complainant and the other by the petitioner. At this stage, deeper appreciation of the evidence is not warranted and it is the learned trial Court to decide or pass any verdict that which version is correct and same requires evidence. Admittedly, the complainant never ever gave any amount to the petitioner, rather there was a business bargain of Ghee inter se the complainant and the petitioner for distribution purposes, obviously based on profit, which matter is, prima facie, of civil nature and the present case seems an attempt to exert pressure upon the petitioner to gain benefits. In this regard guideline can be sought from the case of Shahid Imran v. The State, etc. (2011 SCMR 1614), wherein it has been invariably held by the Apex Court that, "------Money given by complainant to accused for investment in business venture would not constitute entrustment within meaning of S. 406, P.P.C. Additional Sessions Judge would rightly admit accused to pre-arrest bail in such case. High Court would act illegally by cancelling bail of accused without considering that considerations for grant of bail and its cancellation are quite different. Supreme Court converting leave petition against order of High Court into appeal, allowing appeal and admitting accused to pre-arrest bail." Even in

case of Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others (2006 PCr.LJ 1900-Lahore) it has been observed that, "Complainant had given money to accused/petitioner for purpose of doing business an giving profit to complainant therefrom.---On failure of accused to return money/profit to complainant, the latter lodged F.I.R. against accused---Validity---Offence of criminal breach of trust defined under S.405, P.P.C. punishable under S.406, P.P.C. was to be committed if property (money) was given on trust and same property was not returned---If a person gave money to other for purpose of investment in business and equivalent amount of money along with profit was to be returned by the latter then such business transaction was not to attract provision of Ss.405 & 406 of P.P.C.---Such transaction was not of entrustment of property but simply one of investment of property---No date, time or place of criminal intimidation by accused was given in F.I.R.---No relevant details of criminal intimidation were brought on record of investigation---No one could be prosecuted on the basis of vague and unspecified allegations---Trial Court, in case of submission of challan, would not be in a position to frame charge against accused---Complainant had tried to convert a civil and business dispute into a criminal case in order to extract concession of civil matter---F.I.R. was quashed." Same view has been reiterated by this Court in case of Ghulam Ali v. The State and another (2013 MLD 891-Lahore). The case law rendered by learned counsel for the complainant, with utmost respect, is distinguishable and does not apply to the facts and circumstances of the instant case, as each and every case has its peculiar facts and circumstances and the Court has to evaluate the same in judicious manner, independently.

7. In view of the above said circumstances, by placing reliance on the judgments (Supra), the application in hand is accepted and the ad interim pre arrest bail already granted to the petitioner vide order dated 3-6-2013 is confirmed subject to his furnishing of bail bonds in the sum of Rs.100,000 (one hundred thousand) with one surety in the like amount to the satisfaction of the learned trial Court.

8. Before parting with this order, it is clarified that the findings given in this order are tentative in nature and it will have no effect upon the merits of the case in any manner whatsoever.

MH/K-37/L **Bail allowed.**

2014 P Cr. L J 52

[Lahore]

Before Shahid Bilal Hassan, J

AMAR UL HASSAN ZIKRIA---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

Writ Petition No.3479 of 2011/BWP, decided on 16th May, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 154, 22-A & 22-B--- Constitution of Pakistan, Art.199--- Constitutional petition--- Cognizable offence--- Registration of complaint--- Preliminary inquiry---Scope---Grievance of petitioner was that inquiries were allegedly held wherein accused was found innocent and stance of petitioner was found incorrect, despite the fact that serious allegations had been levelled against accused and wrong doers---Validity---All such acts by authorities denying petitioner his lawful right were unwarranted under the law---Police officials, at the very outset were bound to see as to whether a cognizable office was made out from bare reading of petition or not---As cognizable offence was made out, therefore, police officials were not under the law, bound to hold a preliminary inquiry as to the correctness or otherwise of allegations---From bare reading of complaint of petitioner, cognizable office was made out under the relevant provisions of law and police was bound to register criminal case against wrong doers---High Court directed police to register a case against accused and conduct investigation strictly in accordance with law---Petition was allowed in circumstances.

Muhammad Basir v. SHO and others PLD 2007 SC 539; Ghulam Farid v. S.H.O. and others 2013 PCr.LJ 117 and Mst. Sulima v. Government of Sindh through Secretary Home Department and 14 others 2013 PCr.LJ 100 rel.

Mrs. Kausar Iqbal Bhatti for Petitioner.

Manzoor Ahmad Warraich, learned AAG.

Muhammad Yasin, ASI.

Zeeshan Haider for Respondent No.4.

Ghulam Mohy Ud Din SHO in person.

ORDER

SHAHID BILAL HASSAN, J.---Through this constitutional petition, the petitioner has sought direction to the respondent No.2 so as to register a criminal case against respondent No.4/SHO Police Station City C-Division, Rahim Yar Khan and five other persons and to act strictly in accordance with law.

2. Factually speaking prior to approaching this court, the petitioner approached the learned Additional Sessions Judge/Justice of Peace, through an application under section 22-A/22-B of Cr.P.C. for redressal of the same grievance as mentioned above. On the said application, after all the requisite procedure the learned Addl. Sessions Judge/Justice of Peace, Rahim Yar Khan was pleased to dispose of the application vide order dated 8-2-2010 as follows:--

"As per allegations contained in the petition, respondent No.3 along with five unknown persons entered into house of petitioner forcibly and took away his brother Noman Hassan Zakriya forcibly. Although the SHO Police Station City A-Div. Rahim Yar Khan has reported that by orders of District Coordination Officer, Rahimyar Khan dated 1-2-2010, regarding detention of Noman Hassan Zakriya, petitioner's brother, for thirty days, he was arrested from Church Road, Rahim Yar Khan and no one entered into house of petitioner, but in view of seriousness of allegations of allegedly trespassing

into house of petitioner by police officer along with five unknown persons, the petitioner is directed to approach the District Police Officer, Rahim Yar Khan and move complaint to him, and DPO, Rahim Yar Khan is directed to proceed with the complaint of petitioner in accordance with law. This petition is disposed of accordingly. File be consigned to record room after its due completion."

The said order dated 8-2-2010 passed by learned Additional Sessions Judge/Justice of Peace, Rahim Yar Khan was not complied with and hence this constitutional petition before this Court.

3. The learned counsel, in support of this writ petition, has stated that the matter was promptly and duly reported to the SHO, Police Station City A-Division, Rahim Yar Khan and an application for registration of F.I.R. was also submitted but the police officials did not look into the matter which they were bound to do under the law leaving the petitioner with no other option but to approach the learned Ex-Officio Justice of Peace/Sessions Judge, Rahim Yar Khan, who was pleased, after following requisite procedure, to refer the matter to the police officials as there were serious allegations levelled in the petition on the basis of which cognizable offence was made out. Further adds that from bare reading of the petition of the petitioner a cognizable offence is made out but the respondents/police officials are reluctant to register a case against the wrong doers who also happen to be their colleagues i.e. police officials. Further adds that the Ex-Officio Justice of Peace is only required to pass an order on receiving of an application after being satisfied that cognizable offence is made under the provisions of section 154, Cr.P.C. against the wrong doers or not. Further adds that the powers conferred upon Ex-Officio Justice of Peace are non-judicial but administrative in nature. Lastly adds that under no circumstances

of law, preliminary inquiry is required to be held before lodging the F.I.R., which is against the mandate of law.

4. Learned counsel for the respondent No. 4 has strongly opposed this petition as according to the stance taken by the said respondent, the respondent No.4 raided the house of the petitioner so as to arrest Maulvi Noman Hassan Ludhianvi and detain him for 30 days in District Jail, Rahim Yar Khan under section 10(3) of Maintenance of Public Order Ordinance, 1960 and it was in connection with the said order by the high ups that the respondent No.4 raided the house of the petitioner and needful was also done. Further states that on the application of the petitioner under sections 22-A, 22-B, Cr.P.C. before the learned Justice of Peace and in compliance of the order of said Court dated 8-2-2010, an inquiry was conducted and vide report dated 16-3-2010, it was declared that no such occurrence as alleged by the petitioner, took place. The said inquiry was conducted on the instruction of the District Police Officer who appointed DSP, City Circle as Inquiry Officer. Further adds that there was another inquiry where respondent No. 4 was charge-sheeted and after following the whole requisite procedure the respondent No.4 was declared innocent and was exonerated. Lastly states that there was nothing personal between the respondent No.4 and the petitioner as he performed his duties purely in accordance with law and on the dictates of the high ups/Senior Officials.

5. I have heard both the learned counsel for the parties and perused the record available before me.

6. From the perusal of the application referred to by the petitioner, he has alleged that on 1-2-2010 at about 6-00 p.m. he was present at his house with his family members including female family members where six

persons armed with deadly weapons wearing white dresses knocked the door of the petitioner and forcibly entered into the house and on query they flared up and forcibly trespassed the house, ruined the sanctity and prestige of family/womenfolk while entering into the residential room forcibly. These allegations levelled have been given in detail in the application by the petitioner and after going through all the said allegations being serious with regard to trespassing into the house of the petitioner, the learned Justice of Peace/Additional Sessions Judge directed to proceed with the complaint of the petitioner and the said order dated 8-2-2010 was not complied with. Interestingly, on the application for initiating legal proceedings against the respondent No.4 and others, the police officials are holding inquiries which is altogether against the dictates of law as in the case of Muhammad Bashir v. SHO, etc. reported as PLD 2007 SC 539, it has been held by the Hon'ble Supreme Court that no authority vested with an Officer Incharge of the police station or with anyone else to hold an inquiry into the correctness or otherwise of the information which was conveyed to the SHO for the purpose of recording of an F.I.R. Further the Hon'ble Supreme Court has observed "any F.I.R. registered after such exercise i.e. determination of the truth or falsity of the information conveyed to the SHO would get hit by the provisions of section 162, Cr.P.C. Existence of an F.I.R. was no condition precedent for holding an investigation nor was the same a prerequisite for the arrest of a person concerned with the commission of cognizable offence; nor does recording of an F.I.R. mean that the S.H.O. or a police officer deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned therein or that any accused person nominated therein must be arrested---Check against lodging of false F.I.Rs. was not refusal to record such F.I.Rs., but punishment of such informants

under S.182, P.P.C. etc. which should be if enforced, a fairly deterrent against misuse of the provisions of S.154, Cr.P.C." Further the Hon'ble Supreme Court in the said judgment in Para No.27 observed and held as under:--

"The conclusions that we draw from the above, rather lengthy discussion, on the subject of F.I.R., are as under:--

(a) no authority vested with an Officer Incharge of a Police Station or with anyone else to refuse to record an F.I.R. where the information conveyed, disclosed the commission of a cognizable offence;

(b) no authority vested with an Officer Incharge of Police Station or with any one else to hold any inquiry into the correctness or otherwise of the information which is conveyed to the S.H.O. for the purposes of recording of an F.I.R.

(c) any F.I.R. registered after such an exercise i.e. determination of the truth or falsity of the information conveyed to the S.H.O., would get hit by the provisions of section 162, Cr.P.C.

(d) existence of an F.I.R. is no condition precedent for holding of an investigation nor is the same a prerequisite for the arrest of a person concerned with the commission of a cognizable offence;

(e) nor does the recording of an F.I.R. mean that the S.H.O. or a police officer deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned therein or that any accused nominated therein must be arrested; and finally that,

(f) the check against lodging of false F.I.Rs. was not refusal to record such F.I.Rs. but punishment of such informants under S. 182, P.P.C. etc.

which should be, if enforced, a fairly deterrent against misuse of the provisions of S.154, Cr.P.C."

7. With utmost respect, in this case the respondents have not followed the requisite procedure laid down by the Hon'ble Supreme Court in the judgment referred to above as on the application of the petitioner, inquiries have allegedly been held wherein respondent No.4 has been found innocent and the stance of the petitioner has been denied despite the fact that serious allegations have been levelled against the respondent No.4 and the wrong doers. All these acts by the respondents denying the petitioner his lawful right are unwarranted under the law in the light of said judgment of the Hon'ble Supreme Court, as the police officials at the very outset were bound to see as to whether a cognizable offence is made out from the bare reading of the petition or not. Here in this case, a cognizable offence is made out. The police officials were not, under the law, bound to hold a preliminary inquiry as to the correctness or otherwise of the allegations. Similar view has been given in the case of Ghulam Farid v. S.H.O. etc. reported as 2013 PCr.LJ 117; it has been held by the Hon'ble Sindh High Court as under:--

"Station House Officer (SHO) of Police holding inquiry to assess correctness of information provided by complainant---Legality---No provision in any law, including Ss.154 and 155, Cr.P.C., authorized an Officer Incharge of the Police Station to hold any inquiry to assess the correctness or falsity of the information received by him before complying with the mandatory requirement of reducing the information into writing irrespective of the fact whether such information was true or not."

Again similar view has also been given in case Mst. Sulima v. Government of Sindh, through Secretary Home Department and 14 others (2013 PCr.LJ

100 Sindh).

8. Therefore, for all intents and purposes, the petitioner's case is a fit case wherein from the bare reading of the complaint of the petitioner, cognizable offence is made out under the relevant provisions of law and the police are bound to register a criminal case against the wrong doers. In the given circumstances, this writ petition is allowed with the direction to the respondents/police officials to register a case against the respondent No.4 and concerned strictly in accordance with law.

MH/A-117/L **Petition allowed.**

2014 P Cr. L J 272

[Lahore]

Before Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ

NOOR KHATOON---Appellant

Versus

KHALIL AHMAD and others---Respondents

Criminal Appeal No.41 of 2011/BWP, decided on 7th May, 2013.

Penal Code (XLV of 1860)---

----S. 302--- Criminal Procedure Code (V of 1898), S.417---Qatl-e-amd---Appeal against acquittal---Scope---Prosecution case was stuffed with many discrepancies going to roots of the case---Benefit of slightest doubt was to go to accused as he was favorite child of law---Ordinary scope of appeal against acquittal was considerably narrow and limited on the examination of judgment of acquittal---Credence should be accorded to findings of Trial Court whereby accused had been exonerated from the charge of commission of crime---Once judgment of acquittal was recorded, accused had earned double presumption of innocence, therefore, such judgment could not be interfered with unless and until strong and exceptional circumstances would exist, warranting interference by High Court---No misreading, non-reading and non-appraisal of evidence were noticed in true perspective by Trial Court---High Court declined to interfere in judgment passed by Trial Court---Appeal was dismissed in circumstances.

Iftikhar Hussain and others v. The State 2004 SCMR 1185 and Haji Amanullah v. Munir Ahmad and others 2010 SCMR 222 rel.

Muhammad Sharif Bhatti for Appellant.

Malik Muhammad Latif, Deputy Prosecutor-General for Respondents.

Date of hearing: 7th May, 2013.

JUDGMENT

SHAHID BILAL HASSAN, J.---This appeal is directed against the judgment dated 10-1-2011 passed by the learned Sessions Judge, Bahawalpur whereby respondents Nos.1 and 2 were acquitted in case F.I.R. No.40 of 2009 dated 15-2-2009 registered under section 302 read with section 109 of The Pakistan Penal Code, 1860 at Police Station Samma Satta, District Bahawalpur.

2. According to the prosecution story as narrated by the appellant/complainant/Mst. Noor Khatoon wife of Muhammad Iqbal was earlier married to one Gul Muhammad and out of the said wedlock Muhammad Sajjad (deceased) and Nasreen were born, and after the death of Gul Muhammad, she contracted second marriage with one Muhammad Iqbal and both son and daughter named above started living with the complainant. Muhammad Sajjad son of the complainant contracted marriage with one Mst. Razia (accused) and out of the said wedlock three daughters were born. It is important to mention here that said Razia had a daughter from her previous husband who also resided with her mother and Muhammad Sajjad (deceased). About 8-months prior to the alleged occurrence Muhammad Sajjad shifted his residence from mauza Malikpur to Basti Raman where Khalil Ahmad accused used to visit him. One day before the occurrence when the complainant and her husband namely Muhammad Iqbal came to see Muhammad Sajjad (deceased) where Khalil Ahmad (accused) was present for the last 2/3-days. On 15-2-2009 after about Fajr prayer the complainant, Muhammad Iqbal husband of the complainant and one Falak Sher who had come to see the complainant were sitting in the courtyard of the house when Muhammad Sajjad (deceased) was sleeping in his room. Khalil Ahmad (accused) was also in the said room. Mst. Razia went out of the room when the complainant was about to enter and she raised hue and cry on seeing Khalil Ahmad armed with pistol. In response to the said hue and cry Falak Sher and Muhammad Iqbal also approached near the door witnessing Khalil Ahmad firing on the person of Muhammad Sajjad with an

intention to kill him and managed to escape by extending threats of dire consequences. Muhammad Sajjad (deceased) succumbed to the injuries on the spot. It is also the prosecution story as alleged by the complainant that Khalil Ahmad accused had illicit relation with Mst. Razia Bibi co-accused, which fact was known to Muhammad Sajjad (deceased) who disproved the said relation and it was on account of said grudge that Khalil Ahmad committed murder of the son of the complainant on the instigation/abetment of Mst. Razia Bibi co-accused.

3. Both Khalil Ahmad and Mst. Razia Bibi were arrested in this case and after completion of investigation by the police challan of this case was sent to the court where charge was framed against both the accused on 22-4-2009 who denied the same and claimed trial. In order to prove its case the prosecution produced as many as 14-witnesses Muhammad Sarfraz firstly appeared as P.W.12 and again appeared as P.W.14. In response to the prosecution evidence both the accused/respondents Nos. 1 and 2 got their statements recorded without oath under section 342, Cr.P.C., while denying all the allegations levelled against them in the prosecution story and sought their innocence.

4. The learned trial Court seized of the matter, after the recording of prosecution evidence and recording of statements of respondents Nos.1 and 2 and after apprising the evidence available on record pronounced the impugned judgment on 10-1-2011 by acquitting both respondents Nos.1 and 2 of the charges levelled against them while holding that the prosecution has miserably failed to establish its case against the accused beyond reasonable doubt, therefore, both the accused Khalil Ahmad and Mst. Razia Bibi were acquitted of the offences under sections 302 and 109 of the P.P.C. by extending benefit of doubt to them.

5. The learned counsel for the appellant has inter alia contended that both respondents Nos.1 and 2/accused have been acquitted by the learned trial Court on whimsical grounds, as the evidence led by the

appellant/complainant during the trial was not properly appreciated by the learned trial Court. Adds that the prosecution fully established the guilt of respondents Nos.1 and 2 with regard to the commission of sections 302/109 of P.P.C. beyond reasonable shadow of doubt but the learned trial Court while passing of the impugned judgment misread and misinterpreted the evidence available on the record which act on the part of the learned trial Court has prejudiced the appellant. Further adds the impugned judgment is against law and facts of the case. The learned trial Court did not consider the testimony of the appellant/complainant who was an eye-witness along with the testimony of P.W.6 (Falak Sher) who was also an eyewitness as both the said P.Ws. proved beyond reasonable doubt the case of the prosecution. Even the motive as alleged by the complainant stood established and proved by P.Ws.9 and 10 namely Arshad and Muhammad Ajmal sons of Pehlwan, therefore, the impugned judgment cannot hold field in light of the said facts and circumstances of the case.

6. We have heard the learned counsel for the appellant and the learned DPG and perused the record.

7. Prosecution version as contained in the Crime Report Exh.PF/1 based upon the complaint Exh.PF submitted by Mst. Noor Khatoon complainant P.W.5 that she along with her husband was present in the house of her son namely Muhammad Sajjad (deceased) where he used to reside along with his children and wife Mst. Razia Bibi (accused). On 15-2-2009 after Fajr prayer complainant along with her husband Muhammad Iqbal (given up P.W.) and Falak Sher P.W.6 was present in the house and were making gossips when Mst. Razia Bibi (accused) came out of the room wherein she along with her husband Muhammad Sajjad (deceased) and Khalil Ahmad (accused) slept in the last night. In the meanwhile complainant entered the room where she saw Khalil Ahmad (accused) armed with pistol. Her hue and cry attracted other P.Ws. but Khalil Ahmad (accused) made a straight fire on the head of Muhammad Sajjad (deceased) culminating into his death and fled away from the spot.

8. Mst. Noor Khatoon, during cross-examination, disclosed that they including Khalil Ahmad (accused) took their meals in the night. Khalil Ahmad (accused), her son Muhammad Sajjad (deceased) and Mst. Razia Bibi (accused) along with their children slept in one room of the house whereas the complainant along with her husband slept in another room.

9. According to prosecution story, the motive behind the occurrence is stated to be the illicit liaison inter se Khalil Ahmad and Mst. Razia Bibi (accused). This fact was in the knowledge of deceased and he used to ask his wife (Mst. Razia Bibi) not to contact Khalil Ahmad. When the position was as such it does not appeal to a prudent mind that how Khalil Ahmad (accused) was present in the house when the occurrence took place, in presence of the husband and in-laws of his co-accused Mst. Razia Bibi. More than this, admittedly all the above persons took the meal in the preceding night of the occurrence together after this they all slept in the same room.

10. Suffice it to observe that all the alleged eye-witnesses of the occurrence are chance witnesses because complainant and her husband used to live in Kot Dadu Ghallu, Tehsil Bahawalpur which is at a distance of about 11 kilometers from Basti Raman, the place of occurrence. Record further reveals that both the complainant and her husband were not happy with the deceased and his wife Mst. Razia Bibi (accused) as they had contracted marriage without their blessings. Mst. Razia Bibi (accused) was the real niece (Bhanjee) of Muhammad Iqbal husband of the complainant. Because the deceased and Mst. Razia Bibi contracted marriage against the wishes of their elders so visitation of complainant with her husband does not fit in the screen of the prosecution case. Moreover, the eye-witnesses were the residents of far flung areas from the place of occurrence and they had not shown any specific purpose or reasoning for their presence at the spot at the time of occurrence with the deceased. Admittedly the accused and deceased slept in the same room after taking meal but no untoward incident took place

throughout the night despite the fact that the accused had ample opportunity to fulfil his alleged design of murder but astonishingly he waited for the morning when the complainant along with other P.Ws. were present outside the room wherein the occurrence took place. This fact also speaks volume about the authenticity of the occurrence because a prudent mind person does not leave any evidence making him culprit.

11. The postmortem examination was conducted at 2-30 p.m. on 15-2-2009 whereas the occurrence took place after Fajr prayer on the same day and the intervening period was sufficient to concoct a story and to wait for the relatives of the deceased in order to cite them as eye-witnesses in the case. At the cost of repetition the presence of the eye-witnesses at the place of occurrence at the time of occurrence is dubious.

12. So far as the motive is concerned it is alleged in the Crime Report that Khalil Ahmad and Mst. Razia Bibi (accused) had illicit relations and the deceased used to forbid his wife from having any link with his paramour. Though it was not the requirement of law that the prosecution must show that the accused had a motive to commit the occurrence but where a particular motive was setup, the prosecution was under obligation to prove the same. But in the instant case the prosecution has miserably failed to prove the motive part of the occurrence by producing plausible, cogent, trustworthy and reliable evidence, as according to Mst. Noor Khatoon (P.W.5), her son Muhammad Sajjad (deceased) had told her about the illicit liaison between Mst. Razia Bibi and Khalil Ahmad (deceased), meaning thereby her evidence on this fact is based on hearsay which is a weak type of evidence. Falak Sher (P.W.6) has also deposed in line with the deposition of P.W.5.

13. As far as the story in respect of hatching conspiracy of murder by both the accused is concerned, in this respect the prosecution has brought in the witness box Arshad (P.W.9) and Muhammad Ajmal (P.W.10). According to their deposition a few days prior to the present occurrence, they visited the

house of Sajjad (deceased) in order to see him where Khalil Ahmad accused was already present. After sometime, they were coming out of the house when they heard whispering from outside the door of the house. Mst. Razia Bibi accused was saying Khalil Ahmad that Muhammad Sajjad used to torture her and also creates hurdle in their relations, therefore, he should be removed from their way then they would contract marriage. They further added that this fact was told to the deceased by them. If at all the statements given by these P.Ws. are presumed to be correct, the same boomerangs to the prosecution case, as if the deceased was in the knowledge about the conspiracy of his murder, he would not have allowed Khalil Ahmad accused to enter in his house in the preceding night of the occurrence, rather it is depicted from the prosecution story that Khalil Ahmad took meal with family members of the deceased as their friend, which means both the witnesses of conspiracy have been introduced only to create evidence and to connect the accused with the commission of offence.

14. Moreover, the daughters of deceased Muhammad Sajjad have not been presented before the Investigating Officer or interrogated during the investigation despite the fact that as per prosecution story, they were present in the room at the time of occurrence and were natural witnesses which creates doubt about the prosecution case. Giving up of Muhammad Iqbal husband of the complainant, being an alleged eye-witness also creates doubts about the prosecution stance, as it would be presumed that best evidence has been withheld probably with a fear that he might not support the prosecution case, rather would bring true facts.

15. Dr. Rana Iftikhar Ahmad (P.W.1) has admitted that the bullet was visible in the dead body according to the X-Rays but no plausible explanation has been put forward by the doctor that why the same was not recovered from the dead body rather he explained that due to penetration into bone it was not necessary to recover the same, meaning thereby the report of postmortem examination is defective and corroboratory evidence has been destroyed.

16. It is now settled law that even evidence of interested witnesses cannot be out-rightly discarded unless it is proved that the witness has involved the accused for some ulterior motive. But in the case in hand, the prosecution witnesses regarding the occurrence are not only inimical towards the accused due to their marriage but their presence at the scene of occurrence is also ambiguous as discussed above.

17. Mere recovery of weapon of offence is not sufficient to connect the accused with the offence alleged against him. Even otherwise, the inquest report is silent about the empty cartridge taken into possession by the Investigating Officer vide memo. Exh.PH dated 15-2-2009. The same was also not sent to any quarter for the report whether the same was fired with the pistol allegedly got recovered from the accused. The slackness on the part of the I.O., can also be visualized from the fact that he got prepared the scaled site-plan of the place of occurrence Exh.PM and Exh.PM/1 from Zafar Hussain Patwari/P.W.8 on 20-7-2009 i.e., after more than five months of the occurrence. Moreover, the doctor remained fail to recover the bullet available in the dead body for the reason best known to him which is also injurious to the prosecution case, as no matching could be got conducted from the Forensic Expert.

18. Compendium of the above discussion is that the prosecution case is stuffed with many discrepancies going to the roots of the case. Even otherwise, a slightest doubt would favour the accused as he is favourite child of law. Admittedly the ordinary scope of appeal against acquittal of the accused is considerably narrow and limited on the examination of the judgment of acquittal as a whole, credence should be accorded to the findings of the learned trial Court whereby the accused had been exonerated from the charge of commission of the crime. It is well settled law that once if judgment of acquittal is recorded, the accused earns double presumption of innocence, therefore, such judgment cannot be interfered with unless and until strong and exceptional circumstances exist, warranting interference by this court but the instance is lacking of any such ground. In this regard,

reference may be made to the case of "IFTIKHAR HUSSAIN and others v. THE STATE" (2004 SCMR 1185), wherein the Hon'ble apex Court was pleased to observe at page 1194 as under:--

"13. It is well settled principle of criminal administration of justice that when an accused is acquitted of the charge, he enjoys double presumption of innocence in his favour and Courts seized with acquittal appeal under section 417, Cr.P.C., are obliged to be very careful in dislodging such presumption. Undoubtedly, two views are always possible while appreciating the evidence available on record, therefore, for such reason and in order to avoid the multiplicity of litigation, it is always insisted that the Court should follow the recognized principles for interference in the acquittal judgment as held in the case of Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 SC 11) that the appellate Court seized with the acquittal appeal under section 417, Cr.P.C., is competent to interfere in the order challenged before it provided it has been established that the trial Court has disregarded material evidence or misread such evidence or received such evidence illegally...."

In this regard further reliance may be placed on the case of "HAJI AMANULLAH v. MUNIR AHMAD and others" (2010 SCMR 222), wherein it has been held at page 226 by the Hon'ble Supreme Court of Pakistan as under:--

"4.....It is well settled by now that in an appeal "the Court would not interfere with acquittal merely because reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusion are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized

in these cases, in this behalf was that the finding sought to be interfered with after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

19. For what has been discussed above, we find no misreading, non-reading and non-appraisal of evidence in true perspective by the learned trial Court. Therefore, we are not inclined to interfere in the impugned judgment passed by the learned trial Court therefore this appeal having no force is dismissed.

MH/N-54/L **Appeal dismissed.**

2014 P L C (C.S.) 29

[Lahore High Court]

Before Ijaz ul Ahsan and Shahid Bilal Hassan, JJ

Lt. Commander (Retired) NAEEM JAVED

Versus

UNIVERSITY OF THE PUNJAB through Vice-Chancellor, Lahore and another

Writ Petition No.6763 of 2008, heard on 18th July, 2013.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability---Civil service---Non-statutory rules of service---Principle of "master and servant"---Scope---- Principle of "master and servant" was applicable to the employees whose services were not governed by any statutory rules---Constitutional petition was not competent.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability---Civil service---Contractual employee---Termination of contract---Claim of re-instatement---Scope---Where the services of contract employee were terminated before time, at best, he could claim damages to the extent of unexpired period of his service---Constitutional petition was not maintainable.

Federation of Pakistan v. Muhammad Azam Chattha 2013 SCMR 120 rel.

(c) University of the Punjab Act (IX of 1973)---

----S. 15(3)---Constitution of Pakistan, Art.199---Constitutional petition---Termination of retired employee appointed on contract---Applicability of government directive on autonomous University---Scope---Petitioner after

his retirement was appointed on contract basis in the University---Government issued direction to remove all employees appointed after retirement on contract basis---Before completion of tenure of contract, the Vice-Chancellor of the University, while complying with the directive of government relieved the petitioner from the University service---Contention was University was not under the administrative control or supervision of the government, directive issued by the government was not binding on University being governed by an independent statute---Validity---University being an autonomous body was not bound by the directive issued by the government---University administration was empowered to decide whether they were to follow the directions given by the government or not---University authorities, in their wisdom opted to follow the directions of the government issued in respect of appointment of retired employees---University administration had taken a step in the right direction as all postings/appointments should normally be made on regular basis after the publication and observance of necessary formalities---Re-employment of retired employees on contract had been deprecated---Constitutional petition was dismissed.

PLD 2011 SC 277 and 2011 SCMR 582 rel.

(d) Constitution of Pakistan---

----Art. 199---Constitutional petition---Policy of termination of retired officials appointed on contract basis---Pre-mature retirement---Scope---Petitioner, a University employee having premature retirement was not governed by the government policy---Policy of government was relatable to re-employment of retired officers/officials and had not distinguished between any category of premature retired persons---Constitutional petition was

dismissed.

(e) Constitution of Pakistan---

----Art. 199---Constitutional petition---Termination simpliciter---Natural justice, principles of---Personal hearing---Scope---Petitioner's contractual appointment was terminated without giving any opportunity of personal hearing---Contention was that termination of petitioner was in violation of principles of natural justice---Validity---Petitioner was not being stigmatized so the ground of violation of natural justice was insignificant---Right of hearing was always to be linked by the merits of the case and was not a technical right---Constitutional petition was dismissed.

Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another PLD 2010 SC 483 and Abdul Qadir and others v. The Settlement Commissioner and others PLD 1991 SC 1029 rel.

Munshi Tahir Zahoor v. Additional Secretary to Chief Justice 2006 PLC (C.S.) 101; Zonal Manager U.B.L. and another v. Mst. Parveen Akhtar PLD 2007 SC 298; Pakistan International Airlines Corporation through Chairman v. Shehzad Farooq Malik 2004 SCMR 158; Abdul Rashid Khan v. Registrar Bahauddin Zakaria University Multan and others 2011 SCMR 944; Ijaz Hussain Suleri v. The Registrar and another 1999 SCMR 2381; Usman Ghani and others v. Islamia University and others 2012 PLC (C.S.) 830; Pakistan Telecommunication Co. Ltd. through Chairman v. Iqbal Nasir and others PLD 2011 SC 132; Pakistan International Airline Corporation and others v. Tanweer ur Rehman and others PLD 2010 SC 676; University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali 1992 SCMR 1093 and Dr. M. Afzal Beg v. University of the Punjab and others 1999 PLC (C.S.) 60 ref.

(f) Administration of justice---

----Right of hearing---Such right was always to be linked by the merits of the case and was not a technical right.

Tariq Masood Khan for Petitioner.

Muhammad Shahzad Shaukat, Legal Advisor University of the Punjab, Lahore for Respondents.

Date of hearing: 18th July, 2013.

JUDGMENT

SHAHID BILAL HASSAN, J.--- Through this constitutional petition, the petitioner has sought indulgence of this Court while calling in question the office order dated 11-4-2008 issued by the University of the Punjab, Lahore, relieving the petitioner from the University services with immediate effect in compliance of directive dated 10-4-2008 issued by the Services and General Administration Department, Government of Punjab, Lahore, which according to the petitioner, are without lawful authority and of no legal effect.

2. Factually speaking, stance of the petitioner in this writ petition is to the effect that he joined the College of Information Technology of the respondent/University as a teacher on contract basis in the year 2001, where-after he was appointed as Assistant Professor in the same Institute and ever since he had been serving the University. Thereafter, vide office Order No.97- 84-Est.II dated 10-1-2008, the petitioner was appointed as Director Administration on contract basis against a vacant post with immediate effect on terms and conditions mentioned in the said office order issued by the respondent/University. After a period of approximately three months, the petitioner received office order issued by the Deputy Registrar (Admin-II)

bearing No.10873-82/Est.11 dated 11-4-2008 on the basis of which and while complying with the directive from the Deputy Secretary (Services), Government of the Punjab, Services and General Administration Department, Lahore vide letter No.SI-2-35/2000 dated 10-4-2008, the Vice-Chancellor of the University in exercise of powers vested in him under section 15 subsection (3) of the Punjab University Act, 1973 relieved the petitioner from the University services with immediate effect while holding that the petitioner would be entitled to one month's salary in lieu of one month quitting of service notice as per terms and conditions of his appointment. The said office order dated 11-4-2008 has been called into question by the petitioner through this constitutional petition.

3. Learned counsel for the petitioner has contended that the impugned order of the respondent/University in compliance with the directive of the Government of the Punjab dated 10-4-2008 is not sustainable under any circumstances as the University is not under the administrative control or supervision of the Services and General Administration Department of the Government of Punjab and resultantly directive issued by the Government is not binding on the University being governed by an independent statute i.e. University of the Punjab Act, 1973 and Rules and Regulations in this regard. The learned counsel further adds that the petitioner could not have been relieved from his services in terms of the procedure laid down in the University of the Punjab Act, 1973 which attracted the petitioner's case. Adds that for all intents and purposes the petitioner was appointed on contract basis for a period of one year and under no circumstances services of the petitioner could be relieved after a period of two and half months and without assigning any reason in this regard. Learned counsel has contended

that the order of relieving the petitioner is unlawful as the University ought to have issued notice to the petitioner which needful was not done and no opportunity of audience was given to the petitioner by the University authorities. Adds that the petitioner has obtained pre-mature retirement from the Navy and as such the petitioner has not attained the age of superannuation being born in the year 1955. Learned counsel for the petitioner has also drawn the attention of this Court to the directive which, according to the learned counsel, does not apply to the officers retired from the Navy. Relies on case of Munshi Tahir Zahoor v. Additional Secretary to Chief Justice (20006 PLC (C.S.) 101); Zonal Manager U.B.L. and another v. Mst. Parveen Akhtar (PLD 2007 SC 298); and Pakistan International Airlines Corporation through Chairman v. Shehzad Farooq Malik (2004 SCMR 158).

4. While defending this petition by refuting the stance of the petitioner, the learned counsel for the respondent/University has admitted that the petitioner was appointed as a teacher in the College of Information Technology of the University, whereafter the petitioner was appointed as Assistant Professor in the same Institute. All the said appointments were on contract basis and finally vide order dated 10-1-2008 issued by the Vice-Chancellor of the University, the petitioner was appointed as Director Administration on contract basis with terms and conditions narrated in the said letter of appointment. It is the stance of the respondent that contract appointment of the petitioner could be terminated at any stage on one month's notice or pay in lieu thereof and pursuant to the directive dated 10-4-2008 and shift in the University Policy with regards to the contract services of the petitioner along with other employees who were also employees on

contract basis, were relieved on payment of one month pay in lieu of the requisite notice. Adds that the services of 34 contract employees including the petitioner were terminated who were serving the University after retiring from their concerned departments. It is the defence of the respondent/ University that the petitioner's termination of contract on one month notice or pay in lieu was duly in accordance with law and terms and conditions which were admitted by the petitioner. The petitioner being a contract employee cannot file this writ petition, which according to the University, merits dismissal. Adds that the relationship of the University with its employees is that of master and servant and even otherwise the petitioner was not a regular employee of the respondent/University; therefore, he cannot avail the remedy so as to get his grievance redressed, if any, through this constitutional petition. It has been maintained by the University that the directive dated 10-4-2008 holds field and the same was complied with and even otherwise University had shifted its policy as it started resorting to regular services after observing due formalities in accordance with its Rules. The respondent has also stated that though there is a Statue that is governing the University but as a natural course, it is following the directions of the Provincial Government from time to time. The petitioner, therefore, according to the University has been relieved after following the requisite and lawful procedure. Lastly it has been prayed that this petition be dismissed.

5. We have heard both the learned counsel at length and perused the record made available before us.

6. Admittedly, the petitioner retired from service of Pakistan Navy on 24-8-1997 and was given various contract appointments by the

University/respondent. On 10-1-2008, the petitioner was appointed as Director Administration by the Vice-Chancellor of the University in exercise of his emergency powers. The terms and conditions contained in Office Order dated 10-1-2008 contained the following conditions:---

(1) The appointment is available for contract period only and terminable on one month's quit service notice or pay in lieu thereof from either side.

(2)

(3)

(4)

(5)

(6) The appointment will be for one year renewable contract.

The respondent/University on 11-4-2008 invoked the termination clause, ex facie, in compliance with the Government of the Punjab's letter dated 10-4-2008 and resultantly the petitioner was relieved from the University services subject to payment of one month's salary in lieu of the requisite notice. The University has filed its report and parawise comments to the writ petition and has maintained that the petitioner was not discriminated in any manner as the termination of the contract of the petitioner was without any stigma. Furthermore, admittedly being a contract employee, the relationship between the petitioner and the University is governed by the principle of 'Master and Servant' and the said service is not

governed by any statutory Rules.

7. While opting this defence, the learned counsel for the University has contended that this petition is not competent under the law as the matter where services of an employee are not governed by any statutory rules, the principle of 'Master and Servant' is applicable and therefore, writ petition is not competent. In support of this primary defence regarding maintainability reliance has been placed in the case of Abdul Rashid Khan v. Registrar Bahauddin Zakaria University Multan and others (2011 SCMR 944), wherein it has been held that, "Arts. 185(3) & 199--- Constitutional jurisdiction of High Court--- Educational institution---Non-statutory rules---Scope---petitioner was employee of University and invoked constitutional jurisdiction of High Court for implementation of office order in his favour with regard to vice versa transfer---Constitutional petition and Intra-Court Appeal filed by petitioner were concurrently dismissed by High Court---Validity---University had no statutory rules, therefore, petitioner had no remedy before High Court under Art.199 of the Constitution---Supreme Court declined to take any exception to concurrent findings of two forums of law---Leave to appeal was refused."

In case of Ijaz Hussain Suleri v. The Registrar and another (1999 SCMR 2381), it has been held that, "S.11-A---Constitution of Pakistan (1973), Art. 185(3)---Employees of University---Status---Such employees were neither holders of statutory posts nor their terms and conditions were governed by statutory rules---High Court had rightly held that the Constitutional petition was not maintainable inasmuch as original order of the Chancellor was susceptible to examination in revision as contemplated by S.11-A of University of Punjab Act, 1973---Leave to appeal was refused

in circumstances."

In case of Usman Ghani and others v. Islamia University and others 2012 PLC (C.S.) 830 it has been held that, "Ss.15(3) & 11-A---Constitution of Pakistan, 1973, Art.199---Constitutional petition---Duties and power of Syndicate---Appointment as Assistant Librarian on contract basis---Petitioners were neither holding statutory posts nor their terms and conditions were governed by Statutory Rules---Lack of invoke constitutional jurisdiction of High Court---Validity---There is no cavil to proposition that V.C. in exercise of his powers in terms of S.15(3) of Act has an authority to take any action, therefore, initial appointment of respondent on contract basis made by him cannot be termed as an order passed without any lawful authority---If aggrieved of any such order of authority could have availed efficacious remedy of revision before Chancellor---Writ petition was not maintainable when adequate remedy of revision under S.11-A of Act was available---Petitioners were neither holders of any statutory post nor their terms and conditions of their service were governed under Statutes, Regulations or Rules issued by Senate of University for its internal use, they lack any locus standi to invoke constitutional jurisdiction of High Court---Petition was dismissed."

In case of Pakistan Telecommunication Co. Ltd. through Chairman v. Iqbal Nasir and others (PLD 2011 Supreme Court 132), it has been held that, " . Employees of Pakistan Telecommunication Corporation Limited were governed by principle of "Master and servant" and in absence of statutory rules, constitutional petitions filed by employees were not maintainable---All employees having entered into contract of service on the same or similar terms and conditions had no vested right to seek regularization of their

employment, which was discretionary with the master---Master was within his right to retain or dispense with services of any employee on the basis of satisfactory or otherwise performance---Contract employees had no right to invoke constitutional jurisdiction, where their services were terminated on completion of period of contract---As all respondents were covered under the definition of workman, they were entitled to one month's notice or salary in lieu thereof, as permissible to them under the rule of master and servant---Supreme Court set aside the judgment passed by High Court in favour of contract employees of Pakistan Telecommunication Corporation Limited---Appeal was allowed."

In case of Pakistan International Airline Corporation and others v. Tanweer ur Rehman and others (PLD 2010 Supreme Court 676), it has been held that, "------ If any adverse action was taken by employer in violation of statutory rules, only then such action should be amenable to constitutional jurisdiction but if such action had no backing of statutory rules then principle of 'Master and Servant' would be applicable and such employees had to seek remedy permissible before the court of competent jurisdiction---Rules laid down in the judgments of Supreme Court in Muhammad Mubeen-us-Salam's case, reported as PLD 2006 SC 602 and Muhammad ldreees's case, reported as PLD 2007 SC 681, would be applicable to ordinary person filing petition by invoking jurisdiction of High Court under Art.199 of the Constitution and he had to approach the court within a reasonable time---Although no definition of the expression "reasonable time" was available in any instrument of law, however the courts had interpreted it to be ninety days---Pakistan International Airlines Corporation was performing functions in connection with the affairs of the Federation but since services of employees

were governed by the contract executed between both the parties and not by statutory rules framed under S.30 of Pakistan International Airlines Corporation Act, 1956, with prior approval of Federal Government, therefore, they would be governed by the principle of 'Master and Servant'--- Appeal was disposed of accordingly."

In I.C.A. No.282 of 2010, titled University of the Punjab through Vice-Chancellor and others v. Muhammad Imran and others, this Court observed that, "The next controversy pertains to the seniority inter se the employees of the University. Admittedly, the employees of the University were neither holder of statutory posts nor their terms and conditions were governed by statutory rules as already declared by the Hon'ble Supreme Court of Pakistan in cases reported as 1992 SCMR 1093, 1999 SCMR 2381 and 2010 SCMR 1484. Therefore, the impugned judgment is not sustainable in the eye of law whereby the learned Single Judge accepted the writ petition and directed the appellants to reckon the seniority of the respondents from the date of initial appointment and seniority list dated 13-1-2009 and consider them for promotion as Senior Clerk in preference to those who are junior to them. Moreover, the respondents have alternate remedy available with them."

In case of University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali (1992 SCMR 1093), it has been held that, "The scheme of the University of the Punjab Act, 1973 otherwise does not show that the Rules of Efficiency and Discipline or the conditions of service of the employees are governed by the statutory rules. In the absence of it, subsection (8) of section 11 of the Act which relates to the manner in which the Chancellor shall act in the discharge of his duties, does not make the conditions of service of the

employees statutory. All that subsection (8) of section 11 provides is that the Governor shall be bound by the advice of the Chief Minister as he is bound to discharge of his functions under Article 105 of the Constitution of the Islamic Republic of Pakistan. Further, such an incorporation by reference on the strength of a statutory provision of a constitutional provision does not raise the status of the statutory provision to that of a constitutional provision."

In case of Dr. M. Afzal Beg v. University of the Punjab and others (1999 PLC (C.S.) 60), it has been held that, "Petitioner was governed by non-statutory rules and principle of master and servant was attracted in his case. Constitutional jurisdiction of High Court under Article 199 could not be invoked."

8. It has categorically been held in all the above cases that the status of the employees whose service is not governed by any statutory rules, the principle of "Master and Servant" is applicable and a writ petition was not competent. Moreover, in the judgment reported as "Federation of Pakistan v. Muhammad Azam Chattha (2013 SCMR 120)" the Hon'ble Supreme Court of Pakistan has categorically held that where the services of contract employee are terminated before time, he can, at best, claims damages to the extent of unexpired period of his service. The ground of discrimination urged by the learned counsel for the petitioner is baseless as it has not been substantiated in any respect. The University in its comments, has categorically maintained that it applied the Government of Punjab's letter dated 10-4-2008 across the board and services of all the employees covered thereby were dispensed with. No reason to disbelieve the stance of the University is discernable from the record; therefore, the ground so urged has

no substance. It has also been urged on behalf of the petitioner's side that the University being an autonomous body was not bound by the directive issued by the Government of Punjab. In this regard, it suffices to say that it is for the University Administration to decide whether they were to follow the directions given by the Government of Punjab. University Authorities, in their wisdom opted to do so. It being a step in the right direction in as such as all postings/appointments should normally be made on regular basis after the publication and observance of necessary formalities no fault could be found therewith. Even otherwise the Hon'ble Supreme Court of Pakistan has also expressed its displeasure vis. Re-employment of retired employees. Furthermore, the re-employment of retired employees on contract basis has been deprecated by the Hon'ble Supreme Court of Pakistan in the judgments reported as Suo Motu case No.24 of 2010 and Human Rights Cases Nos.57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P and 58118-K of 2010 reported as PLD 2011 Supreme Court 277, in which it has been held that, "S.14---ESTACODE, Vol. I (2007 Edn.) Instructions---Employment after retirement---Record in the present case, showed that prima facie, while re-employing the retired civil servants/persons in the police department the provisions of law i.e. S.14 of the Civil Servants Act, 1973 as well as Instructions contained in ESTACODE, Vol. I, Edn. 2007 under the heading "Re-employment" and the judgments of the superior courts on the subject were not considered/adhered to---Effect---Held, for establishing rule of law and Constitutionalism, it was necessary that the relevant provisions should be followed strictly in letter and spirit otherwise it would not be possible to provide an effective machinery in law particularly in Police Department to ensure law and order so the peace in the country, at the same

time to avoid violation of the relevant provisions of law which was tantamount to blocking the promotion of the Officers who had also served in the Forces and were waiting for their promotion but they were not getting chance because of the re-employment/contract awarded to the retired Officers---Such was not only in the Police Department but for the purpose of achieving good governance; the same principle should be followed and strictly applied in other Departments as well---Supreme Court observed that Attorney General shall take up the matter with the Government/Competent Authority so that it may take necessary steps to rectify if any omission had been committed---Attorney General shall convey present order to the Secretary, Establishment Division and the Chief Secretaries of the Provinces to ensure that if any civil servant or other person who had been re-employed, his case be also examined in terms of the provisions of law and both Federal and Provincial Governments should take necessary steps to ensure that re-employment or employment on contract basis were not made in violation of the relevant law."

In 2011 SCMR 582, it has been held that, "S. 14--Employment after retirement---Appointment on contract basis are not allowed to be continued in terms of S.14 of the Civil Servants Act, 1973 and the Policy, unless the conditions specified therein are satisfied."

9. So far as the argument of the learned counsel for the petitioner that the petitioner having obtained premature retirement from Pakistan Navy was not governed by the Government of Punjab's letter dated 10-4-2008, is concerned, suffice is to say that the letter issued by the Government of Punjab is relatable to re-employment of retired officers/ officials and does not distinguish between any category of such retired persons. This ground,

therefore, has also no merits.

10. The ground of violation of natural justice is also insignificant firstly because the petitioner was not being stigmatized in any manner and secondly because the right of hearing is always to be linked by the merits of the case and is, therefore, not a technical right. Admittedly, there is no merit in the petitioner's writ petition and therefore, safer reliance can be placed on the law laid down by the Hon'ble apex Court in "Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another (PLD 2010 SC 483) and "Abdul Qadir and others v. The Settlement Commissioner and others (PLD 1991 SC 1029), wherein it has been held that the petitioner has no case even on this score.

11. With utmost respect to the case-law referred to by the learned counsel for the petitioner, the same has no relevance to the facts and circumstances of the present case, rather same is distinguishable.

12. For what has been discussed above, we find that the petitioner cannot invoke the constitutional jurisdiction of this Court as he is not governed by any statutory rules, rather his services are governed by principle of "Master and Servant". Therefore, relying on the judgments (Supra), the instant writ petition has no force, same is hereby dismissed.

JJK/N-50/L **Petition dismissed.**

2014 Y L R 171

[Lahore]

Before Muhammad Anwaarul Haq and Shahid Bilal Hassan, JJ

ABDUL WAHAB---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No.367 of 2011/BWP, decided on 28th May, 2013.

Control of Narcotic Substances Act (XXV of 1997)---

----S.9(c)---Recovery of narcotics---Appreciation of evidence---Benefit of doubt---Identification of accused---Charas weighing 80 Kilograms was recovered from a truck---Three prosecution witnesses stated that there were only four accused at the time of raid and not eight---Accused was not known to a single prosecution witness at the time of raid or prior to that---Whole prosecution evidence was silent on such issue and not a single witness uttered a word as to how he came to identify accused or with regard to the effect as to the source of identification---Prosecution witnesses stated that prior to the time of raid they did not know accused and had not met him, rather he was stranger to accused---Mukhber/spy was not present at the spot at the time of raid---Truck alleged to have been recovered was not in working condition and there was no evidence to link accused with the truck in any manner---Prosecution failed to prove the charge against accused and High Court set aside the conviction and sentence awarded by Trial Court and accused was acquitted of the charge---Appeal was allowed in circumstances.

Hassan Raza alias Taidi v. The State 2006 YLR 2668; Dr. Emmanuel Onuwabuchi Keke v. The State and others 2006 YLR 1834; Muhammad Abbas v. The State 2006 YLR 2378; Umer Rehman v. The State PLD 2009 Kar. 284; Joseph Sunday v. The State 2010 YLR 1335; Fazal and 2 others v. The State 2010 PCr.LJ 360; Meharban and 2 others v. The State 2011 PCr.LJ 8; Ghulam Hussain and 9 others v. The State 2011 PCr.LJ 72; Bakhti Jan v. The State 2011 YLR 134; Tariq Mehmood v. State through Deputy Attorney

General PLD 2009 SC 39; Nasrullah v. The State 2011 PCr.LJ 277 and Mushtaq v. The State 2002 PCr.LJ 1312 ref.

Malik Sadiq Mahmud Khurram for Appellants

Khalid Pervaiz Uppal, Deputy Prosecutor-General for Respondents.

Date of hearing: 28th May, 2013.

JUDGMENT

SHAHID BILAL HASSAN, J.---Abdul Wahab son of Allah Jewaya Caste Moda, resident of Mouza Kulab, Tehsil Ahmedpur East, District Bahawalpur was tried by the learned Addl. Sessions Judge, Ahmedpur East, in case F.I.R. No.452/2008 under section 9(c) of The Control of Narcotic Substances Act, 1997 at Police Station Saddar Ahmedpur East, District Bahawalpur. The learned Additional Sessions Judge vide his judgment dated 19-9-2011 convicted the appellant under section 9(c) of C.N.S.A., 1997 and sentenced him to life imprisonment. The appellant was also liable to pay fine of Rs.2,00,000 in default thereof he would further undergo six months' S.I.

2. The appellant being aggrieved has challenged the impugned judgment dated 19-9-2011 through this Criminal Appeal.

3. The prosecution story as narrated in the Crime Report Exh.P.C., was got lodged by Ibrar Hussain Gujjar, Inspector/ S.H.O. (P.W.9) on 30-10-2008 at about 7-00 p.m., through an application Exh. P.C., maintaining therein that on the day of occurrence he along with Niaz Ali, S.-I., Irshad Ahmad, A.S.-I., Muhammad Asghar, 1455-C, Zahoor Ahmad 366-C Ghulam Shabbir Ahmad 1515-C, Nasrullah 1135-C, Ilahi Bakhsh 202-C, Muhammad Siddique 1021-C and Riaz Ahmad 87-C, were present at "Ahmed Petroleum" on official Vehicle No.1429/BRL driven by Mehboob in connection with mobile duty and scrutiny of crime, that tipper conveyed information that certain persons namely Muhammad Akram son of Muhammad Sadiq, Riaz Ahmad son of Ilahi Bakhsh, Nasir son of Ilahi Bakhsh and Abdul Wahab son of Allah Jewaya dealing in narcotics since long, were present at the moment in Truck No.C-2844/Peshawar at Mouza Kundi Parhar near Canal Sultan

Wah and were unloading narcotics from the said truck and if raid is conducted immediately, huge quantity of narcotics could be recovered, as such complainant reached at the spot immediately on the said spy information. They had just reached near the truck, the said persons along with four unknown persons, having seen the police party, ran away leaving the sac (Bori) along with truck. They were chased but succeeded in taking to their heals taking the benefit of standing crops. The sac lying near the truck was checked, from where 40-packets of Charas were recovered and 26-packets were also recovered from the secret cavities of the truck. On weighing the Charas was found as 80-kilogram. Ten grams of Charas was separated from each of the recovered packets for chemical examination. Samples and remaining Charas were made into sealed parcels and seal of "N.A" was impressed thereupon. One seal of "N.A" upon each of the samples and four seals upon bulk were impressed before witnesses Irshad Ahmad, A.S.-I. and Muhammad Asghar 1455-HC. Parcels and truck were secured through memo. All the accused persons committed offence under section 9(c) of the Control of Narcotic Substances Act, 1997 by keeping Charas in their possession for personal consumption and sale, as such complaint was sent to police station for registration of F.I.R. through Zahoor Ahmed 366-C-II. Number of F.I.R. be intimated. Niaz Ali, S.I. was deputed to investigate the matter.

4. Initially the challan was submitted showing all the four accused as Proclaimed Offenders with red ink. The present appellant Abdul Wahab was arrested later on and supplementary challan was submitted against him. The appellant appeared before the learned trial Court, formal charge against him was framed on 12-10-2009 to which he pleaded not guilty and claimed trial; hence, the complainant's evidence was summoned. The prosecution in order to prove his case produced as many as nine witnesses. P.W.1, (Zahoor Ahmad, 456-C) was entrusted 66-sealed parcels by Niaz Ali on 30-10-2008, which he handed over to Muhammad Bilal, 1739-C for onward transmission

to the office of Chemical Examiner. P.W.2, (Muhammad Bilal, 1739-C) deposited 66-parcels in the office of Chemical Examiner on 5-11-2008. P.W.3, (Abbas Ali, A.S.-I.) was entrusted with the investigation on 18-11-2008; he obtained warrants for the arrest of accused and also got issued proclamations against them and submitted challan under section 512 of Cr.P.C., against Muhammad Akram, Riaz, Nasir and Abdul Wahab (the present appellant). P.W.4 and P.W.5, (Irshad Ahmad, A.S.-I. and Asghar Ali, 1455-C) were witnesses of recovery of narcotics, Exh.P.A. P.W.6 (Niaz Ali, S.-I.) was the I.O., of this case, he reached the place of occurrence along with the S.H.O. and other police officials receiving the spy information about the occurrence; he was handed over the narcotics and truck; he recorded the statement of witnesses under section 161 of the Cr.P.C.; inspected the spot; prepared site plan, Exh.P.B; conducted raids for the arrest of the accused persons and he was transferred on 11-11-2008. P.W.7 (Riaz Hussain, S.-I.) received the complaint brought by Zahoor Ahmad, 36-/C-II having been sent by Ibrar Hussain Inspector/ S.H.O. and chalked out formal F.I.R. P.W.8 (Muhammad Siddique, Inspector) took up the investigation of the case on 23-4-2009; he arrested the appellant Abdul Wahab and sent him to judicial lock-up. P.W.9 (Ibrar Hussain Gujjar, Inspector) was present at Ahmed Petroleum along with other police officials on 30-10-2008; he received spy information and reached the place of occurrence; he secured 80-KG of Charas and truck left by the accused persons while running from the scene; prepared memo Exh.PA and sent complaint Exh.P.C., to police station for registration of formal F.I.R. and deputed Niaz Ahmad S.I. for investigation.

5. Prosecution tendered in evidence report of Chemical Examiner as Exh.P.D and closed evidence. Statement of Arif Mehmood 970-HC was recorded as C.W.1. After recording the prosecution evidence, statement of appellant was recorded under section 342, Cr.P.C. In reply to the question "why this case against them and why the P.Ws. deposed against him?" accused appellant Abdul Wahab replied that I am innocent, nothing was

recovered from my possession. A quarrel took place between me and the Ibrar Hussain Gujjar, Inspector/complainant prior to the occurrence due to which I was falsely involved in this case. Moreover, police officials implicated me also to show efficiency to their superiors/high ups. Neither I was present at the spot nor I ran away from the scene. All the P.Ws. deposed against me on the asking of the I.O/complainant because they were subordinate to him. Accused appellant (Abdul Wahab) did not opt to appear as a witness in his own defence under section 340(2) of Cr.P.C., nor produced any evidence in defence.

6. After hearing learned counsel for the parties and perusing the record, the learned trial Court announced the final judgment and awarded life imprisonment to the appellant vide judgment dated 19-9-2011.

7. Learned counsel for the appellant argued that no relevant, admissible, legal and independent evidence was produced by the prosecution to prove the charge against the appellant, it was the requirement of law that unimpeachable evidence must be brought to prove the case punishable with death or life sentence otherwise the benefit of doubt must be extended to the accused; that no recovery was made from the possession of the appellant/accused; that as per F.I.R. a sac of alleged articles was lying near the truck and no accused was present at the time of alleged recovery; that P.W.4, states that he cannot explain from whose possession the narcotics was recovered; that P.W. 5 also states that 66-parcels of Charas were recovered from whose possession; that P.W.9, did not mention the quantity of recovered substance from the physical possession of the accused; that no mention of name of the appellant in the recovery memo; that there is contradiction in the statements of witnesses regarding the time for leaving the police station; that the time of arrival of the witnesses at the spot as well as the meeting of Mukhbar were different; that no independent witness was produced from the public at large as there were many persons present at the spot; that there is contradiction in the statements of all the witnesses with

respect to direction of escape of accused as well as number of accused; that the prosecution did not lead any evidence as to how they came to identify the appellant and what was their source of identification; that the appellant was unknown to the witnesses prior to the occurrence; that the witnesses admitted that Mukhbar was not present at the spot, so in his absence who identified the accused is a mystery; that at the time of arrival at the spot there was total darkness however no source of light has been mentioned; that no documentary evidence is available linking the Truck to the appellant; that there is contradiction in the statements of witnesses with respect to number of truck, one witness (P.W.4) mentioned the number of Truck as C-4146 but the other witness (P.W.5) mentioned the number of Truck as C-2844; that there is also a contradiction in the statements of witnesses regarding the weighed of case property by different persons; that the prosecution case is fatally flawed as no case property exhibited in the Court. Similarly the same was never put to the accused while he was examined under section 342 of the Cr.P.C.; that the report of Chemical Examiner is invalid and unacceptable as the number of seals as mentioned in complaint Exh.PC and F.I.R. Exh.PC/1 and recovery memo Exh.PA is four whereas the Chemical Examiner report mentioned the number of seal as one; that as per Chemical Examiner Report, the samples were forwarded by ETO whereas the prosecution stated that the same were taken from the police station; that admittedly there is clear difference in handwriting of both the documents complaint Exh.PC and recovery memo Exh.PA and that the judgment of the learned trial Court may very kindly be set aside, conviction and sentence awarded to the appellant may very kindly be declared as illegal and the appellant may kindly be acquitted from the charge. Reliance has been placed upon "Hassan Raza alias Taidi v. The State" (2006 YLR 2668),"Dr. EMMANUEL ONUWABUCHI KEKE v. THE STATE and others" (2006 YLR 1834), "MUHAMMAD ABBAS v. THE STATE" (2006 YLR 2378), "UMER REHMAN v. THE STATE" (PLD 2009 Karachi 284), "JOSEPH SUNDAY v. THE STATE"

(2010 YLR 1335), "FAZAL and 2 others v. THE STATE" (2010 PCr.LJ 360), "MEHARBAN and 2 others v. THE STATE" (2011 PCr.LJ 8), "GHULAM HUSSAIN and 9 others v. THE STATE" (2011 PCr.LJ 72), and "BAKHTI JAN v. THE STATE" (2011 YLR 134).

8. On the other hand learned Deputy Prosecutor-General has opposed the submissions made by learned counsel for the appellant that 66 packets of Charas were exhibited by the evidence of Arshad Ahmed, A.S.-I. (P.W.4) and Asghar Ali, H.C. through recovery memo Exh.PA; that the case property (narcotics) was produced in the Court; that there is a suggestion to the recovery P.Ws. that the narcotics packets are not available in the Court and the accused is not prejudiced; that the accused were identified by the spy informer to the complainant/I.O.(P.W.9); that Niaz Ali, S.I. and other police officials are informed by P.W.9 who were together at the time of raid; that the informer was remained present during the whole proceedings of raid when the accused has been identified by the spy informer, so there is no need of the identification test; that the identification parade was necessary where the name, parentage of accused is not known; that 66-packets of Charas were recovered through recovery memo Exh.PA and duly proved by the recovery witnesses; that the samples of parcels 66 in number have been received by Chemical Examiner through Muhammad Bilal (P.W.2), the narcotics in these samples is Charas as shown in the Chemical Examiner Report Exh.PD.; that delay in sending samples is not fatal to the prosecution because Rules 4 & 5 are directory and not mandatory in nature; that procedural defects/irregularities in transportation or possession of narcotics should be overlooked in large interest of country and that there are minor contradictions which are not fatal for the prosecution and elaboration given in the impugned judgment on pages 12 to 18 of the judgment for minor contradictions of the P.Ws. Reliance has been made upon "TARIQ MEHMOOD v. STATE through Deputy Attorney-General" (PLD 2009 SC 39), "NASRULLAH v. THE STATE" (2011 PCr.LJ 277), and "MUSHTAQ

v. THE STATE" (2002 PCr.LJ 1312).

9. We have heard the learned counsel for the parties and gone through the record.

10. The precise allegation against the appellant and the other accused named in this case is to the effect that on 30-10-2008 the appellant along with other co-accused were unloading Charas from a truck and on seeing the police party, all the accused including the appellant managed to escape from the clutches of the police, who recovered 80-kilograms of Charas from the place of occurrence and as such all the accused in the case have committed an offence under section 9-C of the Control of Narcotic Substances Act, 1997. In order to prove the said allegation the prosecution produced nine witnesses. Zahoor Ahmad, HC appeared as (P.W.1) before the learned trial Court, he is a witness only to the extent of receiving 66-parcels sealed and handing over them to the concerned official for onward transmission to the office of Chemical Examiner. One Muhammad Bilal-1739-C, appeared as P.W.2, who is only made a statement to the effect that he received parcels from P.W.1 and for-warding to the office of Chemical Examiner on the same day i.e. on 5-11-2008. Abbas Ali, S.I. appeared as P.W.3, who has stated that he was entrusted with the investigation of the case and at the relevant time the accused of the case were yet to be arrested and therefore, he processed their warrants and prepared the challan under section 512 of the Cr.P.C. and was transferred thereafter. Irshad Ahmad, A.S.-I. appeared as P.W.4. He is interesting witness for the reason that he is an eyewitness along with P.W.5 as well. He has stated that he saw four accused unloading the sac from the truck. Interestingly he has also stated that there were only four accused person at the place of occurrence. This statement negates the stance of the prosecution when it is stated that there were four named and four un-named accused. P.W.4, has further stated that he does not know the four named accused personally. He for the first time saw them at the place of occurrence, who ran away in different directions on seeing the police party. He has

further stated that he cannot tell from whose possession narcotics was recovered. Further states that narcotics recovered were weighed at the place of occurrence. P.W.5, Asghar Ali, HC is also an eye-witness. He has stated that four accused on seeing the police party escaped leaving behind a sac of Charas and a truck while supporting the contents of the prosecution story narrated in the F.I.R. In his cross-examination he states that he does not know informer. He has further stated that there was no driver of truck or cleaner present at the spot and finally he has stated that he does not know from whose possession 66-parcels of Charas were recovered. Niaz Ali, S.-I. appeared as P.W.6 and also gave the same stance, that is, to the effect that all the four accused on seeing the police party fled away from the spot and left the sac near the truck which on examination by the police party was found to be 80-kilograms of Charas. He further stated that the informer remained with the police party during the raid proceedings, recovery and weighing all the contraband. Further stated that all the accused ran away from the place of occurrence. On one side, he is unaware as to how many secret boxes are lying there. Ibrar Hussain, Inspector recovered despite the fact that he was present at the time of recovery. Riaz Hussain, S.I. appeared as P.W.7 stating that he drafted the formal F.I.R. Exh.PC. Muhammad Siddique, Inspector appeared and stated that he was entrusted with the case on 23-4-2009 on which he arrested the appellant and sent him to judicial lock-up. He has further stated that there were eight accused in total, four named and four unnamed. He has stated that when the accused ran away the police party was at a distance of 2/3 feet from the truck. He found the appellant guilty.

11. The case of the prosecution as stated in the Crime Report and the evidence of the witnesses is to the effect that the appellant and three other accused were unloading the contraband from a truck, which was intervened by the police and on the said intervention by the police the accused persons managed to escape.

12. Now, here the stance of the appellant is to the effect that no recovery of the contraband was got effected from the possession of the appellant. It is in the F.I.R. that a sac was lying near the truck and no accused was present at the time of alleged recovery, it is the case of the prosecution that the appellant fled away on seeing the police party. P.Ws.4 and 5 have categorically stated that they do not know as to from whose possession the narcotics was recovered on the one hand and on the other hand both the witnesses have firstly stated that at the time of raid only four accused were present and not eight as alleged by P.W.9 and all the said four accused ran away/managed to escape in various directions. Both the prosecution witnesses have stated that they do not know the accused persons personally nor had they seen them before the occurrence. P.W.6, has also shown his ignorance to the effect that he does not know from whose possession Charas was recovered. Lastly, the testimony of P.W.9 is also silent with regard to the recovery of contraband. It is also to be seen that the name of the appellant is not in the recovery memo, therefore, it can safely be sated that the prosecution has not been able to prove the recovery of the Charas/contraband from the possession of the appellant and the other named co-accused. The whole evidence of the prosecution in this regard is altogether indifferent or silent.

13. It is also noteworthy here that no identification test of the accused took place, which ought to have taken place, as all the prosecution witnesses were not known to the appellant or the other named accused, it was only the spy/informer/Mukhbar who is stated to know the appellant and the other co-accused. This is evident from the testimony of the P.Ws wherein they have categorically stated that they are not known to the accused rather, they saw the appellant and the other co-accused for the first time at the time when the raid was conducted.

14. Another important aspect here in this case is to the effect that all the prosecution witnesses are police officials. Admittedly the place of

occurrence was a popular area where many people were even present at the relevant time but the prosecution and the police did not bother to join/associate any independent witness so as to strengthen their stance against the appellant and the other co-accused. The testimony of the P.Ws.4 and 6 supports the fact that at the time of occurrence there were many people present there and the police did not join single one of them. The judgments referred to by the learned counsel for the appellant substantiate his points being relevant are applicable to the facts of this case.

15. The stance of the prosecution with regard to the spy information is contrary. Most of the P.Ws. are not known to the spy/informer/Mukhbar except for P.W.9. It is astonishing to note here that there were 12-police officials who raided the spot and only four accused managed to escape. On one side or on all directions it has been stated by the prosecution witnesses not a single accused could be arrested. This shows that the prosecution has a doubtful stance with regard to the presence and the escape of the appellant and other co-accused. P.Ws.4, 5 and 6 have negated the stance of the prosecution narrated in the F.I.R., that is, to the effect that there were eight accused four named and four un-named. Three prosecution witnesses have in a very crystal clear manner that there were only four accused at the time of raid and not eight. Another important aspect with regard to the identification test of the accused, admittedly, the appellant was not known to a single prosecution witness at the time of raid or prior to that. The whole prosecution evidence is silent on this issue. Not a single witness uttered a word as to how he came to identify the appellant or with regard to the effect as to the source of identification. P.Ws.4 and 5 have stated that prior to the time of raid they did not know the appellant and have not met him, rather the said witness they have stated that the appellant was stranger to them. P.W.5 has stated that at the time of raid the Mukhbar/spy was not present at the spot. Finally it is evident from the prosecution evidence that the truck alleged to have been recovered by the prosecution side in this case was not in a working

condition, on the one hand and on the other hand, there is no evidence to link the appellant with the truck in any manner whatsoever.

16. The stance taken up by the learned DPG do not find support from the evidence produced by the prosecution side.

17. In the light of what has been discussed above, the prosecution has miserably failed to prove the charge levelled against the appellant Abdul Wahab and as such the appeal is accepted and the conviction and sentence awarded to him vide judgment dated 19-9-2011 is set aside. The appellant Abdul Wahab is in jail. He is also directed to be released forthwith, if not required in any other case.

MH/A-118/L **Appeal allowed.**

2014 Y L R 2450

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD JAVAID IQBAL---Petitioner

Versus

STATE BANK OF PAKISTAN through Governor and others---Respondents

Writ Petition No.2047 of 2014, decided on 10th April, 2014.

Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Factual controversies---Petitioner had availed the "yellow-cab scheme" of the Provincial Government and after balloting, a vehicle was handed over to the petitioner conditional upon petitioner making monthly payments to the bank---Said vehicle was subsequently repossessed by the bank upon default of payment by the petitioner---Petitioner sought release of the vehicle---Held, that petitioner had committed default in his fulfilment of contractual obligations and vehicle was repossessed after his persistent defaults---Person who violated any contractual obligation had no right to take fruit from using the same in its true perspective---No illegality in the repossession of vehicle had been pointed out---Factual controversies could not be resolved in the Constitutional jurisdiction of High Court---High Court observed that the petitioner could approach a proper forum for redressal of his grievance in accordance with law---Constitutional petition was dismissed, in circumstances.

Syed Nisar Hussain Shah for Petitioner.

Muhammad Saleem Iqbal for Respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.---Through this constitutional petition, the petitioner prays for issuance of a direction to the respondents to release the vehicle in question bearing Registration No.MNS-11-5125 Suzuki Mehran which was taken forcibly into possession and hand over the same to the petitioner without any further charges.

2. Vide order dated 19-2-2014, respondents Nos. 2 to 5 were directed to file report and parawise comments so as to reach this court within a fortnight. In compliance of the order of this Court respondents Nos. 2 to 4 filed their report and para wise comments on 12-3-2014.

3. The learned counsel for the petitioner contends that under the garb of Yellow Cab Scheme, the Government of Punjab launched a self employment scheme for unemployed educated persons. The petitioner submitted an application for the same. After balloting due process the petitioner was handed over the Suzuki Mehran Car. The petitioner regularly paid the monthly instalments to the Bank of Punjab, according to the schedule given by the Bank and last instalment was deposited on 23-1-2014. On 31-1-2014 the petitioner was going to Jalalpur Pirwala Road from Shujaabad on the above referred car, respondent No.3's repossessing team stopped the petitioner's vehicle and forcibly took its possession, hence this writ petition.

4. Heard

5. Perusal of record shows that the petitioner after having availed the Lease Finance Facility has committed default in fulfilment of his contractual obligation and due to persistent default the vehicle in question was repossessed on 31-1-2014. It is evident from the record that the respondent/Bank repeatedly issued notices to the petitioner to pay overdue

instalments which were not paid but the petitioner has miserably failed to honour the request. It is also pertinent to mention here that according to the statement of account duly verified as Bankers Book of Evidence Act, 1891 the petitioner never deposited the monthly instalments on its due dates. According to Clause "14" of the Vehicle(s) Lease Agreement the petitioner has committed default, which is reproduced as under:--

"14.01. The lessee shall be in default of this Lease Agreement on the occurrence of any one or more of the events specified below:--

(a) Failure to pay on or prior to relevant due dates any instalments of the lease rentals, charges or any other sums whatsoever payable by the lessee under the terms of this Lease Agreement.

(b) .(c) .(d) .(e) .(f) .(g) .

14.2. Upon the occurrence of any or more of the events mentioned above, BOP shall have the option and the right to exercise any one or more of the following remedies without having given any prior notice or demand after the occurrence of such an event, so that BOP may--

(a)

(b) repossess the Vehicle(s), without the intervention of court for this purpose, the lessee hereby irrevocably appoints BOP as his due and lawful attorney and hereby authorized, it in the name and on behalf of the lessee and without and on behalf of the lessee and without the consent of the lessee to enter into and remove the Vehicle(s) from any place; and; further surrenders right for challenging the same before any court. For repossession by BOP shall not constitute a termination of this Leased Agreement unless BOP so notified and Lessee expressly in writing. BOP may also exercise any and all other lawful remedies that BOP may have by reason of the default of the

lessee.

(c) . (d) . etc.

6. In the attending circumstances, it is apparent from the record available before this Court, the petitioner is responsible for non-payment of due instalments. It is also noted that if a person is violated to any contractual obligation then he has no right to take fruit from using the same in its true perspective. The learned counsel for the petitioner has failed to point out any illegality or irregularity in taking repossession of the vehicle in question from the petitioner and it seems to be reasonable and in accordance with law and no illegality has been committed in this regard by the Bank. Record depicts that factual controversies are involved in this writ petition which cannot be decided by this Court in constitutional jurisdiction. The petitioner can approach the proper forum for redressal of his grievance in accordance with law, if so advised.

9(sic) The upshot of the above discussion, this writ petition being devoid of any force is hereby dismissed with no order as to costs.

KMZ/M-144/L **Petition dismissed.**

PLJ 2014 Cr.C. (Lahore) 101 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Muhammad Anwaar-ul-Haq and Shahid Bilal Hassan, JJ.

LIAQAT ALI--Petitioner

versus

STATE etc.--Respondents.

Crl. Misc. No. 974-B of 2013, decided on 28.5.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Pre-arrest bail--Confirmed--Allegation of--Recovery of charas--Prosecution as per record has put forward two stances, firstly, 1240 grams of Charas was recovered from the secret cavity of the van, secondly, 1100 grams Charas was recovered--Admittedly the contraband was not recovered from the possession of the petitioner--Complainant was the real brother of ASI with whom the petitioner has strained relations, in this backdrop mala fides on the part of the complainant cannot be ruled out--Petitioner was no more required by the prosecution side for any further investigation and recovery--Case of the petitioner was a fit one for the grant of pre-arrest bail--In ordinary cases accused persons u/S. 9-C of the Control of Narcotic Substances Act, 1997 do not deserve the right for the grant of pre-arrest bail but the facts of each and every case are to be seen independently--In this case there were mala fides surfacing on the face of the record on the part of the complainant and the prosecution who have joined hands just in order to unlawfully drag the petitioner and punishing him for a crime he has not committed as apparent on the face of the record, therefore, pre-arrest bail granted to the petitioner--Bail confirmed. [Pp. 102 & 103] A

Mr. Muhammad Umair Mohsin, Advocate alongwith Petitioner.

Mr. Khalid Pervaiz OPel, D.P.G. for State.

Ch. Ahmad Mehmood Goraya, Advocate for Complainant.

Date of hearing: 28.5.2013.

Order

Petitioner Liaquat Ali son of Mukhtar Ahmed seeks pre-arrest bail in case FIR No. 60/2013 dated 22.03.2013 for offence under Sections 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station Saddar Yazman.

2. According to the prosecution story as narrated in the Crime Report is that on 26.02.2013 Liaqat Ali and Muhammad Akhtar alias Rola hired Suzuki Pick Up at the rate of Rs. 1300/- for the purpose of transportation of passengers; that both the accused kept a gift pack in front of Wagon; that when they reached Talewal bridge, Police Patrolling Party checked the vehicle; that the police party found gift pack which was lying in the Wagon; that "Charas" was found in that packet; that both the accused fled away from the scene. Hence this FIR.

3. Learned counsel for the petitioner referred Rapat No. 5 of Police Patrolling Party of Talewala bridge dated 26.02.2013; that the van of the complainant was checked by the raiding party and recovered 1240 grams "Charas"; that Rapat No. 7 further corroborates the stance taken by the petitioner; that during investigation in fact contraband was recovered from the van of Muhammad Irfan complainant and shifted his liability towards the petitioner and a false case has been registered against the present petitioner with mala fide intention and to safe his skin, as his real brother is an ASI in

Police at Bahawalpur. He further contends that nothing has been recovered from the possession of the petitioner and that even the weight of the contraband mentioned in the FIR is 1100-grams "Charas" and Rapat Nos. 5 and 7 shows that 1240- grams. Adds that the case against the petitioner is false and there is delay of twenty-four days in lodging the FIR without any explanation. Further adds that the registration of case on the statement of Muhammad Irfan complainant by itself is not permissible if any raid was conducted.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant have strongly opposed the bail petition by stating that the petitioner is specifically nominated in the FIR; that Specific role has been attributed to the petitioner and a heavy quantity of narcotic belonging to him has been recovered.

5. We have heard the arguments and perused the record.

6. Interestingly, the alleged occurrence took place on 26.2.2013 when the police party searched the van of the complainant in his presence and during the said search, recovered Charas from the possession of the complainant after which the police was legally bound to register a criminal case against the complainant but the needful was not done but rather on 22.3.2013 FIR was lodged against the petitioner after a delay of approximately 24-days which is altogether un-explained and another co-accused on the application of the complainant which act on the part of the police cannot be digested by a sane mind. The prosecution as per record has put forward two stances, firstly, 1240 grams of Charas was recovered from the secret cavity of the van, secondly, 1100 grams Charas was recovered. Admittedly the contraband was not recovered from the possession of the petitioner. Complainant is the real

brother of one Muhammad Aslam ASI with whom the petitioner has strained relations, in this backdrop mala fides on the part of the complainant cannot be ruled out. The petitioner is no more required by the prosecution side for any further investigation and recovery. In the given circumstances, the case of the petitioner is a fit one for the grant of pre-arrest bail in this case. We are conscious of the fact that in ordinary cases accused persons under Section 9-C of the Control of Narcotic Substances Act, 1997 do not deserve the right for the grant of pre-arrest bail but the facts of each and every case are to be seen independently. In this case there are mala fides surfacing on the face of the record on the part of the complainant and the prosecution who have joined hands just in order to unlawfully drag the petitioner and punishing him for a crime he has not committed as apparent on the face of the record, therefore, pre-arrest bail granted to the petitioner in this case vide order dated 20.05.2013 is hereby confirmed, subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. Before parting with this order, it is clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

(A.S.) **Bail confirmed.**

PLJ 2014 Cr.C. (Lahore) 113 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Muhammad Anwaar-ul-Haq and Shahid Bilal Hassan, JJ.

PUNNAL KHAN--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 510-B of 2013, decided on 21.5.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 365-A & 34--Bail, grant of--Further inquiry--Allegation of--Petitioner was involved in this case on the Supplementary Statement of the abductee, who alleged that the petitioner was guarding the place where the accused party had kept the said abductee--There was no allegation levelled against the petitioner with regards to kidnapping the abductee, there was no allegation against the petitioner to the effect that either he demanded ransom or received the same, which was evident from the record that the complainant has himself paid the ransom amount of Rs. 5,00,000/- to the other co-accused of this case--Specific role has been assigned to the six accused nominated in the FIR even otherwise involving a person during supplementary statement created doubt in the case of prosecution to the extent of newly added facts and newly added accused--Case of the petitioner was that of further probe--The trial of this case was likely to consume reasonable period for its final verdict--So, in such circumstances, the question of evidentiary value of the supplementary statement of the complainant and that of authenticity of allegation against the petitioner will be determined by the trial Court after recording the evidence of the parties and till then, the case of the petitioner was covered within the mischief of Sub-Section (2) of Section 497, Cr.P.C--being one of further inquiry--Petitioner was behind the bars since his arrest and was no more required by the prosecution for any further investigation and the detention of

the petitioner for an indefinite period will not serve any useful purpose--Bail accepted. [P. 115] A, B & C

Syed Muhammad Jameel Anwar, Advocate for Petitioner.

Mr. Asghar Ali Gill, DPG for State.

Mr. Nasir-u-Din, Advocate for Complainant.

Date of hearing: 21.5.2013.

Order

Petitioner Punnal Khan through the instant petition has sought for post-arrest bail in case F.I.R. No. 42/2011 dated 4/05.12.2010 registered at Police Station Uch Sharif, District Bahawalpur under Section 365-A read with Section 34 of the Pakistan Penal Code, 1860.

2. Briefly the prosecution story, as narrated in the crime report by the complainant of this case is that his son namely Waqas Jameel was found missing during the intervening night of 4/5.12.2010. During search of Waqas Jameel the complainant received a telephonic call from the abductee, who asked the complainant to arrange ransom as the accused party had kidnapped him and in this regard abductee asked the complainant to contact co-accused namely Mehboob Ahmed Bhatti. The needful was done and ultimately an amount of Rs. 5,00,000/- (rupees five hundred thousand) according to the prosecution was settled which amount was paid by the complainant in the presence of witnesses to Mehboob Ahmed Bhatti and Rasool Bukhsh, who promised that the abductee would reach home but the needful was not done as promised even after having received ransom amount, hence this case against the petitioner and others.

3. The learned counsel for the petitioner contends that the petitioner is not nominated in the FIR; that there is delay of two months in lodging the FIR; subsequently the petitioner was involved on the statement of the abductee; that there is no allegation against the present petitioner regarding the abduction and demanding of ransom; the allegation against the petitioner is

that he was guarding the place where the alleged abductee Waqas Jamil was placed.

4. The learned Deputy Prosecutor General assisted by the learned counsel for the complainant strongly opposed the bail petition and contends that the petitioner was nominated in the FIR; that the petitioner remained absconder for a period of one year and eight months and challan has been submitted before the learned trial Court under Section 512, Cr.P.C.; that there is no reason to falsely implicate in the present case.

5. Both the parties have been heard at length and record of the case has been perused carefully by us.

6. It is an admitted position that originally the case was registered under the Provisions of Section 365-A, read with Section 34, PPC against six accused namely Rasool Bukhsh son of Kabir Khan, Bashir Ahmed son of Kabir Khan, Liaquat Ali son of Rasool Bukhsh, Muhammad Hussain alias Hasni son of Hazoor Bukhsh, Abdul Razzaq son of Faiz Bukhsh and Mehboob Ahmed son of Hussain Bukhsh. According to the prosecution story specific role has been assigned to the said accused of the case and the name of the petitioner is not nominated in the FIR. The petitioner was involved in this case on the Supplementary Statement of the abductee, who alleged that the petitioner was guarding the place where the accused party had kept the said abductee. There is no allegation levelled against the petitioner with regards to kidnapping the abductee, there is no allegation against the petitioner to the effect that either he demanded ransom or received the same, which is evident from the record that the complainant has himself paid the ransom amount of Rs. 5,00,000/- (rupees five hundred thousand only) to Mehboob Ahmed and Rasool Bukhsh the other co-accused of this case. Specific role has been assigned to the six accused nominated in the FIR even otherwise involving a person during supplementary statement creates doubt in the case of prosecution to the extent of newly added facts and newly added accused.

7. In the light of what has been discussed above, we find that the case of the petitioner is that of further probe. The trial of this case is likely to consume reasonable period for its final verdict. So, in such circumstances, the question of evidentiary value of the supplementary statement of the complainant and that of authenticity of allegation against the petitioner will be determined by the learned trial Court after recording the evidence of the parties and till then, the case of the petitioner is covered within the mischief of sub-section (2) of Section 497, Cr.P.C. being one of further inquiry.

8. The petitioner is behind the bars since his arrest and is no more required by the prosecution for any further investigation and the detention of the petitioner for an indefinite period will not serve any useful purpose.

9. In this view of the matter, we accept this petition and allow bail to the petitioner subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

10. Before parting with this order, it is clarified that the observations given in this order are tentative in nature and it will have no effect upon the merits of the case in any manner whatsoever.

(A.S.) **Bail accepted.**

PLJ 2014 Cr.C. (Lahore) 294

Present: Shahid Bilal Hassan, J.

MUHAMMAD ABBAS--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 15402-B of 2013, decided on 1.1.2014.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 365-B--Bail before arrest, confirmed--Accused had entered into Nikah with victim lady--Nikahnama got verified by police from union council--Joined investigation--No recovery was effected--Validity--When accused had made a case for grant of post arrest bail, sending him behind bars after declining his pre-arrest bail, in order to enable to come out of jail after few days, will serve no useful--No exceptional grounds had been brought on record on behalf of prosecution side--Bail was confirmed. [P. 295] A

NLR 1999 Cr.LJ 749, rel.

Mr. Zaheer-ul-Hassan Zahoor, Advocate with Petitioner.

Mr. Muhammad Najeeb Wattoo, Advocate for Complainant.

Mr. Iftikhar-ul-Haq, Addl. Prosecutor General for State.

Date of hearing: 1.1.2014.

ORDER

Entreating for grant of pre arrest bail in a case bearing FIR No. 426 dated 02.07.2013, registered with Police Station, Green Town, Lahore, under Section(s) 365-B of Pakistan Penal Code, 1860, the petitioner Muhammad Abbas has moved the instant application, after having been declined vide order dated 04.11.2013 by the learned Addl. Sessions Judge, Lahore.

2. Precisely allegation against the petitioner is to the effect that he alongwith his co-accused persons abducted Mst. Neelam Bibi, sister of the complainant and petitioner committed Zina Bil Jabr with her.

3. Heard.

4. After hearing the arguments and going through the record carefully, it has become diaphanous that allegedly the petitioner has entered into Nikah with the victim lady Mst. Neelam Bibi on 24.06.2013 and during investigation, the said Nikahnama has been got verified by the police from the concerned Union Council where entry of the same has been found, whereas the F.I.R. has been got lodged on 02.07.2013, which is after solemnization of Nikah between the petitioner and Mst. Neelam Bibi (alleged abductee/victim). Moreover, it has come on surface, during investigation, that the victim lady Mst. Neelam Bibi herself left the house of her brother and entered into Nikah with the petitioner; so false involvement of the petitioner in this case just because he has divorced elder sister of the complainant and victim lady, namely Khursheed Bibi, cannot be ruled out. The petitioner has joined the investigation and no more required by the police for further investigation. No recovery is to be effected from the petitioner. When the petitioner has made a case for grant of post arrest bail, sending him behind the bars after declining his pre-arrest, bail, in order to enable him to come out of jail after few days, will serve no useful. No exceptional grounds have been brought on record on behalf of the complainant/prosecution side. Therefore, while placing reliance on case of Muhammad Aslam Vs. The State (NLR 1999 Cr.LJ 749), the application in hand is accepted and ad interim pre-arrest bail already granted to the petitioner is confirmed subject to furnishing of bail bonds to the tune of Rs. 100,000/- (One hundred thousands) with one surety in the like amount to the satisfaction of the learned Trial Court.

5. Before parting with this order, however, it is clarified that the reasoning given in this order are tentative in nature and will have no effect whatsoever in any matter upon the merits of the case.

(R.A.) **Bail confirmed.**

PLJ 2014 Cr.C. (Lahore) 295

Present: Shahid Bilal Hassan, J.

SAJID ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 13706-B of 2013, decided on 25.11.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 148 & 149--Bail, grant of--Injury on non-vital part of body--Forming an unlawful assembling in order to commit rioting assaulted--No injury on person of deceased was attributed to accused--No recovery was effected from petitioner--Validity--Petitioner was present on the day time and place of occurrence but he did not make any fire on the injured--Though findings of police are not binding upon High Court, yet same can be considered at bail stage when same were based on reasonable facts--Injury attributed to petitioner was on non-vital part of body of injured and no injury was attributed to petitioner towards deceased--Though trial had commenced but same could not create hurdle in way of granting bail when petitioner had made a case for further probe as contemplated u/S. 497(2) of, Cr.P.C.--Bail was admitted. [Pp. 297] A, B & C

2013 YLR 216 Lah, 2012 SCMR 887 & 2012 SCMR 1955, rel.

Mr. Khadim Hussain Sindhu, Advocate for Petitioner.

Ch. Sajid Ali Bul, Advocate for Complainant.

Mr. Khurram Khan, DPG for State.

Date of hearing: 25.11.2013.

ORDER

Beseeching for grant of post arrest bail in a case bearing F.I.R. No. 413 dated 20.05.2013, offence under Sections 302, 324, 148, 149 of, PPC, registered at Police Station, Factory Area, Sheikhupura, after having been declined vide order dated 17.09.2013 by the learned Addl. Sessions Judge, Ferozwala, the petitioner Sajid Ali has brought the instant petition.

2. According to prosecution story pervaded in the F.I.R. allegation against the petitioner is to the effect that he alongwith his co-accused by forming an unlawful assembly in order to commit rioting assaulted upon the complainant party and present petitioner fired with his pistol .30 bore which landed on right thigh of the injured P.W. Yaseen.

3. Learned counsel for the petitioner has, inter alia, contended that the injury assigned to the petitioner is on non-vital part of the body, which is simple in nature; that co-accused namely Altaf Hussain and Manzoor Hussain have been assigned the main role of committing Qatl-i-Amd of deceased namely Muhammad Ishfaq and no injury on the person of the deceased is attributed to the petitioner; that no recovery has been effected from the person of the petitioner; that allegedly it was a night time occurrence; adds that the petitioner is not linked with the motive part of the occurrence which also allegedly relates to the co-accused; that the petitioner was arrested on 18.06.2013 and ever since he is behind the bars and investigation is complete; that he is no more required by the police for further investigation; that during investigation it has been found that the petitioner was present at the day, time and place of occurrence but no injury has been attributed to him and the injury allegedly attributed to him has been found to have been caused by co-accused Altaf. In the given circumstances, the case of the petitioner

falls within the ambit of Section 497(2) of, Cr.P.C. requiring further probe and entitles the petitioner to the concession of bail. Relies on Muhammad Ashraf Vs. The State and another (2013 YLR 216-Lahore), Mazhar Hussain Vs. The State and another (2012 SCMR 887) and Pur Bux Vs. The State (2012 SCMR 1955).

4. On the contrary, learned DPG assisted by learned counsel for the complainant have strongly opposed this bail application contending that the petitioner is nominated in the FIR with specific role; that he was identified by the complainant and all the P.Ws.; that trial has commenced; charge has been framed, witnesses are regularly attending the Court; that the petitioner has been found guilty during the investigation.

5. Heard.

6. I.O. present in Court admits that during the investigation it has been found that the petitioner was present on the day, time and place of the occurrence, but he did not make any fire on the person of Yaseen injured P.W. as per his investigation. Though the findings of the police are not binding upon this Court, yet same can be considered at bail stage when same are based on reasonable facts. Even otherwise, the injury attributed to the petitioner is on non-vital part of the body of the injured and no injury has been attributed to the petitioner towards the deceased. The question of vicarious liability will be determined at trial by the learned trial Court after recording evidence. The petitioner has joined the investigation and no recovery of weapon of offence has been effected from his person. Though trial has commenced, but same cannot create any hurdle in the way of granting bail when the petitioner has made a case for further probe as contemplated under Section 497(2) of the, Cr.P.C. Further incarceration of the petitioner in this case will serve no

useful purpose. Therefore, by place reliance on the case law referred to by learned counsel for the petitioner, the application in hand is accepted and the petitioner is admitted to post arrest bail subject to furnishing bail bond in the sum of Rs. 300,000/- (Three hundred thousands) with one surety in the like amount to the satisfaction of the learned trial Court.

7. Before parting with this order, it is, however, clarified that the findings recorded supra are tentative in nature and will have no effect whatsoever upon the merits of the case in any manner.

(R.A.) **Bail granted.**

PLJ 2014 Cr.C. (Lahore) 360

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

TALIB REHMAN--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 1932-B of 2013, decided on 23.10.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail, grant of--Further inquiry--Allegation of--Qatl-e-Amad--Petitioner was not nominated in the FIR despite the fact that he was known to the complainant and has been involved in this case on the basis of supplementary statement, though recorded on the same day, on the basis of suspicion, which is a weak type of evidence and cannot equate the First Information Report--There was no direct evidence regarding commission of Qatl-e-Amd of the deceased by the petitioner--The evidence regarding alleged motive has been created in the shape of statement of mother of Mangathir of deceased after about 10 days of the alleged occurrence--The recoveries of articles related to the deceased have allegedly been effected on the pointation of the petitioner after considerable period of the occurrence, which seem to be planted one, as no criminal keeps the proof of commission of offence safe for such a long period, even otherwise same was relatable to corroborative piece of evidence--All these facts made the case of the petitioner that of further probe as contemplated under Section 497(2) of the, Cr.P.C.--Validity of extra judicial confession, allegedly made by the petitioner before the P.Ws. who were also witnesses of last seen, will be seen by the trial Court after recording evidence--As far as the arguments of counsel for the complainant that the trial has commenced and 11 P.Ws. have been examined, it cannot create any hurdle in way of petitioner when he has made a case of further

probe into his case--Petitioner was behind the bars and was no more required for the purposes of investigation or recovery; therefore, no fruitful purpose would be served for keeping the petitioner behind the gallows for an indefinite period--In the absence of any exceptional grounds by the complainant and the prosecution for refusal of bail to the petitioner particularly when he has made a case of further inquiry falling under Section 497(2) of the, Cr.P.C. and while relying on the case law (Supra), the application in hand was accepted. [Pp. 362, 363 & 364] A, B, C & D

2012 SCMR 1273, 2012 SCMR 1137, PLD 2012 SC 222, 2013 SCMR 49 & 2013 PCr.LJ 971 Lahore, rel.

Mian Muhammad Tayyab Wattoo, Advocate for Petitioner.

Mr. Muhammad Afzal Wattoo, Advocate for Complainant.

Mr. Khalid Parvez Uppal, DPG for State.

Date of hearing: 23.10.2013

ORDER

Imploring for grant of post arrest bail in a case bearing FIR No. 106 of 2013, dated 09.02.2013, registered with Police Station, City B-Division Bahawalnagar, under Section(s) 302, 34 of, PPC, the petitioner Talib Rehman son of Muhammad Shafi has moved the instant application, after having been declined vide order dated 07.09.2013 by the learned Addl. Sessions Judge, Bahawalnagar.

2. According to the prosecution story narrated by the complainant of this case on 09.02.2013, the complainant alongwith Zahoor Ahmed and one Muhammad Waryam took the dead body of deceased namely Saeed Ahmad to DHQ Hospital, Bahawalnagar and it transpired that some unknown person caused death of Saeed Ahmed for some unknown reason.

3. Learned counsel for the petitioner has, inter alia, contended that another application was submitted through which supplementary statement of the complainant was got recorded in which the complainant changed his stance,

which application is undated; that a new prosecution story was built up with the aid of same P.Ws. narrated in the FIR; adds that the petitioner is innocent as case of prosecution is based on circumstantial evidence and as such the petitioner cannot be kept behind the bars for an indefinite period. The petitioner was arrested on 26.02.2013; he has joined investigation and is no more required for further investigation or recovery purposes; that there is no cogent and reliable evidence before the prosecution so as to connect the petitioner with the commission of crime. Relies on Muhammad Jamil Vs. Shaukat Ali and another (1996 SCMR 1685), Allah Ditta Vs. The State and others (2012 SCMR 184), Mst. Maria Khan Vs. The State and another (2013 SCMR 49), Asif Shahzad Vs. The State and another (2013 PCr. LJ 971-Lahore) and Crl. Misc. No. 86-B of 2013/BWP titled "Muhammad Azam, etc. Vs. The State etc."

4. On the contrary, learned DPG assisted by learned counsel for the complainant have strongly opposed this bail application on the grounds that petitioner had a personal grudge and motive against the deceased regarding engagement of Mst. Shakeela, paternal cousin of the petitioner, with the deceased; that the petitioner intended to take hand of Mst. Shakeela, but on refusal of her mother, he committed this callous offence; that there is last seen evidence in the form of Muhammad Abbas and Abdullah P.Ws. who saw the deceased in the room of petitioner during the preceding night of the occurrence; that the statements of P.Ws. before whom he made extra judicial confession is also on record; that recovery of mobile phone, with uniform, books and bag of deceased on the pointation of petitioner also connects the petitioner with the commission of offence. Moreover the rope with which the petitioner and his co-accused committed the crime has also been recovered; that regarding motive Mst. Ghulam Jannat, mother of Mst. Shakeela has also got recorded her statement on 19.02.2013; that Jaffar Ali and Muhammad Saleem P.Ws. saw the petitioner alongwith his co-accused while taking the dead body of deceased in a sack near the place from where the dead body was recovered; that all the circumstantial, last seen evidence and recoveries

coupled with motive connect the petitioner with the crime; that the petitioner remained fugitive from law for a considerable period of about 17 days as he was arrested on 26.02.2013, so his abscondence shows his guilty conscience; that statements of eleven P.Ws. have been recorded by the learned trial Court and the trial is ripe for its final verdict and the delay if any is being caused by the petitioner's side; that there is no mala fide on the part of the complainant or police to falsely involve the petitioner in this case; therefore, lastly pray for dismissal of the bail application.

5. Heard.

6. Admittedly, the petitioner is not nominated in the FIR despite the fact that he was known to the complainant and has been involved in this case on the basis of supplementary statement, though recorded on the same day, on the basis of suspicion, which is a weak type of evidence and cannot equate the First Information Report. There is no direct evidence regarding commission of Qatl-e-Amd of the deceased by the petitioner. The evidence regarding alleged motive has been created in the shape of statement of Mst. Ghulam Jannat, mother of Mst. Shakeela Bibi on 19.02.2013 after about 10 days of the alleged occurrence. The recoveries of articles related to the deceased have allegedly been effected on the pointation of the petitioner after considerable period of the occurrence, which seem to be planted one, as no criminal keeps the proof of commission of offence safe for such a long period, even otherwise same is relatable to corroborative piece of evidence. All these facts make the case of the petitioner that of further probe as contemplated under Section 497(2) of the, Cr.P.C.

7. So far as the abscondence of the petitioner is concerned, in Ikram Ul Haq's case (2012 SCMR 1273), it has been held that, "S.497(2)---Bail---Case of further inquiry---Abscondment of the accused---Effect---Where a case called for further inquiry into the guilt of an accused, bail was to be allowed to him as a matter of right and not by way of grace or concession---Bail was sometimes refused to an accused person on account of his abscondment but

such refusal of bail proceeded primarily upon the question of propriety, and whenever a question of propriety was confronted with a question of a right, the latter must prevail." In Ehsan Ullah's case (2012 SCMR 1137), it has been held that, "497(2)---Bail--Abscondence---Further inquiry---In case calling for further inquiry into the guilt of accused, bail is to be allowed to him as of right and not by way of grace or concession---Mere abscondence of accused person may not be sufficient to refuse bail to him." It has been further held in the Ehsan Ullah's case that, "Prosecution itself had two versions vis-a-vis the accused, first was of complainant party according to which accused was present at the spot and had resorted to firing and second of investigating agency according to which accused was not present at the spot and he was abetting his co-accused behind the scene-----bail was allowed." Such like view has also been taken in case of Qamar alias Mitho Vs. The State & others (PLD 2012 SC 222). The validity of extra judicial confession, allegedly made by the petitioner before the P.Ws. who are also witnesses of last seen, will be seen by the learned trial Court after recording evidence.

8. As far as the arguments of learned counsel for the complainant that the trial has commenced and 11 P.Ws. have been examined, it cannot create any hurdle in way of petitioner when he has made a case of further probe into his case. Reliance is placed on Mst. Maria Khan's case (2013 SCMR 49) in which it has been held that, "Evidence, recording of---complainant contended that testimony of three prosecution witnesses had been recorded in trial Court, therefore, bail should be declined to accused---Validity---Such consideration was not valid nor was it an absolute rule that where evidence had been recorded, accused could not be enlarged on bail---Where liberty of citizen was involved such conjectural considerations could not be a basis for declining bail." Even in Asif Shahzad's case (2013 PCr. LJ 971-Lahore) this Court observed that, "Bail could be granted at any stage, even before deliverance of final judgment."

9. The petitioner is behind the bars since 26.02.2013 and is no more required for the purposes of investigation or recovery; therefore, no fruitful purpose would be served for keeping the petitioner behind the gallows for an indefinite period. In the absence of any exceptional grounds by the complainant and the prosecution for refusal of bail to the petitioner particularly when he has made a case of further inquiry falling under Section 497(2) of the, Cr.P.C. and while relying on the case law (Supra), the application in hand is accepted and the petitioner is admitted to post arrest bail subject to his furnishing of bail bonds to the tune of Rs.200,000/- (two hundred thousands) with one surety in the like amount to the satisfaction of the learned trial Court.

10. However, before parting with this order, it is clarified that the observations given in this order are tentative in nature and it will have no effect upon the merits of the case in any manner whatsoever.

(A.S.) **Bail accepted.**

PLJ 2014 Cr.C. (Lahore) 402

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

MUHAMMAD TAYYAB--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 793-B of 2013, decided on 4.6.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 411--Bail, grant of--Further inquiry--Case against the petitioner has been lodged with a delay of one and half month which was unexplained and there was no direct evidence available with the complainant against the petitioner--Evidentiary status of the alleged recovery from the petitioner so as to connected him with the commission of Section 380, PPC can be seen and determined by the trail Court after recording of evidence--Mere registration of other criminal cases against the petitioner cannot disentitle him to bail particularly when the prosecution is silent on the question of conviction of the petitioner in the said alleged cases--Detention of the petitioner incarceration will not serve any useful purpose because the challan has been submitted in the trial Court but there is yet to be any progress, which accordingly is at initial stage and as such in absence of any exceptional circumstances grant of bail to an accused is a right, which should be given to the accused and refusal is an exception--Bail accepted. [P. 404] A & B

2012 SCMR 573, 2009 SCMR 1488, 2011 SCMR 1708 & PLD 1995 SC 34, rel.

Mr. Tariq Mehmood Khan, Advocate for Petitioner.

Mr. Asghar Ali Gill, Deputy Prosecutor-General for Respondents.

Date of hearing: 4.6.2013.

Order

Complainant despite service has opted to remain absent.

2. Petitioner seeks post arrest bail in case FIR No. 81/2013 dated 01.3.2013 registered under Sections 380, read with Section 411 of The Pakistan Penal Code, 1860 at Police Station Pacca Laran, District Rahim Yar Khan at the instance of one Raja Muhammad Akbar son of Raja Muhammad Ashraf.

3. Allegations in brief as contained in the Crime Report are that during the night between 20/21.01.2013 one buffalo, ox, cow and two calf valuing Rs.5,00,000/- of the complainant were found missing and stolen. On query, the complainant came to know that one Yaseen, Asghar Reham Ali, Jalil Ahmad and Muhammad Tayyab (petitioner) had stolen the said cattle etc, which fact was admitted and confessed before the complainant party by the accused party.

4. The learned counsel for the petitioner maintained that the petitioner has been falsely implicated in the present case and the FIR has been lodged with an un-explained delay of one and half month; that even the matter was not reported to the police concerned in the form of Rapt; that there is no source of information given in the prosecution story as to how the complainant or his companions came to know about the alleged offences committed by the petitioner and his other co-accused, who has stolen the cattle belonging to the complainant; that there is no direct evidence available to the prosecution to connect the petitioner and other co-accused with the commission of said crime; that there is no extra-judicial confession either by the petitioner or any other co-accused of this case with regard to the commission of offences levelled against them; that the petitioner was arrested on 02.3.2013 though recovery of one cow and one calf has been made on the person of the petitioner but the same is altogether untrue and false being planted; that at the most according to the learned counsel for the petitioner the offence under Section 411 of, PPC if at all attracted, the punishment of which is three years

and the same does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C., and there are no exceptional grounds available to the complainant so as to deny the concession of post arrest bail to the petitioner and that all the other co-accused are at large they are not being arrested by the police.

5. On the other hand, the learned DPG while opposing the bail application has maintained that the petitioner has been nominated in the FIR; that the recovery of one calf and buffalo has been effected from the petitioner, which connects him with the commission of offence as narrated by the prosecution; that the delay is well explained as the complainant of this case alongwith his companions tried to search out the truth; that Section 380 of, PPC is fully attracted in this case and that the petitioner is a hardened criminal and there are nineteen cases lodged against him prior to the present one.

6. Arguments heard and record perused.

7. After perusing the record carefully with the assistance of the learned counsel for the petitioner and the learned DPG the case of the petitioner falls within the ambit of Section 497(2) of the, Cr.P.C. being one of further inquiry. Admittedly the case against the petitioner has been lodged with a delay of one and half month which is unexplained and there is no direct evidence available with the complainant against the petitioner. Evidentiary status of the alleged recovery from the petitioner so as to connect him with the commission of Section 380, PPC can be seen and determined by the trial Court after recording of evidence. Mere registration of other criminal cases against the petitioner cannot disentitle him to bail particularly when the prosecution is silent on the question of conviction of the petitioner in the said alleged cases. Reliance in this regard is placed upon "Jamal-ud-Din alias Zubair Kahn v. The State" (2012 SCMR 573) and another similar unreported case "Shoukat Ali v. The State" (Crl. Misc. No. 654-B of 2013/BWP). Detention of the petitioner incarceration will not serve any useful purpose because the challan has been

submitted in the trial Court but there is yet to be any progress, which accordingly is at initial stage and as such in absence of any exceptional circumstances grant of bail to an accused is a right, which should be given to the accused and refusal is an exception as held by the Hon'ble Supreme Court of Pakistan in "Zafar Iqbal v. Muhammad Anwar and others" (2009 SCMR 1488) "Riaz Jafar Natiq v. Muhammad Nadeem Dar and others" (2011 SCMR 1708) and "Tariq Bashir and 5 others v. The State" (PLD 1995 SC 34).

8. The epitome of the above discussion, the application for post arrest bail is hereby accepted and the petitioner is admitted to bail till the final decision of the case subject to furnishing bail bonds in the sum of Rs.1,00,000/- (rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

9. Before parting with this order, it is however, clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

(A.S.) **Bail accepted.**

PLJ 2104 Cr.C. (Lahore) 406 (DB)

[Bahawalpur Bench, Bahawalpur]

Present: Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ.

MUHAMMAD SAJID @ SHAHID--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 349-B of 2013/BWP, decided on 11.6.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(2)--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Further inquiry--Allegation of--Recovery of narcotic substance--Petitioner was arrested and he was behind bars ever since and was admittedly not required by prosecution side for further recovery or investigation--Counsel for petitioner has produced certified copies of order sheet of trial Court, perusal of which shows that charge in this case was framed after which prosecution witnesses were summoned--It was crystal clear that ever since presentation of challan before trial Court, trial was lingering on one pretext or other and guilt of accused/petitioner was yet to determine--It was evident from certified copies of order sheet produced before us that prosecution was not pursuing case vigilantly and its witnesses were not in attendance before trial Court which they otherwise ought to have bound under law--In given circumstances it can safely be presumed that trial in this case was likely to consume a reasonable time, and even otherwise no useful purpose will be served by keeping petitioner behind bar for an indefinite period--Admittedly petitioner was behind bars since eight and a half months have elapsed--After recording evidence of parties that alleged recovered substance was a narcotic substance within meaning of CNSA,

1997, if same contains 0.2 percent of morphine and till that time case of petitioner was covered u/S. 51(2) CNSA, 1997 calling for further inquiry into his guilt--Bail allowed. [Pp. 407 & 408] A & B

2008 YLR 1784, Lahore, ref.

Mr. Imran Khan Bhadera, Advocate for Petitioner.

Mr. Khalid Pervaiz Oppal, DPG for Respondents.

Date of hearing: 11.6.2013.

Order

Through this petition, Muhammad Sajid @ Shahid petitioner has sought his post arrest bail in case FIR No. 372/2012 dated 23.08.2012 offence under Section 9-C registered with Police Station Kot Sabzal tehsil Sadiq Abad District Rahim Yar Khan.

2. The prosecution story as narrated by the complainant per FIR is that on spy information the police conducted a raid and recovered 2 Kg of Poast on 23.09.2012 from the petitioner, hence this case.

3. Learned counsel for the petitioner inter-alia contends that the petitioner is innocent and has not committed the offence alleged against him; that the whole prosecution story is untrue, baseless and concocted as there is a clear-cut violation of Section 21 of the Control of Narcotic Substances Act (XXV of 1997) and Section 103 of Cr. P.C. It has also been argued by learned counsel for the petitioner that the report of Chemical Examiner does not disclose any intoxicant substance; that it is yet to be determined whether the recovered substance was Poast or otherwise; that the petitioner is no more required to the prosecution for further investigation; that further detention of the petitioner behind the bar will not serve any useful purpose.

4. On the other hand, learned DPG has strongly opposed this bail petition while arguing that two Kg of Poast has been recovered from physical possession of the petitioner, therefore, he is not entitled to the grant of post arrest bail.

5. We have heard the learned counsel for the parties and perused the record.

6. The petitioner was arrested in this case on 23.09.2012 and he is behind the bars ever since and is admittedly not required by prosecution side for further recovery or investigation. The learned counsel for the petitioner has produced certified copies of the order sheet of the learned trial Court, perusal of which shows that charge in this case was framed on 13.12.2012 after which the prosecution witnesses were summoned for 16.01.2013. On 16.01.2013 no prosecution witness was in attendance. Thereafter the case was adjourned to 04.02.2013, 18.2.2013, 07.03.2013, 27.03.2013 and 15.04.2013 and on all the said dates except for 07.03.2013 two PWs Muhammad Anwer constable and Muhammad Saleem constable were present but their statements could not be recorded as the lawyers were observing strike on the said date. Now the learned trial Court has summoned the prosecution witnesses through non-bailable warrants. It is crystal clear that ever since the presentation of challan before the learned trial Court, the trial is lingering on one pretext or the other and the guilt of the accused/petitioner is yet to determine. It is evident from the certified copies of the order sheet produced before us that the prosecution is not pursuing the case vigilantly and its witnesses are not in attendance before the learned trial Court which they otherwise ought to have bound under the law. In the given circumstances it can safely be presumed that the trial in this case is likely to consume a reasonable time, and even otherwise no useful purpose will be

served by keeping the petitioner behind bar for an indefinite period. Admittedly the petitioner is behind the bars since 23.09.2012 i.e. eight and a half months have elapsed. Apart from the above, it is yet to be determined by the learned trial, of course, after recording the evidence of the parties that the alleged recovered substance is a narcotic substance within the meaning of CNSA, 1997, if the same contains 0.2 percent of morphine and till that time the case of the petitioner is covered under Section 51(2) CNSA, 1997 calling for further inquiry into his guilt. Reliance is placed upon the case of "Masud Ahmad versus The State" (2008 YLR 1784 Lahore).

7. Therefore, application is allowed and the petitioner is granted post arrest bail in this case subject to his furnishing bail bond to the tune of Rs.2,00,000/-(two lacs) with two sureties in the like amount to the satisfaction of learned trial Court.

8. Before parting with this order, it is however, made clear that the assessment made in this order is tentative in nature and it will not effect upon the merits of the case while deciding it by the learned trial Court.

(A.S.) **Bail allowed.**

PLJ 2014 Cr.C. (Lahore) 409 (DB)

[Bahawalpur Bench, Bahawalpur]

Present: Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ.

Mst. PATHANI BIBI etc.--Petitioners

versus

STATE etc.--Respondents

Crl. Misc.No. 897-B of 2013/BWP, decided on 11.6.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497(1)--Pakistan Penal Code, (XLV of 1860), Ss. 302/109/365-A--Bail, grant of--Petitioners were females having suckling baby--Both petitioners were females and their case was being covered by Ist Proviso of Section 497(1), Cr.P.C. coupled with fact that petitioner was in jail with her suckling baby aged about 7/8 months--Petitioners were entitled to grant of post arrest bail as prosecution' side has failed to point out any exceptional ground so as to keep petitioners behind bar particularly, petitioners were not named in FIR and were previous non-convict--Challan of this case has not been submitted to Court of competent jurisdiction and petitioners were not required by prosecution side for any further investigation--It would be uncalled for if they were kept behind bar for an indefinite period--Bail granted.

[P. 413] A

1994 SCMR 1729, 2011 MLD 1292 (Lahore) & 1996 SCMR 973, ref.

Mr. Syed Zeshan Haider, Advocate for Petitioner.

Muhammad Ayaz Kulyar, Advocate for Complainant.

Mr. Khalid Pervaiz Uppal, DPG for Respondents.

Date of hearing: 11.6.2013.

Order

Through this petition the petitioners have prayed for the grant of post arrest bail in case FIR No. 01/2013 dated 1.1.2013 offences under Sections 302/109/365-A, PPC registered with Police Station Sama Satta, Tehsil & District Bahawalpur.

2. Briefly the prosecution case, as per the FIR is that on 26.12.2012 at about 9.00 p.m., the complainant went to his Tube Well situated at Mouza Sheik Shajra, so as to give meal to his brother namely Muhammad Shahbaz, Muhammad Zeshan son of Abdul Majeed and Muhammad Farhan son of Mushtaq Ahmad who used to live there when he reached there, he did not find them there. The complainant waited, during which period Mukhtar Ahmad, Allah Dittah and Muhammad Ashfaq sons of Altaf Hussain R/o the said locality informed the petitioner that sometime earlier they were passing through the tube well where they saw one car and one Motor Cycle parked alongwith 4 persons whom they can identify if shown were standing. Thereafter the complainant as per prosecution story kept on looking for the said three missing persons but his efforts ended in vain and resultantly lodged the FIR against 4 unknown persons under Section 395, PPC.

3. Subsequent to the lodging of FIR and during investigation of this case offences under Sections 365-A and 302, PPC were added and other co-accused including the petitioners were nominated in the case by the two alleged abductees namely Muhammad Zeshan and Muhammad Shahbaz in their statements recorded under Section 161, Cr.P.C. on 15.01.2013 implicating the petitioners alongwith others by assigning the role of their abduction and murder of Muhammad Farhan son of Mushtaq Ahmad.

4. It has been contended on behalf of the petitioners that both the petitioners have neither been named in the FIR nor any role has been assigned to them by the complainant side so as to connect them with the commission of the offences as leveled against them i.e. kidnapping for ransom or committing Qatl-i-amd; that there is no allegation of abduction or surveillance in the prosecution story against the petitioners; that both the petitioners are females and as such they are entitled to the grant of post arrest bail under the law; that Khursheed Bibi is in jail with a suckling baby aged about 7/8 months and as such she is entitled to the grant of post arrest bail in light of various judgments of the Honourable Supreme Court of Pakistan and this Court in similar cases; that the petitioners being law abiding citizens of Islamic Republic of Pakistan have no previous criminal record and that the case of the petitioners on the face of it falls within the ambit of further probe for which evidence is required and it will be a futile exercise to keep the petitioners behind the bar for an indefinite period.

5. On the other hand, learned DPG assisted by learned counsel for the complainant has strongly opposed the bail petition while arguing that the petitioners and the other co- accused have jointly committed the offences leveled against them with their common intention and as such all the accused are liable to be punished equally; that recovery of Rs.80,000/- has been effected from the petitioners out of the total amount of Rs.20,00,000/-, therefore, the offences leveled against them on the face of record have been proved; that the alleged offences fall within the ambit of prohibitory clause of Section 497(1), Cr.P.C., therefore, the petitioners are not entitled the relief prayed for.

6. We have heard the learned counsel for the parties and perused the record.

7. Admittedly the petitioners are not named in the FIR. No allegation of either abduction, kidnapping for ransom or commission of Qatl-i-amd has been alleged by the prosecution against the petitioners. The prosecution is silent with regard to the abduction, kidnapping for ransom, surveillance and committing of Qatl-i-amd against the petitioners as apparent from the contents of the FIR the offences mentioned therein nominating 4 persons who can be identified on presentation by the witnesses mentioned in the FIR. On 15.01.2013, the alleged abductees namely Muhammad Zeshan and Muhammad Shahbaz got recorded their statements before the police under Section 161, Cr.P.C. and involved the petitioners with the role that the petitioners used to give meal to their co-accused and have not leveled the allegation regarding kidnapping for ransom and committing Qatl-i-amd. The petitioners were arrested on 12.03.2013 and after investigation they were sent to judicial lock up. Admittedly Petitioner No. 2 Khurshid Bibi is in jail with a suckling baby aged about 7/8 months which fact is not denied by the prosecution. It has been held by the Hon'ble Supreme Court of Pakistan in the case of Mst. Nusrat v. The State" (1996 SCMR 973), wherein it has been held by the Honourbale Supreme of Pakistan as under:

"Suckling child of accused was kept with mother in jail obviously for his welfare----Concept of "welfare of minor" was compatible with jail life----- Instead of detaining the innocent child/infant in the jail for the crime allegedly committed by his mother, it was in the interest of justice as well as welfare of minor if the mother was released from jail-----"

8. Similar view has been followed by this Court in a number of cases.

Reliance is placed upon "Ghulam Sakina and others vs. The State" (1991 P.Cr.L.J. 1316) "Mst. Irshad alias Mst. Waziran v. The State" (2006

P.Cr.L.J.251), "The State v. Farzana Kausar" (2008 YLR 2600), "Nasreen Bibi v. The State" (2011 YLR 1028) AND Mst. Kabela v. The State" (2011 YLR 2975. In all the said verdicts of this Court, a mother of a suckling baby has been given the right of the concession of bail."

9. Admittedly both the petitioners are females, therefore, the case in the given circumstances is also covered within the ambit of Ist Proviso of Section 497(1), Cr.P.C. A Division Bench of this Court in the case of "Mst. Hurriya Naveed versus The State and another" (2011 MLD 1292 (Lahore) has taken a similar view stated as under:

"Accused though was nominated in the F.I.R., but being fair sex her case would be came within the mischief of proviso of S.497, Cr.P.C.-----Accused was in family way and to her extent investigation was complete; and she was no more required for further investigation-------Facts and circumstances of the case, prima facie, persuaded the Court to grant her bail-----Accused was admitted to post arrest bail, in the circumstances."

10. In the case of "Liaqat Ali vs. Mst. Bashiran Bibi" (1994 SCMR 1729) the Hon'ble Supreme Court of Pakistan was pleased to uphold the bail granting order passed by the High Court on the ground that she being woman was covered by the Ist Proviso of Section 497(1), Cr.P.C. This view is given in the following cases as well:--

"2013 PCr.LJ 48, 2012 YLR 745, 2012 P.Cr.L.J 841, PLD 2005 Lahore 352, 1983 P.Cr.L.J 1787, 1989 P.Cr.L.J 179, 1991 P.Cr.L.J 1 (suo moto bail granted to female accused), 2007 YLR 3132, 2005 P.Cr.L.J 164, 2003 YLR 3031, 2002 MLD 1071, 2002 MLD 1026, 2008 YLR 2600, 2006 YLR 1403, 1991 MLD 1814 and 1984 P.Cr.L.J 129 whereby the grant of bail to a female is given as her case fell under Ist proviso of Section 497, Cr.P.C."

11. Keeping in view the above stated facts it is an admitted fact that both the petitioners are females and their case is being covered by the Ist Proviso of Section 497(1), Cr.P.C. coupled with the fact that Petitioner No. 2 is in jail with her suckling baby aged about 7/8 months, we hold that the petitioners are entitled to the grant of post arrest bail as the prosecution' side has failed to point out any exceptional ground so as to keep the petitioners behind the bar since 12.03.2013, particularly, keeping in view the fact that the petitioners are not named in the FIR and are previous non-convict. The challan of this case has not been submitted to the Court of competent jurisdiction and the petitioners are not required by the prosecution side for any further investigation. It would be uncalled for if they are kept behind the bar for an indefinite period.

12. In view of the forgoing circumstances, the application is allowed and the petitioners are granted post arrest bail under the Ist proviso of Section 497(1), Cr.P.C. being the women subject to furnishing bail bond to the tune of Rs.2,00,000/- (two lacs) each with two sureties each in the like amount to the satisfaction of learned trial Court.

13. Before parting with this order, it is made clear that the assessment made in this order is tentative in nature and it will not effect upon the merits of the case while deciding it by the learned trial Court.

(A.S.) **Bail granted.**

PLJ 2014 Cr.C. (Lahore) 439

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

MUHAMMAD MANSHA--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 1347-B of 2013, decided on 2.10.2013.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/34--Bail, dismissal of--Specific role was attributed--FIR has been lodged with all promptitude, without wasting a single moment, within 45 minutes of the occurrence despite the fact that it was night time, and the petitioner has been nominated with specific role of causing fire-arm injury on the chest of the deceased which culminated into his death. The occurrence as suffused in the FIR finds support from the statement of the P.Ws. recorded u/S. 161 of the, Cr.P.C. coupled with the medical evidence which is also in line with the ocular account. Though the findings of the police can be taken into consideration while dealing with the bail matters, yet in this case, ex facie, the investigation conducted by the police, seems to be pregnant with mala fides, as the petitioner has been declared innocent on the basis of oral plea of alibi which is not the mandate of law, even otherwise, such plea cannot be taken into account at bail stage as same is uncalled for under the law--Discharge report submitted by the police before the Area Magistrate has not been agreed with, which order holds field, as according to law the innocence or guilt of the accused has to be adjudged by the trial Court after recording evidence of witnesses produced by the parties and evaluating the same--But in the present case, as observed supra, the petitioner has been declared

innocent only on the basis of his oral plea of alibi, which is not the myth and demand of criminal law, rather illuminates mala fides on the part of Investigating Agency. Even otherwise, each and every case has its peculiar facts and circumstances and the Court has to assess the same according to the demand of administration of justice. [Pp. 442 & 443] A, B & E

2010 SCMR 966, 1986 SCMR 192 & 2003 SCMR 68, ref.

Tentative assessment--

----Bail stage--At bail stage, only tentative assessment of the record is required and deeper appreciation is not warranted, which is the domain of trial Court after recording evidence of the parties at trial. Sufficient incriminating material is available on the record, prima facie, connecting the petitioner with the commission of crime. [P. 443] C

Opinion of police--

----Opinion of Police when relevant--Police investigation, no doubt, is not binding on any Court, but it being the first agency coming into contact with the aggrieved party and accused party during investigation, its opinion is relevant if the same does not smack of mala fides. [P. 443] D

Mirza Muhammad Azam, Advocate for Petitioner.

M/S Zaffar Iqbal Awan and M. Abdul Rasheed Rashid, Advocates for Complainant.

Mr. Khalid Parvez Uppal, DPG for State.

Date of hearing: 2.10.2013.

ORDER

Being imprisoned in case FIR No. 454 of 2012, dated 09.12.2012, registered at Police Station, Macleod Gung, Bahawalnagar, for offence under Section 302 read with Section 34 of the, P.P.C., the petitioner Muhammad Mansha son of Muhammad Hanif, has moved the instant bail application for grant of post arrest bail after having been declined vide order dated 20.06.2013 by the learned Addl. Sessions Judge, Minchinabad.

2. Precise allegation against the petitioner is to the effect that he fired on the person of Ghulam Sarwar, father of the complainant, with his pistol which landed on left side of his chest, who succumbed to the said fire shot.

3. Learned counsel for the petitioner has, inter alia, contended that the petitioner is innocent and has no concern whatsoever with the commission of offence levelled against him; that the petitioner was arrested on 30.03.2012 in this case, joined the investigation and no recovery was got effected from his person; that the complainant produced an empty of .30 bore pistol before the I.O. after 26 days which proves that concoction has taken place; that during the investigation the petitioner has been found innocent. Adds that other co-accused namely Muhammad Akram and Muhammad Farooq have also been declared innocent by the police during investigation in this case. further adds that in fact a dacoity took place in the house of one Muhammad Sharif and also in the house of complainant, during which murder had taken place. Adds that said stance is supported by said Muhammad Sharif during the investigation; that Superintendent of Police conducted investigation and found the petitioner to be innocent and the said investigation report holds field as it was not challenged by the complainant before any higher forum. Reliance is placed on Rehmat Ullah alias Rehman v. The State and another (1970 SCMR 299), Chaudhary Muhammad Khan v. Sanaullah and another

(PLD 1971 Supreme Court 324), Amir Ali and others v. The State (1984 SCMR 521), Muhammad Kasim and another v. State (1999 Cr.C. (Lahore), 256), Muhammad Yar v. The State (1999 MLD 878 Lahore), Muhammad Zaheer v. The State (2009 YLR 816), Muhammad Iqbal v. State (PLJ 1996 Cr. C. (Lahore) 1193), and has argued that though the police opinion according to the said judgments passed by the Hon'ble Supreme Court and this Court is not binding on the Court, but at bail stage it can be considered if it is reasonable and conducted in accordance with law; that the case of prosecution becomes of two versions: one by that of complainant and other of police, therefore, the presumption favouring the accused at this stage is to be followed. States that admittedly there is previous enmity, therefore, the petitioner has falsely been roped in this case; hence, he is entitled to the concession of post arrest bail.

4. On the other hand, learned DPG assisted by learned counsel for the complainant have strongly opposed this bail application on the grounds that it is a prompt lodged FIR, registered exactly after 45 minutes from the time of occurrence; that the accused petitioner has been nominated in the FIR with main role of committing Qatl-i-Amd; that P.Ws. were present at time of occurrence who have also identified the petitioner and the other co-accused and they got recorded their statements on these lines; that the petitioner was armed with pistol and the empty of the bullet was got recovered on 05.01.2013, which connects the petitioner with the commission of the crime. Relies on 2009 SCMR 611 and submits that according to the said judgment of the Hon'ble Supreme Court, the duty of the police is only to collect evidence for or against in the alleged occurrence and not to give its opinion, which is primary duty of the Court of competent jurisdiction. States that ocular account and medical evidence are in line with each other supported by

the statements of P.Ws. which all connect the petitioner and co-accused with the commission of crime as alleged by the complainant. Further adds that no dacoity took place in the house of complainant as alleged by the petitioner's side and there is no statement of Muhammad Sharif as alleged, available on the record. States that it is also evident that there is no evidence as to any dacoity and no FIR was lodged by Muhammad Sharif. Adds that the case law cited by the learned counsel for the petitioner, with utmost respect, do not attract to the case of the petitioner as in this case the police have totally failed to give any cogent or sound reason so as to declare the petitioner and his co-accused innocent; that being a prompt lodged FIR there is no dent in the prosecution story which, for all intents and purposes, connects the petitioner and his co-accused with the commission of offence; therefore, the case of the petitioner does not fall within the ambit of further probe in terms of Section 497(2) of the, Cr.P.C. and as such in a case of capital punishment he is not entitled to any leniency at this stage. Relies on Imtiaz Ahmad and others vs. The State (1986 SCMR 192), Sami Ullah Khan and another vs. The State (1999 PCr.LJ 1113-Lahore) and Mst. Qudrat Bibi vs. Muhammad Iqbal and another (2003 SCMR 68). Further argues that police found the petitioner and his co-accused to be innocent and made a request before the learned Area Magistrate so as to discharge all the accused, but vide order dated 12.04.2013, learned Judicial Magistrate disagreed with the opinion of the police which order was not assailed before any higher forum, therefore, it holds field and in the given circumstances, the stance of the petitioner's side carries no weight under the law. Relies on Muhammad Haroon and another vs. The State (PLD 2009 Karachi 120), Anwarudin vs. The State (2012 PCr.LJ 837 Sindh) and Anwar Shamim and another vs. The State (2010 SCMR 1791). Learned DPG has also strongly opposed this bail application

and argues that specific role has been attributed to the petitioner, which is supported by ocular account corroborated by medical evidence. States that vide police Diary No. 41 dated 12.04.2013, the police has declared the petitioner innocent on oral plea of alibi which under the law, cannot be considered at bail stage; that trial is in progress where charge has been framed on 17.09.2013 and the case is fixed for evidence of the prosecution; that the motive on the face of it stances proved. Lastly prayer for dismissal of the bail application has been made.

5. Heard.

6. After hearing the arguments and perusing the record, it has observed that the FIR has been lodged with all promptitude, without wasting a single moment, within 45 minutes of the occurrence despite the fact that it was night time, and the petitioner has been nominated with specific role of causing fire-arm injury on the chest of the deceased which culminated into his death. The occurrence as suffused in the FIR finds support from the statement of the P.Ws. recorded under Section 161 of the, Cr.P.C. coupled with the medical evidence which is also in line with the ocular account. Though the findings of the police can be taken into consideration while dealing with the bail matters, yet in this case, ex facie, the investigation conducted by the police, seems to be pregnant with mala fides, as the petitioner has been declared innocent on the basis of oral plea of alibi which is not the mandate of law, even otherwise, such plea cannot be taken into account at bail stage as same is uncalled for under the law. The fortification can be sought from Shoukat Ilahi's case (2010 SCMR 966), in which it has been held that, "accused having been declared innocent by police during investigation alone was not a valid ground for grant of bail---none of grounds

valid for grant of bail in a case falling under the prohibitory clause of S.497, Cr.P.C., was available to accused---Accused had not raised the plea of alibi at the time of moving his bail before arrest application, meaning thereby that he had no such defence at that time---Even otherwise, accused had relied upon the evidence of a large number of witnesses in support of his plea of alibi, which could not be evaluated at present stage and would be assessed at the trial." Moreover, the discharge report submitted by the police before the learned Area Magistrate has not been agreed with, which order holds field, as according to law the innocence or guilt of the accused has to be adjudged by the learned trial Court after recording evidence of witnesses produced by the parties and evaluating the same; in this regard safer reliance can be placed on Imtiaz Ahmed's case (1986 SCMR 192), in which it has been held that, "Investigating Officer could not be a judge---Innocence and guilt of accused had to be adjudged by trial Court after recording evidence of witnesses produced by parties and evaluating same." At bail stage, only tentative assessment of the record is required and deeper appreciation is not warranted, which is the domain of learned trial Court after recording evidence of the parties at trial. Sufficient incriminating material is available on the record, prima facie, connecting the petitioner with the commission of crime. The case law referred to by learned counsel for the petitioner, with utmost respect, does not attract and render assistance to the petitioner's case, rather boomerangs to his stance, because it is held in these judgments that "Opinion of Police when relevant---Police investigation, no doubt, is not binding on any Court, but it being the first agency coming into contact with the aggrieved party and accused party during investigation, its opinion is relevant if the same does not smack of mala fides." But in the present case, as observed supra, the petitioner has been declared innocent only on the basis

of his oral plea of alibi, which is not the myth and demand of criminal law, rather illuminates mala fides on the part of Investigating Agency. Even otherwise, each and every case has its peculiar facts and circumstances and the Court has to assess the same according to the demand of administration of justice. Therefore, while placing reliance on Imtiaz Ahmed's case (1986 SCMR 192), Mst. Qudr at Bibi's case (2003 SCMR 68) and Shoukat Ilahi's case (2010 SCMR 966), this application is, having no merits, dismissed.

7. Before parting with this order, it is, however, clarified that the findings recorded supra are tentative in nature and will have no adverse effect whatsoever in any manner on the trial of the case.

(A.S.) **Bail dismissed.**

PLJ 2014 Cr.C. (Lahore) 625 (DB)

[Bahawalpur Bench Bahawalpur]

Present: Altaf Ibrahim Qureshi and Shahid Bilal Hassan, JJ.

KHADIM HUSSAIN, etc.--Appellants

versus

STATE, etc.--Respondents

Crl. Appeal Nos. 360 & 353 of 2004/BWP, decided on 16.5.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(c)--Conviction and sentence--Challenge to--Modification in sentence--Mitigating circumstance--Sentence was reduced--When none of accused has intention to kill any particular person on side of complainant party and both parties were itching for a confrontation and a clash and in sense, complainant party and accused came to a clash and had a free fight which was apparent from facts that only one appellant allegedly gave hatchet blows on head of deceased and none of remaining accused were alleged to have given any blow to him from weapons held by them, as is evident from medical evidence--However, there was conflict in contents of FIR and medical evidence as well as deposition of PWs regarding causing of injuries on head of deceased with hatchet, as in FIR it has been stated that appellants caused hatchet blow on head of while at time of recording evidence as PWs both witnesses have improved their version by stating that two blows of hatchet, one on right side of top and other on left side of top, of head were caused by appellant, which casts aspersion about veracity of prosecution case regarding mode and manner of occurrence, rather it supports version of defence that it was a free fight during Punchayat held to settle disputes between parties--But, though there was conflict inter se ocular account and medical evidence regarding number of injuries yet seat of injury remains

same i.e. head; therefore, when we juxtapose both stances, taken by prosecution and defence, admission on part of accused side coupled with deposition of injured/complainant, on oath, suffices it to conclude that appellant-convict caused injury on head of deceased which, later on, resulted in his death due to hematoma--As quantum of sentence awarded to appellant was harsh--Admittedly, appellant has served out 11 years and more than two months sentence, awarded to him--Without touching any other merits at this stage coupled with mitigating circumstances such as suppression of injuries received by accused side, occurrence being result of free fight without premeditation and belated recovery, find it appropriate to modify impugned judgment and while taking a lenient view uphold conviction of appellant but keeping in view mitigating circumstances discussed above, reduce his sentence from imprisonment for life to 14 years--Appeal partly allowed. [Pp. 631 & 633] A & C

2004 SCMR 1185 & 2010 SCMR 222, ref.

Double Presumption of Innocence--

----Principle--It is well settled law that once a judgment of acquittal is recorded, accused earns double presumption of innocence. [P. 632] B

Mr. Mumtaz Hussain Bazmi, Advocate for Appellant (in Crl. A. No. 360/2004) and for Respondents Nos. 2 to 13 (in Crl. A. No. 353/2004).

Mr. Muhammad Latif, D.P.G. for State.

Malik Sadiq Mahmud Khurram, Advocate for Complainant and for Appellants (in Crl. A. No. 353/2004).

Date of hearing: 16.5.2013.

JUDGMENT

SHAHID BILAL HASSAN, J.--The appellants namely Khadim Hussain and Muhammad Hashim sons of Manzoor Ahmad, Caste Pugal, resident of

Mouza Mandhal, Tehsil Ahmedpur East, District Bahawalpur were tried alongwith 10 other co-accused by the learned Addl. Sessions Judge, Ahmedpur East, in case FIR No. 59 of 2004 dated 15.02.2004 under Sections 302, 324, 148 read with Section 149 of The Pakistan Penal Code, 1860 at Police Station Naushehra Jadeed, Tehsil Ahmedpur East, District Bahawalpur. The learned Additional Sessions Judge vide his judgment dated 27.11.2004 convicted the appellants as under:

Khadim Hussain (Appellant No. 1), to imprisonment for life under Section 302(c) of The Pakistan Penal Code, 1860 with fine of Rs.25,000/-, in default of its payment to further undergo one year R.I. He was also directed to pay compensation of Rs.25,000/- to the legal heirs of the deceased under Section 540(A), Cr.P.C.

Muhammad Hashim (Appellant No. 2) to two years R.I. under Section 337-F(V) of, PPC.

Both the appellants were extended benefit of Section 382-B of the, Cr.P.C. while the other accused were acquitted from the charge.

2. Being aggrieved of the impugned judgment dated 27.11.2004 the appellants assailed the same through the appeal captioned above.

3. The complainant (appellant in Crl. Appeal No. 353 of 2004/BWP) aggrieved of the impugned judgment to the extent of acquittal of the co-accused (Respondents No. 2 to 13) has also filed separate appeal. Therefore, both the appeals are disposed of through this single judgment being outcome of same judgment.

4. Briefly the prosecution story permeated in the Crime Report Ex.P.A. which was lodged on the complaint of Muhammad Nawaz Complainant (P.W.1) is as such that Murid Hussain (deceased) and Muhammad Iqbal son of Manzoor Hussain, Pugal by caste, r/o Mouza Mandhal used to deal in joint venture of buying and selling buffalos. Murid Hussain (deceased) had

to receive profit amount of Rs.3000/- from Muhammad Iqbal, but he was not paying the same to him (deceased). On the preceding day of occurrence, a quarrel took place between them. On the fateful day at about 2.00 O' clock complainant and his brother Murid Hussain (deceased) were standing at the back of their house. In the meanwhile Khadim Hussain (convict/Appellant No. 1), Muhammad Hashim (convict/ Appellant No. 2), Muhammad Iqbal, Muhammad Madni, Muhammad Maki sons of Manzoor Ahmad, Abdul Hadi, Jameel Ahmad sons of Abdul Raziq, Haji Zahoor Ahmad son of Abdul Raheem, Jaleel Ahmad, Rafique, Siddique and Saeed Ahmad sons of Bashir Ahmad, all armed with hatchets, chhurry, iron rods and sotis came there. Khadim Hussain with intention to kill caused injury with hatchet on the head of Murid Hussain (deceased), he became unconscious and fell down on the ground. Abdul Hadi hit iron rod on the left arm of Murid Hussain. Muhammad Hashim caused chhurry blow to the complainant, which hit on his right hand and left upper arm. Muhammad Madni caught complainant from his ears and caused slaps & fist blows. Saeed Ahmed gave beating to complainant with his shoe, on his waist and buttocks. All the remaining accused caused slaps and fist blows to complainant and Murid Hussain (deceased) on their different parts of bodies. Hue and cry attracted the P.Ws. Muhammad Azam and Sajjad Ahmad, who entreated the accused persons and saved them (Murid Hussain and Muhammad Nawaz) from the clutches of the accused persons.

5. Murid Hussain was taken to Rural Health Centre Mubarakpur. Anwar-Ul-Haq, ASI reached the hospital after receiving the information about the incident, where the complainant (Muhammad Nawaz) got recorded his statement Ex.P.A, and thumb marked the same as token of its correctness after having been read over and explained to him.

6. After recording the statement of complainant the I.O., inquired from the Doctor about the condition of Murid Hussain (injured at that time) in order to

record his statement, but the doctor told that he was not able to record his statement. On the same day, the Investigating Officer recorded supplementary statement of Muhammad Nawaz. Murid Hussain was referred to B.V. Hospital Bahawalpur being in serious condition. The Investigating Officer alongwith police officials proceeded to the place of occurrence and recorded the statements of witnesses under Section 161 of the, Cr.P.C., prepared rough site-plan Ex.PU of place of occurrence, secured blood-stained soil from the place of occurrence, sealed into a parcel and took into possession vide recovery memo. Ex.PB. On 19.02.2004, the I.O., received the information from Neuro Surgeory Department B.V.Hospital Bahawalpur that Murid Hussain was in very serious condition, who ultimately expired when the I.O. reached Neuro Surgeory Ward. Anwar-Ul-Haq ASI (P.W.10) prepared Inquest Report of Murid Hussain, which is Ex.PR. The dead-body of Murid Hussain was shifted to mortuary of RHC Mubarakpur through Muneer Ahmad constable for postmortem. After postmortem on the dead-body last worn clothes of the deceased i.e. shirt P.10, vest P.11, blood-stained Chaddar, P.12, were taken into possession vide recovery memo. Ex.PM by the I.O. After the death of Murid Hussain, Pervaiz Iqbal SHO (PW.11) took over the investigation of this case.

7. Khadim Hussain (Appellant No. 1) and Muhammad Hashim (Appellant No. 2) were arrested on 23.03.2004.

8. On receipt of challan, the accused were indicted under Sections 302, 148 read with Section 149 of The Pakistan Penal Code, 1860, but the accused pleaded not guilty and claimed trial.

9. Ocular evidence was furnished by Muhammad Nawaz complainant (P.W.1) and Muhammad Mehboob (P.W.2).

10. Muhammad Zaffar (P.W.3) rendered the recovery evidence in support of prosecution case, while the medical evidence was furnished by Dr. Abdullah (P.W.8).

11. On 06.4.2004 hatchet was recovered from Khadim Hussain accused which was taken into possession vide recovery memo. Ex.PC. Chhurry (P-2) was recovered from Muhammad Hashim accused which was taken into possession vide recovery memo. Ex.PD.

12. Liaqat Ali 579/HC (P.W.4), Saeed Ahmad 1074/C (P.W.5), Muneer Ahmad 297/C (P.W.6), Farooq Ahmad Patwari Halqa (P.W.7) and Muhammad Akram ASI (P.W.9) are the formal witnesses.

13. After recording the prosecution evidence, statements of accused persons were recorded under Section 342 of the, Cr.P.C. All the incriminating evidence was put to them, but they denied the allegations levelled against them during the prosecution evidence and stated that they have falsely been involved in this case. Khadim Hussain (convict/appellant) also refuted the allegations levelled against him by the prosecution witnesses and in answer to the question why this case against him and why P.Ws. deposed against him, has stated as under:

"In view of the sudden free fight four persons were injured through bricks throwing on each other. The prosecution witnesses nominated in the FIR and the owner of the house where the free fight took place had refused to support false story, consequent upon which the kith's and kin's of Muhammad Nawaz complainant and he himself were planted as witness of fiction who have supported a false story."

However, all the accused opted not to give statement under Section 340(2) of Cr.P.C.

14. After hearing learned counsel for the parties and perusing the record, the learned trial Court passed the impugned judgment dated 27.11.2004 while

awarding sentence to the appellants Khadim Hussain and Muhammad Hashim mentioned supra and acquitted the co-accused/Respondents No. 2 to 13 in Crl. Appeal No. 353 of 2004.

15. Learned counsel for the appellants Khadim Hussain and Muhammad Hashim argued that the prosecution has miserably failed to establish its case against the appellants beyond shadow of a reasonable doubt; that there are material contradictions & discrepancies in the prosecution evidence, which fact has been admitted by the learned trial Court, but even then the conviction has been passed against the appellants; that there is conflict between ocular account and medical evidence; that the impugned conviction has been based on surmises and conjectures which is not warranted under the law and even a slightest doubt would go in favour of the appellants, as the accused is a favourite child of law; that the stance taken up by the defence side (appellants) has been established through independent evidence of doctor (P.W.8) and the Investigating Officers i.e. P.W.10 & P.W.11, but even then the learned trial Court has passed the conviction against the appellants, which is against the justice and the precedent set by the Apex Court that if the prosecution fails to prove its case by producing cogent, trustworthy and reliable evidence, the stance taken up by the defence side would be taken up in toto, which has been proved on record; that there are improvements in the statements of the P.Ws. as compared to the statements recorded by the Investigating Officers; that in fact no recovery has been effected from the appellants, rather fake recovery has been planted in order to strengthen the prosecution case; that even if the recovery of alleged weapons of offence is believed, the same is of no avail to the prosecution case as it has been shown to be made on 06.04.2004 after about two months and 9 days of the alleged occurrence and such type of recovery loose its credence; that the person in whose Courtyard the alleged occurrence took place, has neither been produced before the police, nor appeared in the

witness box before the learned trial Court, which speaks volume about the veracity and authenticity of the prosecution story, even this fact has been admitted by the learned trial Court that the occurrence has not taken place in the mode and manner as narrated by the complainant & P.W.; that the learned trial Court while believing the same set of evidence has rightly acquitted the co-accused but to the extent of convicts/appellants the same has been misconstrued which is harsh, perverse and against the law on the subject. Adds that awarding sentence of imprisonment for life, under the circumstances of the case, is not sustainable in the eye of law. Lastly prayed that while setting aside the impugned conviction order, the appellants may be acquitted.

16. On the other hand learned Deputy Prosecutor General assisted by learned counsel for the complainant/appellant Muhammad Nawaz has opposed the submissions made by learned counsel for the appellants Khadim Hussain, etc. and argued that the prosecution has proved its case against the present appellants as well as Respondents No. 2 to 13/co-accused, who are vicariously liable and committed the occurrence in the mode and manner as narrated in the F.I.R; that the sentence awarded to the appellants is meager and learned trial Court has taken a lenient view; that to the extent of acquittal of the co-accused/Respondents No. 2 to 13, the findings of the learned trial Court are not based on cogent reasoning; that the time, place and presence of the injured P.W. is admitted by the defence; that the substitution is rare phenomenon when the injured P.W. appeared before the learned trial Court and got recorded his evidence by attributing specific roles to each of the accused; that motive part of the occurrence has been proved indubitably and same fact has been admitted by the learned trial Court; that the defence remained changing its stances during the cross-examination, even while recording statement under Section 342 of Cr.P.C. Khadim Hussain (appellant) opened a new orifice, hence, the defence taken by the accused

cannot be believed in anyway; that the medical evidence is in line with the ocular account. Therefore, appeal filed by Khadim Hussain & Muhammad Hashim may be dismissed, while by accepting the appeal filed by Muhammad Nawaz complainant, the Respondents No. 2 to 13 may be convicted and sentenced, accordingly.

17. We have heard the learned counsel for the parties as well as learned DPG for the State and gone through the record.

18. Perusal of the record and evidence of both the sides makes it clear that the time, place and occurrence as well as the presence of the accused persons is admitted. The only question which requires discussion and consideration is the mode and manner of occurrence. The defence took the stance that a Punchayat was convened in order to settle the disputes in the house of one Muhammad Akbar, but on some trivial both the sides annoyed and flared up in a spur of moment, which culminated into the present occurrence. The bricks were lying over there, which were pelted by the parties on each other, which divulges that it was not a pre-planned and pre-meditated occurrence, rather it occurred at the spur of moment and the accused party was not having any intention to commit Qatl-e-Amd of Murid Hussain. This fact finds support from the evidence of Anwar-ul-Haq ASI (P.W.10) who has conceded that it subsequently was heard about pelting of pieces of bricks on each other. The deposition of Pervez Iqbal SI/SHO (P.W.11) is also in line with that of P.W.10 who deposed that broken pieces of bricks were pelted on each other in this occurrence. During the investigation, it has come on surface that free fight took place inter se the parties. When none of the accused has intention to kill any particular person on the side of the complainant party and both the parties were itching for a confrontation and a clash and in sense, complainant party and accused came to a clash and had a free fight which was apparent from the facts that only one Khadim Hussain (appellant) allegedly gave hatchet blows on the head of deceased and none of

the remaining accused were alleged to have given any blow to him from the weapons held by them, as is evident from the medical evidence. However, there is conflict in the contents of the FIR and the medical evidence as well as deposition of P.W.1 & P.W.2 regarding causing of injuries on the head of Murid Hussain (deceased) with hatchet, as in FIR it has been stated that Khadim Hussain caused hatchet blow on the head of Murid Hussain, while at the time of recording evidence as P.W.1 & P.W.2 both the witnesses have improved their version by stating that two blows of hatchet, one on right side of top and other on left side of top, of head were caused by Khadim Hussain, which casts aspersion about the veracity of the prosecution case regarding the mode and manner of the occurrence, rather it supports the version of the defence that it was a free fight during the Punchayat held to settle the disputes between the parties. But, though there is conflict inter se the ocular account and medical evidence regarding number of injuries yet the seat of injury remains the same i.e. head; therefore, when we juxtapose both the stances, taken by prosecution and defence, admission on the part of accused side coupled with deposition of injured/complainant, on oath, suffices it to conclude that appellant-convict Khadim Hussain caused injury on the head of Murid Hussain deceased which, later on, resulted in his death due to hematoma.

19. Moreover, the prosecution side has suppressed the injuries sustained by the appellant Khadim Hussain and one Mst. Rehmat Bibi during the occurrence, while recording the complaint, which shows mala fide and ill-will and manifests that the prosecution has not stepped into the arena with clean hands, as is evident from the evidence of Dr. Abdullah (P.W.8) who medically examined said Khadim Hussain and Mst. Rehmat Bibi.

20. As far as the recovery is concerned, same has allegedly been effected after about two months and nine days of the occurrence, which, in the eye of law has no credence, as one cannot keep the weapon of offence for such a

long period in order to get the same recovered for using the same as supportive evidence to pass conviction against him. Even otherwise, the recovery witnesses are closely related to the complainant, P.W.2 and the deceased and they failed to establish their purpose of presence at the time of disclosure of the appellants/convicts, so their testimony coupled with laps of long period, cannot be relied upon.

21. Motive part of the occurrence has not been rebutted during the cross-examination, which means the same has been admitted by the defence. When a fact remains un-rebutted or no question to shake the same is put by the defence, the same would be admitted to be true. The motive as alleged by the prosecution stands admitted and proved.

22. As far as the appeal filed by Muhammad Nawaz complainant is concerned, it would not go without saying that there is tendency in our society especially in the countryside that a wider net is spread in order to involve whole male family members so as to obstruct them in pursuing the case. Therefore, the findings of the learned trial Court regarding the acquittal of co-accused/Respondents No. 2 to 13 in Criminal Appeal No. 353 of 2004, filed by Muhammad Nawaz complainant is based on plausible and cogent reasoning coupled with the fact that they played no active role during the occurrence and no injury is attributed to the deceased at their hands because same finds no support from the medical evidence, especially Abdul Hadi, Jaleel and Zahoor have been found innocent during the investigation. Admittedly, the ordinary scope of appeal against acquittal of the accused-respondents is considerably narrow and limited. On the examination of the judgment of the acquittal as a whole, credence would be accorded to the findings of the learned trial Court, whereby the accused-respondents had been exonerated from the charge of commission of the crime. It is well settled law that once a judgment of acquittal is recorded, the accused earns double presumption of innocence, therefore, such judgment cannot be

interfered with unless and until strong and exceptional circumstances exist, warranting interference by this Court which the instant case to the extent of Respondents No. 2 to 13 is lacking. The learned Trial Court has not ignored the evidence on the record nor has discarded any evidence against the law. In these circumstances, the learned Trial Court has rightly acquitted the accused-Respondents No. 2 to 13. Even otherwise, the acquittal of the said respondents is neither perverse nor based upon misreading and non-reading of evidence. In this regard reference can be made to the case of Iftikhar Hussain and others Vs. The State (2004 S.C.M.R. 1185), wherein the Hon'ble Apex Court invariably held that' "It is well settled principle of criminal administration of justice that when an accused is acquitted of the charge, he enjoys double presumption of innocence in his favour and Courts seized with acquittal appeal under Section 417, Cr.P.C. are obliged to be very careful in dislodging such presumption. Undoubtedly, two views are always possible while appreciating the evidence available on record, therefore, for such reason and in order to avoid the multiplicity of litigation, it is always insisted that the Court should follow the recognized principles for interference in the acquittal judgment as held in the case of Ghulam Sikandar and another versus Mumaraz Khan and others PLD 1985 SC 11 that the Appellate Court seized with the acquittal appeal under Section 417, Cr.P.C. is competent to interfere in the order challenged before it provided it has been established that the trial Court has disregarded material evidence or misread such evidence or received such evidence illegally.....". In this regard further reliance can be placed on the case of Haji Amanullah versus Munir Ahmad and others (2010 SCMR 222) wherein it has been held by the Apex Court that, "It is well settled by now that in an appeal the Court would not interfere with acquittal merely because reappraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the

conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

23. The report was called for from the Superintendent, Central Jail, Bahawalpur with regards to the served and un-served sentence of the appellant Khadim Hussain. In compliance with the orders of this Court, the Superintendent, Central Jail, Bahawalpur vide his letter dated 02.04.2013 informed this Court that the appellant Khadim Hussain has served out sentence of eleven years two months and 9 days as on 02.04.2013 and the remaining portion of sentence is 13 years 09 months and 21 days, if fine is paid. In this regard, the arguments of the learned counsel for the appellant Khadim Hussain carries weight as the quantum of sentence awarded to the appellant is harsh. Admittedly, the appellant has served out 11 years and more than two months sentence, awarded to him. Without touching any other merits at this stage coupled with mitigating circumstances such as suppression of injuries received by accused side, occurrence being result of free fight without premeditation and belated recovery, we find it appropriate to modify the impugned judgment and while taking a lenient view uphold the conviction of the appellant Khadim Hussain but keeping in view the mitigating circumstances discussed above, reduce his sentence from imprisonment for life to 14 years. So far as the imposition of fine Rs.25,000/- , in default of payment to further undergo one year R.I. same is reduced from one year R.I. to three months R.I., while the order germane to payment of compensation Rs.25,000/- is concern, same is upheld.

24. So far as the convict-appellant Muhammad Hashim is concerned, he has already undergone 10 months of sentence awarded to him. Had he been behind the gallows, the remittance granted by the Government from time to time would have affected his sentence and he had been released from jail after serving out his sentence. He has faced the agony of trial by appearing before this Court after release on bail pursuant to suspension of sentence awarded to him as well as before the learned Trial Court; therefore, taking a lenient view, the sentence already undergone by him is considered as sufficient. He is present before us on bail due to suspension of sentence, so he is set at liberty and his surety stands discharged.

25. For what has been discussed above, the Criminal Appeal No. 360 of 2004 titled "Khadim Hussain, etc. Vs. The State, etc." is partly allowed with the abovementioned modification, while the Criminal Appeal No. 353 of 2004 titled "Muhammad Nawaz Vs. The State, etc." is dismissed being devoid of any force.

(A.S.) **Appeal partly allowed.**

PLJ 2014 Lahore 218

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

MUHAMMAD JAVED AALAM --Petitioner

versus

ZAFFAR IQBAL--Respondent

C.Rev. No. 358 of 2009/BWP, decided on 24.9.2013.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Concurrent findings--Suit for rendition of account--Umpire was appointed to settle dispute inter se parties--Decision of umpire was converted into final decree--Question of--Whether any irregularity, illegality and wrong exercise of jurisdiction vested in a Court was committed--Validity--It is well settled by now that High Court cannot interfere in the finding on question of law or facts, howsoever, erroneous in exercise of its revisional jurisdiction--No such occasion has arisen at trial as well as appellate stage, so High Court finds no illegality, irregularity or infirmity, wrong exercise of jurisdiction vested upon the Courts below while passing the impugned order, judgment and decrees, respectively; therefore, same do not call for any interference by High Court while exercising revisional jurisdiction--When the petitioner has failed to establish any illegality, irregularity or infirmity in the findings of Courts below, it can be safely observed that the same are result of appraising the evidence in true perspective, applying of judicial mind, rightly interpreting the law and upto the dexterity, therefore, same do not call for any call for any interfere by High Court. [P. 221] A, B & C

Mrs. Nusrat Jabeen, Advocate for Petitioner.

Mr. Muhammad Naveed Farhan, Advocate for Respondent.

Date of hearing: 10.9.2013.

ORDER

Muhammad Javed Aalam, the petitioner, through the instant civil revision has called into question the legality and sustainability of the impugned judgments and decrees dated 30.03.2006 & 14.04.2009, by which learned Civil Judge 1st Class, Fortabbas & learned Addl. District Judge, Haroonabad Camp at Fortabbas, while deciding the suit titled "Zaffar Iqbal vs. Muhammad Javed Aalam" for rendition of accounts decreed the same and appeal preferred by the petitioner also met with the same fate, respectively.

2. Briefly, the facts leading towards this civil revision are as such that the present respondent/plaintiff instituted a suit for rendition of accounts against the petitioner/defendant pleading therein that the parties were running a joint venture in the shape of Ice Factory as partners. After dissolution of partnership Rs. 236,000/- were found outstanding against the petitioner/defendant, in this respect he (petitioner/defendant) executed an agreement dated 03.12.1990, in which terms and conditions were settled for payment of the disputed amount with profit. Afterwards, the petitioner/defendant was asked to pay the disputed amount, but he remained procrastinating and ultimately refused. The suit was contested by the petitioner/defendant by filing written statement. The divergence in the pleadings was summed up into issues on 05.12.1995. Both the parties lead their evidence, pro and contra, in support of their respective versions. Learned trial Court vide its judgment dated 20.09.1995 passed preliminary decree in favour of the respondent/plaintiff. On 21.05.1999, with the consent of the parties, an Umpire was appointed to settle the dispute inter se the

parties, who submitted his decision on 20.10.1999 before the learned trial Court and making basis the said decision, the learned trial Court finally disposed of the suit of the respondent/plaintiff. Being aggrieved of the same, the petitioner/defendant preferred an appeal, which was ultimately accepted vide judgment dated 20.02.2003, impugned order dated 20.10.1999 was set aside and suit was remanded to the learned trial Court for decision afresh in accordance with law. The said judgment of learned Appellate Court was assailed before this Court by filing a civil revision, which was dismissed vide order dated 11.10.2004. After remand of the suit, the learned trial Court vide its order and decree dated 30.03.2006, again decreed the suit in favour of the respondent/plaintiff making basis the decision of the Umpire, appointed with the consent of the parties while converting the preliminary decree dated 20.09.1995 into final decree. Being aggrieved of the said order and decree, the present petitioner again preferred an appeal before the learned Appellate Court, which was subsequently dismissed by maintaining the order and decree of the learned trial Court, vide judgment dated 14.04.2009, this civil revision.

3. Learned counsel for the petitioner has argued that the impugned judgments and decrees are against facts and law; result of misreading and non-reading of evidence and incorrect appreciation of law; that the learned trial Court did not provide any proper opportunity to file objections on the decision of the Umpire as required under the Arbitration Act, hence, by bypassing the said procedure decreed the suit of the respondent/plaintiff making basis the said decision of Umpire; that learned Appellate Court has erred in endorsing the order and decree of the learned trial Court and has not made any exertion to appreciate the evidence in true perspective; that the impugned judgments and decrees are based on the decision of Umpire/Arbitrator but his decision has

not been got exhibited on the record, therefore, the same are nullity in the eye of law; that the Umpire/Arbitrator remained fail to determine the dispute inter se the parties in an unambiguous way and excessive amount was fixed, so his decision could not be made basis for passing any decree against the petitioner; that the impugned order and decree of the learned trial Court was in sheer negligence of remand judgment, so the same was not sustainable in the eye of law and liable to be struck down rather to be endorsed by the learned Appellate Court; therefore, both the judgments and decrees passed by Courts below are liable to be set aside and resultantly the suit of the respondent/plaintiff is liable to be dismissed.

4. Learned counsel appearing on behalf of the respondent by favouring the impugned judgments and decrees has controverted the grounds and submissions made by learned counsel for the petitioner and has prayed for dismissal of the instant revision petition at this preliminary stage on the ground that concurrent findings have been given by the two Courts below and no illegality, infirmity or irregularity and misreading or non-reading of evidence has been made by the learned Courts below.

5. Arguments heard. Record perused.

6. The main stress of the learned counsel for the petitioner is on the point that after submission of the decision by the Umpire/Arbitrator, the learned trial Court has not afforded opportunity to the parties to submit their objections on the said decision. In this regard, when record made available has been consulted, it is evident that the learned trial Court provided one fair opportunity to the parties to submit their objections, if any, on the decision of the Umpire/Arbitrator, appointed with the consent of the parties, but the parties failed to submit their objections, so the learned trial Court, by

presuming that the parties had no objections on the said decision of Umpire/Arbitrator, made basis the same and converted the preliminary decree into final decree in favour of the respondent/plaintiff; therefore, the findings of the learned trial Court in the impugned order regarding modification of the Award by mentioning that the decree could be satisfied from the share of the petitioner/defendant, are well reasoned especially when the Umpire/Arbitrator was appointed on the request and statement of the present petitioner/defendant. The learned Appellate Court has also rightly considered the facts of the case and evidence brought on record. It is an admitted fact that the parties started a joint venture in the shape of Ice Factory and after its dissolution the amount in dispute was found outstanding against the petitioner/defendant and the present petitioner/defendant himself offered to appoint Umpire/Arbitrator to settle the dispute inter se him and the respondent/plaintiff and when the said Umpire/Arbitrator made decision after considering all the facts, obviously put before him, it is the present petitioner who is not agreeing with the same. In revisional jurisdiction the Court has only to see, whether any irregularity, illegality and wrong exercise of jurisdiction vested in a Court has been committed. Section 115 of, C.P.C. is reproduced below for ease of reference:--

"115. Revision.--(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears:--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

It is well settled by now that the High Court cannot interfere in the finding on question of law or facts, howsoever, erroneous in exercise of its revisional jurisdiction. This view has been fortified by case of Hakim ud Din through L.Rs. & others vs. Faiz Bukhsh & others (2007 SCMR 870), in which it has been held that, "It is established proposition of law that finding on questions of law or fact howsoever, erroneous the same may be recorded by a Court of exercise of its revisional jurisdiction under Section 115, C.P.C., unless such findings suffer from jurisdictional defect, illegality or material irregularity." Similar view has been reiterated in case of "Abdul Aziz vs. Sheikh Fateh Muhammad" (2007 SCMR 336) But in the present case, no such occasion has arisen at the trial as well as appellate stage, so this Court finds no illegality, irregularity or infirmity, wrong exercise of jurisdiction vested upon the Courts below while passing the impugned order, judgment and decrees, respectively; therefore, same do not call for any interference by this Court while exercising revisional jurisdiction.

7. In view of the above said discussion, when the petitioner/ defendant has failed to establish any illegality, irregularity or infirmity in the findings of Courts below, it can be safely observed that the same are result of appraising the evidence in true perspective, applying of judicial mind, rightly interpreting the law and upto the dexterity, therefore, same do not call for any call for any interfere by this Court. Resultantly, by placing reliance on the judgments supra, this civil revision is dismissed in limine.

(R.A.) **Petition dismissed.**

PLJ 2014 Lahore 230

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

Mst. ZUBAIDA QURESHI, etc.--Petitioners

versus

IQBAL HUSSAIN QURESHI, etc.--Respondents

Civil Revision No. 146 of 2009, decided on 22.11.2013.

Civil Procedure Code, 1908 (V of 1908)--

----O. XXI, R. 58--Examining of witnesses on commission in course of proceedings--Validity--Proceedings under Order XXI Rule 58 of CPC cannot be subject matter of revision as such an order can be challenged by a separate suit, unless there are exceptional circumstances. [P. 234] A

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Scope of--Maintainability--Revision petition is competent under the law, as an order granting permission to record evidence through commission or declining the same falls within the category of case decided for the purpose of Section 115, CPC. [P. 236] B

Civil Procedure Code, 1908 (V of 1908)--

----O. XXVI, R. 1--Recording statement through local commission--Unmarried old parda nasheen ladies and residing beyond jurisdiction of trial Court--Since the petitioners are unmarried women, they may not be having any male member to join them as the male members of the petitioners' family happen to be respondents, being their real brothers in instant civil revision and are at daggers drawn with the petitioners. [P. 236] C

Civil Procedure Code, 1908 (V of 1908)--

----O. XXVI, R. 4 & S. 115--Application to record statements through local commission, was declined by trial Court--Another application to extent of witnesses be recorded through local commission already appointed at Karachi--High Court cannot interfere in revision even if order assailed was

wrong--Evidence on commission to record to old women was allowed--Judicial Policy--Provisions of Order XXVI, Rule 4, CPC are permissive as every case is to be seen and considered on its on merits--Since the petitioners are admittedly old pardanashin ladies, permanently living in Karachi which is at a distance of approximately 1000 km from the Courts at Chishtian, trial Court has already allowed (seven) witnesses of the petitioners, to be recorded through local commission at Karachi at expense of the petitioners, the petitioners are residing outside the jurisdiction of trial Court and admittedly if the petitioners' evidence is recorded at Karachi it would save reasonable time--Order passed by trial Court to extent of declining the petitioners to get their statements recorded through local commission at Karachi, is set aside and reversed by allowing the petitioners to get their statements recorded through Local Commission at Karachi--Petition was accepted. [P. 238] D

Sardar Muhammad Hussain Khan, Advocate for Petitioners.

M/s. Abdul Qayyum Awan and Hameed-uz-Zaman, Advocates for Respondents.

Date of hearing: 22.10.2013.

ORDER

Through this revision petition, the petitioners have called into question order dated 21.3.2009 passed by the learned Civil Judge, Chishtian whereby an application to record their statements through Local Commission was declined by the learned trial Court in a suit for declaration etc filed by them against the respondents while allowing the statements/evidence of the other witnesses of the petitioners to be recorded through local Commission at Karachi.

2. Factually speaking, the petitioners on 25.6.2007 filed a suit for declaration and permanent injunction against the respondents in the Court of Civil Judge, 1st Class Chishtian praying therein that they be declared as owners in possession of the disputed property (detail mentioned in the head note of the plaint), on the basis of an oral gift made in their favour by Mst. Kalsoom Ahmed alias Umme Kalsoom their real mother who died on 11.6.2003 and in furtherance also executed a memorandum of acknowledgement of gift dated

28.2.2003 separately and the defendants have no concern whatsoever with the title/ownership of the said property in dispute. In response to the said suit defendants appeared before the learned trial Court by filing their written statements. Defendant No. 3 filed a conceding written statement whereas Defendants No. 1 and 2 contested the suit and on the basis of divergent pleadings, the learned trial Court framed issues and was pleased to fix the case for recording of evidence of petitioner's side.

3. The petitioners filed an application under Order XXVI Rule 4 read with Section 151, CPC before the learned trial Court so as to allow examination of their witnesses who were four in number through local commission as they were statedly permanently resident of Karachi. The said application of the petitioners was allowed by the learned trial Court vide order dated 17.5.2008 with a direction to the concerned local commission to record the evidence of the four stated witnesses of the petitioners.

4. The petitioners preferred another similar application before the learned trial Court so as to include three witnesses alongwith the plaintiffs/petitioners for the purposes of recording their statements through local commission already appointed at Karachi. The said application was vehemently opposed by the respondents and vide order dated 25.3.2009 the application of the petitioners to the extent of three witnesses was accepted and declined to the extent of petitioners by the learned trial Court while observing that the major part of suit property is situated at Karachi but the petitioners opted to file civil suit before the learned Courts at Chishtian and in this view of the matter they cannot claim the desired facility after having opted Courts at Chishtian on their own.

5. The learned counsel for the petitioners has contended that the order of learned trial Court rejecting the stance of the petitioners for recording their evidence is altogether illegal, arbitrary and based on material irregularity. Adds that the reason for disallowing the petitioners' application is altogether against the principles of natural justice, as the petitioners are old aged Parda Nasheen Ladies belonging to a highly respectable family, they are permanently resident of Karachi which is about 1000 kilometers away from the learned trial Court at Chishtian and lastly that since the local commission

has already been appointed for recording evidence of remaining seven witnesses, therefore, it would be in the interest of justice to direct the learned local commission to record the statements of the petitioners at their expense. Relies on Muhammad Ismail v. District Judge, Sargodha and 4 others" (1981 CLC 361), "Babu Gulab Rai Ghutghutia v. Mahendra Nath Sreemani" (AIR 1935 Patna 220), "Fariddin Ahmed v. Abdul Wahab" (AIR 1926 Patna 277). "Mrs. Zohada Beputn Saheha v. Messrs. Haji Dawood Ayed, Firm and others" (AIR 1940 Patna 437), "Messrs National Insurance Corporation v. Messrs St. Thomas Shipping Co. Inc. Panama and others" (1990 ALD 672(1), and "Iqbal M. Hamzah v. Gillette Pakistan Ltd." (2011 YLR 277).

6. On the other hand, the learned counsel appearing on behalf of the respondents has opposed this civil revision by contending therein that the impugned order passed by the learned Civil Judge is totally in accordance with law. Adds that the learned trial Court has already shown grace and has allowed the application of the petitioners firstly on 17.5.2008 whereby evidence of four witnesses was allowed to be recorded by the learned local commission and evidence of three other witnesses was allowed by the learned trial Court to be recorded through commission, on the second application, the petitioners cannot be allowed to get their statements recorded through local commission as it was the petitioners who opted the Courts at Chishtian, therefore, after having choice of forum the petitioners cannot be allowed to ask for their examination elsewhere other than the Courts at Chishtian. Lastly adds that this Court cannot interfere under Section 115 of, CPC even if the impugned order of the learned trial Court is wrong and substantial justice has been done. Relies on "Mst. Ghulam Sakina and 6 others v. Karim Bakhsh and 7 others" (PLD 1970 Lahore 412), "Fariddin Ahmed v. Abdul Wahab" (AIR 1926 Patna 277), and "Syed Ali Muhammad v. Syed Mir Ahmad Shah and another" (PLD 1951 Baluchistan 23).

7. Arguments heard. Record available on the file perused.

8. The respondents have contested the present civil revision primarily on two grounds. Firstly, it is the stance of the respondents that this civil revision against the impugned order is incompetent as under Section 115 of, CPC this Court cannot interfere in revision even if the order assailed is wrong. In this

regard the respondents have relied in the case of "Mst. Ghulam Sakina and 6 others v. Karim Bakhsh and 7 others" (PLD 1970 Lahore 412) and "Sayed Ali Muhammad v. Syed Mir Ahmad Shah and another" (PLD 1954 Baluchistan 23). The second objection of the respondents' side is to the effect that the order impugned has been passed by the learned trial Court strictly in accordance with law and that since the petitioners had choice of forum, therefore, they should not be allowed to get their testimony recorded elsewhere other than in the Court where they have instituted their suit.

9. The first question at this stage to be considered by this Court is as to whether civil revision against the impugned order is maintainable and this Court can interfere into the vires of the same in terms of Section 115 of, CPC. The learned counsel appearing on behalf of the respondents' side has relied in the case of "Mst. Ghulam Sakina and 6 others v. Karim Bakhsh and 7 others" (PLD 1970 Lahore 412), wherein this Court has shown reluctance in interfering in revision even if order of Court below is wrong but substantial justice if otherwise has been done. The case of "Sayed Ali Muhammad v. Syed Mir Ahmad Shah and another" (PLD 1954 Baluchistan 23), has also been referred to in this regard where it has been observed that an order refusing to examine certain witnesses on commission cannot be subject to revision if the proceedings themselves are not open to revision. In the former case, the matter in issue was with regards to dismissal of a civil suit under the provisions of Order IX Rule 8, CPC as the case was not fixed for hearing but for determining some interlocutory matter only. In the latter case, the question of examining of witnesses on commission in course of proceedings under Order XXI Rule 58 of, CPC was discussed and was held that proceedings under Order XXI Rule 58 of, CPC cannot be subject matter of revision as such an order can be challenged by a separate suit, unless there are exceptional circumstances. Its note worthy that, it has also been laid down in the said judgment that the provisions of Order XXVI Rule 4 of, CPC do not apply to execution proceedings. In this view of the matter both the judgments referred to by the respondents' side cannot be of any help as they are not applicable in the present case which primarily revolves around the provisions of Order XXVI of, CPC in a pending civil suit.

10. In the case of "International Credit and Investment Company (Overseas) Ltd. and another v. Attock Oil Company Ltd., and another" (PLD 1997 Lahore 480), a similar question came up for hearing before this Court and it was held as under:--

"The impugned order suffers from illegality causing miscarriage of justice and is not sustainable. An order of a Civil Court under the provisions of Order XXVI, Rule 5, C.P.C., declining to appoint a Commission is a case decided and is amenable to the revisional jurisdiction of this Court under Section 115, C.P.C. In the case of Rehman Dad and another v. Major/Raja Sajawal Khan etc 1970 SCMR 350; Muhammad Ismail v. District Judge, Sargodha and 4 others 1981 CLC 361 (Lahore); Begum Farkhanda Akhtar and others v. Capt. M. Asif Akhtar and others 1995 CLC 75 (Lahore); M.J. Sheth & Co. v. Ramiza Bi and another AIR 1938 Mad. 646; N.P.Subbiah Pillai v. M. Nellayappa Pillai AIR 1993 Mad 366; Hukumal v. Manghoomal AIR 1953 Ajmer 27; Amina Bivi v. Abdul Jabbar AIR 1979 Mad. 121 and Ponnusamy Pandaram v. The Salem Vaiyappamalai Jangamar Sangam AIR 1986 Mad. 33, it was held that an order refusing to appoint a Commission under Order 26, C.P.C. was revisable under Section 115, C.P.C. A similar view has been taken in the case of Mrs. Zohada Begum Saheba v. Messrs Haji Dawood Ayed Firm and others AIR 1940 Pat. 437. In the cases of Kumar Sarat Kumar Ray v. Ram Chandra Chatterjee AIR, 1922 Cal. 42 and Akbar Ali Khan v. Herbet Francis 1925 Pat. 125. It was further held that an application for appointment of Commissioner under Order XXVI, Rule 5, C.P.C. made by a defendant was to stand on entirely different footing than application made by a plaintiff and that the revision was competent in such cases. It may also be! mentioned here that the expression "case decided" does not mean the decision of the whole matter in issue or civil suit and the term has been interpreted to include even interlocutory orders. Reliance can be placed on the cases of Bibi Gurdevi v. Ghaudhri Muhammad Bakhsh AIR 1943 Lah. 65 (by a Full Bench of seven Judges), Bashir Ahmad Khan v. Qaiser Ali Khan and 2 others PLD 1973 SC 507; Chaudhry A. Mad Din v. Australasia Bank Ltd. Bhalwal 1970 SCMR 507; Bahadur Shah and 2 others

v. Sharaf and 9 others PLD 1973 Lah. 513 and The State v. Anayatullah PLD 1983 FSC 191.

Similar view has been given in the case of "Muhammad Ismail v. District Judge, Sargodha and 4 others" (1981 CLC 361), in which it has been held as under:

"S. 115--Revision, scope of--Substantial question, having bearing on merits of suit, decided by judicial approach--such order amounts to a case decided as contemplated by S. 115--Application for appointment of a Local Commissioner judicially determined by Civil Court--Held, a case decided for purpose of S. 115--Civil Procedure Code (V of 1908) O. XXVI, R. 9."

In the light of what has been discussed hereinbefore and following the case "International Credit and Investment Company (Overseas) Ltd., and another (supra), this revision petition is competent under the law, as an order granting permission to record evidence through commission or declining the same falls within the category of case decided for the purpose of Section 115, CPC.

11. Now coming to the second aspect of the case as to whether in the given peculiar circumstances of the case the petitioners could be denied the right to give their statements/evidence before the Local Commission or not. Admittedly, the respondents are real brothers of the petitioners. The petitioners are permanently resident of Karachi for a long time which fact has not been denied by the respondents' side. The stance taken up by the petitioners in their application is to the effect that since they are old Parda Nasheen Ladies, it will be difficult for them to travel all the way from Karachi to the concerned trial Court at Chishtian which is approximately at a distance of 1000.k.m. on regular dates of hearing, therefore, they be allowed to get their statements/testimony recorded before the local Commission who has already been appointed in this case by the learned trial Court while vide order dated 17.5.2008 and 25.3.2009 whereby the learned trial Court was pleased to allow their applications and resultantly appointed a local Commission so as to record the testimony of seven witnesses of the petitioners at Karachi. The said order dated 25.3.2009 which was partially

allowed to the extent of recording statement of three witnesses of the petitioner at Karachi whereas the request of the petitioners to their extent was declined. It is also the stance of the petitioners that in case they are allowed to get their statements recorded at Karachi, quick disposal is likely to take place. He has further contended that since the other seven witnesses have been allowed to get their statements recorded at Karachi at the expense of the petitioners so they also be awarded similar treatment.

12. The stance of the petitioners to the effect that they are unmarried old Parda Nasheen ladies and residing at Karachi which is at a distance of approximately 1000.k.m. beyond the jurisdiction of the learned trial Court has not been denied by the respondents. It is important to mention here that since the petitioners are unmarried women, they may not be having any male member to join them as the male members of the petitioners' family happen to be respondents, being their real brothers in this civil revision and are at daggers drawn with the petitioners. Another aspect to the case is to the effect that after completing one set of evidence at Karachi the second set of evidence, that is, the testimony of the petitioners as proposed will take place at Chishtian is likely to consume a reasonable time and the same is against the norms of natural justice as under the Judicial Policy expeditious and quick disposal of cases is always encouraged by Courts. The stance taken up by the petitioners in the given circumstances of this case seems to be a very reasonable. In the case of "Mst. Baggi v. Mst. Jan Begum and 7 others" (1985 CLC 1573), in which it has been held as under:--

"O. XXVI, Rule 1--Commission to examine witness--Powers of Court to issue--Person an old woman, suffering from infirmity caused by fracture of her left femur, requisite conditions contained in O.XXVI, R.1, C.P.C., held, completely fulfilled--such powers entitled to normal facility provided by law in circumstances."

In another case "Fariduddin Ahmed v. Abdul Wahab" (AIR 1926 Patna 277), in which it has been held "that commission should be issued for his examination outside the jurisdiction of the Court." In a similar case of (Babu) Gulab Bai Ghutghutia v. (Babu) Mahendra Nath Sreemani" (AIR 1935 Patna 220), it was held that "except under very exceptions circumstances get

commission appointed for his examination--Plaintiff having chosen forum but risky to undertake journey to such forum from place of residence -- Held commission for his examination could be appointed on his paying costs for defendant for making arrangement for cross-examination.--Where the plaintiff has selected his own forum but at the same time it was risky to compel him to come to such place for examination from place of his residence, a commission can be issued for his examination but he must pay the defendant sufficient costs to enable the latter to make adequate arrangements for his cross-examination."

13. On the question of distance wisdom is drawn from "Mrs. Zohada Begum Saheba v. Messrs Haji Dawood Ayed, Firm and others" (AIR 1940 Patna 437), in which it has been held that a defendant in a suit applied for the issue of commission for the examination of her husband as a witness on her behalf At the time of application the husband was serving as Deputy Magistrate more than 200 miles from the Court where the suit was pending. He was unable to obtain leave to proceed to the Court. The Court refused the application: Held that the Court acted with material irregularity in the exercise of its jurisdiction in refusing the application.

In another case "Messrs National Insurance Corporation v. Messrs St. Thomas Shipping Co. Inc. Panama and others" (1990 ALD 672(1), in which it was held that "O. XXVI, Rule 5--Examination of witnesses on Commission--Provision of examining a witness on Commission, would be fully attracted where such witness was living beyond the jurisdiction of Court and nature and circumstances were such that they could nor be made to travel from for off distances to Court."

In another judgment rendered in the case of "Iqbal M. Hamzah v. Gillettte Pakistan Ltd." (2011 YLR 277), in which it has been held that "defendant had no lucid justification to oppose the application as taking steps for early decision in the matter and recording evidence on Commission to save time of parties could not be termed to be erroneous or an act against principle of natural justice--It was in the interest of both the parties if they would have come out of litigation as early as possible--Plaintiff was ready to bear expenses of Commission and no prejudice would be caused to defendant--

High Court allowed recording of evidence before Local Commissioner--Application was allowed in circumstances."

14. In the above mentioned cases, evidence on commission has been allowed to old women, to persons residing outside the jurisdiction of the Court, to persons for whom its risky to come to such place for examination from the place of his residence subject to payment of costs for arrangements, to persons serving more than 200 miles away from the Court and lastly for the purposes of early disposal of cases as per judicial policy, therefore, it can safely be concluded that the provisions of Order XXVI Rule 4, CPC are permissive as every case is to be seen and considered on its on merits keeping in view its facts. Since the petitioners are admittedly old Pardanashin ladies, permanently living in Karachi which is at a distance of approximately 1000 km from the Courts at Chishtian, the learned trial Court has already allowed 07 (seven) witnesses of the petitioners, to be recorded through local commission at Karachi at the expense of the petitioners, the petitioners are residing outside the jurisdiction of the learned trial Court and admittedly if the petitioners' evidence is recorded at Karachi it would save reasonable time, so in the given peculiar circumstances the case, and while relying on the judgments (supra), this revision petition is accepted and the impugned order dated 25.3.2009 passed by the learned trial Court to the extent of declining the petitioners to get their statements recorded through Local Commission at Karachi, is set aside and reversed by allowing the petitioners to get their statements recorded through Local Commission at Karachi. The learned trial Court on receipt of this verdict shall fix the fee of the Local Commission to the extent of the petitioners and proceed accordingly.

(R.A.) **Petition accepted.**

PLJ 2014 Lahore 265

[Bahawalpur Bench Bahawalpur]

Present: Shahid Bilal Hassan, J.

AHMED RAZA SULTAN etc.--Petitioners

versus

SENIOR MEMBER BOARD OF REVENUE, etc.--Respondents

W.P. Nos. 756, 846 & 745 of 2013/BWP, decided on 22.11.2013.

Constitution of Pakistan, 1973--

----Arts. 199 & 212--Constitutional petition--Subsequent orders of suspension were challenged through writ petition--Question of jurisdiction of High Court for entertaining writ petitions--Petitions were not maintainable in terms of bar contained in Art. 212 of Constitution of service matter--Question of--Whether order of suspension in interim/interlocutory or final in nature and whether High Court can interfere into vires of interlocutory order in writ jurisdiction--No writ petition is entertain-able or lies against terms and conditions of service including the suspension from service as the jurisdiction of High Court is barred under Art. 212 of Constitution--Service Tribunal, the right forum, to agitate the matter of suspension and other matters relating to terms and conditions of service and not High Court--Orders passed by an Authority, under terms and conditions of service rules, even though without jurisdiction or mala fide cannot be challenged by filing writ petition before High Court as the provisions contained in Art. 212 of Constitution ousts jurisdiction of all other Courts including High Court and same can only be challenged before Service Tribunal--Jurisdiction of High Court is ousted by way of Art. 212 of Constitution and it is only Service Tribunal before whom such like matters can be agitated, even though the

departmental orders have been passed without jurisdiction and with mala fide intention--Fundamental rights have been infringed by way of impugned orders, the writ jurisdiction of High Court cannot be invoked and civil servants cannot bypass Service Tribunal, the proper forum to agitate the questions/matters regarding service--High Court lacks jurisdiction to interfere into the matters relating to terms and conditions of service, for which Service Tribunal has exclusive jurisdiction--Petitions are not entertain-able being barred by jurisdiction contained in Art. 212 of the Constitution and resultantly same are dismissed. [Pp. 279, 281 & 282] A, D, E, F & G

1996 SCMR 1165; 1991 SCMR 1041; 2009 MLD 766; 2009 YLR 1021.

Suspension Order--

----Scope of--Suspension means to stop an official/officer from performing his duties temporarily and not permanently, same is distinguishable from permanent removal from service--Even, during the period of interim suspension, the person so suspended continues to hold office and receive pay or subsistence allowance during that period, though he is deprived of from actually performing functions of that office. [P. 280] B

Suspension Order--

----An order of suspension, pending a departmental enquiry is not a punishment--An order of suspension, pending a departmental enquiry is not a punishment. [P. 281] C

M/s. M.A. Ghaffar-ul-Haq, Muhammad Amir Niaz Bhadaira and Ch. Shafi Muhammad Tariq, Advocates for Petitioners.

Malik Muhammad Mumtaz Akhtar, Addl. A.G. assisted by Sardar Shahzad Ahmad Khan Dhukkar, A.A.G. and Mr. Mahmood Ahmad Bhatti, Advocate for Respondent No. 11 (in W.P. No. 745 of 2013).

Mr. Masood Kareem, SCO, Board of Revenue Punjab, Lahore

Date of hearing: 25.09.2013

JUDGMENT

By way of this single judgment, this Court intends to dispose of the above captioned three writ petitions, as in all the three, the order dated 02.02.2013 passed by Secretary to the Chief Minister Co-ordination Punjab, Lahore alongwith subsequent orders regarding their suspension have been assailed as the writ petitions are inter connected and interlinked.

2. Tersely, the facts leading towards these writ petitions are as such that petitioner Ahmed Raza Sultan (in W.P. No. 756 of 2013) was posted as Tehsildar, Bahawalnagar vide notification dated 31.07.2012, who joined on 03.08.2012; during his posting at Bahawalnagar, he received order "Tehsildar Bahawalnagar to examine and report" on the application of Ahmed Yar son of Allah Ditta (Petitioner in W.P. No. 745 of 2013) regarding a Mutation No. 60, entered on 22.09.1972 and sanctioned on 02.10.1972 from Addl. District Collector Bahawalnagar (Umer Farooq/petitioner in W.P. No. 846/2013). The petitioner sent the application to Girdawr Halqa for report as per law on 11.10.2012, which needful was done and report was submitted before him on 15.10.2012; the petitioner (Ahmed Raza Sultan) summoned the parties relating to the said mutation and conducted inquiry, found that donor Mst. Gaman was murdered in the year 1969 and her brother Ahmed Yar got lodged a case FIR No. 55 of 1969 under Section 364, 302, 34 of, PPC, at P.S. Donga Bonga, District Bahawalnagar against her (Mst. Gaman) husband namely Muhammad Yar Khan and Muhammad Amin, brother of her husband (who were subsequently

convicted and sentenced). The petitioner (Ahmed Raza Sultan) found that the said Mutation No. 60 was based on fraud and impersonation just to deprive of the legal heirs of Mst. Gaman from their legal shares. During his inquiry, it was found that Mst. Faiz Elahi (donee) was mentally retired and unable to get her statement recorded. He compiled his report and submitted the same to the Addl. District Collector Bahawalnagar (Umer Farooq/ petitioner in W.P. No. 846/2013) authorized as District Collector, on 25.10.2012 for further appropriate legal action, who vide order dated 31.10.2012 ordered to review the fraudulent Mutation No. 60 and subsequent mutations passed on the basis of said mutation and sent the matter to the petitioner Ahmed Raza Sultan (then Tehsildar Bahawalnagar). On receipt of said order, he (Ahmed Raza Sultan) ordered Girdawr Halqa to comply with the order as per law; that on 02.11.2012, he (Ahmed Raza Sultan) received another order of the Collector on the application of Ahmed Yar (Petitioner in W.P. No. 745 of 2013) filed against the Naib Tehsildar Donga Bonga/Revenue Circle Bahawalnagar and pursuant to said order, the petitioner (Ahmed Raza Sultan) got entered Mutation No. 499 sanctioned on 03.11.2012 by reverting the disputed property measuring 536 kanals situated in Khata No. 28 and land measuring 400 kanals falling in Khata No. 41, Mauza Barra Sajwar Khan in favour of Mst. Gaman from Mst. Faiz Elahi and Asmat Rafique, respectively. He (Ahmed Raza Sultan) also got entered mutation of Inheritance No. 500 on 10.11.2012, sanctioned on 12.11.2012, in favour of the legal heirs of Mst. Gaman (deceased) in accordance with law; that some of the property in dispute was got by Respondent No. 6/District Coordination Officer, Mandi Baha-ud-Din in the name of his relative namely Asmat Rafique son of Muhammad Rafique, who approached the petitioner (Ahmed Raza Sultan) through D.C.O. Bahawalnagar in order to reverse the orders passed by him reviewing the fraudulent Mutation No. 60, but he (Ahmed Raza Sultan) refused, so he was got transferred to Haroonabad on 05.01.2013 and also got lodged FIR No. 36 of 2013 against the petitioner (Ahmed Raza Sultan). The

Respondent No. 6 having his influence in the Chief Minister Secretariat Punjab got issued an order on 29.01.2013 on the verbal orders of Chief Minister Punjab through which the Commissioner Sahiwal Division was directed to file a report before the Chief Minister Secretariat, who summoned the petitioner (Ahmed Raza Sultan) through telephonic message via Assistant Commissioner Haroonabad and Umer Farooq, Additional District Collector (petitioner in W.P. No. 846/2013) on 30.01.2013 at 11.00 a.m., while Ahmad Yar (Petitioner in W.P. No. 745 of 2013) got telephonic message through Naib Tehsildar Donga Bonga to appear before Commissioner Sahiwal Division on 30.01.2013, all rushed towards Sahiwal for appearing before the Commissioner Sahiwal/Respondent No. 4, who orally questioned regarding Mutation No. 60 and asked the petitioners (Ahmed Raza Sultan and Umer Farooq) to sit in the adjoining room but thereafter they were never called again till 6.00 p.m. and they left the office of Commissioner, Sahiwal/Respondent No. 4 after submitting their brief stances. It has been averred in the petition of Ahmed Yar that the said Commissioner asked from him that how much money he paid to the Tehsildar (Ahmed Raza Sultan) and Additional District Collector (Umer Farooq) for getting orders of review of Mutation No. 60, but as he had not paid any amount, so he narrated the same facts before the Commissioner, Sahiwal. It came to the knowledge of the petitioners that Commissioner, Sahiwal/Respondent No. 4 sent the following recommendations to the Secretary Coordination, Chief Minister Secretariat, Lahore:--

A. Mr. Omer Farooq Alvi, ADC Bahawalnagar and Mr. Ahmed Raza Sultan, then Tehsildar Bahawalnagar and now Tehsildar Haroonabad, may be suspended from service immediately on accounts of misuse of powers, gross misconduct, negligence and corruption.

B. An inquiry under the PEEDA Act may be initiated against the two officers mentioned above and the Patwari and Kanoongo, who are already under suspension.

C. The matter may be referred to the Anti-Corruption Establishment for registration of an FIR and further action according to law.

D. The matter of delay in police action may be got further probed into should the competent authority deem it necessary.

E. The issue of how senior officers, like the ADC in the instant matter, are transferred out or suspended on complaints of corruption or maladministration on request of DCOs or Commissioners may also be looked into as a matter of policy. Necessary guidelines in this respect may also be developed, it is submitted.

Thereafter, Respondent No. 2/Secretary Coordination, Chief Minister Secretariat, Lahore passed the following order on report of the Commissioner, Sahiwal:--

(i) The recommendations of the Inquiry Officer/Commissioner Sahiwal Division mentioned at (A), (B) & (C) of the enclosed inquiry report, are approved.

(ii) Regarding recommendation at D, Inspector General of Police may please appoint a Senior Officer to inquire into this aspect within 3 days.

(iii) Chief Secretary may please be review the matter pointed out at E of the recommendation.

On the basis of above said order, the petitioner (Ahmed Raza Sultan) was placed under suspension vide Order No. 383-2013/137-E(F)II dated 02nd February, 2013 and petitioner (Umer Farooq Alvi) was placed under suspension vide Order No. SO (C-III) 12-42/2011 dated 04th February, 2013.

3. Being aggrieved of the above said impugned proceedings by the Commissioner Sahiwal Division Sahiwal, impugned order dated 02.02.2013 by the Respondent No. 2 and subsequent orders of suspension passed by Respondent No. 1 dated 02.02.2013 and 04.02.2013 have been assailed by the petitioners (Ahmad Raza Sultan/Tehsildar and Umer Farooq/Additional District Collector) through the captioned writ petitions separately inter alia on the following grounds:--

1. That the petitioners acted in lawful manner and committed no illegality while allowing the review of fraudulent mutation and implementing the same in the revenue record in accordance with the provisions of West Pakistan Land Revenue Act, 1967 as no proceedings can be done against or on behalf of the dead persons as provided under Order XXII of, CPC;

2. That the actions taken by the petitioners were in official capacity; hence, under the provisions of Section 181 of Land Revenue Act, 1967, all the proceedings conducted against the petitioners are void ab initio, without jurisdiction, without lawful authority and sheer abuse of power besides being coram non judice;

3. That the proceedings conducted by Respondent No. 4/ Commissioner Sahiwal are in violation of law, which are based on without adopting proper modus operandi provided under the law; hence, same is not tenable under the law;

4. That the proceedings taken against the petitioners are based on recommendations of Respondent No. 4 who has no jurisdiction to interfere in the matter of the petitioners, hence, same are not sustainable in the eye of law;

5. That the inquiry conducted cannot be said an inquiry as no statement of allegation, no list of witnesses, chance of cross-examination was handed

over to the petitioners and they have been condemned unheard, which is violation of principle of audi alter am partum;

6. That the impugned orders of the respondents are coram non judice and abuse of process of law; hence, not sustainable and liable to be struck down.

4. Earlier, while dealing with the W.P. No. 756 of 2013, on 08.02.2013, this Court considered that the following questions emerging from the arguments advanced and documents made available:--

(i) Whether the competent authority applied its independent mind while passing the impugned order, which apparently lacking from the tenor of the order?

(ii) Whether in all the cases which had been reviewed by the concerned authorities in accordance with law, the Chief Minister has shown his indulgence for taking action against the alleged delinquents and what are those cases?

(iii) Whether the concerned respondents had not provided the right of appeal under relevant law against the said order and if appeal had already filed and operation of the order in review had already been stayed, then what was the extraneous consideration for initiating such speedy proceedings in this matter by the Chief Minister himself and appointed the Sub-enquiry Officer and then approved it for taking action against the petitioner and others?

(iv) Whether a fair opportunity as envisaged under Article 10-A of the Constitution of Islamic Republic of Pakistan has been granted to the petitioner while conducting the self-styled enquiry by Respondent No. 4?

(v) Whether without initiating any disciplinary proceedings under the PEEDA Act, the petitioner could be suspended?

(vi) Whether the placing of the matter for approval before the Chief Minister and after its approval from the competent authority or for that matter the forum where the appeal against the order in review would not prejudice as head of the province showing his annoyance regarding the passing of the order passed in review?

(vii) Whether the protection under Section 181 of the Land Revenue Act is not provided to the acts and actions taken by the Revenue Officer, which had been done bonafidely?

Taking up C.M. No. 02 of 2013 on the even date, this Court passed the following order:

"Subject to notice for the said date, the operation of impugned orders dated 02.02.2013 passed by the Respondents No. 1 & 2 shall remain suspended, meanwhile."

5. Being aggrieved of the above said order of this Court, the respondents filed a Civil Petition No. 519-L of 2013 titled "Senior Member B.O.R. Punjab, etc. vs. Ahmed Raza Sultan" before the Hon'ble Supreme Court and vide order dated 07.08.2013 the Hon'ble Supreme Court was pleased to convert the petition into appeal and partly allowed the same with the following observations:--

"The learned High Court, we may observe with respect, ought to have decided the question of jurisdiction in the first instance before passing any order suspending the operation of an order passed in departmental proceedings. ----------.

4. In view of the fair stand taken by the learned Law Officer, we are persuaded to convert this petition into appeal and partly allow the same and by setting aside the impugned order of the learned High Court dated 08.02.2013, we direct that let the writ petition be fixed for hearing for a date in the next week and shall be decided within a fortnight."

6. Learned counsels for the petitioners have, inter alia, argued that the petitioners Umer Farooq and Ahmed Raza Sultan have jurisdiction under Sections 31(2), 172 and 172(2)(vi) of West Pakistan Land Revenue Act, 1967, so under the said provisions of law, the petitioners have acted purely in accordance with law. Adds that no wrong has been committed by the petitioners; that the order passed by the petitioner Ahmad Raza Sultan was subject to appeal against which the concerned aggrieved party has preferred and that is sub-judice before the competent forum; that only five minutes hearing was given to the petitioners which is in violation of Section 13 of the West Pakistan Land Revenue Act, 1967; that Commissioner, Sahiwal was not competent to hold inquiry against the petitioners; that the competent authority so as to take cognizance of the matter was learned Senior Member Board of Revenue, Punjab, Lahore and not the Chief Minister; that the ingredients of inquiry are missing as there was no charge sheet, reply, cross-examination of the witnesses; therefore, the inquiry is defective under the law. Lastly, argued that the petitioners have not challenged the transfer orders and terms & conditions of service, but have approached this Court for the infringement of their fundamental rights; therefore, this Court has ample jurisdiction to entertain such like writ petitions in order to shield the citizens/civil servant from illegal and unlawful acts of the Executive/High Ups. Relies on Corruption in Hajj arrangement in 2010 (PLD 2011 S.C. 963), Syed Mahmood Akhtar Naqvi vs. F.O.P. (2013 SCMR 1), Qadeer Ahmed vs. Punjab Provincial Cooperative (2003 PLC (C.S.) 770), Ammar Bibi vs. OSD (KLR 1986 Civil 213), Ahmad Ali vs. DEO (PLJ 2002 Lahore 2011), Brig. M. Bashir vs. Abdul Karim (PLD 2004 S.C. 271), Govt. of Sindh vs. Nazakat Ali (2011 SCMR 592), Hassan Din vs. Hafiz Abdul Salam (PLD 1991 S.C. 65), Shafia Salma vs. Taj-ul-Malook (2000 MLD 294), M. Ashfaq vs. The State (PLD 2002 Lahore 36), M. Jameel Das vs. The Pakistan (1999 CLC 514), Muhammad Saleh vs. Secretary (PLJ 2008 Lahore 772), Rehmat Ullah vs. Saleh Khan (PLJ 2007 S.C. 797), Khadim Hussain

vs. Abid Hussain (PLD 2009 S.C. 419), Nazir Ahmad vs. Barkat Masih (2009 MLD 461), Mst. Raj Bibi vs. Sooba (PLJ 2002 S.C. 427), Muhammad Ayub Khoro vs. Pakistan (PLD 1960 S.C. 237), Abdul Rauf vs. Abdul Hameed Khan (PLD 1965 S.C. 671), Mazhar Ali vs. F.O.P. (PLJ 1992 S.C. 121), Misri through L.Rs. vs. M. Sharif, etc. (1997 SCMR 338), Maqsood Ahmad Khan vs. MBR (PLD 1981 Lahore 665), Govt. of Punjab vs. M/s. United Sugar (2008 SCMR 1148), M. Afzal vs. BOR (PLD 1967 S.C. 314), Mst. Kaneez Fatima vs. M. Saleem Salam (2001 SCMR 1493), Hizara Hilltrack vs. Mst. Qaisera Elahi (PLJ 2005 S.C. 925), Zahid Akhtar's case (PLD 1995 S.C. 530), M. Akram vs. MBR (2007 SCMR 289), Farukh J. Gulzar vs. Secretary Local Govt. (1998 SCMR 2222), Munawar Khan vs. Niaz Muhammad (1993 SCMR 1287), Abdul Rasheed vs. Riaz-ud-Din (1995 SCMR 999) and M. Saleh vs. United Grain (PLD 1964 S.C. 97).

7. On the contrary, learned Addl. Advocate General Punjab assisted by learned counsel appearing on behalf of the respondents have strongly opposed these writ petitions mainly on the ground that this Court lacks jurisdiction to entertain the matter in hand under Article 212(2) of the Constitution; that whole the proceedings regarding Mutation No. 60 were conducted with mala fide and no proof of insanity of Mst. Faiz Elahi was brought on record; that at the relevant time Ahmed Raza Sultan was not Tehsildar of the Qanoon-goi of the land where mutation was to be reviewed; that whole the inquiry proceedings were conducted in fair way and in fact the inquiry by Commissioner, Sahiwal was to ensure for regular enquiry if warranted so that a person should not be dragged in the agony of enquiry without any lawful excuse. Lastly prayed for dismissal of the writ petitions under discussion. Relies on Govt. of Sindh through Secretary Education and Literacy Department and others vs. Nizakat Ali and others (2011 SCMR 592), Miss Zubaida Khatoon vs. Mrs. Tehmina Sajid Sheikh and others (PLJ 2011 SC 533), Dr. Ghazanffarullah, Medical Superintendent, Tehsil Headquarter Hospital, Bhalwal and 2 others vs. Secretary Health,

Government of the Punjab, Civil Secretariat, Lahore and 6 others (PLJ 2011 Lahore 392), Mulazim Hussain vs. Director General Agricultural Research and 3 others (PLJ 2010 Lahore 71), Khalid Mahmood Wattoo vs. Government of Punjab and others (1998 SCMR 2280), Abdul Bari vs. Government of Pakistan and 2 others (PLD 1981 Karachi 290), Muzaffar Hussain vs. The Superintendent of Police, District Sialkot (2002 PLC (CS) 442-Lahore), Khalil-ur-Rehman and others vs. Government of Pakistan and others (PLD 1981 Karachi 750), Sher Muhammad vs. Director General of Pakistan, Telegraph and Telephones Department and another (PLD 1979 Karachi 1), Iqan Ahmed Khurram vs. Government of Pakistan and others (PLD 1980 Supreme Court 153), Habib Bank Limited and others vs. Syed Zia-ulHassan Kazmi (1998 SCMR 60), Mushtaq Sadiq Khokhar vs. Engineer-in-Chief Pakistan Army, G.H.Q. and another (1985 SCMR 63), Muhammad Amin Mughal vs. Secretary Local Government and Rural Development Department and 4 others (2002 PLC (C.S.) 816-Lahore), Syed Zamiruddin vs. Government of Sindh through Secretary, Education Department, Sindh Karachi and 2 others (1997 PLC (C.S.) 702-Karachi High Court), Khurshid Ahmad Naz vs. Deputy Commissioner, D.G. Khan and another (1983 PLC (C.S.) 46-Lahore High Court), WAPDA vs. Commissioner for workmen's Compensation and authority under the payment of Wages Act and others (2001 PLC 527-Lahore), I.A. Sharwani and others vs. Government of Pakistan through Secretary, Finance Division, Islamabad and others (1991 SCMR 1041), Syed Saghir Ahmed Naqvi vs. Province of Sindh through Chief Secretary, S & GAD, Karachi and others (1996 SCMR 1165), Dr. Sabir Zameer Siddiqui vs. Mian Abdul Malik and 4 others (PLD 1991 Supreme Court 226), Muhammad Shafique vs. Director Education (SE), Sargodha Division and another (1997 PLC (C.S.) 199), Government of Balochistan, CWPP & H Department and others vs. Nawabzada Mir Tariq Hussain Khan Magsi and others (2010 SCMR 115)

and Deputy Commissioner/Registrar, Sialkot and 2 others vs. Hamid Khaldi and 4 others (1987 CLC 2360-Lahore).

8. Heard.

9. The stance taken up by the writ petitioners in W.P.No. 756 of 2013 and W.P. No. 846 of 2013 is to the effect that they both acted in good faith and strictly in accordance with law on the application of an aggrieved applicant (petitioner in W.P. No. 745 of 2013) and decided the same by redressing his grievance and resultantly the impugned inquiry followed by the order of suspension dated 02.02.2013 and 04.02.2013 respectively could not have been passed by the respondents which act of the respondents has been called into question by the petitioners. While responding to the allegations of the petitioners, the respondents in their refutations have mainly called into question the jurisdiction of this Court for entertaining these Writ Petitions under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. It is the stance of the respondents that these Writ Petitions are not maintainable in terms of bar contained in Article 212 of the Constitution being essentially an outcome of a Service Matter, involving the vires of terms and conditions of service and therefore, jurisdiction under Article 199 of Constitution cannot be invoked by the petitioners, if at all the petitioners are aggrieved, they may, if so advised, approach the Service Tribunal concerned being competent and having the jurisdiction to entertain and redress the grievance of the petitioners. For ready reference, Article 212 of the Constitution is reproduced infra:--

"212. Administrative Courts and Tribunals.--(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of--

(a) matters relating to the terms and conditions of persons who are or have been] in the service of Pakistan, including disciplinary matters;

(b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or

(c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other Court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other Court immediately before the establishment of the Administrative Court or Tribunal other than an appeal pending before the Supreme Court, shall abate on such establishment:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal."

Apart from the said defence, the respondents have categorically denied the allegations levelled by the petitioners while stating that they have proceeded against the petitioners (Tehsildar and Addl. District Collector) strictly in accordance with law as no illegality has been committed by them.

10. According to the record made available, on 09.10.2012 Ahmed Yar son of Allah Ditta (Petitioner in W.P. No. 745 of 2013) filed an application before Additional District Collector, Bahawalnagar (Petitioner in W.P. No. 846 of 2013) for review of Mutation No. 60 dated 02.10.1972, on the basis of which one Mst. Gaman Bibi widow of Muhammad Yar Khan made Tamleek of land measuring 936 kanals situated at Mauza Sajwar Khan in favour of Mst. Faiz Elahi daughter of Shahray Khan i.e. the sister of Muhammad Yar Khan and all subsequent mutations. The stance taken up in the said application was to the effect that Mst. Gaman was murdered in the year 1969 whereas the accused of the said murder case were witnesses to the said mutation and there was a bar on Tamleek in favour of Mst. Faiz Elahi as she was not an heir of Mst. Gaman. While entertaining the said application seeking review of Mutation No. 60 dated 02.10.1972, the Addl. District Collector, Bahawalnagar directed the Tehsildar, Bahawalnagar to "Examine and Report" on 09.10.2012. The Tehsildar, on receiving the said application directed the Girdawar to report as per law on 11.10.2012. On 25.10.2012, the Tehsildar, Bahawalnagar gave his report recommending review of Mutation No. 60 dated 02.10.1972 and subsequent mutations as well. In response to the said recommendations, the Addl. District Collector, Bahawalnagar vide order dated 03.10.2012 allowed the review of all mutations resulting into Mutation No. 500 dated 11.10.2012 reverting the land in favour of the legal heirs of Mst. Gaman.

11. The said act on the part of the petitioners gave birth to various complaints by the aggrieved alleging gross misconduct and misuse of powers by the Additional District Collector and Tehsildar, Bahawalnagar. In response to the said complaints, the Commissioner, Sahiwal Division, Sahiwal, was ordered to conduct an inquiry by the Chief Minister, Punjab through his Secretary (Co-ordination). The needful was done by the Commissioner, Sahiwal on the following issues:-

1. Whether the order passed by the Additional District Collector Bahawalnagar to review the mutations has been passed in accordance with the settled principles of law?

2. Whether Mr. Ahmad Raza Sultan, Tehsildar was competent to file report and subsequently to review the said mutations and whether the land in question falls in his jurisdiction?

12. Ahmad Yar (Petitioner in W.P. No. 745 of 2013), one Asmat Rafique Bajwa son of Muhammad Rafique Bajwa, Umer Farooq Alvi, Additional District Collector, Bahawalnagar (Petitioner in W.P. No. 846 of 2013), Ahmad Raza Sultan, Tehsildar Bahawalnagar (Petitioner in W.P. No. 756 of 2013), Muhammad Hanif, concerned Patwari, Ghulam Murtaza, Assistant Commissioner Bahawalnagar, all appeared in the inquiry proceedings along with complete relevant record and their respective stance/defence was recorded. After hearing all the said concerned and perusing the record, the Commissioner Sahiwal/Inquiry Officer made the following recommendations:--

A. Mr. Omer Farooq Alvi, ADC Bahawalnagar and Mr. Ahmed Raza Sultan, then Tehsildar Bahawalnagar and now Tehsildar Haroonabad, may be suspended from service immediately on accounts of misuse of powers, gross misconduct, negligence and corruption.

B. An inquiry under the PEEDA Act may be initiated against the two officers mentioned above and the Patwari and Kanoongo, who are already under suspension.

C. The matter may be referred to the Anti-Corruption Establishment for registration of an FIR and further action according to law.

D. The matter of delay in police action may be got further probed into should the competent authority deem it necessary.

E. The issue of how senior officers, like the ADC in the instant matter, are transferred out or suspended on complaints of corruption or maladministration on request of DCOs or Commissioners may also be looked into as a matter of policy. Necessary guidelines in this respect may also be developed, it is submitted.

13. The above stated inquiry report resulted in the suspension of the petitioner Ahmad Raza Sultan, Tehsildar vide impugned order dated 02.02.2013 on the allegation of gross misconduct, while the petitioner Umer Farooq Alvi, Addl. District Collector was suspended vide impugned order dated 04.02.2013.

14. The first issue to be discussed and addressed at this juncture is with regards to the objection raised by the respondents' side regarding the maintainability of these writ petitions stating therein that this Court lacks jurisdiction under Article 199 of the Constitution to entertain the same in view of the bar contained in Article 212 of the Constitution. In this regard, this Court is guided by the observation rendered in order dated 07.08.2013 passed by the Hon'ble Supreme Court of Pakistan in CPLA No. 519-L of 2013 preferred by the respondents whereby the said August Court observed as under:

"The learned High Court, we may observe with respect, ought to have decided the question of jurisdiction in the first instance before passing any order suspending the operation of an order passed in departmental proceedings."

Similar view has been taken in Govt. of Sindh vs. Nazakat Ali (2011 SCMR 592) and 1997 PLC (C.S.) 12-Supreme Court of Pakistan.

15. Admittedly, petitioners namely Ahmad Raza Sultan and Umer Farooq Alvi are Government Servants and fall within the ambit of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 (hereinafter

referred to the said Act) in terms of Section 1 of the said Act in case of allegation of misconduct, corruption, etc. The Competent Authority to initiate proceedings against the concerned includes the "Chief Minister" as per Sec. 2(f)(i) of the said Act. Under Sec.16 of the said Act, departmental appeal and review lies to the accused or the aggrieved and finally appeal lies before the Punjab Service Tribunal. Interestingly, in this case, the petitioners have not admittedly availed the remedy/remedies available to them under the said mandatory provisions of law and instead have opted to file these constitutional petitions before this Court under Article 199 of the Constitution. In the landmark judgment of Peer Muhammad s case (2007 SCMR 54), the August Supreme Court held that, "The provisions as contained in Art.212 of the Constitution of Islamic Republic of Pakistan ousts jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide did not confer upon High Court jurisdiction to act in the matter in view of Constitutional ouster as contained in Art.212 of the Constitution of Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such like matter."

Similar view has been taken in 1998 SCMR 280, 1992 SCMR 365, PLD 1984 S.C. 539, 1997 SCMR 167, 1997 SCMR 169, 1990 SCMR 999, 1999 SCMR 784, PLD 1995 S.C. 530, 1998 SCMR 2280, 1992 PLC (C.S.) 1020, PLD 1980 S.C. 153, 1996 SCMR 1165, PLD 1981 Karachi 290, PLD 1981 Karachi 750 and C.P. No. 2123-L of 2009.

In case of Muzaffar Hussain (2002 PLC (C.S.) 442), it has been held that, "When final order cannot be interfered with by High Court, interference in interim order will manifestly frustrate the object of Law.

Even in S.M. Waseem Ashraf's case (2013 SCMR 338), it has been held that, "Any forum or Court which had no jurisdiction to decide the main matter on

a case before it, had no jurisdiction to decide any ancillary matter or incidental matter thereto."

Similarly, in a case reported as "Province of Punjab vs. Muhammad Ashraf" (2000 PLC (CS) 118), it has been observed that, "Suspension from service---Jurisdiction of Service Tribunal in respect of matters relating to terms and conditions of service----Matters relating to terms and conditions of civil servants, would include suspension from service of a civil servant and Service Tribunal alone had the jurisdiction to adjudicate upon such matter in appropriate proceedings---Jurisdiction of High Court in the matter was barred under Art. 212 of Constitution of Pakistan (1973)." Similar view has been adopted by this Court in Muhammad Ashraf Chaudhary's case (2001 PLC (C.S.) 781), Muhammad Amin Mughal's case (2002 PLC (C.S.) 816), Mrs. Shah Jahan, Headmistress, Government Girls Elementary School, Pindi Bhattian's case (2003 PLC (C.S.) 1416) and Hashmat Nabi Ali's case (2004 PLC (C.S.) 1254).

16. In view of the above discussion, it can safely be observed that no writ petition is entertain-able or lies against terms and conditions of service including the suspension from service as the jurisdiction of this Court is barred under Art. 212 of Constitution. It is only the Service Tribunal, the right forum, to agitate the matter of suspension and other matters relating to terms and conditions of service and not this Court.

17. Now, this Court adverts to the question as to whether the order of suspension is `interim/interlocutory' or `final' in nature and whether this Court can interfere into vires of interlocutory orders in writ jurisdiction. In this regard the definition of word `suspend' and `suspension' as elaborated in the Black's Law Dictionary (Ninth Edition) by Bryan A. Garner is reproduced for ease of reference infra:--

`Suspend: 1. To interrupt; postpone; defer <the fire alarm suspended the prosecutor's opening statement>. 2. To temporarily keep (a person) from

performing a function, occupying an office, holding a job, or exercising a right or privilege <the attorney's law license was suspended for violating the Model Rules of Professional Conduct>.

Suspension: The act of temporarily delaying, interrupting, or terminating something <suspension of business operations> <suspension of statute>. 2. The state of such delay, interruption, or termination <corporate transfers were not allowed because of the suspension of business>. 3. The temporary deprivation of a person's powers or privileges, esp. of office or profession; esp., a fairly stringent level of lawyer discipline that prohibits the lawyer from practicing law for a specified period, usu. from several months to several years <suspension of the bar license>. Suspension may entail requiring the lawyer to pass a legal ethics bar examination, or to take one or more ethics courses as continuing legal education, before being readmitted to active practice. 4. The temporary withdrawal from employment, as distinguished from permanent severance <suspension from teaching without pay>. 5. An ecclesiastical censure that can be temporary or permanent, and partial or complete. 6. The process of staying a judgment pending an appeal to the Supreme Court." According to the Oxford Dictionary, "Suspension" means, "action of debarring or state of being debarred, specially for a time, from a function or privilege; temporary deprivation of ones office or position or a gain, state of being temporarily kept from doing or deprived of something." as held in M. Memon vs. Dacca Improvement Trust (PLD 1964 Dac. 671).

The word `interim' inter alia means one for the time being; one made in the meantime and until something is done; an interval of time between one event, process or period and another; belonging to or taking place during an interim; temporary; something done in the interim, a provisional arrangement adopted in the meanwhile; done, made, occurring etc. in or in the meantime; provisional.

While the word `interlocutory' inter alia means "pronounced or made during the course of suit, divorce, trial or the like order pronounced during the course of an action, not finally decisive of a case or suit; provisional decision in a case."

18. From the bare reading of the above referred definitions, it is crystal clear that suspension means to stop an official/officer from performing his duties temporarily and not permanently, same is distinguishable from permanent removal from service. Even, during the period of interim suspension, the person so suspended continues to hold office and receive pay or subsistence allowance during that period, though he is deprived of from actually performing the functions of that office. Meaning thereby, he remains the holder of his office and is not punished in any way till the completion of the enquiry. The punishment, if any, is imposed on him only after completion of the enquiry and on the basis of the result of the enquiry. This means that an order of suspension, pending a departmental enquiry is not a punishment. So it can safely be gathered that the orders/recommendations assailed through these writ petitions are not final in nature rather interim/interlocutory. For ready reference, the impugned order is reproduced as under:--

(i) The recommendations of the Inquiry Officer/Commissioner Sahiwal Division mentioned at (A), (B) & (C) of the enclosed inquiry report, are approved.

(ii) Regarding recommendation at D, Inspector General of Police may please appoint a Senior Officer to inquire into this aspect within 3 days.

(iii) Chief Secretary may please be review the matter pointed out at E of the recommendation.

Against interlocutory order no writ petition lies or entertainable. Even otherwise, same are considered to be final; admittedly it has been passed by a competent authority according to terms and conditions of the Service Rules.

The orders passed by an Authority, under terms and conditions of service rules, even though without jurisdiction or mala fide cannot be challenged by filing writ petition before this Court as the provisions contained in Art. 212 of the Constitution of Islamic Republic of Pakistan, 1973 ousts jurisdiction of all other Courts including this Court and same can only be challenged before Service Tribunal. In this regard safer reliance can be placed on Tipu Sultan Khan's case [2009 YLR 1021], in which it has been observed that, "Art. 199----Constitutional petition against interlocutory orders---Maintainability----Constitutional petition would not lie against an interlocutory order, unless the controversy between the parties affecting the right was decided finally and it came within the ambit of the case decided." Same view has been reiterated in Khuram Zulfiqar's case (2009 MLD 766).

19. The record made available before this Court clearly depicts that while holding inquiry, the Commissioner, Sahiwal communicated the petitioners through Govt. offices and not otherwise and till the passing of impugned orders/ recommendations whole the process was conducted in a fair way. As discussed above, the jurisdiction of this Court is ousted by way of Art. 212 of the Constitution and it is only the Service Tribunal before whom such like matters can be agitated, even though the departmental orders have been passed without jurisdiction and with mala fide intention. Therefore, mere adding a word that fundamental rights have been infringed by way of impugned orders, the writ jurisdiction of this Court cannot be invoked and civil servants cannot bypass Service Tribunal, the proper forum to agitate the questions/matters regarding service. In this regard guidance can be sought from Sharwani and others' case (1991 SCMR 1014), wherein it has been held that, `Civil Servant cannot bypass Service Tribunal by adding a ground of violation of fundamental rights----Tribunal has jurisdiction even in violation of fundamental rules." Even in Saghir Ahmed Naqvi's case (1996 SCMR 1165), it has been held that, "Statute excluding a right of appeal from interim order could not be bypassed by brining under attack such interim order in

Constitutional jurisdiction---Party effected had to wait till it matures into final order and then to attack it in proper exclusive forum." In the present case, the petitioners Ahmed Raza Sultan and Umer Farooq have had ample opportunity to assail their suspension order before the learned Service Tribunal, which is the proper forum in this regard for getting their grievance redressed. Moreover, the other allegations levelled by the parties are concerned, when the writ petitions are not competent and this Court has no jurisdiction, there is no need to discuss the same.

20. So far as the writ petition of Ahmad Yar petitioner (W.P. No. 745 of 2013) is concerned, same seems to be based on mala fide intention and apparently in collusion with the other two writ petitioners namely Ahmad Raza Sultan, Tehsildar and Umer Farooq Alvi, Additional District Collector; because the petitioner Ahmed Yar, being a private person, is not aggrieved party of the impugned orders dated 02.02.2013 and 04.02.2013, by way of this Ahmad Raza Sultan and Umer Farooq Alvi were suspended; therefore, his writ petition Bearing No. 745 of 2013 is not maintainable on this sole ground.

21. In view of the above discussion, this Court lacks jurisdiction to interfere into the matters relating to terms and conditions of service, for which Service Tribunal has exclusive jurisdiction. Moreso, it is considered view of this Court as well as Hon'ble Supreme Court that while exercising writ jurisdiction, the factual controversy cannot be taken into account; rather the same is to be agitated before the learned Civil Court, which is the ultimate forum in this regard, because to resolve the factual questions evidence of both the parties, oral as well as documentary, has to be recorded and this Court being Court of Law, cannot exercise that jurisdiction. Each and every case has its peculiar facts and circumstances and the Courts of Law have to thwart the same according to its legal acumen in order to administer justice. The case law/judgments referred to by the learned counsels for the

petitioners, with utmost respect, are on different facts and circumstances and do not render assistance/help to the petitioners' cause.

22. For what has been discussed above, this Court comes to the conclusion that all the captioned writs are not entertain-able being barred by jurisdiction contained in Art. 212 of the Constitution and resultantly same are dismissed, being devoid of any force.

(R.A.) **Petitions dismissed.**

PLJ 2014 Lahore 283

Present: Shahid Bilal Hassan, J.

Mst. HASEENA BIBI--Petitioner

versus

JUSTICE OF PEACE, etc.--Respondents

W.P. No. 4719 of 2013, decided on 9.10.2013.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 154--Constitutional petition--Registration of criminal case--So-called police encounter--Right of every citizen to get his case investigated from investigating agency--Sufficient incriminating material available to connect with commission of crime--Validity--Mere pendency of judicial inquiry was no bar to registration of criminal case if cognizable offence is made out from information--No bar to register a criminal case even if judicial inquiry was pending--It is an admitted position that judicial inquiry conducted by inquiry officer is a quasi judicial proceedings and any aggrieved person can get his or her grievance redressed against police officials, if dissatisfied with proceeding in accordance with law--By approaching police official who on receiving information is bound to proceed under Section 154, Cr.P.C. only if a cognizable offence is made out and investigate matter independently and strictly in accordance with law--Right to get an FIR lodged in such a situation is an independent right available to every citizen who is aggrieved in such situation--Incharge police officer is duty bound to register a criminal case against the person complained u/S. 154, Cr.P.C. as report of judicial inquiry is no bar in way for lodging of an FIR and after registration of case, conduct fair investigation independently in accordance with law--Petition was allowed. [Pp. 287, 288 & 291] A, B, C & D

2003 PLC (CS) 759, 2004 MLD 1609, 2012 PCr.LJ 1797, PLD 2002 Lah. 78 & PLD 2007 SC 539, rel.

Syed Zeeshan Haider, Advocate for Petitioner.

Sardar Muhammad Shahzad Khan Dhukkar, AAG for Respondents.

Mr. Umair Mohsin, Advocate for Respondents No. 3 to 7.

Date of hearing: 5.9.2013.

ORDER

Through this constitutional petition, the petitioner has called into question the order dated 05.7.2013 passed by the learned Ex-Officio Justice of Peace at Liaqatpur, District Rahimyar Khan whereby he declined to make an order so as to register a criminal case on the application of the petitioner.

2. Brief facts which gave birth to the institution of this petition are to the effect that the petitioner filed an application on 18.6.2013 before the learned Addl. Sessions Judge/Justice of Peace at Liaqatpur, District Rahimyar Khan stating therein that on 08.5.2013 the son of the petitioner namely Muhammad Tariq aged 25-years was present in his house wherein one Hameed son of Mustafa and one Arabi son of Nazir Ahmad who were known to the son of the petitioner came and asked Muhammad Tariq to join them as they had been invited to some function. The behaviour of the said two was mysterious which led the petitioner to advise her son not to join them but the son went alongwith the said two. After reasonable time when the son of the petitioner did not return, the petitioner went to the house of one of the said two acquaintances and before reaching the said house the petitioner saw some police officials the names of which have been mentioned in the application forcibly taking the petitioner's son alongwith them in a while Suzuki car. The said act was witnessed by 30/40 persons living in the vicinity and certain names of witnesses were also mentioned in this regard. The petitioner alongwith her witnesses went to one Mian Manzoor Ahmed who is an

influential person of the area and narrated the whole story who contacted the SHO of police station Sehja, the said SHO confessed having taken the petitioner's son. The petitioner met her son on 09.5.2013 at the police station where her son was confined in the lockup. She was informed that police officials were physically torturing her son and are keeping him at private places and there were threats of dire consequences by the said SHO to the effect that the son of the petitioner will be murdered in a police encounter and if she intends to save his life she should pay an amount of Rs. 5,00,000/-. Since the petitioner is a poor lady she could not arrange the said amount. On 13.5.2013 at about 10.00 a.m. in the morning the petitioner was informed that her son had been murdered in a so-called police encounter. The petitioner there and then alongwith witnesses again approached Mian Manzoor Ahmed who contacted the SHO concerned who stated that since the desired amount had not been given, therefore, the petitioner's son namely Muhammad Tariq had been murdered in a police encounter. The petitioner also approached the SHO concerned, who in presence of witnesses admitted that he murdered her son in a fake police encounter in the command of senior police officers. It has also been alleged that Hameed and Arabi who took the petitioner's son admitted that they were given illegal gratification so as to hand over the petitioner's son to the SHO for the purposes of fake police encounter. Now there are threats by the SHO concerned that in case the petitioner initiates any criminal proceedings against him, the other son of the petitioner was also murdered. On these grounds, the petitioner approached the learned Ex-Officio Justice of Peace who called for report and parawise comments from the SHO concerned wherein it came to light that the son of the petitioner was murdered and case FIR No. 108/2013 dated 13.5.2013 under Sections 324, 353, 148 read with Section 149 of, PPC at Police Station Sehja was registered. On receiving comments from the police, the learned Ex-Officio Justice of Peace declined the petitioner's application being not maintainable as statedly judicial inquiry was in progress. Being left with no

other option the petitioner has filed this writ petition seeking declaration so as to initiate criminal proceedings against Respondents No. 2 to 7.

3. The learned counsel for the petitioner has contended that there is sufficient incriminating material available with the petitioner to connect the respondents with the commission of crime; that only criteria which is fixed for registration of FIR is providing the information of commission of any cognizable offence and no authority is competent to refuse registration of FIR; that the stance taken by the petitioner and her witnesses in this petition is completely in line with their statements made during the course of judicial inquiry and their deposition made before judicial Magistrate has illegally been ignored by learned judicial Magistrate; that the evidence led by the petitioner is sufficient to prove a charge of 302 of, PPC; that it is the right of every citizen of Pakistan to get his case investigated from the investigating agency of the country and also to get his case prosecuted through prosecution of the country then why the petitioner should be deprived from this right; that there is no mala fide with the petitioner in filing of the petition as real son who allegedly was involved in criminal activities has been murdered and all the cases pending against him (if any) have reached to an end with his murder; that the officials who are allegedly participants of so-called police encounter are neither involved in the murder of petitioner's son nor they have been arrayed as accused into this petition, because they neither made any encounter nor they committed the murder of petitioner's son; that the piece of evidence are required to be not only thoroughly investigated but also required expert's evidences including Call Data Records as cell numbers used into this occurrence are mentioned in this petition and which could only be collected through investigation process and petitioner being a woman of advanced age is not in the position to collect and produce the same before Court; that the contention raised by the learned counsel that issuance of direction for registration of criminal case will be a futile exercise as after registration of case the case would be cancelled is nothing more than as open

threat and an expression of boundless powers shown by police authorities and keeping in view this attitude of police authorities the august Supreme Court of Pakistan held in 2012 SCMR 428 that cases of police encounter should be investigated by any independent agency so that impartial investigation can be made possible; that the parents of deceased Muhammad Nadir never made any statement in favour of police officials during the judicial inquiry rather they only showed their reluctance to make any statement; that neither any police official received any scratch nor any vehicle of police was hit by any built nor it was only the accused who received fire-arm injuries this shows the fakeness of police encounter; that the verdict given in judicial inquiry is not strong enough to straight away reject the evidence which is likely to be produced before the Court as proposed in this petition and that it was strongly argued by the learned counsel for the respondents that as the judicial inquiry was conducted by a judicial Magistrate and after recording material evidence, the learned judicial Magistrate has exonerated the police officials from any criminal activity and declared the police encounter as genuine one but it is a settled principle of law that judicial inquiry is not a device which could exonerate or incriminate any person of the charge. In support of his contentions, the learned counsel for the petitioner has relied on "Mumtaz Hussain v. Deputy Inspector-General, Faisalabad and 7 others" (PLD 2002 Lahore 78).

4. On the contrary, the learned AAG assisted by the learned counsel for the Respondents No. 2 to 7 have vehemently opposed this writ petition and have supported the impugned order while maintaining that the same is strictly in accordance with law and according to the facts of the petitioner's case as it has been observed by the learned Ex-Officio Justice of Peace in the order dated 5.7.2013 that the petitioner may file a private complaint and it was on the said stance that the learned Ex-Officio Justice of Peace disposed of the application of the petitioner. Adds that since the judicial inquiry has been finalized wherein all the police officials have been exonerated, therefore, no

fruitful purpose will be served so as to initiate any criminal proceedings against Respondents No. 2 to 7 who are all police officials. There are 34-cases registered against Muhammad Tariq. Relied on "Muhammad Masood v. S.S.P., Railways, Rawalpindi and others" (2000 P.Cr.LJ 67), "Khizer Hayat and others v. Inspector General of Police (Punjab), Lahore and others" (PLD 2005 Lahore 470) "Muhammad Ramzan v. Additional Sessions Judge/ Justice of Peace, Kabirwala, District Khanewal and 6 others" (2005 P.Cr.LJ 1579), "Asma Jahangir, Chairperson Human Rights Commission of Pakistan v. Senior Superintendent of Police (Operations), Lahore and 3 others" (2005 P.Cr.LJ 1517) and "Riaz Ahmed v. The State" (2012 YLR 1260).

5. Heard the learned counsel for the parties and perused the record.

6. It is an admitted fact that the son of the petitioner died in a police encounter after which case FIR No. 108/2013 dated 13.5.2013 was lodged and resultantly on the order of the learned Sessions Judge concerned, judicial inquiry was ordered to be conducted which was done by the learned Magistrate/Inquiry Officer at Khanpur who exonerated all the police officials by holding that both the deceased in the police encounter namely Muhammad Nadir and Muhammad Tariq alongwith three others committed dacoity at the night of 12.5.2013 and looted gold ornaments, cash, motorbike and fled away. The police party on information chased them and when they reached near the said accused they (accused) started firing at the police party. In this scenario the police was left with no other option except to act in accordance with law which needful was done and resultantly both Muhammad Nadir and Muhammad Tariq died in the police encounter which was altogether lawful. It is the case of the petitioner that her stance was not considered by the learned Magistrate who sided with the police party and resultantly exonerated them.

7. In the impugned order, the learned Ex-Officio Justice of Peace has observed as under:

"2. Report of SHO received, which disclosed that her son has been murdered in case FIR No. 108/2013 under Sections 324/ 353/148/149, PPC at Police Station Sehja. In this regard judicial inquiry is in progress. Therefore, the petition in hand is not maintainable. However, the petitioner may file a private complaint, if so advised. With this observation, the petition stands disposed of. File be consigned after its completion."

In the case of "Noor Ahmad v. D.I.G., Police, D.G. Khan Division and 7 others" (2005 YLR 1545) wherein it has been held by this Court that "purpose of judicial inquiry was to find out facts and mere pendency of the same was no bar to register a criminal case." In another case reported as "Muhammad Saeed (Rana Saeed Ahmed) v. Home Secretary, Province of Punjab and 7 others" (2000 YLR 1607), wherein it has been held that holding of judicial inquiry under S.176, Cr.P.C. was no bar for registration of second F.I.R., under S. 154, Cr.P.C.

8. In light of the above said judgments of this Court, the impugned order cannot hold field as mere pendency of judicial inquiry was no bar to the registration of a criminal case if otherwise a cognizable offence is made out from the information passed on to the SHO, therefore, the learned Ex-Officio Justice of Peace did not pass a just order in accordance with law as there was no bar to register a criminal case against the concerned even if judicial inquiry was pending while following the above two precedents of this Court.

9. It is an admitted position that judicial inquiry conducted by the Magistrate/Inquiry Officer is a quasi-judicial proceedings and any aggrieved person can get his or her grievance redressed against police officials, if dissatisfied with the said proceeding in accordance with law. The report in this regard is not binding on the aggrieved person, it is rather an independent right available to every citizen of Pakistan to knock the door of law i.e. by approaching the police official concerned who on receiving information is bound to proceed under Section 154, Cr.P.C., only if a cognizable offence is

made out and investigate the matter independently and strictly in accordance with law. The right to get an FIR lodged in such a situation is an independent right available to every citizen who is aggrieved in such a situation. In the case in hand, the report of the judicial inquiry has even otherwise not considered the stance of the petitioner as required but the right of the petitioner cannot be laid to rest at this stage as her son has been done to death by the police in an unlawful manner according to her stance raised in her application. On this point this Court is guided by the case of "Rahat Naseem Malik v. President of Pakistan and others" (2003 PLC (CS) 759), in which it has been held that Inquiry officer performs, quasi judicial functions and is not supposed to pronounce a judicial verdict, as Judge of a Court of law is required to do so under recognized procedure laid down for conducting, legal proceedings. In another important case reported as "Sakhi Muhammad v. The State" (2004 MLD 1609) in which it has been held that respondents alleged that in judicial inquiry it was found that incident was a genuine police encounter and deceased were rightly killed by police---one of deceased persons was not involved in any case in whole of his life whereas other one was a proclaimed offender---F.I.R. and police Karwai had not mentioned that a pistol was also recovered from dead body of deceased was not involved in any case---F.I.R. further mentioned that rifle was lying besides the dead body of other person who was proclaimed offender---Both deceased were gun-downed from a distance of 1-1/2 miles away---Was neither argued nor brought on record that occurrence had taken place in the shop and the shots fired by the police also hit on the wall or shutter of said shop---Not a single scratch was found on any of police officials who were 17 in number---Crime empties taken from the spot were not sent to fire-arm expert alongwith rifle and pistol of both deceased to ascertain whether they made a fire or not---Prima facie a case was made out against respondents and they would be given sufficient opportunity to produce their evidence before the trial Court---Order passed by Sessions Judge was set aside, in circumstances. In another

similar case reported as "Aslam Jan Khan v. The State through Additional Advocate-General, Bannu and 8 others" (2012 P.Cr.LJ 1797), wherein it has been held that registration of criminal case against the police---petitioners had sought issuance of a writ to District Police Officer and S.H.O. Police Station concerned, directing them to register a case against the Police/Raiding party----Counsel for the police raised preliminary objection on the maintainability of the constitutional petition on the ground that petitions were not maintainable as alternate remedy of complaint by virtue of Chapter XVI of the, Cr.P.C., was available to the petitioners, which was not only adequate, but efficacious, as well----Validity---Said preliminary objection, qua the maintainability of the constitutional petition, was not sustainable in view of peculiar circumstances of the case---Allegation had been made by S.H.O. against the petitioners and the deceased that they had made firing on the Police party, but none from the raiding party had sustained a single injury, while all the injuries were on the persons of the petitioners and his brother and one person had lost his life in the same incident---Constitutional petition was allowed." The same view has been taken in case reported as "Mumtaz Hussain v. Deputy Inspector-General, Faisalabad and 7 others" (PLD 2002 Lahore 78), in which it has been held that mere fact that inquiry was conducted by a judicial Magistrate regarding cause of death would not bar registration of criminal case u/S. 154, Cr.P.C.--Registration of criminal case is independent right of aggrieved person---Such person can report the matter to incharge of concerned police station, who is bound under S. 154, Cr.P.C. to record the report and conduct investigation in accordance with law---Opinion qua the cause of death is not binding on police officer holding investigation under Chap. XIV, Cr.P.C. or Court of law holding trial of accused person---Inquiry report may be relied upon by prosecution or defence and may be given due weight if the conclusion arrived at by the Magistrate are consistent with the evidence brought on record---During investigation or trial, police officer or Court of law, as the

case may be, can legitimately arrive at a contrary finding in the light of evidence brought on record.---Police torture---Death in police custody---- Judicial inquiry exonerating accused person from charge of murder of the person who died in police custody---Complainant and eye-witnesses had seen police giving Chhitter blows on buttocks of the deceased---Effect--- Cause of death was relevant qua the offence under S.302, P.P.C. but it had no bearing qua other offences of illegal arrest and confinement of deceased and injuries caused to him during police custody---criminal case, in the present case ought to have been registered by police under the relevant provisions of Penal Code, 1860, including Ss.302 & 342., P.P.C.---High Court directed Senior Superintendent of Police to register criminal case against accused police officials---Constitutional petition was allowed in circumstances.

10. The application of the petitioner was carefully examined, a perusal of which shows that a cognizable offence is made out against the concerned. Now, the question which comes to light is what ought to be done on the application of the petitioner. In another landmark judgment of the Hon'ble Supreme Court of Pakistan reported as "Muhammad Bashir v. Station House Officer, Okara Cantt., and others" (PLD 2007 Supreme Court 539) in which it has been held by the Hon'ble Supreme Court of Pakistan that no authority vested with an officer In-charge of the police station or with anyone else to hold an inquiry into the correctness or otherwise of the information which was conveyed to the SHO for the purpose of recording of an FIR. Further the Hon'ble Supreme Court has observed "any FIR registered after such exercise i.e. determination of the truth or falsity of the information conveyed to the SHO would get hit by the provisions of Section 162, Cr.P.C. Existence of an F.I.R. was no condition precedent for holding an investigation nor was the same a prerequisite for the arrest of a persons concerned with the commission of cognizable offence; nor does recording of an F.I.R. mean that the S.H.O. or a police office deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned

therein or that any accused persons nominated therein must be arrested--- Check against lodging of false F.I.Rs. was not refusal to record such F.I.Rs, but punishment of such informants under S. 182, P.P.C. etc. which should if enforced, a fairly deterrent against misuse of the provisions of S.154, Cr.P.C." Further the Hon'ble Supreme Court in the said judgment in Para No. 27 observed and held as under:--

"The conclusions that we draw from the above, rather length discussion, on the subject of F.I.R., are as under--

(a) no authority vested with an Officer Incharge of a Police Station or with anyone else to refuse to record an F.I.R. where the information conveyed, disclosed the commission of a cognizable offence;

(b) no authority vested with an Officer Incharge of Police Station or with any one else to hold any inquiry into the correctness or otherwise of the information which is conveyed to the S.H.O. for the purposes of recording of an F.I.R.

(c) any F.I.R. registered after such an exercise i.e. determination of the truth or falsity of the information conveyed to the S.H.O., would get hit by the provisions of Section 162, Cr.P.C.

(d) existence of an F.I.R. is no condition precedent for holding of an investigation nor is the same a prerequisite for the arrest of a person concerned with the commission of a cognizable offence;

(e) nor does the recording of an F.I.R. mean that the S.H.O. or a police officer deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned therein or that any accused nominated therein must be arrested; and finally that,

(f) the check against lodging of false F.I.Rs. was not refusal to record such F.I.Rs. but punishment of such informants under S.182, P.P.C. etc.

which should be, in enforced, a fairly deterrent against misuse of the provisions of S.154, Cr.P.C."

In the light of above discussion, the Incharge Police Officer of a police station is duty bound to register a criminal case against the person complained under Section 154, Cr.P.C. as report of judicial inquiry is no bar in the way for lodging of an FIR and after registration of case, conduct fair investigation independently in accordance with law. With utmost respect the judgments referred to by the learned counsel for Respondents No. 2 to 7 do not attract to the facts of the petitioner's case as the said precedents have no nexus with the lodging of FIR in presence of judicial inquiry against the police officials on behalf of a person who is dissatisfied with the same.

11. Pursuant to above discussion and while relying on a judgment of the apex Court "Muhammad Bashir (supra)", this writ petition is allowed and the District Police Officer, concerned is directed to register a criminal case against Respondents No. 3 to 7, immediately under intimation to the Deputy Registrar (Judicial) of this Bench within a week positively.

(R.A.) **Petition allowed.**

PLJ 2014 Lahore 833

[Multan Bench Multan]

Present: Shahid Bilal Hassan, J.

MUHAMMAD IBRAHIM--Petitioner

versus

MUHAMMAD BUKHSH and 6 others--Respondents

C.R. No. 922 of 1996, heard on 17.3.2014.

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Arts. 17, 79 & 117--Agreement to sell--Failed to prove his stance by producing cogent and unimpeachable evidence--Marginal witnesses were not produced when execution of agreement to sell was deneied by predecessor in interest--Obligation to prove execution through unimpeachable and trustworthy evidence--No reason for non-production of marginal witnesses--Validity--There is no denial to fact that scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in eventuality those were conceived by Art. 79 of Qanoon-i-Shahadat Order, 1984, itself not as a substitute--When marginal witnesses were not produced by petitioner, evidence of scribe is of no value; even in instant case scribe has admitted that he was not conversant and familiar with did not show him his identity card, his evidence also did not lend any support to stance of petitioner, because no transaction i.e. entering into agreement and making payment of earnest money has ever taken in his presence--Petitioner had failed to discharge onus shifted on him after specific denial of predecessor in interest of respondents regarding execution of agreement to sell after receiving earnest money especially when petitioner was not in possession of land, he has rightly been declined decree for specified performance of agreement to sell with perpetual injunction by First Appellate Court and had rightly set aside judgment and decree of trial Court which was

otherwise based on wrong premises and misconceived one--Petition was dismissed. [Pp. 838 & 839] A & B

Mirza Aziz Akbar Baig, Advocate for Petitioner.

Ch. Khalid Mehmood Arain, Advocate for Respondents.

Date of hearing: 17.3.2014.

JUDGMENT

Calling into question the vires of impugned judgment and decree dated 25.06.1996, whereby appeal preferred against the judgment and decree dated 31.07.1995 passed by learned Civil Judge, Mian Channu decreeing the suit filed by the present petitioner, was set aside and the suit of the petitioner for specific performance and permanent injunction titled "Muhammad Ibrahim vs. Muhammad Bukhsh" was dismissed; the appellant has preferred the instant civil revision.

2. The facts leading towards this civil revision may be summarized as such that present petitioner instituted a suit for specific performance with permanent injunction against one Muhammad Bukhsh (predecessor-in-interest of Respondents No. 1 to 7) regarding land measuring 16 kanals, situated in Mauza Jungle Bhusi-pindi, Tehsil Mian Channu, District Khanewal, on the basis of agreement dated 15.09.1988, while contending therein that agreement to sell was entered into for consideration of Rs. 110,000/-, out of which Rs. 20,000/- were paid as earnest money and balance amount was to be paid on 10.01.1989, but the respondent/defendant Muhammad Bukhsh refused to fulfills his part of agreement, which resulted into filing of the suit. Written statement was submitted on behalf of the defendan Muhammad Bukhsh while admitting the agreement to sell, but in terms that agreement was in consideration of Rs. 1.80,000/- and only Rs. 5000/- were paid as earnest money. During the pendency of the suit, the respondent Muhammad Bukhsh moved an application to the learned trial Court maintaining that he never ever appointed a counsel who submitted the

written statement on his behalf and prayed for cancellation of written statement with permission to file a fresh written statement, which application was dismissed by learned trial Court; against which the respondent Muhammad Bukhsh preferred a revision, which allowed and matter was remanded to the learned trial Court for decision afresh recording evidence; the issue was framed regarding the said point and after recording evidence, vide order dated 19.05.1992, the said application was against dismissed; against which again civil revision was preferred the same was allowed vide judgment dated 08.03.1993 on consensus of both the parties. The respondent/defendant Muhammad Bukhsh filed written statement, in which he denied the averments of the plaint and contended that fraud and forgery was committed with him.

From the divergent pleadings of the parties, the following issues were framed:--

1. Whether the impugned agreement to sell dated 15.09.1988 is a fake and fictitious document as well as result, of fraud? OPD

2. Whether the plaintiff has not come in the Court with clean hands? OPD

3. Whether the plaintiff is not in possession of the suit land and as such the suit is not. maintainable on this account? OPD

4. Whether the plaintiff has got no cause of action? OPD

5. Whether the defendant entered into a valid contract of sale of the suit land with the plaintiff on 15.09.1988, received Rs. 20,000/- as earnest money and as such the plaintiff is entitled to the specific performance of the same? OPP

6. Relief

Both the parties adduced their evidence, oral as well as documentary, in pro and contra. After hearing the arguments of learned counsel for the parties, the learned trial Court vide judgment and decree dated 31.07.1995 decreed

the suit in favour of the present petitioner. Feeling aggrieved of the said judgment and decree, the respondent/defendant Muhammad Bukhsh preferred an appeal before the learned District Judge, Khanewal, which ultimately was accepted vide impugned judgment and decree dated 25.06.1996, judgment and decree of learned trial Court was set aside and suit of the present petitioner was dismissed.

3. Being aggrieved of the said judgment and decree, the petitioner has preferred the instant civil revision inter alia on the following grounds:--

. That the judgment of the learned Courts below are at variance;

. That the judgment of learned lower appellate Court is in violation of Order XX Rule 5 of the Civil Procedure Code, 1908;

. That the impugned judgment and decree is against law of Qanun-e-Shahadat Order, 1984;

. That the petitioner has proved his case indubitably through reliable and trustworthy evidence;

. That the learned lower appellate Court has failed to evaluate the evidence in true perspective;

. That the impugned judgment and decree is result of misreading and non-reading of evidence;

. That the learned lower appellate Court has failed to exercise the jurisdiction in proper way and material irregularity and illegality has been committed; hence, the impugned judgment and decree is liable to be set aside and the judgment and decree of learned trial Court, decreeing the suit of the present petitioner, is liable to be restored.

4. Learned counsel for the petitioner while advancing his arguments reiterated the grounds taken in the civil revision and prayed for setting aside the impugned judgment and decree while accepting the revision petition in hand being result of misreading and non-reading of evidence and restoration of the judgment and decree passed by learned trial Court has been prayed for.

5. On the contrary, learned counsel for the respondents/ defendants by favouring the impugned judgment and decree prayed for dismissal of the revision petition in hand being without any force contending that the petitioner has failed to prove his stance by producing cogent and unimpeachable evidence, rather the marginal witnesses have not been produced before the learned trial Court; therefore, when execution of agreement to sell has specifically been denied by predecessor-in-interest of the Respondents No. 1 to 7, the petitioner was under obligation to prove the execution of same through unimpeachable and trustworthy evidence.

6. Heard.

7. It is the case of petitioner that Muhammad Bukhsh, the original owner of the suit land (predecessor-in-interest of the Respondents No. 1 to 7) agreed to sell 16 kanals of land for consideration of Rs. 110,000/- out of which an amount of Rs. 20,000/- was received by him (Muhammad Bukhsh) as earnest money and an agreement to sell dated 15.09.1988 was reduced into writing and after receiving the remaining sale price Rs. 90,000/- to be paid on 10.01.1989, the suit land was to be transferred in favour of the petitioner, but said Muhammad Bukhsh refused to coupe with the demand of the petitioner and ultimately refused to fulfill his part of agreement. This stance of the petitioner has specifically been denied by Muhammad Bukhsh in his life time while submitting his written statement. He (Muhammad Bukhsh) has contended that no such agreement to sell was ever; reached at between him and the petitioner and he did not receive any amount from the petitioner. When execution of agreement to sell has been denied by the defendant/Muhammad Bukhsh (predecessor-in-interest of Respondents No. 1 to 7), execution whereof has to be proved by the petitioner by producing two marginal witnesses before whom such transaction has taken place. Mere taking of a stance in the pleadings is not sufficient, but same has to be proved by producing cogent, reliable, trustworthy and confidence inspiring evidence. Article, 117 of the Qanun-e-Shahadat Order, 1984 elaborates that such person will be under burden to prove any stance which he asserts in the

pleadings. The said provision of law is reproduced in verbatim for ease of reference:-

"117. Burden of proof.--(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

According to Article 17 of the Qanun-e-Shahadat Order, 1984, it is provided that lor proving a document two witnesses are required to be produced. For ease of reference the said provision, of QSO, 1984 is reproduced infra:-

"17. Competence and number of witnesses.--(1) ……..

……
……
……
……..

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,--

(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

(b)

……
…
……
…….

The petitioner has not produced the marginal witnesses namely Zulfiqar Ali and Niamat Ali, but instead he produced one Faiz Muhammad as marginal

witness of the agreement to sell, but in fact he was not enjoying such status, and no reason for non-production of marginal witnesses has been disclosed. When the position is as such that the marginal witnesses are not produced who are required to be produced according to the mandate of law, the execution of agreement to sell is not proved in accordance with law, because under Article 79 of the Qanun-e-Shahadat Order, 1984, it is mandatory to prove the contents of a document by producing two truthful witnesses. For ease of reference, said Article is reproduced as under:-

"Article 79. Proof of execution of document required by law to be attested.-- 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: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Furthermore, there is no denial to the fact that scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Art. 79 of Qanun-e-Shahadat Order, 1984, itself not as a substitute. In this case, when the marginal witnesses are not produced by the petitioner, the evidence of scribe is of no value; even in this case the scribe has admitted that he was not conversant and familiar with Muhammad Bukhsh and he (Muhammad Bukhsh) did not show him his identity card, meaning thereby in the given scenario, his evidence also does not lend any support to the stance of the petitioner, because no transaction i.e. entering into agreement and making payment of earnest money has ever taken in his presence. In this regard safer reliance can be placed on Hafiz Tassaduq Hussain vs. Muhammad Din

through Legal Heirs and others (PLD 2011 Supreme Court 241) whore it has beenj held that:-

"Agreement to sell--Execution--Proof--Scribe of document, evidence of--Requirement of two attesting witnesses--Suit filed by plaintiff was dismissed by trial Court on the ground that he failed to produce two marginal witnesses in proof of execution of agreement of sell--Judgment and decree passed by trial Court was maintained by Lower Appellate Court and High Court--Validity--Transaction of sale of immovable properly (if not a conditional sale) was the conclusive transfer of an absolute title and ownership of property unto the vendee in presentee, while agreement to sell was meant for accomplishing the object of sale in futurity and for all intents and purposes it pertained to future obligations of the parties thereto--Sale agreement/agreement to sell was duly covered and fell within the pale, of Art. 17 of Qanun-e-Shahadat, 1984--Purpose and object of attestation of document by certain number of witnesses and its proof through them was meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and thus legislature in its wisdom had established class of documents which were specified in Art. 17 of Qanun-e-Shahadat, 1984--For validity of instruments falling within Art. 17 of Qanun-e-Shahadat, 1984, the attestation as required therein was absolute and imperative—For the purpose of proof of such a document, attesting witnesses had to be compulsorily examined as per requirement of Art. 70 of Qanun-e-Shahadat, 1984, otherwise it was not to be considered and taken as proved and used in evidence--Such principle of law was in line with the principle that where law required an act to be done in a particular manner, it had to be done in that way and not otherwise--Scribe of document could only be a competent witness in terms of Arts. 17 and 79 of Qanun-e-Shahadat, 1984, if he had fixed his signature as an attesting witness of the document and not otherwise--Signing of document in the capacity of a writer did not fulfill and meet mandatory requirement of attestation by him separately--Scribe of document could be examined by concerned parly for

corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Art. 79 of Qanun-e-Shahadat, 1984, itself not as a substitute--Mandatory provisions of law had to be complied and fulfilled and only for the reasons or the perception that such attesting witness if examined would turn hostile did not absolve the concerned party of its duty to follow the law and allow the provisions of Qanun-e-Shahadat, 1984, relating to hostile witness take its own course--Supreme Court declined to interfere in the judgments and decrees passed by the Court below--Appeal was dismissed."

8. In view of the above, the petitioner has failed to discharge the onus shifted on him after specific denial of the predecessor-in-interest of Respondents No. 1 to 7 i.e. Muhammad Bukhsh (deceased) regarding execution of agreement to sell after receiving the earnest money especially when the petitioner is not in possession of the land in dispute, he has rightly been declined the decree for specified performance of agreement to sell with perpetual injunction by the learned first Appellate Court and has rightly set aside the judgment and decree of the learned trial Court which is otherwise based on wrong premises and misconceived one. The conclusion drawn by the learned first appellate Court based on cogent reasoning and upto the dexterity. No misreading and non-reading of evidence, oral as well as documentary, has been committed while passing the impugned judgment and decree, rather each and every aspect of the case has been kept in view. There is no occasion in the impugned judgment calling for interference by this Court at this revisional stage, because the scope of revision is limited in nature, while dealing with the revision petitions the Courts have only to see the following points, which have been elaborated in Section 115 of the Code of Civil Procedure, 1908 and reads as under:-

"115.-1 [(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in winch no appeal lies thereto, and if such subordinate Court appears:--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed, to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit;

……

…..

9. The above discussion ends with the observation that the impugned judgment and decree is bcised on cogent and plausible reasoning, the same is upheld and while placing reliance on the judgments (Supra) the revision petition in hand is hereby dismissed having no force.

(R.A.) **Petition dismissed.**

PLJ 2014 Lahore 885 (DB)

Present: Amin-ud-Din Khan and Shahid Bilal Hassan, JJ.

Mst. PARVEEN AKHTAR--Appellant

versus

Mst. AMNA BIBI and 2 others--Respondents

R.F.A. No. 163 of 2012, heard on 24.2.2014.

Universal Truth--

----A man can tell a lie but the document not. [P. 887] A

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Subsequent transfer of plot--Became owner of plot vide registered sale deed--Respondent was not owner of plot--Clerical mistake--No exertion was ever made until now to get corrected date--In exchange deed, allegedly entered into by meaning thereby some foul-play was conspired by parties to create fuss for respondent in whose favour later on plot owned by respondent was transferred through General Attorney of respondent--Reasons recorded by trial Court in impugned judgment were well based and solid, no misreading and non-reading of evidence had been committed; therefore, impugned judgment and decree did not call for any interference by High Court. [P. 887] B & C

M/s. Muhammad Riaz Lone and Zafar Iqbal Chaudhry, Advocates for Appellant.

Ch. Nasim Riaz Gorsi, Advocate for Respondent No. 2.

Ch. Muhammad Imtiaz Ahmad Khan, Advocate for Respondent No. 3.

Date of hearing: 24.2.2014.

JUDGMENT

SHAHID BILAL HASSAN, J.--Calling into question the vires of impugned judgment and decree dated 12.12.2011 passed by learned Civil Judge 1st

Class, Lahore whereby suit for declaration, cancellation of documents, specific performance, possession with consequential relief and permanent injunction, has been dismissed; the appellant has preferred the instant appeal.

2. The facts culminating into this appeal are as such that appellant was owner of a plot measuring 4 marlas, Khasra No. 9631, Khatooni No. 198, Scheme No. 105 vide registered Sale-Deed No. 2651, Bahi No. 1, Volume No. 2565 P.P. 190 to 192 dated 04.02.1986 situated in Mauza Niaz Baig, District Lahore; that the Respondent No. 1 was owner of a Plot No. 126 measuring 5 marlas falling in Khasra No. 5821 Khatooni No. 1810 vide registered Sale-Deed No. 16885 Bahi No. 1 dated 1.9.1987 situated, in Mauza Niaz Baig, Tehsil & District Lahore, that the appellant and Respondent No. 1 (mother of appellant) agreed to exchange their above said plot with each other and accordingly exchanged deed was executed, which was duly registered vide document No. 1706 Bahi No. 1 Volume No. 93 P.P.78 to 79 dated 20.04.1986 with the Sub-Registrar Sadar, Lahore and the possession of both the said plots were delivered to each other accordingly and it was agreed that they would get transferred the said plots in their names later on; that the appellant got transferred her plot in the name of Respondent No. 1 by performing her part of exchange deed but Respondent No. 1 lingered on the matter inspite of repeated demands; that due to some difference Later on, the Respondent No. 1 transferred the said Plot No. 126 in the name of Respondent No. 3 vide sale-deed. No. 9860 Bahi No. 1, Volume No. 258 dated 05.09.2003 registered with Sub-Registrar Allama Iqbal Town, Lahore through Respondent No. 2, her General Attorney, followed by Mutation No. 51356 dated 20.11.2003; that the said exchange deed was neither revoked nor rescinded by the appellant and Respondent No. 1, pursuant to which the appellant has become owner of the said Plot No. 126 Khasra No. 5821 measuring 5 marlas, situated in Mauza Niaz Baig, Lahore; therefore, the subsequent transfer of said plot to Respondent No. 3 through Respondent No. 2 is against law and facts; hence, the suit. The respondents were proceeded against ex parte after publication proclamation in the newspaper.

Ex parte evidence of the appellant was recorded and vide impugned judgment and decree, the suit of the appellant was dismissed.

3. Being aggrieved of the said judgment and decree, the appellant has preferred the instant appeal inter alia on the following grounds:--

1. That the impugned judgment and decree is against law and facts;

2. That due to clerical mistake the date 01.09.1987 was mentioned in the Sale-Deed No. 16885, but in fact same was 01.09.1981, and this error or defect can be cured, and the learned trial Court has power to amend the same;

3. That there is no evidence in rebuttal, but inspite of that the suit has been, dismissed;

4. That the learned trial Court has not exercised jurisdiction in proper way;

5. That the impugned judgment and decree is against principle of procedural fairness and judicial propriety;

6. That the physical possession of the plot in dispute was delivered, to the appellant, but all these facts have been ignored while passing the impugned judgment and decree, hence, the same is not sustainable in the eye of law and liable to be set aside.

4. Learned counsel for the appellant while reiterating the grounds urged in the appeal has prayed for acceptance of the same consequent whereupon decretal of the suit filed by the appellant has been prayed for.

5. The Respondent No. 1 after due process has been proceeded against ex parte.

6. Learned counsels for the Respondents No. 2 and 3 have strongly opposed the appeal in hand and by favouring the impugned judgment and decree have prayed for dismissal of the appeal in hand.

6. Heard.

7. It is a universal truth that a man can tell a lie but the documents not. It is the case of the appellant that she and Respondent No. 1 (her mother) agreed to exchange the plots, owned by them, respectively vide duly registered exchange deed No. 1706 Bahi No. 1 Volume No. 93 PP 78 to 79 dated 20.04.1986 with the Sub-Registrar, Lahore (when the Respondent No. 1 was not owner of the said Plot No. 126-measuring 5 marlas bearing Khasra No. 5821 Khatooni No. 1810) as allegedly the Respondent No. 1 became owner of said plot on 01.09.1987 vide registered Sale-Deed No. 16885 Bahi No. 1, while the exchange deed (Ex.P1) was executed in the year 1986 i.e. on 20.04.1986; when the position is a such chat the Respondent No. 1 was not owner of the plot how she agreed to exchange the same with the appellant. So far as the stance of the appellant that it was clerical mistake and in fact the Sale-Deed No. 16885 was executed on 01.09.1981, is concerned, it is noteworthy here that no exertion was ever made uptill now to get corrected the said date (01.09.1987) as 01.09.1981, in the exchange deed, allegedly entered into by the appellant and the Respondent No. 1, meaning thereby some foul-play was conspired by the appellant and the Respondent No. 1 to create fuss for the Respondent No. 3, in whose favour later on the plot owned by the Respondent No. 1 has been transferred through General Attorney of Respondent No. 1 i.e. Respondent No. 2, execution of General Power of Attorney in whose favour has not been denied by the Respondent No. 1 or by the appellant. The reasons recorded by learned trial Court in the impugned judgment are well based and solid, no misreading and non-reading of evidence has been committed; therefore, the impugned judgment and decree does not call for any interference by this Court.

8. The above discussion ends with the observation that the impugned judgment and decree is based on cogent and plausible reasoning, the same is upheld and the appeal in hand is hereby dismissed having no force.

(R.A.) **Appeal dismissed.**

PLJ 2014 Lahore 919

Present: Shahid Bilal Hassan, J.

MUHAMMAD NAWAZ JAPPA--Petitioner

versus

GHULAM HAIDER and 3 others--Respondents

C.R. No. 4049 of 2010, decided on 11.6.2014.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Scope--Scope of revision is limited in nature, while dealing with revision petitions Courts have only to see following points, which have been elaborated in Section 115 of CPC. [P. 920] A

Civil Procedure Code, 1908 (V of 1908)--

----O. XXXIX & R. 3(2)--Contempt proceedings--Violation of interim injunction--Validity--While interim injunction was admittedly granted meaning thereby at time of granting interim injunction, petitioner was not in possession of property and when position is a such there appears no question of initiating contempt proceedings against respondents, because they had not violated Court order. [P. 921] B

Sardar Faiz Rasool Khan Jalbani, Advocate for Petitioner.

Date of hearing: 11.6.2014.

ORDER

By way of this civil revision, the petitioner has called into question order dated 29.01.2010, passed by learned trial Court whereby application of the petitioner for initiating contempt proceedings against the respondent was dismissed as well as order dated 17.07.2010 passed by learned Appellate Court whereby appeal preferred against order of learned trial Court also met with the same fate.

2. The facts giving rise to the instant civil revision may be summarized as such that the petitioner instituted a suit for permanent injunction titled "Muhammad Nawaz vs. Ghulam Haider, etc." on 06.05.1999 regarding suit land situated in Chak No. 191/RB Tehsil & District Faisalabad. On 06.05.1999, the learned trial Court granted ad interim injunction. The petitioner filed an application under Order XXXIX Rule 2(3) of Code of Civil Procedure, 1908 for initiation of contempt proceedings against the respondents for allegedly violating the interim injunction dated 06.05.1999. The said application was contested by the respondents. The divergent pleadings were given the form of issues on 01.01.2002. Evidence of both the parties was recorded by learned trial Court and on completion of the same, the learned trial Court after hearing arguments vide impugned order dated 29.01.2010 dismissed the application of the petitioner, against which an appeal was preferred but same ultimately met with the same fate vide impugned order dated 17.07.2010; hence, this civil revision.

3. Learned counsel for the petitioner has argued that the impugned orders are against law and facts of the case; that both the learned Courts below have failed to appreciate the evidence on record as per settled standards of law, hence, the impugned orders are result of misreading and non-reading of evidence. Adds that the petitioner has proved his case through reliable and trustworthy evidence, but even then both the learned Courts have dismissed his application as well as appeal; that both the learned Courts have committed material irregularities and illegalities while declining the relief prayed for; hence, the impugned orders are not sustainable in the eyes of law and liable to be set aside; resultantly, while accepting the application of the petitioner, the respondents may be punished under Contempt of Court Act and possession of the petitioner over the suit land may be restored.

4. Heard.

5. The scope of revision is limited in nature, while dealing with the revision petitions the Courts have only to see the following points, which have been elaborated in Section 115 of the Code of Civil Procedure, 1908 and reads as under:--

"115.-1[(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit;

.....

....."

In the present matter, the learned Courts below have rightly reached the conclusion that there is conflict in stances of the petitioner, allegedly taken in the F.I.R. No. 260 dated 09.05.1999 and in the application for initiating contempt proceedings, because in the F.I.R. it is the version of the petitioner that respondents allegedly took over possession of the disputed property on 01.05.1999, while the interim injunction was admittedly granted on 06.05.1999, meaning thereby at the time of granting interim injunction, the petitioner was not in possession of the property in question and when position is a such there appears no question of initiating contempt proceedings against the respondents, because they have not violated the

Court order. Therefore, both the learned Courts have concurrently reached a right conclusion and have rightly dismissed the application as well as appeal preferred by the petitioner. No illegality, irregularity or wrong exercise of jurisdiction have been committed by the learned Courts below warranting interference of this Court on revisional jurisdiction. Resultantly, the instant civil revision being devoid of any force, is hereby dismissed in limine.

(R.A.) **Revision dismissed.**

PLJ 2014 Lahore 1014

[Multan Bench Multan]

Present: Shahid Bilal Hassan, J.

ALI SHER KHAN through its Special Attorney--Petitioner

versus

FAYSAL BANK LTD., KARACHI through its Chairman/President and 2 others--Respondents

W.P. No. 16357 of 2012, decided on 20.3.2014.

Financial Institutions (Recovery of Finances) Ordinance, 2001--

----S. 7(4)--Constitution of Pakistan, 1973--Art. 199--Constitutioal Petition--Possession of car on lease basis through repossession agents--Challenge to--Question of--Maintainability of petition--Defaulter of Bank--Authorized to take possession of vehicle--Factual controversy cannot be taken into consideration--Short of four installements--Validity--All these facts divulge factual controversy inter se parties which cannot be determined at that stage while exercising writ jurisdiction to resolve such controversy between parties, proper forum was Banking Court which had exclusive jurisdiction in such like matters as provided under Section 7(4) of Ordinance--Petition was dismissed. [P. 1015] A

Mr. Javed Ahmad Khan, Advocate for Petitioner.

Mr. Safdar Ramay, Advocate for Respondents.

Date of hearing: 20.3.2014.

ORDER

By way of this constitutional petition, the petitioner seeks indulgence of this Court to pass a direction to the respondents to return Toyota Corolla Car No.

LEE-09-2101 to the petitioner by declaring the possession of the said vehicle through their repossession Agents as illegal, void ab initio, based on mala fide and without lawful authority.

2. Brief facts necessary for disposal of the instant writ petition may be summarized as such that the petitioner got a car Toyota Corolla XLI from the Respondents No. 1 and 2 on lease basis, which was delivered to him on 11.11.2009 vide a Delivery Letter No. 264 by authorized Agent of the Bank namely City Multan Motors Ltd. Khanewal Road, Multan, which was duly registered with Excise and Taxation Department vide Registration No. LEE-09-2101. The said vehicle was taken into possession by the Bank, which constrained the petitioner to file a Writ Petition No. 342 of 2012 and consequently the vehicle was delivered to the petitioner. Again on 05.11.2012, the Agency of the Bank took the possession of the vehicle without any lawful justification; hence, this writ petition.

3. Learned counsel for the petitioner has argued that there was no default on the part of petitioner at the time of repossession of the vehicle; that the instructions of the Respondent No. 3 State Bank of Pakistan have been violated and without lawful authority have taken possession of the vehicle through repossession Agent, which tantamount to contempt of Court as the vehicle was handed over to the petitioner on the direction of the Court. Therefore, direction may be issued to the respondents to return the vehicle bearing Registration No. LEE-09-2101 Toyota Corolla. Relies on Mst. Safina Aslam and others Vs. Muslim Commercial Bank and another 2011 CLC 18-Lahore and Muhammad Riaz Vs. President, P.C. Bank, Lahore 2013 CLC 1705-Lahore.

4. Learned counsel appearing on behalf of the respondents has contested the instant writ petition by maintaining that the petitioner is defaulter of the Bank and under the rules and regulations, the Bank is authorized to take possession of the Car/Vehicle; that notices have duly been, served upon the original lessee to pay the default amount but he did not respond, so the vehicle has been sold by the Bank through auction in the month of December, 2012; that at the time of disposal of earlier writ petition filed by the petitioner, it was categorically that if the petitioner will make any default in future, the bank will be at liberty to repossess the vehicle; therefore, the petitioner has no right to file this writ petition and the instant writ petition is not maintainable before this Court because the proper forum is the Banking Court.

5. Heard.

6. In writ jurisdiction, the factual controversy cannot be taken into consideration; the petitioner states that he is not defaulter of the Bank, While the bank's stance is that the petitioner has not paid the installments and he is short of four installments and after serving of notice, the vehicle has been auctioned again through publication in the newspaper. All these facts divulge the factual controversy inter se the parties, which cannot be determined at this stage while exercising writ jurisdiction; even otherwise, to resolve this controversy between the petitioner and the respondents, the proper forum is the Banking Court, which has exclusive jurisdiction in such like matters as provided under Section 7(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

7. The case law cited by learned counsel for the petitioner, with utmost respect, has no relevance to the facts and circumstances of the present case; thus, does not render any assistance to the petitioner's cause.

8. In view of above, without touching the merits of the case and discussing the conduct of the petitioner during the course of proceedings in the earlier writ petition, the instant writ petition being not maintainable and devoid, of any force is hereby dismissed.

(R.A.) **Petition dismissed.**

2015 P Cr. L J 1729

[Lahore]

Before Muhammad Anwaarul Haq and Shahid Bilal Hassan, JJ

MUHAMMAD SARWAR and another---Appellants

versus

MUHAMMAD RIAZ and another---Respondents

Criminal Appeal No.1104 and Murder Reference No.222 of 2013, heard on 9th October, 2014.

Penal Code (XLV of 1860)---

----S. 302(b)---Criminal Procedure Code (V of 1898), S.345---Qatl-i-amd---Appreciation of evidence---Compromise---Father and mother of the deceased, who were his only legal heirs, had compounded the offence of murder of their son and had forgiven the accused in the name of Allah waiving their right of Qisas and Diyat---Legal heirs of the deceased had shown no objection to acquittal of the accused---Trial Judge had shown his satisfaction with regard to the genuineness of the compromise---Compromise had been arrived at between the parties without any duress and coercion and was in the interest of the parties so that they might forget the existing estrangement and could live in harmony and peace---Permission to compound the offence was granted---Conviction and sentence, recorded against accused by the Trial Court, were set aside and the accused was acquitted of the charge, and was ordered to be released, in circumstances.

Umar Hayat-1 for Appellants.

Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.

Nemo for the Complainant.

Date of hearing: 9th October, 2014.

JUDGMENT

SHAHID BILAL HASSAN, J.---Appellant Muhammad Sarwar was tried in case FIR No.609/2010 dated 29-8-2010 under sections 302/324/148/149,

P.P.C., Police Station Bhikki District Sheikhupura and through the impugned judgment dated 29-6-2013 passed by the learned Additional Sessions Judge, Sheikhupura, he has been convicted under section 302(b), P.P.C. and sentenced to death with a compensation of Rs.1,00,000 to the legal heirs of the deceased under section 544-A, Cr.P.C.

Murder Reference No.222 of 2013 for confirmation or otherwise of death sentence awarded to appellant Muhammad Sarwar shall also be replied through this single judgment.

2. The learned counsel for the appellant has pointed out that Muhammad Sarwar appellant has been convicted and sentenced only to the extent of murder of Muhammad Ramzan and he has categorically been acquitted from the charge of murder of Muhammad Javed and causing injury to Muhammad Pervez and Mst. Tayyaba Bibi. The learned counsel further adds that the complainant of this case Muhammad Riaz had filed two different PSLAs bearing No.124 of 2013 titled (Muhammad Riaz v. Muhammad Fiaz etc.) and 137 of 2013 titled (Muhammad Riaz v. Muhammad Ashraf etc.) but subsequently both the petitions for special leave to appeal have already been dismissed as withdrawn by the learned counsel for the petitioner (complainant in this case). The learned counsel states that no appeal against acquittal of Muhammad Sarwar from the charge to the extent of murder of Muhammad Javed, and causing injuries to Muhammad Pervez and Mst. Tayyaba Bibi has been filed by the complainant or the legal heirs of Muhammad Javed deceased.

3. In this appeal, an application i.e. Criminal Miscellaneous No.771-M of 2014 under Section 345 Cr.P.C. seeking permission to compound the offence has been filed and a copy of the said application was sent to the learned Sessions Judge, Sheikhupura for submission of his report with regard to genuineness or otherwise of the compromise.

4. Report has been received from the learned Sessions Judge, wherein it is mentioned as under:-

"According to the statements of Muhammad Hanif father and Mst. Sughran Bibi mother of Muhammad Ramzan deceased/victim appeared before this court and they got recorded their statements, wherein they have categorically stated that their deceased son Muhammad Ramzan was un-married and therefore, they were his only legal heirs. They have been identified by their counsel Mr. Muhammad Zaman Sohail, Advocate. They further stated that they had compounded the offence of murder of their son with Muhammad Sarwar convict and have forgiven him in the name of Allah Almighty, waiving their right of Qisas and Diyat against him. They showed no objection to his acquittal."

It is contended by the learned counsel for the petitioner/appellant that no appeal against acquittal is pending against Muhammad Sarwar appellant and the office report dated 9-10-2014 also confirms the said stance taken by the learned counsel for the petitioner/appellant.

5. Learned Deputy Prosecutor General while opposing the compromise contends that although State has not preferred any appeal against the acquittal under section 302/34, P.P.C. or 324, P.P.C. against Muhammad Sarwar but act of Muhammad Sarwar appellant calls for his sentence under section 311, P.P.C. keeping in view of his brutal act during the occurrence who has caused murder of an innocent young boy and he is liable to be convicted for Qatl-i-amd keeping in view section 301, P.P.C. On the other hand, the learned counsel appearing on behalf of appellant Muhammad Sarwar contends that section 311, P.P.C. keeping in view section 345(6), P.P.C. does not attract in case of Tazir as the actual consequence of the acceptance of compromise is acquittal of accused. The learned counsel further contends that after acquittal of appellant from other charges and in the absence of any appeal filed on behalf of the complainant or the legal heirs of injured in this case Muhammad Sarwar appellant deserves acquittal under section 345(6), P.P.C.

6. We find that the compromise has been arrived at between the parties

without any duress and coercion, which even otherwise is in the interest of the parties so that they may forget the existing estrangement and may live in harmony and peace. The learned Sessions Judge has shown his satisfaction with regard to the genuineness of the compromise and the learned Deputy Prosecutor General has also half heartedly opposed acquittal of the appellant. The only objection raised by the learned Deputy Prosecutor General in this case is with regard to the applicability of sections 311, P.P.C. and 345(6), P.P.C. For ready reference section 345(6), P.P.C. is reproduced as under:-

"(1) .....
(2) .....
(3) .....
(4) .....
(5) .....
(6) The composition of an offence under this section shall have the effect of an acquittal of the accused [with whom the offence has been compounded]".

7. The law is very clear on this point that if composition of an offence has been made under this section, the same shall have the effect of an acquittal of the accused. We, therefore, feel no hesitation in granting permission to compound the offence. Accordingly, Criminal Miscellaneous No.771-M of 2014 is accepted and Criminal Appeal No.1104 of 2013 is allowed with the result that conviction and sentence recorded against the appellant Muhammad Sarwar by the learned trial court through the impugned judgment dated 29-6-2013 is set aside and he is acquitted of the charge. The appellant is in jail, he shall be released forthwith if not required in any other case.

8. Death Sentence of appellant/convict Muhammad Sarwar is **NOT CONFIRMED** and Murder Reference No.222 of 2013 is answered in the **NEGATIVE**.

HBT/M-377/L **Appeal allowed.**

2015 Y L R 1352

[Lahore]

Before Shahid Bilal Hassan, J

Mst. FATIMA BIBI through Legal Heirs and others---Appellants

versus

Mst. IRSHAD BEGUM and others---Respondents

Regular Second Appeal No.41 of 1995, decided on 4th July, 2014.

(a) Punjab Pre-emption Act (I of 1913)---

----S. 15---Specific Relief Act (I of 1877), S. 42---Qanun-e-Shahadat (10 of 1984), Art. 58---Transfer of Property Act (IV of 1882), S.52---Pre-emption, suit for---Declaratory suit against vendee by vendor---Effect---Lis pendens, principle of---Applicability---Pre-emptor filed suit for possession through pre-emption whereafter vendor challenged subject sale deed on the grounds of fraud and misrepresentation during pendency of said suit for pre-emption---Contention of pre-emptor was that declaratory decree had been obtained through collusion and fraud---Both the suits were decreed concurrently---Validity--- Suit for possession on the basis of pre-emption was instituted prior to the suit for declaration seeking cancellation of sale deed which was filed during pendency of said suit---Right of pre-emption had already been exercised by the pre-emptor---Sale of suit land was affected through a registered sale deed which had not been denied by the vendee---Suit for declaration had been instituted collusively against the vendee in order to thwart the right of pre-emption---Decree obtained through fraud and collusion had no legal effect upon the decree passed in a suit for pre-emption and same would not affect the rights of pre-emptor accrued in the suit land---Principle of lis pendens was applicable in the present suit to protect the rights of pre-emptor---Pre-emptor was not party to the suit filed for declaration by the vendor and same was not binding upon him in any manner---Declaratory decree could not be allowed to sustain as principle of lis pendens would

protect the rights of successful litigant---Said declaratory decree would be termed as resale in favour of vendor and not otherwise---When a specific plea had been taken then same had to be proved---No illegality, irregularity or wrong exercise of jurisdiction had been pointed out in the impugned judgment decree passed by the Appellate Court---No misreading or non-reading of evidence had been made by the Appellate Court---Impugned judgment and decree was well reasoned which was based on proper appreciation of law---Revision was dismissed in circumstances.

Muhammad Iqbal and others v. Khushi Muhammad through Legal Heirs and others 1995 MLD 1886; Mst. Amanat Bibi v. Khuda Dad and others 1994 CLC 979; Saidan Gul v. Mst. Shughla and 8 others NLR 1980 Revenue BOR 177; Maqbool Ahmed and others v. Ghulam Hussain and others 2007 SCMR 1223; Malik Hussain and others v. Lal Ram Chan and others PLD 1970 SC 299; Ghulam Mehmood v. Hukam Khan and others 2001 MLD 366; Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 SCMR 1024; Ahmad Sher and others v. Muhammad Hayat PLD 2006 SC 448; Falak Sher v. Muhammad Rashid and another PLD 1982 Lah. 426; Munir Hussain v. Muhammad Shafi and another 1981 CLC 1712; Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 CLC 950; Muhammad Khan and another v. Zir Mir Khan and 2 others 1981 CLC 129; Syed Zafar Ali Shah v. Fazal Shah and 2 others 1983 CLC 1816; Mst. Bibi Mehr Jana v. Sultan Muhammad 1985 CLC 1635; Riaz Ahmed v. Asghar Ali and others 2010 YLR 278; Gram Panchayat of Village Naulakha v. Ujagar Singh and others AIR 2000 SC 3272; Muhammad Boota, and others v. Addl. District Judge, Gujranwala and others NLR 2006 Civil 4 and Khushro S. Gandhi and others v. N.A. Guzder (dead) by his legal representatives and others AIR 1970 SC 1468 ref.

Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 SCMR 1024; Ahmad Sher and others v. Muhammad Hayat PLD 2006 SC 448;

Falak Sher v. Muhammad Rashid and another PLD 1982 Lah. 426; Munir Hussain v. Muhammad Shafi and another 1981 CLC 1712; Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 CLC 950; Muhammad Khan and another v. Zir Mir Khan and 2 others 1981 CLC 129; Mst. Bibi Mehr Jana v. Sultan Muhammad 1985 CLC 1635 and Muhammad Boota, and others v. Addl. District Judge, Gujranwala and others NLR 2006 Civil 4 rel.

(b) Administration of justice---

----No one could be non-suited due to approaching higher forum through wrong form of remedy.

Syed Kabeer Ahmad Mahmood for Appellant.

Ch. Muhammad Ashraf Dhaloon, Vice-Counsel for Appellant (in C.R. No.1025 of 1995).

Sheikh Muhammad Rafique Goreja and Tahir Mahmood for Respondent.

Date of hearing: 18th March, 2014.

JUDGMENT

SHAHID BILAL HASSAN, J.---Initially, Mst. Fatima Bibi preferred R.S.A. against judgment and decree dated 6-12-1995, which was admitted to regular hearing; but during the pendency of the second appeal, the appellants moved a C.M. No.548-C of 1997 for converting the appeal into civil revision on the ground that value for the purpose of jurisdiction was Rs.6480 and value for the purpose of court fee was Rs.80,400 and suit was originally filed on 24-2-1979, so civil revision was competent, but inadvertently, Regular Second Appeal has been filed, which application has been contested by the respondents on the ground that the scope of R.S.A. and Civil Revision are different. However, on the basis of mere approaching the higher forum through wrong form of remedy, one cannot be non-suited as valuable interest of the parties are involved and it would be against the principles of natural justice, too; therefore, in the interest of justice, the application bearing C.M.

No.548-C of 1997 is accepted and the R.S.A. is converted into civil revision.

2. Now in order avoid conflicting judgment, by way of this single judgment, this Court intends to decide, the instant R.S.A. (converted into Civil Revision) as well as Civil Revision bearing No. 1025-D of 1995 preferred by Ghulam Haider and others, having assailed one and same judgment dated 6-12-1995 passed by learned Addl. District Judge, Vehari, whereby appeal preferred against judgment and decree dated 2-12-1985, was dismissed.

3. Tersely, the facts necessitating to approach this Court by assailing the impugned judgment and decree dated 6-12-1995 may be summarized as such that 175 Kanals of land situated in Chak No.473/EB Tehsil Burewala was sold by one Ghulam Rasool (predecessor in interest of Mst. Fatima Bibi and others) to Nazir Ahmad and Muhammad Shafi (respondents Nos.13 and 14) for consideration of Rs.328,000 through registered sale deed dated 26-2-1978. On 24-2-1979, Ch. Muhammad Amin, predecessor in interest of the respondents Nos.1 to 12 instituted a suit for possession through pre-emption claiming himself to be co-owner in the land in question and had superior right as against stranger vendees. He asserted that land in question was originally sold for Rs.125,000, but in order to deter right of pre-emption ostensible sale price of Rs.328,000 was mentioned. The suit was contested by the vendees/respondents Nos.13 and 14 by raising factual as well as legal objections in their written statement submitted on 4-9-1979 and also denied the superior right of pre-emption of the pre-emptor. The learned trial Court, summed up the divergence in the pleadings into following issues:--

(1) Whether the plaintiff has no cause of action to bring this suit? OPD

(2) Whether the suit is not maintainable in its present form? OPD

(3) Whether the plaintiff is estopped to bring this suit on account of his conduct? OPD

(4) Whether the suit is collusive? OPD

(5) Whether the plaint is deficient in court fee, if so, its effect? OPD

(6) Whether the suit is barred by time? OPD

(7) Whether the suit property has not been correctly described? OPD

(8) Whether the defendants have improved the suit land, if so, to what value? OPD

(9) Whether the defendants are entitled to special costs? OPD

(10) Whether the plaintiff possesses superior right of pre-emption qua the vendees-defendants? OPP

(11) Whether the sale price of Rs.328,000 was fixed in good faith or actually paid? OPD

(12) If issue No.11 is not decided in affirmatively then what was the market value of the suit land? OP Parties

(13) Relief.

Meanwhile, Ghulam Rasool, vendor (predecessor in interest of Mst. Fatima Bibi and others) instituted a declaratory suit against the vendees Nazir Ahmad, etc. (respondents Nos. 13 and 14) seeking cancellation of the sale deed dated 26-2-1978 ibid on the ground of fraud and misrepresentation on 14-4-1979, during pendency of the suit for pre-emption. He (Ghulam Rasool) also moved an application for impleading him as party in the suit for pre-emption, which was subsequently allowed vide order dated 22-9-1982 and he was impleaded as defendant No.3, who filed his written statement. Similarly, Muhammad Amin pre-emptor (predecessor in interest of Mst. Fatima Bibi and others) was also impleaded as party in suit for declaration instituted by Ghulam Rasool. The said suit for declaration was contested by the vendees (Nazir Ahmad and Muhammad Shafi) as well as pre-emptor (Ch. Muhammad Amin). The learned trial Court consolidated both the suits vide order dated 4-1-1981 and framed the following consolidated issues:--

(1) Whether the plaintiff in suit No.66 has no cause of action to bring this suit? OPD

(2) Whether the plaintiff in suit No.66 has no locus standi to bring this suit? OPD

(3) Whether the Suit No.66 is not maintainable in its present form? OPD

(4) Whether the plaintiff in suit No.66 is estopped to bring this suit on account of his conduct? OPD

(5) Whether the suit No.66 is collusive? OPD

(6) Whether the plaint in suit No.66 as well as in suit No.325 is deficient in court fee? If so is effect? OPD

(7) Whether the suit No.66 is barred by time? OPD

(8) Whether the suit property in suit No.66 has not been correctly described? OPD

(9) Whether the plaintiff in suit No.325 has no cause of action to bring his suit? OPD

(10) Whether the suit No.325 is not maintainable in its present form? OPD

(11) Whether the plaintiff in suit No.325 is estopped by his words and conduct to bring this suit? OPD

(12) Whether the suit No.325 is false and frivolous and the defendants are entitled to special costs? If so to what extent? OPD

(13) Whether the defendants Nos.1 and 2 in both the suits have improved the suit land. If so, to what value? OPD

(14) Whether the defendants in suit No.66 are entitled to special costs under section 35-A of the C.P.C.? OPD

(15) Whether the sale of the suit land by way of registered sale deed No.73 dated 26-2-1978 is unlawful, fraudulent, mala fide, without consideration and result of undue influence and therefore, void and liable to cancellation and ineffective upon the rights of plaintiff Ghulam Rasool in suit No.325 the defendant in suit No.66? OPD (Ghulam Rasool plaintiff in suit No.325)

(16) If issue No.15 is not proved, then whether the plaintiff Ch.

Muhammad Amin in suit No.66 possesses a superior right of pre-emption as against the vendee defendants Nos.1 and 2 in respect of the suit land? OP Plaintiff in suit No.66

(17) Whether the sale price of Rs.328,000 was fixed in good faith or actually paid? OPD 1 and 2

(18) If issue No.17 is not proved in affirmative then what was the market value of the suit land at the time of its sale? OPP

(19) Relief.

After recording evidence of both the parties, in pro and contra, the learned trial Court vide judgment dated 29-10-1981 decreed the suit for possession through pre-emption in favour of the pre-emptor, predecessor in interest of the respondents Nos.1 to 12 and dismissed the declaratory suit of Ghulam Rasool (predecessor in interest of the present petitioners); latter preferred two separate appeals against the said judgment and decree, which were subsequently allowed by learned Appellate Court vide judgment dated 18-9-1984 and suits were remanded with direction to decide both the suits separately. After remand, the learned trial Court vide order dated 6-2-1985 deleted the name of vendor Ghulam Rasool (predecessor in interest of the present petitioners) as well as name of pre-emptor's successors i.e. respondents Nos.1 to 12 from their respective suits. The pre-emptor(s) called into question the remand order dated 18-9-1984 through F.A.Os. Nos.50 and 50-A of 1985 before this Court, but same were dismissed vide order dated 29-1-1985. Meanwhile, after remand, both the parties relied on the already recorded evidence by making statements through their counsel dated 24-11-1985. The learned trial Court after hearing the arguments decreed the suit for possession through pre-emption in favour of the respondents Nos.1 to 12 vide judgment and decree dated 1-12-1985 against the respondents Nos.13 and 14, who did not prefer any appeal. However, Ghulam Rasool, vendor (predecessor in interest of present petitioners) preferred an appeal against the

said judgment and decree on the ground that since his suit for declaration was decreed and sale deed dated 26-2-1978 had been set aside and declared null and void, so the decree could not be passed in favour of the pre-emptor(s)/respondents Nos.1 to 12 and because the said decree adversely affected his rights, he had a right to file appeal being an aggrieved person, but learned District Judge, seized of the matter, vide judgment dated 25-6-1986 dismissed the appeal on the ground that he (Ghulam Rasool) was not party to the suit so he could not challenge the decree. He (Ghulam Rasool) challenged the said judgment through revision before Multan Bench of this Court, which was accepted vide judgment dated 2-2-1993 and case was remanded with the following obser-vations:--

"The result is that the revision petition is accepted and the case is remitted to the learned District Judge, who shall act in accordance with law and keep in view the observation made in this judgment, in the matter of disposal of the appeal filed by the petitioner which shall be deemed to be pending before him. The parties shall appear before the said learned Court on 20-2-1993."

After remand, the learned Appellate Court vide judgment and decree dated 6-12-1995, impugned herein, dismissed the appeal preferred by the present petitioners with the following observations:--

"In the result it is found that the declaratory decree in favour of the deceased vendor/appellant is of no legal consequence and the pre-emption decree under challenge in this appeal is not adversely affected by it"

4. Being aggrieved of the impugned judgment and decree, the present petitioners through the separate civil revisions have assailed the same before this Court.

5. Learned counsel for the petitioners has inter alia contended that the declaratory decree passed in favour of deceased vendor Ghulam Rasool had since declared the sale under pre-emption null and void; therefore, there was

no question of enforcement of right of pre-emption. Adds that said declaratory decree was passed on the same day when the pre-emption decree was passed i.e. on 2-12-1985. Further submits that since pre-emption is a right of substitution, with the disappearance of sale itself the question to pre-empt does not arise; that the declaratory decree was not challenged by the respondents Nos.1 to 12 and as such it became final; that the declaratory decree was passed on special oath and as such it could not be termed to be collusive between the vendor and vendees; that the learned Appellate Court has failed to keep in view the observations recorded by this Court while remitting the case; that both the learned courts have failed to appreciate the basic law on the subject; that the impugned judgments and decrees are result of misreading and non-reading of evidence; the same are based on surmises and conjectures; that the learned trial Court as well as learned appellate Court had illegally decreed the suit for pre-emption in presence of declaratory decree; that material illegalities and irregularities have been committed by learned Courts below; that grave miscarriage of justice has been done by learned Courts below while passing the impugned judgments and decrees; hence, the same are not sustainable in the eyes of law and liable to be set aside; resultantly, the suit filed for possession through pre-emption may be dismissed. Relies on Muhammad Iqbal and others v. Khushi Muhammad through Legal Heirs and others 1995 MLD 1886-Lahore, Mst. Amanat Bibi v. Khuda Dad and others 1994 CLC 979-Lahore, Saidan Gul v. Mst. Shughla and 8 others NLR 1980 Revenue BOR 177, Maqbool Ahmed and others v. Ghulam Hussain and others 2007 SCMR 1223, Malik Hussain and others v. Lal Ram Chan and others PLD 1970 Supreme Court 299 and Ghulam Mehmood v. Hukam Khan and others 2001 MLD 366-Peshawar.

6. On the contrary, learned counsel appearing on behalf of the respondents Nos.1 to 12 by controverting the submissions made by learned counsel for the petitioner(s) has further submitted that Ghulam Rasool,

predecessor in interest of the petitioners challenged the sale of the suit land effected through a registered sale deed dated 26-2-1978, which was subject matter of a pending suit for possession through pre-emption; hence, same did not affect the right of pre-emption that had already accrued to the deceased pre-emptor as a result of the registered sale deed; that the right of pre-emption was exercised on 24-2-1989, while the suit for declaration was filed thereafter on 14-4-1989, which would not affect the superior right of pre-emption. Further adds that may be the declaratory suit seeking cancellation of the registered sale deed was decreed in favour of the deceased vendor i.e. predecessor in interest of the petitioners on the same day when the decree in suit for possession through pre-emption was passed, but it was of no legal consequence as the said decree was obtained with collusion of the vendees/ respondents Nos.13 and 14 in a shameful proceeding of special oath, hence, this decree cannot affect the successful pre-emptors because they were not party to it. Submits that such return of the suit land back to the vendor with collusion of the vendees through a declaratory decree could be nothing but a resale and resale of a subject matter of pre-emption suit does not affect right of the pre-emptors, because principle of lis pendens is there to protect the right of the pre-emptors; hence, the learned Appellate Court has rightly drawn the conclusion and rightly non-suited the petitioners. Relies on Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 SCMR 1024, Ahmad Sher and others v. Muhammad Hayat PLD 2006 Supreme Court 448, Falak Sher v. Muhammad Rashid and another PLD 1982 Lah. 426, Munir Hussain v. Muhammad Shafi and another 1981 CLC 1712-Lahore, Mian Abdul Qayyum v. Dr. Muhammad Akram Khan 1982 CLC 950-Lahore, Muhammad Khan and another v. Zir Mir Khan and 2 others 1981 CLC 129-Lahore, Syed Zafar Ali Shah v. Fazal Shah and 2 others 1983 CLC 1816-Peshawar, Mst. Bibi Mehr Jana v. Sultan Muhammad 1985 CLC 1635, Riaz Ahmed v. Asghar Ali and others 2010 YLR 278, Gram Panchayat of Village

Naulakha v. Ujagar Singh and others AIR 2000 Supreme Court 3272, Muhammad Boota, and others v. Addl. District Judge, Gujranwala, and others NLR 2006 Civil 4 and Khushro S. Gandhi and others v. N.A. Guzder (dead) by his legal representatives and others AIR 1970 Supreme Court 1468.

7. Heard.

8. Admittedly, the suit for possession on the basis of pre-emption was instituted (24-2-1979) prior to the suit for declaration (14-4-1979) seeking cancellation of sale deed dated 26-2-1978 (subject matter in the suit for possession through pre-emption) being based on fraud and misrepresentation, filed by the original vendor i.e. Ghulam Rasool (predecessor in interest of the petitioners), meaning thereby the right of pre-emption had already been exercised by the pre-emptor/Ch. Muhammad Amin (predecessor in interest of the respondents Nos.1 to 12). The sale was affected through a registered sale deed dated 26-2-1978 and same was not denied by the vendees/ respondents Nos.13 and 14, rather admitted that they had purchased the suit land from Ghulam Rasool vendor while submitting their written statement, filed on 4-9-1979, even while submitting their amended written statement, they have affirmed the registered sale deed validly executed in their favour; then how in a suit for declaration filed by vendor Ghulam Rasool, they made offer for taking special oath, from this act fraud and collusion can be smelled, even otherwise, it has rightly been observed by learned Appellate Court that when Muhammad Shafi appeared in the witness box as P.W.2 and specifically stated that he and Nazir Ahmad purchased the suit land through registered sale deed dated 26-2-1978 from Ghulam Rasool, but despite affording an opportunity to cross-examine said witness, said Ghulam Rasool, as he was party to the said as defendant No.3, did not opt to cross-examine him, which further strengthen the fact that the suit for declaration was instituted collusively against the vendees, in order to thwart the right of pre-

emption; therefore, such decree obtained through fraud and collusion has no legal effect upon the decree passed in suit for pre-emption and would not adversely affect the pre-emptors rights accrued in the suit land, that too on special oath especially when vendor and the vendees are closely related inter se as is evident from the impugned judgment that and evidence made available on record that wife of Ghulam Rasool vendor is mother in law of Muhammad Shafi P.W.2/vendee; even otherwise, at the cost of repetition, it is observed that suit for pre-emption was prior than the suit for declaration and same was instituted during pendency of suit for possession through pre-emption, so the principle of lis pendens is also there to protect the rights of the pre-emptor, especially when collusiveness inter the vendor and vendees has been spelt out in obtaining the declaratory decree on the basis of special oath, which seems an attempt to defeat the decree passed in pre-emption suit. In this regard safer reliance can be placed on Mian Abdul Qayyum's case 1982 SCMR 1024, wherein it has been held that:--

"Pre-emption decree---Not affected by anything happening subsequently---Sale pre-emptible and cause of action accruing to respondent to file pre-emption suit under S.21 of Punjab Pre-emption Act, 1913, when sale completed---Decree for declaration, held, cannot bind pre-emptor, subsequent suit being a devise to defeat pre-emption decree."

Moreover, the pre-emptor was not party to the suit filed for declaration by the vendor, so same is not binding upon him in any manner. Reliance in this regard is placed on Ahmad Sher and others's case PLD 2006 Supreme Court 448, wherein it has been invariably held that:--

"Present pre-emptor was not a party to such suit and the decree was obtained on conceding written statement of defendant---Being a consent decree, it was no more than a mere agreement between the parties regardless of the judicial imprimatur that it contained---Such agreement without the present pre-emptor being a party to it, was not binding upon him---High

Court was justified in holding that such consent decree was collusive between the parties thereto to damage the already pending suit for pre-emption."

Furthermore, it is admitted fact that the suit for declaration was instituted during pendency of the suit for possession through pre-emption, therefore, if any decree is passed in suit for declaration, which too on the basis of collusiveness inter se the parties to that suit, same would not adversely affect the suit for pre-emption, because same is an attempt to deprive the preemptor and nothing more than this; in this regard safer reliance can be placed on Falak Sher's case PLD 1982 Lah. 426, wherein it has been observed that:--

"Pre-emption---Declaratory decree against vendee by vendor---Effect of---Collusion between vendor and vendee resulting in declaratory decree aimed at giving back disputed land to vendor with object of defeating pre-emption suit---Held: such decree being on no better footing than re-sale of land by vendee in favour of vendor not to adversely affect suit for pre-emption."

In view of above discussion, if the declaratory decree is allowed to sustain, it would adversely affect the right of pre-emptor accrued after passing of decree in his suit for possession on the basis of pre-emption, which was instituted prior to filing of suit for declaration; therefore, such declaratory decree cannot be allowed to sustain, because the principle of lis pendens protects the rights of successful litigant and while formulating this principle the legislatures were mindful of facing such like situations. In this regard reliance is placed on Munir Hussain's case 1981 CLC 1712 Lahore, wherein it has been observed that:--

"According to section 52 of the said Act, respondent No.2 is to be protected against the adverse effect of the developments resulting in the passing of the declaratory decree. If declaratory decree is allowed to stand, it will not be possible to protect the pre-emptive rights of the first respondent

inasmuch as in the event of the declaratory decree taking effect the very sale pre-empted by him would disappear and thus he would be left with no right to be enforced by means of the pre-emption suit."

Even in Mian Abdul Qayyum' s case 1982 CLC 950-Lahore, it has been observed that, "Right of pre-emption once exercised, held, not lost even if sale retracted---Decree for declaration not binding on pre-emptor even if passed against him---Cause of action once accrued would continue." When it is proved on record that vendor and vendees collusively obtained declaratory decree in order to defeat the right of pre-emptor and to protect the property in dispute, the pre-emptor's rights cannot be defeated, because said decree would be termed as resale in favour of vendor and not otherwise; in this regard reliance can be placed on Muhammad Khan's case 1981 CLC 129-Lahore, wherein it has been held that:--

"Pre-emption, right of---Cannot be defeated by means of resale of land in question in favour of vendor himself."

Even in Mst. Bibi Mehr Jana's case 1985 CLC 1635, it has been observed that, "Right of pre-emption is not lost on retraction of sale."

9. When a specific plea has been taken by the respondents Nos.1 to 12/pre-emptor(s) that declaratory decree was obtained due to collusion and fraud, same was to be proved under Article 58 of the Qanun-e-Shahadat Order, 1984, which is produced for ease of reference as under:--

"58. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Article 54, 55 or 56, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Keeping in view the evidence discussed by learned Appellate Court and conduct of the vendor and vendees, it has surfaced on record that declaratory decree in the present case was obtained collusively in order to defeat the pre-

emptors' rights; therefore, the respondents Nos.1 to 12/pre-emptors have discharged the onus shifted on them in terms of Article 58 of the Order ibid. When the pre-emptors were not made party to the suit for declaration despite the pending of suit for pre-emption, the decree passed in said suit would have no legal effect upon the pre-emptors as held in Muhammad Boota's case NLR 2006 Civil 4, "Consent declaratory decree in favour of plaintiff in declaratory suit filed without impleading pre-emptors plaintiffs of pending pre-emption suit would have no legal value. In such case, principle of lis pendens, as enunciated by S.52 and affirmed consistently by superior Courts would be fully attracted and applied invalidating the consent declaratory decree in favour of plaintiff in her declaratory suit."

10. So far as the objection of learned counsel for the petitioner that learned appellate Court has not considered/kept in view the observation made by this Court while remanding the matter to it by accepting the revision filed by their predecessor in interest i.e. Ghulam Rasool (deceased) is concerned, it is observed that at the time of deciding the revision, the matter in issue was maintainability of the appeal before the learned Appellate Court filed by the predecessor in interest of the petitioners, before this Court and nothing more than that and the learned Appellate Court has rightly observed that it was not observed by this Court that declaratory decree was not collusive, but it was observed by this Court that petitioners' processor could challenge the decree passed in pre-emption suit if his rights are adversely affected.

11. As far as the case-law relied upon by learned counsel for the petitioners, with utmost respect, have no relevance to the facts and circumstances of the present case; therefore, it would not be helpful to the petitioners' cause.

12. The crux of the discussion above is that the petitioners have failed to point out any illegality, irregularity or wrong exercise of jurisdiction

allegedly committed by learned Appellate Court, rather the impugned judgment and decree is well reasoned, based on solid reasoning, appreciation of law on the subject in true perspective. No misreading and non-reading of evidence has been made by learned appellate Court, rather the impugned judgment is upto the dexterity and same does not call for any interference by this Court in revisional jurisdiction.

13. Resultantly, the instant R.S.A. No.41 of 1995 (now converted into Civil Revision) as well as C.R. No. 1025 of 1995, being devoid of any force are hereby dismissed.

AG/F-28/L **Revision dismissed.**

2015 Y L R 1789

[Lahore]

Before Shahid Bilal Hassan, J

FATIMA BIBI and others---Petitioners

versus

MUHAMMAD HANIF and others---Respondents

C.R. No.1152 of 2003, heard on 22nd April, 2015.

Civil Procedure Code (V of 1908)---

----O.XIV, Rr. 1, 3 & 4---Specific Relief Act (I of 1877), S.42---Settlement of issues and determination of suit on "issues of law" or on "issues agreed upon framing of issues"---Obligation of Trial Court to frame issues in accordance with pleadings---Scope---Suit for declaration challenging gift mutations was decreed concurrently---Trial Court had not properly framed the "issues" keeping in view the pleadings of the parties---Plaintiff had challenged a number of mutations but Trial Court while framing issues omitted a pivotal mutation and also misstated the date of attestation of another mutation, which was not in conformity with the date mentioned in the plaint---When issues had not been framed in accordance with pleadings, the edifice and superstructure built on the same had no value in the eye of the law---High Court set aside decree and remanded matter to Trial Court with direction to frame proper issues with regard to the gift mutations in dispute---Revision was allowed, accordingly.

Sheikh Naveed Shahryar, Humaira, Fatima Malik and Uneza Siddiqui for Petitioners.

Shaigan Ejaz Chadhar for Respondents.

Date of hearting: 22nd April, 2015.

JUDGMENT

SHAHID BILAL HASSAN, J.---Mst. Fatima Bibi, predecessor in interest of the present petitioners instituted a suit for declaration challenging the gift Mutations No. 711 dated 31-8-1988, No.100 dated 31-8-1988, No. 1332 dated 10-12-1988 and later on subsequent mutation No.1407, contending that gift mutations were got attested by playing fraud and misrepresentation, in order to deprive the predecessor in interest of Mst. Fatima Bibi.

The suit was contested by the respondents.

2. Divergence in pleadings was summed up into following issues:--

(1) Whether the suit is bad due to non-joinder of necessary parties? OPD

(2) Whether the plaintiffs have not come to the court with clean hands, if so its effect? OPD

(3) Whether the plaintiff has got no locus standi, and cause of action? OPD

(4) Whether the mutations No.100 dated 31-8-1983, 1132 dated 10-12-1985 and 1407 were attested by fraud, with the collusiveness of Revenue Staff therefore, these are void, ineffective upon the rights of the plaintiffs? OPP

(5) Whether the plaintiffs are entitled to decree for declaration on the grounds mentioned in the plaint? OPP

(6) Relief.

3. After recording evidence of the parties and hearing arguments, the learned trial Court vide impugned judgment and decree dated 20-7-2002 dismissed the suit of petitioner; which was assailed by filing appeal before the learned Appellate Court, but appeal met the same fate vide impugned judgment and decree dated 19-5-2003. Hence, this civil revision.

4. After hearing the arguments at length, it transpired that 'issues' in this case have not been properly framed by keeping in view the pleadings of parties, because in the suit, the petitioners have challenged Mutations No.711 dated 31-8-1988, No.100 dated 31-8-1988 No.1332 dated 10-12-1988 and later on subsequent Mutation No.1407; but the learned trial Court while framing the issues omitted the pivotal mutation No.711 as well as mentioned the date of attestation of Mutation No.100 as 31-8-1983, which is not in conformity with date mentioned in the plaint, therefore, when issues have not been framed in pleadings the edifice and superstructure built on the same, has no value in the eye of law.

Pursuant to above, without commenting and discussing the case on merits, it would be appropriate and proper to transmit the case to the learned trial Court for decision afresh after framing proper issues keeping in view the pleadings of parties.

5. In view of above discussion, the instant civil revision is allowed, impugned judgments and decrees passed by learned Courts below are set aside and case is remanded to the learned trial Court, with a direction to

frame issue with regards to the gift in dispute keeping in view the observations recorded above and afford opportunity to lead evidence to both the parties, if desired and decide the lis afresh in accordance with law.

6. No order as to costs.

KMZ/F-19/L **Case remanded.**

2015 Y L R 1946

[Lahore]

Before Shahid Bilal Hassan, J

Haji MUHAMMAD ASHRAF---Petitioner

versus

MAQBOOL HUSSAIN and others---Respondents

W.P. No.8296 of 2014, heard on 20th June, 2014.

(a) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of the High Court---Scope---Only question to be considered by the High Court in its constitutional jurisdiction was whether the subordinate courts had rightly exercised the jurisdiction or not---When the order impugned was well reasoned, same could not be interfered with in constitutional jurisdiction, but when it divulged misreading and non-reading of record and had been passed in a hasty and arbitrary manner, without applying judicious mind, same could be interfered with and revised.

(b) Civil Procedure Code (V of 1908)---

----S. 145---Constitution of Pakistan, Art. 199--- Constitutional petition---Withdrawal of surety bond---Scope---Standing surety for decretal amount---Suit filed by plaintiff against defendant was decreed---Respondent stood surety for defendant for the decretal amount and submitted surety amount and also got his statement recorded---Defendant refused to satisfy the decree, and executing court issued notice to the respondent to satisfy the decree---Respondent filed an application for withdrawal of his surety bond, contending that he had discharged his liability by producing the

defendant/judgment-debtor before the executing court---Validity---Respondent had recorded his statement on oath, duly thumb marked by him, whereby he stood surety for payment of decretal amount instead of appearance of defendant/ judgment-debtor---Respondent could not claim to have discharged his liability and he could not be absolved of his liability on account of arrest of defendant/judgment-debtor---Executing Court had rightly dismissed respondent's application for withdrawal of surety bond---Constitutional petition was allowed accordingly.

Amanullah Khan's case 2012 CLC 679; Mrs. Muhammad Shafi through Agent v. Sultan Ahmed 2000 CLC 85; Karim Bhai v. Hatimbhai PLD 1994 Kar. 311 and Zafar Ullah and another v. Addl. District Judge, Nankana Sahib and 2 others 1993 CLC 255 rel.

Ch. Muhammad Imran Bhatti for Petitioner.

Ch. Imtiaz Ahmad Kamboh for Respondent No.1.

Date of hearing: 20th June, 2014.

JUDGMENT

SHAHID BILAL HASSAN, J.---Through this writ petition, the order dated 20-2-2014 passed by learned Addl. District Judge, Gojra, whereby civil revision preferred against order dated 23-1-2014 passed by learned Civil Judge, Gojra, dismissing the application for withdrawal of surety of the respondent No.1, submitted for respondent No.2, has been allowed and order dated 23-1-2014 has been set aside by discharging the respondent No. 1 from his liability.

2. Learned counsel for the petitioner has argued that petitioner instituted a suit for recovery of Rs.244,818 against the respondent No.2, which was

contested by him and same was ultimately decreed in favour of the petitioner vide judgment and decree dated 16-10-2008, which was assailed through appeal, but same was dismissed vide judgment and decreed dated 9-6-2009. Thereafter, the petitioner/decree holder filed execution petition for execution of decree dated 16-10-2008. During proceedings, the respondent No. 1, on 8-3-2003, appeared before the appellate Court and stood surety of respondent No.2 against decretal amount and submitted his surety bond and also got recorded his statement. On dismissal of appeal, the learned executing Court issued notice to the respondent No.1 for making payment of decretal amount as respondent No.2/ judgment debtor refused to satisfy the decree, but he denied and filed an application for withdrawal of his surety bond; said application was contested by the petitioner/decree holder, which was dismissed vide order dated 23-1-2014; against which a revision petition was preferred which was ultimately allowed vide impugned order dated 27-2-2014; hence, this writ petition.

2A. Learned counsel for the petitioner has argued that impugned order is against law and facts of the case, rather same is not sustainable in the eye of law because same is based on surmises and conjectures; that while passing the impugned order the learned revisional court has failed to apply its judicious mind and has passed the same in fanciful manner; that revision was not maintainable, as the order dated 23-1-2014 was appealable under section 104 read with Order XLIII of Code of Civil Procedure, 1908; that the statement of the respondent No.1 has not been taken into account while passing the impugned order, hence, same is result of misreading and non-reading of record as well as statement of surety, recorded on oath, dated 8-3-2013; hence, the impugned order is not sustainable in the eye of law and liable to be set aside; resultantly, while allowing this writ petition, the

impugned order may be set aside and that of learned executing court may be restored. Relies on Amanullah Khan v. District Judge and 3 others 2012 CLC 679 Lahore, Mrs., Muhammad Shafi through Agent v. Sultan Ahmed 2000 CLC 85 Lahore, Karim Bhai v. Hatimbhai PLD 1994 Karachi 311, Zafar Ullah and another v. Addl. District Judge, Nankana Sahib and 2 others 1993 CLC 255 Lahore, Cantonment Board, Rawalpindi v. Muhammad Sharif through Legal Heirs PLD 1995 Supreme Court 472, Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company PLD 2006 Supreme Court 226, Mst. Maqbool Begum etc. v. Gullan and others PLD 1982 Supreme Court 46, Mst. Murad Begum etc. v. Muhammad Rafiq and others PLD 1974 Supreme Court 322 and Messrs Pakistan State Oil Limited v. Messrs Pakistan Burmah Shell Limited and another 1993 CLC 57-Karachi.

3. On the contrary, learned counsel for the respondent No.1 has contested the instant writ petition with vehemence by contending that the writ petition is not maintainable against an order passed while exercising revisional jurisdiction, even otherwise, the impugned order is well reasoned. Adds that the respondent No.1/ surety has discharged his liability by producing the judgment debtor before the learned Executing Court and hence, the learned revisional Court has rightly accepted the application for withdrawal of his surety bond and has rightly discharged him from his liability. Prayer for dismissal of instant writ petition has been made.

4. Heard.

5. It is an admitted proposition of law that in writ jurisdiction only the question as to whether the learned lower courts have rightly exercised, the jurisdiction or not, has to be considered and when the orders impugned are

well reasoned, same cannot be interfered in writ jurisdiction, but when it divulges that misreading and not reading of record has been committed and order impugned has been passed in haste and arbitrary manner, without applying judicious mind, same can be interfered and revised. Perusal of the statement of respondent No.1/surety recorded on oath on 8-3-2013, duly thumb marked by him, reveals that he stood surety for payment of the decretal amount instead of appearance of the judgment debtor. For ready reference, the statement of surety/ respondent No.1 is reproduced in verbatim:--

When the position is as such, the respondent No.1/surety cannot claim to have discharged his liability and he cannot be absolved of his liability on account of arrest of the respondent No.2/judgment debtor. In this regard reliance is placed on Amanullah Khan's case 2012 CLC 679 Lahore, wherein it has been observed that, 'Petitioner's contention was that as he himself was not judgment debtor and, was merely a surety of judgment debtor, on arrest of judgment debtor, no further action would be taken against him, when he had performed his duty by producing the judgment debtor before the Court-Contention of the petitioner was misconceived as petitioner did not stand surety for appearance of judgment debtor, but he stood surety for the payment of decretal amount---Petitioner, could not be absolved of his liability on account of arrest of judgment debtor '.

6. In view of above discussion, the impugned order dated 20-2-2014 is not sustainable in the eye of law as same has been passed without application of judicial mind and considering the latest development on the subject in question. Resultantly, by placing reliance on the supra judgment as well as Mrs. Muhammad Shafi through Agent v. Sultan Ahmed 2000 CLC 85 Lahore, Karim Bhai v. Hatimbhai PLD 1994 Karachi 311, Zafar Ullah and

another v. Addl. District Judge, Nankana Sahib and 2 others 1993 CLC 255 Lahore, the instant writ petition is allowed, the impugned order dated 20-2-2014 passed by learned Addl. District Judge, Gojra is hereby set aside and reversed and that of learned executing court dated 23-1-2014 is resorted.

MWA/M-357/L **Petition allowed.**

PLJ 2015 Lahore 171

[Multan Bench Multan]

Present: SHAHID BILAL HASSAN, J.

MEER HASSAN (deceased) through his Legal Representative--Petitioners

versus

HAKEEM MUHAMMAD SANA ULLAH (deceased) through his Legal Heirs--Respondents

C.R. No. 623-D of 2006, decided on 27.3.2014.

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 117--Burden of proof--Agreement to sell was reduced into writing--Suit was transferred--Two marginal witnesses--Validity--Mere taking of a stance in pleadings is not sufficient, but same has to be proved by producing cogent, reliable, trustworthy and confidence inspiring evidence--Art. 117 of Qanun-e-Shahadat Order, 1908 elaborates that such person will be under burden to prove any stance which he asserts in pleadings. [P. 175] A

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 17--Agreement to sell--Competence and number of witnesses--Validity--According to Art. 17 of Qanun-e-Shahadat Order, 1984, it is provided that for proving a document two witnesses are required to be produced. [P. 176] B

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 79--Execution of agreement to sell was proved--Proof of--Marginal witness was admittedly died and marginal witnesses were produced--Validity--It is mandatory to prove contents of a document by producing two truthful witnesses--Scribe of document could be examined by party for

corroboration of evidence of marginal witnesses or in eventuality those were conceived by Art.79 of Qanun-i-Shahadat Order, 1984, itself not as a substitute--When marginal witnesses have been produced by predecessor of respondents, evidence of scribe is of no value. [P. 176] C & D

Colonization of Government Lands Act, 1912 (V of 1912)--

----S. 19--Civil Procedure Code, (V of 1908), S. 115--Agreement to sell and renewed agreement to sell--Contents of two documents--Signatures--Revisional jurisdiction--Validity--Point involved in additional issue regarding necessary permission of Collector under Section 19 of Colonization of Government Lands Act, same has rightly been appraised and addressed by Appellate Court and does not call for any interference by High Court--In revisional jurisdiction Court has only to see, whether any irregularity, illegality and wrong exercise of jurisdiction vested in a Court has been committed--It is well settled by now that High Court cannot interfere in findings on question of law or facts, howsoever, erroneous in exercise of its revisional/jurisdiction.[P. 178] E & F

Revisional Jurisdiction--

----No such occasion has arisen at trial as well as appellate stage, so High Court found no illegality, irregularity or infirmity, wrong exercise of jurisdiction vested upon Courts below while passing impugned judgments and decrees, respectively; therefore, same do not call for any interference by High Court while exercising revisional jurisdiction.[P. 179] G

Mian Muhammad Akram, Advocate for Petitioners.

Date of hearing: 27.3.2014.

ORDER

Muhammad Saghir and others, successors of Meer Hassan (deceased)/plaintiff through the instant civil revision have called into question the legality and sustainability of the impugned judgments and decrees dated 22.11.1987 & 15.03.2005, by which learned Civil Judge 1st Class, Mailsi & learned District Judge, Vehari, while deciding the suit titled *"Hakeem Muhammad Sana Ullah vs. Meer Hassan"* for Specific Performance of Contract, decreed the same and appeal preferred by the petitioners was dismissed, respectively.

2. Briefly, the facts leading towards this civil revision are as such that predecessor in interest of present respondents namely Hakeem Muhammad Sana Ullah (deceased) instituted a suit for specific performance of contract against Meer Hassan, deceased predecessor in interest of the petitioners pleading therein that Meer Hassan agreed to sell land measuring 99 *kanals* 8 *marlas* bearing Khatooni Nos. 231, 222 to 226, falling in Khata No. 5/6, 20 to 22, 24/1-2-19 to 23, situated in Chak No. 166/WB, Tehsil Mailsi, in lieu of Rs. 100,000/- accepting Rs. 5000/- as earnest money and later on by receiving Rs. 20,000/- in order to clear the arrears in respect of instalments of money to be paid to acquire proprietary rights for the said land and then handed over possession of the same to the predecessor of the respondents (Hakeem Muhammad Sana Ullah). It has further been asserted that Rs. 10,000/- were later on (10.05.1984) again paid to Meer Hassan deceased predecessor of the present petitioners, at the time of execution of conveyance deed in his (Meer Hassan's) favour as a part of payment of total amount and he (Meer Hassan) executed another agreement to sell as a renewal of the earlier agreement; but later on despite receiving the aforesaid amounts, he (Meer Hassan) refused to keep his words, inspite of the fact that predecessor

in interest of the respondents (Hakeem Muhammad Sana Ullah) was ready to perform, his part of agreement i.e. payment of remaining amount of Rs. 65,000/-, which culminated in filing of the suit. The suit was contested by Meer Hassan (predecessor in interest of the present petitioners), who raised legal as well as factual objections. The divergence in the pleadings was summed up into following issues:-

1. Whether the plaintiff has no cause of action as well as *locus standi* to institute this suit? OPD
2. Whether the alleged agreement deed is fictitious and collusive with one Muhammad Zafar s/o Jan Muhammad, if so to what effect? OPD
3. Whether the parties entered into a valid agreement to sell on 28.03.1982 and that the plaintiff is entitled to the decree for specific performance in respect of the suit land on the basis of the same? OPP
4. Whether the suit is *mala fide* and that the defendant is entitled to receive special costs from the plaintiff? OPD
5. Relief

Both the parties lead their evidence, pro and contra, in support of their respective versions. Learned trial Court *vide* its judgment, dated 22.11.1987 decreed the suit in favour of the respondents' predecessor in interest subject to payment of the remaining sale price Rs. 65,000/- to be deposited in the Court on or before 22.12.1987. Meer Hassan, predecessor in interest of the present petitioners challenged said judgment and decree through an appeal before the learned Appellate Court, which was ultimately dismissed *vide* judgment dated 08.08.1988; resulting into filing of Regular Second Appeal before this Court, same was consequently allowed on 25.10.2003 and case

was remanded to the learned Appellate Court with direction to decide application moved by the present petitioners under Order VI Rule 17 of the, CPC read with Order XIV Rule 5 of CPC, at the first instance and decide the appeal afresh. After remand, on 20.01.2004, the said application was accepted and on 20.07.2004, the following additional issue was framed:--

ADDITIONAL ISSUE

Whether necessary permission of the Collector has not been obtained by the plaintiff under Section 19 of the Colonization of Government Lands Act? If so its effect? OPD

On the above additional issue, no evidence was led on behalf of both the parties. After hearing arguments of the learned counsel for parties, the learned Appellate Court *vide* impugned judgment and decree dated 15.03.2005, dismissed the appeal of the present petitioners; hence, this civil revision assailing the impugned judgments and decrees dated 22.11.1987 and 15.03.2005, respectively *inter alia* on the following grounds:--

- That the impugned judgments and decrees suffer from misreading and non-reading of evidence; hence, not sustainable in the eyes of law;
- That the learned Courts below have not applied the relevant provisions of law and have decide the suit as well as appeal on wrong premises of law;
- That the findings on Issues Nos. 1 to 5, recorded by learned lower Courts are against law and facts, hence, call for interference;
- That the evidence brought on record has been misread and misinterpreted by learned Courts below; and evidence has not been properly evaluated;

- That material illegalities and irregularities have been committed by the learned Courts below; hence, the impugned judgments and decrees dated 15.03.2005 and 22.11.1987 are liable to be set aside and suit of the respondents is liable to be dismissed.

3. Learned counsel for the petitioners while reiterating the grounds urged in this revision petition has further argued that the impugned judgments and decrees are against facts and law; result of misreading and non-reading of evidence and incorrect appreciation of law; therefore, both the judgments and decrees passed by learned Courts below are liable to be set aside and resultantly the suit of the respondents/plaintiff is liable to be dismissed. Relies on *Hakim Ali and another vs. Atta Muhammad and others* 1981 SCMR 993, *Alam Khan vs. Ahla and 6 others* PLJ 1989 Lahore 248, *Bashir Ahmad vs. Abdul Majid and 7 others* 1992 CLC 1069 Karachi, *Muhammad Yaqoob and others vs. Naseer Hussain and others* PLD 1995 Lahore 395, *Fazal Muhammad and others vs. Mst. Zainab Bibi and others* 2001 MLD 2012-Lahore, *Sher Baz Khan vs. Mir Adam Khan* PLD 2002 Peshawar 1, *Mst. Sharman and 11 others vs. Syed Ali Hussain and 18 others* 2006 YLR 130-Lahore, *Ghulam Abbas and another vs. Murid Hussain* 2006 YLR 498-Lahore, *Rais Gul Muhammad and others vs. Muhammad Abdullah Khan* 2012 CLC 1379-Lahore.

4. Heard.

5. It is the case of respondents' predecessor that Meer Hassan, the original owner of the suit land (predecessor in interest of the petitioners) agreed to sell 99 *kanals* 08 *marlas* of land for consideration of Rs. 100,000/- out of which an amount of Rs. 35,000/- was received by him (Meer Hassan) as earnest money and an agreement to sell was reduced into writing, the suit

land was to be transferred in favour of the respondents' predecessor, but said Meer Hassan (deceased predecessor in interest of the petitioners) refused to coupe with the demand of the respondents' predecessor in interest and ultimately refused to fulfill his part of agreement. This stance of the respondents' predecessor in interest has specifically been denied by Meer Hassan. When execution of agreement to sell Meer Hassan (predecessor in interest of petitioners), execution whereof has to be proved by the respondents by producing two marginal witnesses before whom such transaction has taken place. Mere taking of a stance in the pleadings is not sufficient, but same has to be proved by producing cogent, reliable, trustworthy and confidence inspiring evidence. Article 117 of the Qanoon-i-Shahadat Order, 1908 elaborates that such person will be under burden to prove any stance which he asserts in the pleadings. The said provision of law is reproduced in verbatim for ease of reference:--

> "**117. Burden of proof.--**(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

According to article 17 of the Qanoon-i-Shahadat Order, 1984, it is provided that for proving a document two witnesses are required to be produced. For ease of reference the said provision of QSO, 1908 is reproduced infra:--

> **"17. Competence and number of witnesses.--**(1) …….. ……..
>
> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,--

(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

(b) ……..”

The respondents' predecessor/plaintiff has produced one marginal witness of Ex.P1, whereas other marginal witness has admittedly died and marginal witnesses of Ex.P2 have also been produced, the execution of agreement to sell is proved in accordance with law, because under Article 79 of the Qanoon-e-Shahadat Order, 1984, it is mandatory to prove the contents of a document by producing two truthful witnesses. For ease of reference, said Article is reproduced as under:--

> "**Article 79. Proof of execution of document required by law to be attested.--**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: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Furthermore, there is no denial to the fact that scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Art.79 of Qanun-i-Shahadat Order, 1984, itself not as a substitute. In this case, when the

marginal witnesses have been produced by the predecessor of the respondents, the evidence of scribe is of no value. In this regard safer reliance can be placed on *Hafiz Tassaduq Hussain vs. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241) where it has been held that:--

> "Transaction of sale of immovable property (if not a conditional sale) was the conclusive transfer of an absolute title and ownership of property unto the vendee in presentee, while agreement, to sell was meant for accomplishing the object of sale in futurity and for all intents and purposes it pertained to future obligations of the parties thereto---Sale agreement/agreement to sell was duly covered and fell within the pale of Art. 17 of Qanun-e-Shahadat, 1984--Purpose and object of attestation of document by certain number of witnesses and its proof through them was meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and thus legislature in its wisdom had established class of documents which were specified in Art. 17 of Qanun-e-Shahadat, 1984--For validity of instruments falling within Art. 17 of Qanun-e-Shahadat, 1984, the attestation as required therein was absolute and imperative--For the purpose of proof of such a document, attesting witnesses had to be compulsorily examined as per requirement of Art. 79 of Qanun-e-Shahadat, 1984, otherwise it was not to be considered and taken as proved and used in evidence--Such principle of law was in line with the principle that where law required an act to be done in a particular manner, it had to be done in, that way and not otherwise--Scribe of document could only be a competent witness in terms of Art. 17 and 79 of Qanun-e-Shahadat, 1984, if he had fixed his

signature as an attesting witness of the document and not otherwise--Signing of document in the capacity of a writer did not fulfill and meet mandatory requirement of attestation by him separately--Scribe of document could be examined by concerned party for corroboration of evidence of marginal witnesses or in the eventuality those were conceived by Art. 79 of Qanun-e-Shahadat, 1984, itself not as a substitute--Mandatory provisions of law had to be complied and fulfilled and only for the reasons or the perception that such attesting witness if examined would turn hostile did not absolve the concerned, party of its duty to fallow the law and allow the provisions of Qanun-e-Shahadat, 1984, relating to hostile witness take its own course"

In view of above, the respondents' predecessor/plaintiff successfully proved his case of making payment of earnest money, subsequent amounts at different times i.e. Rs. 35,000/- to Meer Hassan, predecessor in interest of the petitioners, who admittedly signed the agreement to sell Ex.P1 and renewed agreement to sell Ex.P2; meaning thereby he had admitted the contents of the said two documents and then put his signatures thereon. Moreover, the point involved in additional issue regarding necessary permission of the Collector under Section 19 of the Colonization of Government Lands Act is concerned, same has rightly been appraised and addressed by the learned Appellate Court and does not call for any interference by this Court. Even otherwise, in revisional jurisdiction the Court has only to see, whether any irregularity, illegality and wrong exercise of jurisdiction vested in a Court has been committed. Section 115 of C.P.C. is reproduced below for case of reference:

"115. Revision.--(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High

Court and in which no appeal lies thereto, and if such subordinate Court appears:--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

It is well settled by now that the High Court cannot interfere in the findings on question of law or facts, howsoever, erroneous in exercise of its revisional jurisdiction. This view has been fortified by case of *Hakim Ud Din through L.Rs. & others vs. Faiz Bukhsh & others* 2007 SCMR 870, in which it has been held that:

"It is established proposition of law that finding on questions of law or fact, howsoever, erroneous the same may be regarded by a Court in exercise of its revisional jurisdiction under Section 115, C.P.C., unless such findings suffer from jurisdictional defect, illegality or material irregularity," Similar view has been adopted in case of *Abdul Aziz vs. Sheikh Fateh Muhammad* 2007 SCMR 336 wherein it has been invariably held that, "Interference in concurrent findings on controversial question of facts or mixed, question of law and facts in revisional jurisdiction for mere reason that an others view of evidence was also possible, is not proper."

But in the present case, no such occasion has arisen at the trial as well as appellate stage, so this Court finds no illegality, irregularity or infirmity, wrong exercise of jurisdiction vested upon the Courts below while passing the impugned judgments and decrees, respectively; therefore, same do not

call for any interference by this Court while exercising revisional jurisdiction.

6. So far as the case law submitted by learned counsel for the petitioners is concerned, with utmost respect, same has no relevance to the facts and circumstances of the instant case; therefore, does not render any assistance to the petitioners' cause; as each and every case has its own peculiar facts and circumstances and the Courts have to evaluate the same with independent mind so as to administer justice in accordance with law.

7. In view of the above said discussion, when the petitioners/plaintiff have failed to establish any illegality, irregularity or infirmity in the findings of learned Courts below rendered in the impugned judgments, it can be safely observed that the same are result of appraising the evidence in true perspective, applying of judicial mind, rightly interpreting the law and upto the dexterity, therefore, same do not call for any interference by this Court. Resultantly, by placing reliance on the judgments supra, this civil revision is dismissed *in limine*.

(R.A.) **Revision dismissed.**

P L D 2015 Lahore 421

Before Shahid Bilal Hassan, J

Mst. BHARYAN and others---Appellant

versus

HASSAN MUHAMMAD and others---Respondents

F.A.O. No.234 of 2010, decided on 18th June, 2014.

(a) Suits Valuation Act (VII of 1887)---

----S. 3---Civil Procedure Code (V of 1908), S. 6 & O. VII, R. 10---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Subsequent change in valuation of suit---Effect---Jurisdiction---Civil Judge Class III decreed the suit against which an appeal was filed wherein valuation of the same for the purpose of court fee and jurisdiction was conceded as Rs.564,000---Appellate Court remanded the case to Senior Civil Judge for decision afresh---Validity---Valuation of the suit for the purpose of court fee and jurisdiction at the time of institution of the same was fixed at Rs. 400 and same continued till passing of judgment and decree by the Trial Court---Said valuation was within the pecuniary jurisdiction of Civil Judge Class III as same had been determined by the plaintiffs themselves---Valuation of original suit as determined under S.3 of Suits Valuation Act, 1887 for the purpose of jurisdiction would be the determining factor and not the market value or sale price of subject matter of suit---Where during pendency of suit the value of subject matter was found to be more than pecuniary jurisdiction of the court trying the same, such court would not be deprived from its pecuniary jurisdiction to try the said suit---No objection on pecuniary jurisdiction was raised during pendency of present suit and such objection was made for the first time at appellate stage which would not debar the proceedings conducted by the Civil Judge Class III as provisions of O. VII, R. 10, C.P.C. would apply only where court initially lacked jurisdiction to entertain and try the suit---No objection with regard to proceedings conducted by Civil Judge Class III had been raised at appellate stage and

same could not be allowed to be taken at revisional stage---Impugned judgment remanding case to the court having pecuniary jurisdiction for deciding the same on merits did not suffer from any material irregularity and illegality---Judgment and decree passed by Civil Judge Class III would be void and nullity in the eye of law---Appellate Court had rightly remanded the case to the court having pecuniary jurisdiction for rehearing the parties and deciding the suit afresh---No illegality, irregularity or wrong exercise of jurisdiction by the Appellate Court was pointed out---Appeal was dismissed in circumstances.

Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584; Mahmood Khan and others v. Agricultural Development Bank of Pakistan and others 1998 CLC 790; Messrs Pakistan Telecommunication Corporation through its Director v. Abdus Sattar and 5 others 1995 MLD 1563; Muhammad v. Mt. Wahab Jan AIR 1935 Pesh. 174; Suba Khan v. Rehmat Din and 2 others 1980 CLC 589; Sankappa Rai and others v. Keraga Pujary and others AIR 1931 Madras 575; Muhammad Suleman v. Habib Bank Limited, Hyderabad 1988 CLC 969; Mahmood Akhtar and another v. Ch. Muhammad Hussain Naqshbandi, Addl. District Judge, Rawalpindi and another 1986 CLC 1451 and Muhammad Naseer and others v. Mustafa and others 2001 SCMR 1258 ref.

Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584; Mahmood Khan and others v. Agricultural Development Bank of Pakistan and others 1998 CLC 790; Messrs Pakistan Telecommunication Corporation through its Director v. Abdus Sattar and 5 others 1995 MLD 1563; Muhammad v. Mt. Wahab Jan AIR 1935 Pesh. 174; Suba Khan v. Rehmat Din and 2 others 1980 CLC 589 and Sankappa Rai and others v. Keraga Pujary and others AIR 1931 Mad. 575 distinguished.

Mahmood Akhtar and another v. Ch. Muhammad Hussain Naqshbandi, Addl. District Judge, Rawalpindi and another 1986 CLC 1451; Muhammad Naseer and others v. Mustafa and others 2001 SCMR 1258;

Muhammad Ali v. Imdad Hussain 1997 CLC 768; Nasima Faiz's case 1994 MLD 810 and Zahida Parveen v. Muhammad Saleem 2003 CLC 1245 rel.

(b) Civil Procedure Code (V of 1908)---

----S. 115---Revision---Scope---Revision had limited scope and only question of illegality, irregularity and wrong exercise of jurisdiction by the courts below had to be seen.

Muhammad Akhtar for Appellants.

Hafiz Rizwan Aziz for Respondents No.1.

ORDER

SHAHID BILAL HASSAN, J.---On 3-9-1991, one Muhammad Khan son of Taj Khan, predecessor in interest of the respondents instituted a suit for declaration to the effect that Rustam was the owner of the disputed land and Mutation No.14 dated 25-5-1954 as well as subsequent mutations were illegal and void, against the appellants regarding land measuring 47 kanals 15 marlas, Khewat Nos.17/95, 27, 29, 95, 92 Khatooni No.135, Khasra Nos. 660, 661, 674, 675, 681, 682, 683, 686 (8 patches) presently land measuring 60 kanals 16 marlas Khewat No.149, Khatuni Nos.352 to 355 Khasra Nos. 1349, 1350, 1325, 1308 min, 1358, 1364, 1351, 1309, 1312, 1324 as per Jamabandi for the year 1987-88, situated at Mauza Badarpur, Tehsil Kasur. On 29-10-1991, the appellants filed their written statement. On 8-6-1992, the issues were framed. After recording evidence of the parties, the learned Civil Judge Class III decreed the suit vide judgment and decree dated 31-3-1994; against which an appeal was preferred before the learned District Judge, Kasur on 11-4-1994. During hearing of appeal a joint statement of learned counsel for the parties was recorded by the learned Addl. District Judge, Kasur on 18-6-1995, whereby valuation of suit for the purpose of court fee and jurisdiction was conceded as Rs.564,000; on the same day, the learned Addl. District Judge, Kasur returned the appeal to the present appellants for filing before the court of competent jurisdiction. On 22-6-1995, the appellants filed appeal before this court bearing R.F.A. No.166 of 1995,

along with an application for condonation of delay in filing of appeal. On 10-7-2002, a learned Division Bench of this Court dismissed the said application as well as appeal as being time barred. Appellants filed a petition for leave to appeal before the august Supreme Court of Pakistan bearing C.P. No.3262/L of 2003 and on 28-5-2003, the august Supreme Court of Pakistan, granted leave to appeal and on 9-10-2008, at the time of final hearing of the case, Civil Appeal No.1143 of 2003 was allowed, judgment of this Court dated 10-7-2002 was set aside and case was remitted to the learned District Judge, Kasur with the consent of learned counsel for the parties. After remand, the learned District Judge, Kasur vide impugned judgment and decree dated 17-3-2010 accepted the appeal and while setting aside the impugned judgment and decree dated 31-3-1994 remanded the case to the learned Senior Civil Judge, Kasur for hearing the parties on the basis of available evidence on record and to decide the case within two months. Hence, this appeal.

2. Learned counsel for the appellants has inter alia argued that the impugned judgment and decree dated 17-3-2010 is against law and facts of the case. Adds that while passing the impugned judgment, learned District Judge has not appreciated that when the trial Court was not competent to entertain the suit due to lack of pecuniary jurisdiction, how the proceedings conducted/recorded by it can be termed as valid and legal, rather same were Coram Non Judice. Submits that by holding the same as according to law, the learned District Judge has erred in law and has failed to follow the precedents, even the impugned judgment is self contradictory and without application of judicious mind. Submits that the mandate of law required that plaint should have been returned under Order VII, Rule 10 of Code of Civil Procedure, 1908 for its presentation before the Court of competent jurisdiction. Hence, the impugned judgment and decree is not sustainable in the eyes of law and is liable to be set aside; resultantly, by allowing this appeal, the impugned judgment and decree dated 17-3-2010 passed by learned District Judge may be set aside and plaint may be ordered to be

returned to the respondents/plaintiffs for its presentation before a court of competent jurisdiction. Relies on Sherin and 4 others v. Fazal Muhammad and 4 others 1995 SCMR 584, Mahmood Khan and others v. Agricultural Development Bank of Pakistan and others 1998 CLC 790-Karachi, Messrs Pakistan Telecommunication Corporation through its Director v. Abdus Sattar and 5 others 1995 MLD 1563 Karachi, Mohammad v. Mt. Wahab Jan AIR 1935 Peshawar 174, Suba Khan v. Rehmat Din and 2 others 1980 CLC 589-Lahore and Sankappa Rai and others v. Keraga Pujary and others AIR 1931 Madras 575.

3. On the contrary, learned counsel for the respondents/ plaintiffs, by favouring the impugned judgment and decree, has prayed for dismissal of the appeal in hand. Relies on Muhammad Suleman v. Habib Bank Limited, Hyderabad 1988 CLC 969-Karachi, Mahmood Akhtar and another v. Ch. Muhammad Hussain Naqshbandi, Addl. District Judge, Rawalpindi and another 1986 CLC 1451-Lahore and Muhammad Naseer and others v. Mustafa and others 2001 SCMR 1258.

4. Heard.

5. The moot point in this civil revision is that when the learned trial Court had no pecuniary jurisdiction, whether the proceedings conducted by it would be considered in accordance with law or not? In order to address this question, this Court has to see, initially, at the time of institution of the suit, the valuation of the suit for the purpose of court fee and jurisdiction was fixed at Rs.400 and same continued till passing of the judgment and decree by the learned trial Court, which lies within the pecuniary jurisdiction of learned Civil Judge Class III, because the valuation of the original suit has been determined by the respondents/ plaintiffs themselves under section 3 of Suits Valuation Act, 1887, thus, same would be a determining factor for the purpose of jurisdiction and not the market value or sale price of subject matter of suit, as agreed by the learned counsel for parties at appellate stage; in this regard reliance is placed on Muhammad Ali v. Imdad Hussain 1997

CLC 768-Lahore, wherein it has been observed, 'Suit Valuation Act, 1887, S.3---Subsequent change in valuation of suit---Effect---Jurisdiction---Initial value was within pecuniary jurisdiction of Trial Court and it rightly entertained such suit---Valuation of original suit as determined under S.3, Suits Valuation Act, 1887 for purposes of jurisdiction would be the determining factor and not market value or sale price of subject matter of suit..' Moreover, where during pendency of suit, the value of subject matter was found to be more than pecuniary jurisdiction of the Court trying the suit, such Court would not be deprived from its pecuniary jurisdiction under section 6 of the Code of Civil Procedure, 1908 to try the suit; in this regard guideline can be sought from Muhammad Naseer's case 2001 SCMR 1258, wherein it has invariably been held, 'Suit, institution of---Pecuniary jurisdiction of Court---Scope---Where during pendency of suit, the value of subject matter was found to be more than pecuniary jurisdiction of the Court trying the suit, such court would not be deprived from its pecuniary jurisdiction under S.6 of C.P.C. to try the suit.', but in the present case no such specific objection on the pecuniary jurisdiction was raised during pendency of the suit, mere an objection was raised that valuation of the suit was not properly made and it was for the first time at appellate stage when both the learned counsel for parties conceded the valuation of suit for purpose of court-fee and jurisdiction as Rs.564,000, which does not debar the proceedings conducted by the learned Civil Judge Class III, because the provisions of Order VII, Rule 10 of C.P.C. would apply only where Court initially lacked jurisdiction to entertain and try civil suit. At appellate stage, as is evident from the impugned judgment, no objection regarding proceedings conducted by learned Civil Judge Class III has been raised, therefore, at this revisional stage, no such objection can be allowed to be taken, because this has limited scope and only the question of illegality, irregularity and wrong exercise of jurisdiction by learned lower Court has to be seen at present. Moreover, the question whether any prejudice was caused

to the appellants by proceedings and decision of the suit on merits by the learned Civil Judge Class III was not agitated before the learned Appellate Court; therefore, impugned judgment, remanding the case to the Court having pecuniary jurisdiction for deciding the same on merits after hearing the learned counsel for parties by considering the material available on record, recorded by learned Civil Judge Class III, does not suffer from any material irregularity and illegality. In this regard reliance is placed on Nasima Faiz's case 1994 MLD 810-Lahore, wherein it has been observed, 'O.XLI, R.23---Remand order---Validity---First Appellate Court had remanded case on the ground that valuation of suit for purposes of court-fee was beyond the jurisdiction of Trial Court---Case on remand was entrusted to the Court having pecuniary jurisdiction in the matter---Remand order passed by First Appellate Court was thus, legal and did not suffer from any material irregularity.' However, the order/judgment and decree delivered by learned Civil Judge Class III would be void and nullity in the eye of law and the learned appellate Court has rightly remanded the case to the Court having pecuniary jurisdiction for rehearing the learned counsel for parties and deciding the suit afresh. In this regard reliance is placed on Zahida Parveen v. Muhammad Saleem 2003 CLC 1245-Lahore, wherein it has been observed, 'Pecuniary jurisdiction---Court lacking pecuniary jurisdiction, order/judgment passed by such Court would be void.' Even in Mahmood Akhtar and another's case 1986 CLC 1451-Lahore, it has been held, 'Entrusting of suit to another Court wherein after payment of deficient court-fees, subject matter of suit exceeded pecuniary jurisdiction of Court would not render such Court to be totally bereft of jurisdiction ..'

6. In view of above discussion, the case-law relied upon by learned counsel for the appellants, with utmost respect, has no relevance to the peculiar facts and circumstances of the present case; therefore, same does not render any assistance or help to the appellants' cause; because each and every case has its peculiar facts and circumstances and the Courts have to evaluate

the same with independent mind, so as to administer safer justice to the litigant public without being prejudiced or biased.

7. The crux of discussion above is that this Court finds no illegality, irregularity or wrong exercise of jurisdiction, committed by learned Appellate Court in remanding the suit to learned Senior Civil Judge for hearing the parties on the basis of available evidence on record and to decide the case afresh, rather same is up to the dexterity and based on appreciation of law on the subject; resultantly, the instant appeal being devoid of any force is hereby dismissed. No order as to costs.

AG/B-24/L **Appeal dismissed.**

PLJ 2015 Lahore 482

Present: **SHAHID BILAL HASSAN, J.**

CH. MUHAMMAD KHALID--Petitioner

versus

NAZIR AHMAD ASLAM--Respondent

C.R. No. 1840 of 2014, decided on 27.6.2014.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Civil revision--Suit for recovery as damages--Court fees--Instead of purchasing fresh stamp papers submitted earlier sued Court fees in other case which had been returned same produced before trial Court which was allowed--Challenge to--There is no cavil to proposition that a counsel representing party for all practical purposes; stamps purchased in his name and affixed on plaint deemed to have been purchased by party and affixed on his behalf--Trial Court has not committed any illegality, irregularity or wrong exercise, of jurisdiction in passing impugned order, therefore, same does not warrant interference by High Court in exercise of revisional jurisdiction, which otherwise has a limited scope--Revision was dismissed.

[Pp. 483 & 484] A & B

Ch. Shahid Tabassum, Advocate for Petitioner.

Dr. Hameed Ahmad Ayaz, Advocate for Respondent.

Date of hearing: 27.6.2014.

ORDER

Respondent filed a suit for recovery of Rs. 53,42,460/-as damages against the petitioner before the learned trial Court at Lahore. While entertaining the said suit, the learned Civil Judge directed the respondent/plaintiff to submit requisite Court fee to the tune of Rs. 15,000/-. The respondent instead of

purchasing fresh stamp papers, submitted Court fee which was earlier used and submitted in another case and by order of Court, the same was returned and resultantly produced before the learned trial Court in this case; the same was allowed by the learned trial Court *vide* impugned order dated 09.01.2014, which has been called into question through this civil revision by the petitioner.

2. While opening arguments, learned counsel for the petitioner has submitted that the impugned order is beyond the jurisdiction vested in learned trial Court; that the learned trial Court has erred in law while relying on the judgments produced before it; which actually does not apply to the facts of the case; that purchaser of Court fee neither appeared before the learned trial Court nor his Court fee can be used in the case of respondent/plaintiff; that even otherwise, the Court fee once purchased and used in a case is not originally returned but amount of the same value is returned; that if the impugned order is not set aside, the petitioner would suffer irreparable loss and mental agony in the shape of pendency of frivolous suit filed by the respondent; hence, the impugned order is not sustainable in the eye of law and liable to be set aside; resultantly, the suit of the respondent/plaintiff may be dismissed for non-complying with the order of learned trial Court regarding affixation of Court fee. Relies on *Emperor vs. Abdul Hakim* AIR 1931 Lahore 337, *Zila Council, Sargodha vs. Haji Irshad Ahmad* 1994 CLC 79-Lahore and *Syed Bunyad Ali Shah and 5 others vs. Mst. Bibi Khair Un Nisa and another* 1981 CLC 121 (S.C. (AJ&K)].

3. On the contrary, learned counsel appearing on behalf of the respondent, by favouring the impugned order, has prayed for dismissal of the civil revision in hand by maintaining that no illegality or irregularity and wrong exercise of jurisdiction has been committed by learned trial Court, rather law on the

subject has been followed in proper way. Relies on *Emperor vs. Abdul Hakim* AIR 1931 Lahore 337, *Syed Bunyad Ali Shah and 5 others vs. Mst. Bibi Khair Un Nisa and another* 1981 CLC 121 [(SC (AJ&K)], *Raja Muhammad Afzal Khan vs. Ch. Manzoor Elahi and 6 others* PLD 1975 Lahore 1276 and *Zila Council, Sargodha vs. Haji Irshad Ahmad* 1994 CLC 79-Lahore.

4. Heard.

5. There is no cavil to the proposition that a counsel representing party for all practical purposes; stamps purchased in his name and affixed on plaint deemed to have been purchased by party and affixed on his behalf; in this regard reliance is paced on *Syed Bunyad Ali Shah and 5 others vs. Mst. Bibi Khair Un Nisa and another* 1981 CLC 121 [SC (AJ&K)]. Moreover, in Stamp Law and Procedure Sahib Sing Bulsingh 'Shahani, Accountant & Store-Keeper Officer of the Superintendent of Stamps, Karachi, First Edition, 1937, it has been elaborated that, *'The writing of the name of the purchaser and other particulars on the back of a stamp is required in the case of impressed stamps the Rules for the sale of stamps. The rules go no further than to require endorsement to be made by the Stamp Vendor and there is no provision of the Act or of any Rule made under them that a stamp so endorsed may only be used by or on behalf of the person whose name is so endorsed. The purchase of the Stamp rules requiring the endorsement seems merely the provision of a means of ascertaining when, where and by whom a stamp has been purchased but there is nothing to prevent a impressed stamp purchased by one person being used by some other person…….. Adhesive Court-fee stamps as well as impressed stamps used under the General Stamp Act or Court Fees Act can, therefore, legally be used by persons other than whose names, they bear as purchasers.'* In this regard

safer reliance can also be placed on *Raja Muhammad Afzal Khan's case* PLD 1975 Lahore 1276. In the present case, the Court Fee stamps were duly returned by order of Court of competent jurisdiction and same were gifted by the person, who purchased the Court fee stamps, to his counsel and in view of above citations, the same can be used in other suit, because the main requirement of law is to deposit the Court Fee with the Govt. Treasury and the respondent/plaintiff cannot be burdened with further liability to purchase fresh Court fee stamp unless it is established by the petitioner that the said Court fee stamp, deposited by the respondent/plaintiff, had been utilized for any other purpose or case; in this regard reliance is placed on Zila Council, Sargodha's case 1994 CLC 79-Lahore.

6. The above discussion ends with the observation that the learned trial Court has not committed any illegality, irregularity or wrong exercise, of jurisdiction in passing the impugned order, therefore, same does not warrant interference by this Court in exercise of revisional jurisdiction, which otherwise has a limited scope. Resultantly, the instant civil revision being devoid of any force is hereby dismissed.

(R.A.) **Revision dismissed.**

PLJ 2015 Lahore 984

Present: SHAHID BILAL HASSAN, J.

M/s. ZOR ENGINEERS LIMITED, LAHORE through its Director--Petitioner

versus

EASTERN FEDERAL UNION INSURANCE COMPANY LTD., KARACHI and another--Respondents

C.R. No. 1061 of 2006, heard on 22.4.2015.

Civil Procedure Code, 1908 (V of 1908)--

----O. XXXIX, Rr. 1 & 2--Temporary injunction--Insurance bond--Being issued in consideration of an advance--Tried to encash bond in violation of terms and condition through a suit, dismissal of--Objection with regard to lack of cause of action--Defect in institution of plaint having instituted unauthorisedly and incompetently, defence was incurable--Validity--Bank guarantee is an independent contract between Bank and a party in whose favour guarantee is issued and encashment of irrevocable guarantee cannot be restrained by way of grant of temporary injunction on ground that there is a dispute between parties to main Contract/agreement, as already observed by High Court--When impugned judgments and decrees are result of appreciation of evidence and law on subject in a true perspective and no misreading and non-reading of evidence has been committed by Courts below and not perverse or arbitrary in nature, same cannot be interfered in revisional jurisdiction. [Pp. 987 & 988] A & C

2005 CLD 1710 & 2010 SCMR 5.

Concurrent Findings--

----Scope of--Jurisdiction--There is no occasion of such like nature warranting interference by High Court in impugned judgments and decrees, because it has rightly been observed by Courts below that suit was not maintainable in its present form and no decree for grant of permanent injunction, can be granted. [P. 988] B

M/s. Hasham Ahmad Khan and Umar Tariq Gill, Advocate for Petitioner.

Barriaster Armghan Ishfaq, Advocate for Respondent No. 2.

Date of hearing: 22.4.2015.

JUDGMENT

Petitioner being a Private Limited Company, providing engineering services, instituted a suit for permanent injunction through Mr. D.H. Norris, who was allegedly director of the Company and was fully authorized, by contending that petitioner/plaintiff was awarded a construction contract for extension work at the Television Centre, Abbott Road, Lahore in June, 1975. Allegedly, in October/November, 1977, it was agreed inter the petitioner and Respondent No. 2 that a sum of Rs.800,000/- would be advanced to petitioner which would be utilized by the petitioner for extension work and same would be recovered from the running bills of the petitioner after a grace period of three months and petitioner was asked to arrange an Insurance Bond in the sum of Rs.800,000/-, which the petitioner executed on 01.12.1977 in favour of Respondent No. 2 and it was clearly mentioned in the said bond that it was being issued in consideration of an advance of Rs.800,000/-, to be made to the petitioner/plaintiff; but after securing the Bond for Rs.800,000/-, the Respondent No. 2 only advanced a sum of Rs.338,525/- *vide* Cheque No. 06072728 dated 24.12.1977 and Respondent

No. 2 later on tried to encash the Bond in violation of terms and conditions; hence, the suit.

The suit was contested by the Respondent No. 2 while submitting written statement and raised objections with regards to lack of cause of action, form of suit and maintainability of the suit was called in question and prayed for dismissal of the suit.

The learned trial Court summed up the divergence in pleadings into issues. Both the parties adduced their respective evidence in *pro* and *contra*.

After hearing arguments, the learned trial Court *vide* impugned judgment and decree dated 08.12.2000 dismissed suit of the petitioner.

Feeling aggrieved of the said judgment and decree, the petitioner preferred an appeal, which was subsequently dismissed *vide* impugned judgment and decree dated 22.04.2006 passed by learned Addl. District Judge, Lahore.

2. Advancing arguments, it has been stated that both the learned Courts below have erred in holding that the suit has not been instituted by an authorized person, because no objection has been raised by rival party. Adds that both the learned Courts have failed to appreciate law on the subject in a proper way and misapplied and misinterpreted the provisions of the Specific Relief Act, 1872 by maintaining that efficacious remedy is available to the petitioner other than injunction. Therefore, the impugned judgments and decrees being not sustainable in the eye of law may be set aside while allowing the civil revision in hand and suit of the petitioner may be decreed. Relies on *The Municipal Board, Mathura v. Dr. Radha Ballabh Pathak* A.I.R. (936) 1949 Allahabad 301, *Municipal Committee, Montgomery v. Master Sant Singh* A.I.R. 1940 Lahore 377, *Aziz Ullah Khan and others v. Gul Muhammad Khan* 2000 SCMR 1647, *Messrs National Construction Ltd. v. Aiwan-e-Iqbal Authority* PLD 1994 Supreme Court 311 and *Heavy*

Mechanical Complex (Pvt.) Ltd., Taxila v. Attock Industrial Products Ltd. Rawalpindi PLD 2003 Supreme Court 295.

3. On the contrary, Respondent No. 1 was proceeded against *ex parte*. However, learned counsel appearing on behalf of the Respondent No. 2 while favouring the impugned judgments and decrees has prayed for dismissal of the civil revision in hand. Relies on *PICIC Commercial Bank Limited v. Spectrum Fisheries Limited* 2006 CLD 440-Karachi, *Khan Iftikhar Hussain Khan of Mamdot (Represented by 6 Heirs) v. Messrs Ghulam Nabi Corporation Ltd. Lahore* PLD 1971 Supreme Court 550, *Qamran Construction (Pvt.) Ltd. v. Saleemullah and 2 others* 2008 CLD 239-Karachi, *Haral Textiles Limited v. Banque Indosuez Belgium. S.A. and others* 1999 SCMR 591, *Messrs National Construction Ltd. v. Aiwan-e-Iabal Authority* PLD 1994 Supreme Court 311, *Pakistan Petroleum Limited v. BBJ Pipe Industries (Pvt.) Limited and another* 2005 CLD 1710-Lahore and *Sh. Fateh Muhammad v. Muhammad Adil and others* PLD 2007 Supreme Court 460.

4. Heard.

5. Admittedly, the resolution allegedly passed in favour of persons, who instituted the plaint and amended plaint have not been placed on record nor tendered in evidence, which was mandatory to be placed on record and where there is any defect in the institution of plaint i.e. same having been instituted unauthorisedly and incompetently, the said defence is incurable. It was held in *Khan Iftikhar Hussain Khan of Mamdot (Represented by 6 Heirs) v. Messrs Ghulam Nabi Corporation Ltd. Lahore* PLD 1971 Supreme Court 550 that, 'Suit on behalf of Company by a person (Director In-charge of Company)--Not competent unless he is so authorized by a resolution passed by Company's Board of Directors--Meeting of Directors not duly convened unless due notice of it given to all Director.' In view of above, the findings of learned Courts below in this regard do not call for any

interference by this Court, as same have been rendered by construing law on the subject in a proper way.

In addition to above, Bank guarantee is an independent contract between Bank and a party in whose favour the guarantee is issued and encashment of irrevocable guarantee cannot be restrained by way of grant of temporary injunction on the ground that there is a dispute between the parties to the main Contract/agreement, as already observed by this Court in *Pakistan Petroleum Limited v. BBJ Pipe Industries (Pvt.) Limited and another* 2005 CLD 1710-Lahore.

6. In revisional jurisdiction, the concurrent findings of the learned Courts below on facts cannot be interfered with by this Court at revisional stage, which has limited scope and the Court has only to see whether any material illegality, irregularity or wrong exercise of jurisdiction has been committed by learned Courts below, but in the present case, there is no occasion of such like nature warranting interference by this Court in the impugned judgments and decrees, because it has rightly been observed by learned Courts below that the suit was not maintainable in its present form and no decree for grant of permanent injunction, in view of above discussion, can be granted.

7. The learned Courts below have rightly reached the conclusion after appraising and evaluating the evidence, oral as well as documentary, in a proper way, concurrently, which cannot be interfered with. In this regard guideline can be sought from *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* 2014 SCMR 161, wherein it has invariably been held that:

> `Revisional jurisdiction of High Court could not be invoked against conclusions of law or fact, which did not, in any way, affect jurisdiction of the Court--High Court could not have investigated into

facts or exercised its jurisdiction on the basis of facts or grounds, which were already proved by parties by leading evidence----High Court was justified in not interfering in concurrent findings of facts which were based on material brought on record and proper appreciation of evidence.'

When the impugned judgments and decrees are result of appreciation of evidence and law on the subject in a true perspective and no misreading and non-reading of evidence has been committed by learned Courts below and not perverse or arbitrary in nature, same cannot be interfered in revisional jurisdiction. Reliance is placed on *Muhammad Idrees and others v. Muhammad Pervaiz and others* 2010 SCMR 5.

8. The case law relied upon by learned counsel for the petitioner, with utmost respect, has no relevance to the facts and circumstances of the case in hand; therefore, same does not render any help or assistance to the petitioner's cause.

9. As a sequel of above discussion, while placing reliance on the judgments *supra*, the instant civil revision being devoid of any force and substance stands dismissed.

10. No order as to costs.

(R.A.) **Petition dismissed.**

2016 C L C 1438

[Lahore]

Before Shahid Bilal Hassan, J

SAEEDA GHAZALA and 3 others----Appellants

Versus

TAHIRA NAZ and 10 others----Respondents

R.S.A. No.2 of 2007, heard on 27th May, 2015.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Talb-i-Ishhad, performance of---Procedure---Pre-emptor was bound to prove the dispatch and delivery of notice of Talb-i-Ishhad to the vendee---Where the postman deposed that vendees were not residing on the given address and he returned the envelops by making reports as such, service of addressees of notice of Talb-i-Ishhad was not effected in accordance with law which was fatal for pre-emptor---Plaintiff was not entitled to any decree for possession through pre-emption---Second appeal was allowed in circumstances.

Mehr Din (represented by his Legal Heirs) v. Dr. Bashir Ahmad Khan and 2 others 1985 SCMR 1; Muhammad Hussain and others v. Ghulam Qadir through Legal Heirs PLD 2006 SC 594; Muhammad Shafi v. Muhammad Ayub and another 2006 CLC 556; Muhammad Bakhsh v. Zia Ullah and others 1983 SCMR 988; Muhammad Fazal v. Kaura through Legal Heirs 1999 SCMR 1870; Ghulam Muhammad v. Sabir Hussain and others 2004 SCMR 999; Jangi v. Jhanda and others PLD 1961 (W.P.) Baghdad-ul-Jadid 34; Qudratullah v. Ghulam Jan and others PLD 1966 (W.P.) Pesh. 85; Muhammad Ali and 7 others v. Mst. Humera Fatima and 2 others 2013 SCMR 178; Munawar Hussain and others v. Afaq Ahmed 2013 SCMR 721; Muhammad Akram alias Raja v. Muhammad Ishaque 2004 SCMR 1130;

Muhammad Ashiq Khan v. Muhammad Sharif and 5 others 2014 YLR 767 and The Province of East Pakistan v. Major Nawab Khawaja Hasan Askary and others PLD 1971 SC 82 ref.

Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866; Bashir Ahmed's case 2011 SCMR 762; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; and Dayam Khan and others v. Muslim Khan 2015 SCMR 222 rel.

Umar Abdullah for Appellant.

Jari Ullah Khan for Respondents.

Date of hearing: 27th May, 2015.

JUDGMENT

SHAHID BILAL HASSAN, J.--- On 30.06.1997 Manzoor Subhani entered into an agreement of sale with Asif Baig (Predecessor of petitioners Nos.1 to 3) and Mst. Gulshan Baig (Petitioner No.4) germane to land measuring 02 kanals falling in Khasra No.173, Khata No.120/292 and 32/164, Khasra No.172, Khata No.172/326, Revenue Estate Kotli Behram, Sialkot. The sale price was Rs.20,00,000/-, which was paid through cheque; later on mutation of sale No.1633 was attested on 24.07.1997, but sale was cancelled because it was recorded in violation of section 42 of the Land Revenue Act, 1967 and subsequent mutation No.1657 was attested on 28.08.1997. Being aggrieved of the said transaction, the deceased respondent Asif Baig/ plaintiff instituted a suit for possession on the basis of pre-emption, which was subsequently decreed vide impugned judgment and decree dated 12.04.2005 subject to payment of Rs.20,00,000/-.

2. The petitioners preferred appeal challenging the impugned judgment and decree, whereas deceased respondent/plaintiff namely Hafiz Ghafoor

Ahmed agitated the matter in appeal regarding value of the land.

The learned Appellate Court vide impugned judgment and decree dated 06.11.2006 dismissed appeal of the appellants/vendees and accepted the appeal of respondent(s)/plaintiff(s), reducing the sale price from Rs.20,00,000/- to Rs.100,000/- only.

3. Feeling aggrieved of said judgments and decrees, the instant regular second appeal has been filed by the appellants/vendees.

4. Reiterating the grounds urged in this memorandum of appeal, the learned counsel for appellants has further argued that respondent/ plaintiff has failed to establish performance of Talbs in accordance with law and this issue has not been taken up in a proper sense. Contends that service of addressee has not been proved by the plaintiff as per mandate of law. He has submitted that plaintiff is not co-owner or co-sharer of the suit land as is evident from Ex.P8. Further submits that learned appellate Court has erred while reducing the amount from Rs.20,00,000/- to Rs.100,000/-. States that pre-emption suit does not lie in urban areas. Adds that proper issues have not been framed by learned trial Court. Lastly prays that by accepting the appeal in hand, impugned judgments and decrees may be set aside and suit of the respondent/ plaintiff may be dismissed. Relies on Mehr Din (represented by his Legal Heirs) v. Dr. Bashir Ahmad Khan and 2 others (1985 SCMR 1), Muhammad Hussain and others v. Ghulam Qadir through Legal Heirs (PLD 2006 Supreme Court 594), Muhammad Shafi v. Muhammad Ayub and another (2006 CLC 556-Lahore), Muhammad Bakhsh v. Zia Ullah and others (1983 SCMR 988), Muhammad Fazal v. Kaura through Legal Heirs (1999 SCMR 1870), Ghulam Muhammad v. Sabir Hussain and others (2004 SCMR 999), Jangi v. Jhanda and others (PLD 1961 (W.P.) Baghdad-ul-Jadid 34), Qudratullah v. Ghulam Jan and others (PLD 1966 (W.P.); Peshawar 85),

Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866), Muhammad Ali and 7 others v. Mst. Humera Fatima and 2 others (2013 SCMR 178), Munawar Hussain and others v. Afaq Ahmed (2013 SCMR 721), Muhammad Akram alias Raja v. Muhammad Ishaque (2004 SCMR 1130), Muhammad Ashiq Khan v. Muhammad Sharif and 5 others (2014 YLR 767 Lahore) and The Province of East Pakistan v. Major Nawab Khawaja Hasan Askary and others (PLD 1971 Supreme Court 82).

5. Gainsaying the above submissions learned counsel representing the respondent(s)/plaintiff(s), by favouring the impugned judgments and decrees has prayed for dismissal of the appeal in hand.

6. Heard.

7. To succeed in a suit for possession on the basis of pre-emption, it is required to prove the performance of all the following Talbs in accordance with law, under Section 13 of the Punjab Pre-emption Act, 1991, failing which the same results fatal to the pre-emptor's case

(i) Talb-e-Muwathibat.

(ii) Talb-e-Ishhad.

(iii) Talb-e-Khusumat.

8. It is evident from the record made available before this Court as well as impugned judgments that the respondent/plaintiff's P.Ws. remained consistent regarding performance of Talb-i-Muwathibat, so the findings of the learned Courts below on this point are according to the evidence. Correct appreciation of evidence has been made by learned Courts below on this score, so the findings of the learned Courts below to this extent do not call for any interference.

9. By putting both i.e. impugned judgments and evidence of the parties in juxtaposition, it transpires that evidence of the parties has not been

thoroughly appraised while recording the judgments by learned Courts below with regards to Talb-i-Ishhad.

10. It is admitted on record that when the petitioners have specifically denied the receipt of any notices of Talb-i-Ishhad, it was imperative upon the respondent(s)/plaintiff(s) to prove the dispatch and delivery of notices to the petitioners. Though the respondent(s)/ plaintiff(s) produced postman as P.W.2, yet it is evident from his deposition that Ex.P3 and Ex.P4 (alleged envelopes containing notices of Talb-e-Ishhad) were handed over to him and he went to effect service of the vendees/defendants, but one Khalid Baig told him that vendees/ defendants were not residing there, so he returned the envelopes by making reports; meaning thereby service of the addressees of notices was not effected in accordance with law. Therefore, the findings of learned Courts below on this talb are not as per mandate of law on the subject, so the learned Courts below have failed to appreciate the development with regards to performance of Talb-i-Ishhad and have misconstrued and misinterpreted law on this score, so by placing reliance on Bashir Ahmed (2011 SCMR 762), Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105), Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866) and Dayam Khan and others v. Muslim Khan (2015 SCMR 222), the findings of the learned Courts below pertaining to performance of Talb-i-Ishhad being not in consonance with the mandate of law, are not sustainable and are not entitled to hold field anymore; same are reversed.

11. Even non-performance of one of the Talb in accordance with law is fatal to the pre-emptor and when the respondent(s)/plaintiff(s) has failed to fulfill the requisite performance of Talb-i-Ishhad as per mandate of law, he is not entitled to any decree for possession through pre-emption. Reliance is

placed on Mst. Sahib Jamala v. Fazal Subhan and 11 others (PLD 2005 Supreme Court 977).

12. Pursuant to above discussion, both the learned Courts below have failed to exercise jurisdiction vested in them in a proper way and material illegality and irregularity has been committed, warranting interference by this Court in exercise of revisional jurisdiction; resultantly, while placing reliance on the judgments supra, the present appeal is allowed, impugned judgments and decrees dated 12.04.2005 and 06.11.2006 passed by learned trial Court as well as learned Appellate Court, respectively are set aside and suit of the respondent(s)/ plaintiff(s) is dismissed.

13. No order as to costs.

ZC/S-38/L **Appeal allowed.**

2016 C L C Note 56

[Lahore]

Before Shahid Bilal Hassan, J

NASEER AHMAD----Appellant

Versus

MUHAMMAD MUNIR and 8 others----Respondents

Regular Second Appeal No.135 of 2012, heard on 12th May, 2014.

(a) Limitation Act (IX of 1908)---

----S. 3 & Art. 113---Qanun-e-Shahadat (10 of 1984), Art. 17---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Limitation, question of---Duty of court---Scope---Appellate Court dismissed the suit holding that same was barred by time---Contention of plaintiff was that no plea of limitation was raised by the defendants in their written statement as well as at the time of filing appeal---Validity---Court was bound while entertaining suit for the first time to take into account whether any cause of action was disclosed in the plaint and whether suit was not barred by limitation---Said question of limitation could even be determined at trial and appellate stage if same was not considered at first time and opposite party had not raised any such objection---Appellate Court had rightly taken up the issue of limitation and had rightly reached to the conclusion that suit was hit by limitation---Three years limitation had been provided for filing suit for specific performance from the date fixed or where no such date had been fixed from the date when plaintiff had notice that performance had been refused---Present suit was barred by limitation and was not proceedable---Law would favour vigilant and not the indolent. [para. 5 of the judgment]

Muhammad Sami v. Additional District Judge, Sargodha and others 2007 SCMR 621; Government of N.W.F.P. v. Akbar Shah 2010 SCMR 1408 and Jam Muhammad Ismail's case 2012 MLD 1545 ref.

(b) Specific Relief Act (I of 1877)---

----S. 12---Qanun-e-Shahadat (10 of 1984), Art.17---Suit for specific performance of contract---Proof---Requirements---Each and every transaction must had been endorsed and proved by producing witnesses---Mere production of one witness of making payment was not the mandate of law rather to prove the contents of a document or any act production of two truthful witnesses was necessary---Depositions of marginal witnesses were contrary to each other in the present case---Person seeking a decree for specific performance of agreement to sell/contract had to prove that the person with whom he had entered into agreement enjoyed the title of such property and if he had failed to prove the title of such person then no decree could be passed as same could not be satisfied or implemented---Plaintiff had failed to produce any document showing the ownership of defendants---Findings recorded by the Appellate Court were result of appraising the evidence in true perspective by applying judicial mind---No illegality, irregularity or infirmity was pointed out in the findings recorded by the Appellate Court---Appeal was dismissed in circumstances. [para.6 & 7 of the judgment]

Muhammad Sami v. Additional District Judge, Sargodha and others 2007 SCMR 621; Government of N.W.F.P. v. Akbar Shah 2010 SCMR 1408 and Jam Muhammad Ismail's case 2012 MLD 1545 rel.

Chaudhary Amjad Hussain for Appellant.

Muhammad Rasheed Mirza for Respondents.

Date of hearing: 12th May, 2014.

JUDGMENT

SHAHID BILAL HASSAN, J.---The present appellant instituted a suit for specific performance of agreement to sell in respect of a house measuring 4-162/272 Marlas by maintaining that Bashir Ahmad, predecessor in interest of the respondents was owner of the disputed house who entered into an agreement to sell the same to the appellant in consideration of Rs.425,000/-, received Rs.100,000/- as earnest money and executed the agreement to sell dated 14.04.2003; according to said agreement the remaining sale price was to be paid uptill 14.10.2003 and thereafter execution of agreement to sell was to be made. It is further contended that a dispute arose between Bashir Ahmad and his brothers regarding the suit property and litigation started; the appellant further made payment of Rs.235,000/- at different times, in this way he paid Rs.335,000/- in total; that the dispute arose between Bashir Ahmad and his brothers came to an end on 11.07.2006 and on decision of the same, Bashir Ahmad had to execute the sale deed after receiving remaining sale price i.e. Rs.90,000/-, but he (Bashir Ahmad) did not inform the appellant and on 17.01.2007, he passed away, upon which the appellant approached the respondents to execute the sale deed in favour of the appellant after receiving the remaining sale price, who allegedly acknowledged the demand of the appellant, but ultimately refused; hence, the suit. The said suit was contested by the respondents/ defendants on the ground that the appellant was in possession of the disputed house on rent and he was paying Rs.3000/- per month as rent; that the alleged agreement to sell is forged and fictitious. The learned trial Court, out of the divergent pleadings, framed the following issues:-

1. Whether predecessor of defendants namely Bashir Ahmad underwent agreement to sell dated 14.04.2003 in favour of

plaintiffs with respect to suit property for consideration in the sum of Rs.425,000/ - and received sum of Rs.335,000/ - up to 11.07.2006? OPP

2. Whether there was litigation regarding suit property and the same caused delay in execution of registered sale deed in favour of plaintiff? OPP

3. Whether defendants too had undertaken to comply the agreement undergone by their predecessor after decision of the pending suit? OPP

4. Whether instant suit is false and frivolous as plaintiff is in possession over the suit property as tenant? OPD

5. Whether plaintiff is entitled to decree for specific performance of agreement to sell as prayed for? OPP

6. Relief.

After recording evidence of both the parties and hearing arguments, the learned trial Court vide judgment and decree dated 30.09.2010, decreed the suit in favour of the present appellant; against which an appeal was preferred by the respondents, which was allowed vide impugned judgment and decree dated 29.06.2012 and suit of the appellant was dismissed.

2. Learned counsel for the appellant has argued that the impugned judgment and decree is against law and facts; that the learned first appellate Court has erred in law to disturb the well reasoned judgment and decree of learned trial Court; that the impugned judgment and decree is result of misreading and non-reading of evidence, rather same is based on surmises and conjectures; that no plea of limitation was raised by the respondents in their written statement as well as at the time of filing appeal, but even then the learned first Appellate Court dismissed the suit

of the appellant by holding the same as barred by time, which is not warranted under the law; that learned first appellate Court has wrongly held that sale in question is invalid and has failed to consider the admitted facts; that subsequent happening resulted in non-completion of registered deed, but this fact has not been kept in view by learned first Appellate Court; therefore, the impugned judgment and decree is not sustainable in the eyes of law and liable to be set aside; resultantly, the judgment and decree rendered by learned trial Court is liable to be restored.

3. On the contrary, learned counsel appearing on behalf of the respondents by favouring the impugned judgment and decree has prayed for dismissal of the appeal in hand by contending that it is the Duty of the Court to determine question of limitation irrespective of the fact whether such plea was raised or not by the opposite party; therefore, the learned first Appellate Court has rightly dismissed the suit of the appellant; even otherwise, the appellant has failed to prove the transaction in question allegedly entered into by Bashir Ahmed, predecessor in interest of the respondents, with him.

4. Heard.

5. While entertaining a suit, for the first time, it is the duty of the Court to take into account whether the plaint discloses any cause of action and whether the suit is not barred by limitation and if at that time the question of limitation could not be considered and the opposite party does not raise any such objection, even then the Courts are duty bound to determine the question of limitation at trial and appellate stage. In this regard section 3 of the Limitation Act, 1908 is very much clear, which is reproduced infra:-

> Dismissal of suit, etc. instituted, etc. after period of limitation.---
> Subject to the provisions contained in sections 4 to 25 (inclusive),

every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed although limitation has not been set up as a defence.

In this regard safer reliance can be placed on Muhammad Sami v. Additional District Judge, Sargodha, etc. 2007 SCMR 621, wherein it has been held that, "S.3---Limitation---Question of---Duty of Court---Scope -- Court is bound to notice question of limitation, irrespective of the fact, whether it was agitated or not." Even in Government of N.W.F.P. v. Akbar Shah 2010 SCMR 1408, said view has been re-affirmed while holding that, "S.3---Duty of Court to look into point of limitation without there being objection of any party in terms of S.3 of Limitation Act, 1908." This view has also been followed by this Court in Jam Muhammad Ismail's case 2012 MLD 1545, wherein it has been observed that, "S.3---Suit---Limitation---Duty of Court---Scope---Primary Duty of Trial Court would be to see that whether plaintiffs claim was within limitation even in absence of any objection of opposite party."

Therefore, the learned first Appellate Court has rightly taken up the issue of limitation and has rightly reached the conclusion that the suit is hit by limitation because according to agreement to sell Ex.P1 the target date was 14.10.2003 and suit was to be filed uptill 14.10.2006 in case of any refusal in performance of part of agreement on behalf of Bashir Ahmad, whereas the appellant instituted the suit on 12.07.2007, which is hopelessly barred by limitation and such suit was not proceedable on this score, because Article 113 of the Limitation Act, 1908 provides three years limitation for filing suit for specific performance from the date fixed or where no such date is fixed, then, from the date when the plaintiff has noticed that performance has been refused. The objection of the

appellant that Bashir Ahmed did not inform him about ending of the litigation between him (Bashir Ahmed) and his brothers is of no help to the appellant because the law favours the vigilant and not the indolent, even otherwise from perusal of the agreement to sell Ex.P1 no such term finds place in it, meaning thereby same has been asserted afterwards in order to accrue cause of action; but the appellant has failed to prove the same through trustworthy and reliable independent evidence.

6. Regarding payment of earnest money and amounts afterwards, the learned first appellate Court has rightly observed that each and every transaction must have been endorsed and proved by producing witnesses, mere production of one witness of making of payment is not the mandate of law, rather to prove the contents of a document or any act, it is necessary to produce two truthful witnesses as required under Article 17 of the Qanun-e-Shahadat Order, 1984. Moreover, depositions of the marginal witnesses are also contradictory to each other germane to place of making of payment of earnest money, even their presence at the relevant time i.e. at the time of transaction in question is highly doubtful and evidence of both the P.Ws. i.e. P.W.2 and P.W.4 has rightly been discarded by learned first Appellate Court. Even the appellant has failed to produce any document showing the ownership of Bashir Ahmed, predecessor in interest of the respondents, because a person seeking a decree for specific performance of agreement to sell/ contract has to prove that the person with whom he entered into agreement enjoys the title of such property and if he fails no decree can be passed in his favour, because if such a decree is passed, the same cannot be satisfied or implemented.

7. In view of the above said discussion, when the appellant/plaintiff has failed to establish any illegality, irregularity or infirmity in the

findings of learned first Appellate Court rendered in the impugned judgment and decree, it can be safely observed that the same are result of appraising the evidence in true perspective, applying of judicial mind, rightly interpreting the law and upto the dexterity, therefore, same does not call for any interference by this Court. Resultantly, by placing reliance on the judgments supra, this appeal is dismissed, leaving the parties to bear their own costs.

ZC/N-41/L **Appeal dismissed.**

2016 C L C Note 127

[Lahore]

Before Shahid Bilal Hassan, J

Mst. SARDAR BEGUM---Petitioner

Versus

ZULFIQAR ALI and 2 others---Respondents

Writ Petition No. 26426 of 2013, decided on 14th May, 2014.

(a) Civil Procedure Code (V of 1908)---

----O. XVI, Rr. 1(2) & 14---Constitution of Pakistan, Art. 199---Constitutional petition---Additional witnesses, summoning of---Names of witnesses intended to be summoned were not mentioned in list of witnesses filed earlier---Trial Court allowed to summon witnesses and such order was maintained by Lower Appellate Court in exercise of revisional jurisdiction---Validity---Both the Courts below had jurisdiction to entertain application as well as revision filed against order passed by Trial Court---Trial Court could grant permission under O. XVI, R. 1(2), C.P.C., for summoning of witnesses on showing good cause---Trial Court as well as Lower Appellate Court rightly exercised jurisdiction vested in it---Main object of O. XVI, Rr. 1(2) & 14, C.P.C. was that entire evidence, which was relevant and necessary for ascertaining truth and deciding issues involved completely and effectively, should come before the Court at any stage of trial before passing of judgment---Mere on the pretext of non-submission of list of witnesses and non-mentioning of names of witnesses in list of witnesses, plaintiff could not be thrown out of arena of litigation, because same could not be due to inexperience or lack of understanding on the part of his counsel, which omission was a good cause---High Court declined to interfere in orders passed by two Courts below---Petition was dismissed in circumstances. [Paras. 6, 8 & 10 of the Judgment]

Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 distinguished.

Mst. Hajra Begum through Legal Heirs v. Mst. Badar-un-Nissa and others PLD 2013 Sindh 417; Messrs Bayer Crops Science Pakistan through Chief Executive Officer v. Altaf Hussain and 3 others 2013 MLD 323; Muhammad Yousaf v. Manzoor Ahmad and another PLD 2006 Lah. 738; Muhammad Khan and 6 others v. Mst. Ghulam Fatima and 12 others 1991 SCMR 970; Mian Muhammad Hafiz and others v. Aziz Ahmad and others 1980 SCMR 557 and Order dated 23-9-2013 in C.P. No. 1278 of 2013 rel.

(b) Administration of justice---

----Technicalities---Scope---Law is made to administer safer justice and to resolve controversy inter se the litigants to its legitimate end, rather to knock out any litigant on the basis of technicalities. [Para. 3 of the Judgment]

Umar Hayat v. Additional District Judge and others 2004 SCMR 1367 rel.

Mushtaq Ahmad Kashmiri for Petitioner.

Muhammad Saeed Sheikh for Respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.---Through this constitutional petition, the petitioner has sought indulgence of this Court challenging the vires of order dated 26.09.2013 passed by learned Civil Judge whereby application of respondent No.1 for summoning some witnesses was allowed in a suit for declaration, instituted by the present petitioner, and the order dated 05.10.2013 passed by learned Addl. District Judge, Lahore whereby revision assailing the order passed by learned Civil Judge was dismissed in limine.

2. Factually speaking the petitioner filed a suit for declaration to the effect that sale deed bearing document No.2557 Book No.1 Jild No.756 entered in book of registrar on 08.05.2006 as outcome of forgery, fraud and fictitious. In response to the said suit, the respondent No.1 appeared and filed his contesting written statement. Out of the divergent pleadings of the parties, the following issues were framed on 21.03.2011:-

1. Whether the documents i.e. sale deed No.2557, Jild No.756, Bahi No.1 dated 08.05.2006 in favour of the defendant No.1 is fake, fictitious, forged and has been obtained through fraud, misrepresentation and same be declared as illegal, unlawful, void ab initio and the same be cancelled? OPP
2. Whether the plaintiffs are entitled to the decree for declaration as prayed for? OPP
3. Whether the suit is not maintainable in its present form? OPD
4. Whether the suit has been incorrectly valued for the purpose of court fee and jurisdiction? OPD
5. Whether the suit is barred by law in view of the preliminary objection No.4 of the written statement? OPD
6. Whether the suit is bad for non-joinder of necessary party? OPD
7. Whether the suit has been filed with mala fide intention? OPD
8. Relief.

Both the parties led their evidence, oral as well as documentary, after which the respondent No.1 filed an application before the learned trial Court for summoning the deed writer, local commission and Halqa Patwari concerned. Said application was contested by the petitioner and resultantly vide order dated 26.09.2011, the learned trial Court allowed the application subject to costs of Rs.1000/-. The petitioner, being aggrieved of said order assailed the same through revision before learned

Revisional Court concerned which was dismissed vide order dated 05.10.2013 in limine.

3. Learned counsel for the petitioner has inter alia argued that the respondent No.1 filed application for summoning the witnesses in order to fill the lacunae; that the respondent No.1 failed to submit the list of witnesses within statutory period of seven days before the learned trial Court, therefore, he cannot be benefitted through provisions of Order XVI, Rule 2 of C.P.C., but these facts have not been kept in view by learned Courts below, hence, material illegality has been committed; that the impugned orders are not sustainable in the eyes of law as no good cause has been shown by the respondent No.1 for summoning the witnesses; that the names of the witnesses requested to be summoned are not mentioned in the list of witnesses, hence, while passing the impugned orders the discretion has wrongly been exercised in favour of the respondent No.1; therefore, it is just and legal to set aside the impugned orders and application filed by the respondent No.1 for summoning the witnesses be dismissed. Relies on Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 Supreme Court 255.

4. On the contrary, learned counsel for the respondent No.1 have contested the instant writ petition with vehemence by contending that the writ petition is not maintainable against an order passed while exercising revisional jurisdiction, even otherwise, the impugned orders are well reasoned and discretion vested in learned trial Court has rightly been exercised in order to administer safer justice. Prayer for dismissal of instant writ petition has been made. Relies on Mst. Hajra Begum through Legal Heirs v. Mst. Badar-Un -Nissa and others PLD 2013 Sindh 417, Messrs Bayer Crops Science Pakistan through Chief Executive Officer v. Altaf Hussain and 3 others 2013 MLD 323 Sindh, Muhammad Yousaf v. Manzoor Ahmad and another PLD 2006 Lahore 738, Umar Hayat v. Additional District Judge and others 2004 SCMR 1367, Muhammad Khan and 6 others v. Mst. Ghulam Fatima and 12 others 1991 SCMR 970, Mian

Muhammad Hafiz, etc. v. Aziz Ahmad, etc. 1980 SCMR 557 and order dated 23.09.2013 passed in C.P. No.1278 of 2013 titled Agha Zahid Ali Hilali v. Muhammad Riaz and others.

5. Heard.

6. At the most, while entertaining writ petition against any order, it has to be seen whether the same has been passed without any vested jurisdiction and suffers from jurisdictional defect. But in the present case, both the learned Courts below have jurisdiction to entertain the application as well as revision filed against the impugned order passed by learned trial Court. Under Order XVI, Rule 1(2) of the C.P.C. the learned trial Court can grant permission for summoning of witnesses on showing good cause; when the position is as such the learned trial Court as well as learned Revisional Court have rightly exercised the jurisdiction vested in it. Main object of O. XVI, Rr. 1(2) and 14 of C.P.C. is that entire evidence, which is relevant and necessary for ascertaining truth and deciding issues involved completely and effectively, should come before the Court at any stage of trial before passing of judgment. Reliance is placed on Mst. Hajra Begum through Legal Heirs' case PLD 2013 Sindh 417 and Messrs Bayer Crops Science Pakistan through Chief Executive Officer v. Altaf Hussain and 3 others 2013 MLD 323-Sindh. Even otherwise, the revisional order, in civil litigation, passed in exercise of jurisdiction vested in a Court, cannot be challenged in writ petition. In this regard reliance is placed on Mian Muhammad Hafiz, etc. v. Aziz Ahmad, etc. 1980 SCMR 557, wherein it has been held that:-

> "Trial Court though acted in breach of provisions of O.XVI, R. 1 in allowing application and its order an erroneous exercise of jurisdiction, yet such order, held, not without jurisdiction and accordingly remedy of writ petition totally misconceived."

Even this view has further been strengthened in Muhammad Khan and 6 others v. Mst. Ghulam Fatima and 12 others 1991 SCMR 970 wherein it has invariably been held by the Apex Court of the contrary that:-

> "**Revisional order of Court challenged in Constitutional petition**---High Court having rightly held that revisional order arising out of civil litigation, could not be challenged in Constitutional petition, same was not open to challenge on any legal ground---Order passed by High Court was legal and proper---No point of law being involved, petition for leave to appeal was dismissed."

Similar view has been adopted and followed by this Court in Muhammad Yousaf v. Manzoor Ahmad and another PLD 2006 Lahore 738 wherein it has been observed that:-

> "Petitioner's revision petition against order of the Trial Court having been dismissed, petitioner filed constitutional petition challenging order passed by revisional Court in exercise of its powers under S.115, C.P.C.---Whether constitutional petition was competent and maintainable against revisional order passed in civil litigation---Held, revisional order arising out of civil litigation could not be challenged in constitutional petition---Even if order passed in exercise of revisional jurisdiction was illegal, but was passed with jurisdiction, same could not be assailed in constitutional petition .....".

7. In the present case, the respondent No.1 has submitted list of witnesses, but he has not mentioned the names of the witnesses, sought to be summoned through Court; despite this fact, the trial Court in exercise of its discretionary jurisdiction can grant permission to summon the witnesses for recording evidence, when same are necessary and helpful to the Court for just decision of the case, because law is made to administer safer justice and to resolve the controversy inter se the litigants to its legitimate end, rather to knock out any litigant on the basis of

technicalities. In this regard safer reliance can be placed on Umar Hayat's case 2004 SCMR 1367, wherein it has been held that:-

> "Trial Court was competent to grant permission under O. XVI, R. 1(2), C.P.C. for summoning any witness at any stage subject to showing good cause---Trial Court, in exercise of its discretionary jurisdiction had granted permission to summon the witnesses for recording evidence and the order was maintained by Appellate Court as well as by High Court---Supreme Court in exercise of jurisdiction under Art. 185(3) of the Constitution, declined to interfere with the orders---Leave to appeal was refused."

8. In order to reach a just conclusion in the present case and for deciding issue No.1, the evidence of the witnesses, sought to be produced, is necessary and mere on the pretext of non-submission of list of witnesses and non-mentioning of names of witnesses in the list of witnesses, the respondent No.1 cannot be thrown out of the arena of litigation, because same could be due to in-experience or lack of understanding on the part of his counsel, which omission is a good cause. Reliance in this regard can be placed on an unreported judgment of Hon'ble Supreme Court of Pakistan titled Agha Zahid Ali Hilali v. Muhammad Riaz and others bearing C.P. No.1278 of 2013, decided on 23.09.2013, wherein it has been invariably been held that:-

> "It is not disputed on the record that examination of scribe and stamp vendor in the litigation on going between the parties is imperative for the just decision of the case. Yes, the respondents did not mention the names of these witnesses in their list of witnesses but when during the course of cross-examination, it was suggested to respondent No.1 by the counsel for the petitioners that he failed to prove the document by not examining the scribe and the stamp vendor, he after having been set on his guards, proceeded to move an application for summoning of the aforesaid witnesses. This

shows that omission to summon the witnesses owes its origin to either in-experience or lack of understanding on the part of the counsel or the party. Omission of this type was a good cause to all intents and purpose."

9. So far as the case law referred to by learned counsel for the petitioner, with utmost respect, has no relevance to the facts and circumstances of the present case; therefore, same does not render any assistance or help to the petitioner's cause, especially when constitutional petition is not maintainable and competent against a revisional order passed in exercise of vested jurisdiction.

10. Resultantly, in view of above discussion, while placing reliance on the judgments supra, the instant writ petition being not maintainable is hereby dismissed.

MH/S-91/L **Petition dismissed.**

2016 C L D 1011

[Lahore]

Before Shahid Bilal Hassan, J

FERYAL ALI GAUHAR and others---Petitioners

Versus

ENVIRONMENTAL PROTECTION AGENCY, PUNJAB and others---Respondents

Writ Petition No. 22520 of 2015, decided on 11th March, 2016.

(a) Punjab Environmental Protection Act (XXXIV of 1997)---

----S. 22 [as amended by Punjab Environmental Protection (Amendment) Act (XXXV of 2012)---Lahore Development Authority Act (XXX of 1975), S. 43---Lahore Development Authority Land Use Rules, 2014, R. 27---Petitioners challenged the order of Environmental Protection Agency, Punjab, whereby environmental clearance/approval for construction of a multi-storey hotel had been granted---Petitioners contended that the impugned order had been passed in violation of substantive and procedural requirements of the relevant environmental laws---Validity---Section 43 of Lahore Development Authority Act, 1975 provided that 'no court or Authority shall have jurisdiction to question the legality of anything done or any action taken under [it], by or at the instance of [LDA]'---Rule 27 of Lahore Development Authority Land Use Rules, 2014 spoke of a remedy of appeal before Government of Punjab in case of any grievance germane to any order passed by an officer under said Act and Rules---Section 22 of Punjab Environmental Protection Act, 1997 provided that any person aggrieved by any order or direction of the Environmental Protection Agency, Punjab under any provision of the Act might file appeal to the Environmental Protection Tribunal, which was functioning at present in full strength under

Punjab Environmental Protection Tribunal Rules, 2012---Petitioners, in presence of said alternate remedies, should have approached the said forums instead of invoking the extraordinary constitutional jurisdiction---Petitioners, to satisfy the requirement of being an 'aggrieved person' in public interest litigation needed to disclose personal interest in the performance of legal duty owned to him---Authorities while granting approval for construction of the hotel in question, had followed the rules and regulations---Constitutional petition was dismissed in circumstances.

Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty PLD 1961 SC 119; Catron (Industries) Limited v. Government of Pakistan and others 1999 SCMR 1072; Khalid Mehmood v. Collector of Customs, Customs House, Lahore 1999 SCMR 1881; Farzand Raza Naqvi and 5 others v. Muhammad Din through Legal Heirs and others 2004 SCMR 400; Moulvi Saif Ullah Memon and another v. Province of Sindh and others 2011 CLC 1004; Muhammad Irshad and another v. Tehsil Municipal Administration through Tehsil Nazim, Lodhran and 3 others 2006 CLC 1902; St. Judge's Secondary School and others v. Employees' Old-age Benefits Institution and another 1988 PLC 746; Gulistan Textile Mills Ltd. v. Pakistan 1983 CLC 1474; Messrs S.A. Haroon and others v. The Collector of Customs, Karachi, and the Federation of Pakistan PLD 1959 SC 177; Mirza Muhammad Iqbal and others v. Government of Punjab PLD 1999 Lah. 109; Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemicals Industries (Pvt.), Ltd., Peshawar and others 2003 SCMR 370; Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739; Qazi Ali Athar, Advocate v. Zawar Ahmed Khan Sherwani and 3 others 2007 MLD 1884; Idress Ahmed Aftab v. Government of Punjab and others 2015 CLC 1295; Ms. Salama Iqbal

Chundrigar and others v. Federation of Pakistan through Secretary Ministry of Environmental Protection, Islamabad and others 2009 CLD 682; Bilal Akbar Bhatti v. Election Tribunal, Multan and 15 others PLD 2015 Lah. 272, Suo motu case No.13 of 2010, 2013 SCMR 591; Nayyer Khan v. Government of Pakistan through Secretary Ministry of Defence, Rawalpindi, Cantt. and others 2015 CLC 978; Syeda Abida Hussain Imam and others v. The Province of Punjab through Secretary and others 2015 YLR 1522; Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary, S&GAD, Karachi and another 1996 SCMR 1165; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Zia ur Rehman v. Syed Ahmed Hussain and others 2014 SCMR 1015 and Ghulam Farid alias Farida v. The State PLD 2006 SC 53 ref.

Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739; Suo Motu Case No. 13 of 2010, 2013 SCMR 591 and Nayyer Khan v. Government of Pakistan through Secretary Ministry of Defence, Rawalpindi, Cantt. and others 2015 CLC 978 rel.

(b) Lahore Development Authority Act (XXX of 1975)---

----Ss. 2, 3(c), 6, 14-A & 46---Lahore Development Authority Land Use Rules 2014, Rr. 37(2) & (3)---Petitioners sought declaration from the High Court to the effect that Ss.2, 3(c), 6, 14-A & 46 of Lahore Development Authority Act, 1975 and Rr. 37(2) & (3) of Lahore Development Authority Rules, 2014 be declared as illegal and unconstitutional---Said question pertaining to the said provisions having already been decided by the Supreme Court, declined to discuss and interfere with the provisions.

Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739 rel.

(c) Administration of justice---

----When law prescribes a certain procedure to do things then its compliance is mandatory.

(d) Administration of justice---

----Court can proceed in a matter when it enjoys jurisdiction of dealing such controversy brought before it, and when petition speaks otherwise, the acts done and proceedings carried on by such Court are nothing but an illegality and nullity in the eye of law.

(e) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Public interest litigation---Petitioner in presence of alternate remedies should have approached said forums instead of invoking the constitutional jurisdiction---Petitioner to satisfy the requirement of "aggrieved person" in public interest litigation needed to disclose personal interest in the performance of legal duty owed to him.

Waqas Ahmad Mir for Petitioners.

Ch. Tanveer Akhtar for Respondent No.3.

Jawad Hassan and Ahmad Rafay Alam for Respondent No.8.

Mian Ejaz Majeed, Deputy Director (L&E) E.P.A. Punjab.

Shah Faisal Aziz, Assistant Director, E.P.A.

Sittar Sahil, A.A.-G.

Jahanzeb Inam for Respondent No.5.

ORDER

SHAHID BILAL HASSAN, J.---This petition raises issues with regard to right of clean and healthy environment, environmental approvals effecting air, land, buildings and structures as well as social and economic conditions allegedly affecting community life of petitioners, etc. In this constitution

petition, the petitioners have called into question the decision dated 07.11.2014 issued by respondent No.1/Environmental Protection Agency, Punjab contending the same in glare violation of procedural and substantive requirements of relevant environmental legislation through which environmental clearance/ approval for construction of a multi-storey hotel at Sundar Das Road, Zaman Park, Lahore has been granted. The petitioners brought all glaring illegalities committed while issuance clearing approval for construction of a multi-storey hotel to the attention of Environmental Protection Agency, Town Municipal Administration, Gulberg Town and Lahore Development Authority/respondents Nos.1, 3 and 5 respectively. However, the respondents have ignored the letters written by the petitioners and failed to provide any response. It has been further contended that petitioners cannot be sent to the Environmental Tribunal of the Province since the same is ultra vires, the Constitution, being in violation of Articles 175(3), 202 and 203 of the Constitution of Islamic Republic of Pakistan, 1973. Therefore, the petitioners have filed the instant constitutional petition.

2. Learned counsel for the petitioners while reiterating the grounds urged in the instant constitutional petition, in detail, has prayed for acceptance of the same and declare:

> The impugned Decision of EPA as illegal and without legal effect, furthermore declare impugned decision as violating Petitioners' right to a safe and healthy environment;
>
> EPA as a de-funct body till Advisory Committees are constituted and restrain it from granting any environmental approvals till such time;
>
> Exclusion of Petitions/public from any approval process regarding environment (EIA and/or IEE) as illegal, void and without legal effect;

Any provision of IEE and EIA Regulations 2000 that go beyond PEPA 1997 as ultra vires the Act;

Rule 37(2) and (3) of the LDA Rules 2014 as illegal and unconstitutional;

Sections 2, 3 (c), 6, 14A and 46 of LDA Act as unconstitutional;

Any commercialization permissions regarding the Plot and/or Sundar Das Road by LDA, vide approval dated 25-11-2014, as illegal and unconstitutional;

The Traffic Impact Assessment Study Report, dated 06-11-2014, prepared by Traffic TEPA, as illegal, void and without legal effect;

Suspend, in the interim, the operation and effect of Impugned Decision

Restrain TMA Gulberg Town, in the interim, from allowing any work to commence on the Plot; and

Environmental Tribunal as illegal and unconstitutional since it violates Articles 175(3), 202 and 203 of the Constitution.

Relies on Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739. Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty PLD 1961 Supreme Court 119, Gatron (Industries) Limited v. Government of Pakistan and others 1999 SCMR 1072, Khalid Mehmood v. Collector of Customs, Customs House, Lahore 1999 SCMR 1881, Farzand Raza Naqvi and 5 others v. Muhammad Din through Legal Heirs and others 2004 SCMR 400, Moulvi Saif Ullah Memon and another v. Province of Sindh and others 2011 CLC 1004, Muhammad Irshad and another v. Tehsil Municipal Administration through Teshil Nazim, Lodhran and 3 others 2006 CLC 1902, St. Judge's

Secondary School and others v. Employees' Old-age Benefits Institution and another 1988 PLC 746, Gulistan Textile Mills Ltd. v. Pakistan 1983 CLC 1474 Karachi, Messrs S.A. Haroon and others v. The Collector of Customs, Karachi, and the Federation of Pakistan PLD 1959 Supreme Court (Pak). 177, Mirza Muhammad Iqbal and others v. Government of Punjab PLD 1999 Lahore 109 and Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemicals Industries (Pvt.), Ltd., Peshawar and others 2003 SCMR 370.

3. Nay-saying the submissions made by the learned counsel for the petitioners, the learned counsel appearing on behalf of the respondent No.8 accompanying the representatives of other respondents has argued that petitioners have adequate, efficacious and alternative remedies of approaching the Environmental Protection Tribunal, Lahore. Therefore, the instant writ petition being not maintainable may be dismissed. Relies on Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739, Qazi Ali Athar, Advocate v. Zawar Ahmed Khan Sherwani and 3 others 2007 MLD 1884-Karachi, Idress Ahmed Aftab v. Government of Punjab and others 2015 CLC 1295-Lahore, Ms. Salama Iqbal Chundrigar and others v. Federation of Pakistan through Secretary Ministry of Environmental Protection, Islamabad and others 2009 CLD 682-Karachi, Bilal Akbar Bhatti v. Election Tribunal, Multan and 15 others PLD 2015 Lahore 272, Suo Motu Case No. 13 of 2010 2013 SCMR 591-Supreme Court of Pakistan, Nayyer Khan v. Government of Pakistan through Secretary Ministry of Defence, Rawalpindi, Cantt. and others 2015 CLC 978, Syeda Abida Hussain Imam and others v. The Province of Punjab through Secretary and others 2015 YLR 1522-Lahore.

4. Learned Assistant Advocate General has argued that instant writ petition is not maintainable for the reasons that section 22 of the Punjab Environmental Protection Act, 1997 provides remedy of appeal against the order called into question through the instant writ petition before the Environmental Tribunal and section 21(9) of the Act ibid bars jurisdiction of any other Court and Environmental Tribunal has exclusive jurisdiction for addressing such matters. Even, it is settled principle of law that where a statute provides appeal against an order, constitutional petition is not maintainable. He further argued that when law prescribed a certain procedure to do things then its compliance is mandatory. Relies on Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwan and others 2015 SCMR 1739, Syed Saghir Ahmad Naqvi v. Province of Sindh through Chief Secretary, S&GAD, Karachi and another 1996 SCMR 1165, Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 Supreme Court 691, Zia ur Rehman v. Syed Ahmed Hussain and others 2014 SCMR 1015 and Ghulam Farid alias Farida v. The State PLD 2006 Supreme Court 53.

5. Heard.

6. A Court can proceed in a matter when it enjoys jurisdiction of dealing such controversy, brought before it, and when position speaks otherwise the acts done and proceedings carried on by such Court are nothing but an illegality and nullity in the eye of law. Furthermore, it is settled proposition of law that when Law prescribed a certain procedure to do things then its compliance is mandatory.

7. In the case in hand, the petitioners have adequate and efficacious alternate remedies available with them of filing appeal before the Environmental Tribunal, if they feel themselves to be aggrieved of impugned

order; because section 43 of the Amended Lahore Development Authority Act, 1975 provides 'no Court or Authority shall have jurisdiction to question the legality of anything done or any action taken under [it] by or the instance of the [LDA]. Rule 27 of the LDA Land Use Rules, 2014, speaks a remedy of appeal before the Government of Punjab in case of any grievance germane of any order passed by an officer under LDA Act and Rules.

8. Apart from the above, section 22 of the Punjab Environmental Protection Act, 1997 runs as 'Any person aggrieved by any order or direction of the [EPA, Punjab] under any provisions of this Act' may file an appeal to the Environmental Protection Tribunal, which is functioning at present in full strength with a Chairperson, Technical and General Members, after its establishment under the Punjab Environmental Protection Tribunal Rules, 2012.

Therefore, when the petitioners have alternate efficacious remedy available with them, they ought to have approached the said forums instead of approaching this Court seeking invocation of extraordinary constitutional jurisdiction. Reliance is placed on Order dated 28th July, 2015 passed by this Court in W.P.No.14679 of 2015 (Akram Cotton Mills v. Government of Punjab), wherein it was observed that:

'The petitioner has not availed the alternative remedy that is available to him under the statutory tribunal constituted under the Punjab Environment Protection Act, 1997. As a result, the petitioner's writ petition is liable to be dismissed in reliance on the following judgments where remedies were available to supposed aggrieved persons under the law. The following judgments utilize the principle where writ petitions were not maintainable due to availability of alternate remedies under tribunals: Idrees Ahmed Aftab v. Government of Punjab (2015 CLC 1295)

Salma Iqbal Chundrigar v. Federation of Pakistan (2009 CLD 682)

Bilal Akbar Bhatti v. Election Tribunal Multan (PLD 2015 Lahore 272)

Faiz Bakhsh and others v. Deputy Commissioner/Land Acquisition, Bahawalpur (2006 SCMR 219)

Shahjahan v. Amjad Ali (2000 SCMR 88)'

In this regard further assistance has been sought from Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739, wherein it has been held in reason (v) mentioned under paragraph No.94:

'(v) .....

Moreover, the right of appeal and further remedies on the merits of the EIA approval available under the Pakistan Environmental Protection Act, 1997, have not been availed by the objecting respondents, The EIA cannot be struck down upon presumption or mere apprehension.'

9. It is stance of the respondents that they have followed the rules and regulations in granting approval for construction of hotel in question, whereas the petitioners' claim is otherwise and when law provides specific remedy of assailing any order passed by EPA, Punjab through appeal, the petitioners instead of approaching this Court ought to have knocked the door of a proper forum, which is Punjab Environmental Protection Tribunal, governed under the Punjab Environmental Protection (Amendment) Act, 2012. Moreso, the petitioners have failed to bring on record as to in what manner they would be considered or regarded as aggrieved person as has been observed in Nayyar Khan Government of Pakistan through Secretary Ministry of Defence, Rawalpindi Cantt. and others 2015 CLC 978-Lahore,

which reads:

"To satisfy the requirements of an "aggrieved person" in public interest litigation under Article 199 of the Constitution, the petitioner needs to disclose a personal interest in the performance of legal duty owed to him winch if not performed would result in the loss of some personal benefit or advantage or curtailment of a privilege in liberty or franchise.'

At the most, whole the scenario and picture of the circumstances lead this Court to the conclusion that it is a matter of easement rights, for which the proper remedy is available under law, or if, as stated above, the petitioners are aggrieved of approval granting order by the respondents, they may avail efficacious and alternate remedy of filing appeal before the proper forum, which has even been mentioned by the petitioners in their constitutional petition.

10. So far as prayer with regard to declaring Rule 37(2) and (3) of the Lahore Development Authority Rules, 2014 as illegal and unconstitutional as well as sections 2, 3(c), 6, 14A and 46 of the Lahore Development Authority Act as unconstitutional, is concerned, suffice it to say that same question has been decided once and for all by the august Supreme of Pakistan while passing judgment reported as Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739, wherein it has invariably been held:

'62. There is no doubt that, as correctly noted by the High Court, the amendments made in the LDA Act, 1975 give LDA the authority to act, to undertake projects and to carry out work, which under the PLGA 2013 is within the Local Government domain. The functions of the Municipal Corporations under section 87 of PLGA 2013 and that of the LDA under the LDA Act 1975 overlap.

73. As the test for striking down statutes is not met the provisions of

the LDA Act, 1975 could not have been struck down by the High Court. At the same time, this Court is mindful of the fact that if the provision of the LDA Act, 1975 are interpreted as giving the LDA authority to overlap and override the Local Government and Section 46 is given full sway, it would result in a Local Government that is devoid of all authority be it political, administrative or financial.

74. The solution, therefore, lies in reading the provisions of the two statutes in harmony. The LDA Act, 1975 is to be regarded as an enabling statute. It allows LDA to act in support of and to complement the Local Government in the exercise of its functions and responsibilities. Where the Local Government is unable to act because of a lack of resources or capacity, or where the project is of such a nature that it spills over from the territory of one Local Government to another or where the size of the Project is beyond the financial capacity of the Local Government to execute; that LDA can step in and work with the Local Government. Economies of scale, spillovers and effectiveness are merely illustrative of the situations in which the LDA can act in the exercise of its functions to carry out developmental and other work and perform its statutory functions. These are not exhaustive. Life and time may throw up other situations and create circumstances which may warrant LDA action to be taken in consultation with the Local Government within the purview of PLGA, 2013. Closing the categories today will freeze growth and retard progress.

75. Likewise the Provincial Government, in the exercise of its legislative and executive authority can aid and support the Local

Government. The Provincial Government is also not prevented from taking the initiative for the growth and development of the people and the Province in the exercise of its legislative and executive authority. The exercise of such authority must, however, be in the public interest. It should encourage institutional grown and harmony. It must be in consultation and with the participation of the Local Government. To complement is not to take over.

76. We are conscious that at times a Local Government too may decline consent for extraneous reasons. Where such consent is unreasonably withheld or denied for considerations other that in the public interest the Provincial Government would be at liberty to act in the public interest while constantly drawing guidance from the provisions of the PLGA 2013 as for the time being in force. Indeed the courts too can step in and interfere with such a failure to grant consent.

77. Viewed in the light the LDA Act, 1975 and the legislative and executive authority of the Province are not inconsistent with Article 140A of the Constitution. These create a framework where the Provincial and Local Government and authorities of the Provincial Government work together in the public interest.

78. That being so what should one make of Section 46 of the LDA Act, 1975 which gives its provisions overriding effect. Its use as a tool to demolish the PLGA would be repugnant to Article 140A. To strike it down would mean that even where the provisions of the LDA Act conflict with provisions of other statutes it would not override those. That cannot be the legislative intent. We are of the view that section 46 would apply only in the event of a conflict or inconsistency between its provisions and that of other statutes. It

would have no application and cannot be used to make the LDA Act to otherwise stall PLGA 2013 when substantive factual or policy grounds are unavailable. When harmoniously construed, as stated above, there is no conflict between the provisions of the PLGA 2013 and the LDA Act 1975.'

In presence of above enlightenment and illumination, there is no need to further discuss issue with regard to declaration of said provisions of law as illegal and unconstitutional, because verdict of apex Court of the country has binding effect upon this Court as provided under Article 189 of the Constitution of Islamic Republic of Pakistan.

11. So far as the case law relied upon by the learned counsel for the petitioners, except Lahore Development Authority through D.-G. and others v. Ms. Imrana Tiwana and others 2015 SCMR 1739, has no relevance to the facts and circumstances of the case in hand, rather same are distinguishable; therefore, it does not render any assistance or help to the petitioners' stance.

12. For the foregoing reasons and while placing reliance on the judgments supra as well as on Suo Motu Case No.13 of 2010 2013 SCMR 591-Supreme Court of Pakistan, the instant writ petition being not maintainable, because of remedy available with the petitioners in shape of filing appeal before the Punjab Environmental Protection Tribunal, stands dismissed.

SL/F-7/L **Petition dismissed.**

2016 M L D 420

[Lahore]

Before Shahid Bilal Hassan, J

ALLAH DITTA---Petitioner

Versus

MUHAMMAD ASHIQUE and others---Respondents

C.R. No.2089 of 2007, heard on 27th May, 2015.

Gift---

----Suit for declaration and permanent injunction---Gift mutation---Burden of proof---Non-production of one of the marginal witnesses---Legal effect and presumption---Non-production of Roznamcha Waqiati for proof of entry of gift mutation---Effect---Dispossession from property after delivery of possession---Proof---Plaintiffs filed suit for declaration and permanent injunction challenging validity of gift mutation executed in name of defendant by father of plaintiffs----Trial Court dismissed the suit, and appellate court upheld decree and judgment of Trial Court---Validity---Beneficiary of gift, oral or written, was under burden to prove that the same had been validly executed after fulfilment of all three ingredients that were offer, acceptance and delivery of possession---Defendant had alleged forcible dispossession from suit property after delivery of possession, but he could not bring anything on record that he had been forcibly dispossessed by plaintiffs---Defendant witnesses, apart from being contradictory, failed to mention date of dispossession in their statements and the same, therefore, could not be relied upon---Statement of defendant regarding dispossession was self-made and the same was not trustworthy---Thumb impressions on gift mutation were not proved---Roznamcha Waqiati was not produced to prove entry of gift mutation---One of marginal witnesses was not produced

before Trial Court whose statement was necessary under Arts.17 & 79, Qanun-e-Shahadat, 1984, which provided that in order to prove document, production of two truthful witnesses was sine qua non---Adverse presumption could be drawn for that if the marginal witness had appeared in court, he would not have supported stance of defendant---Revision was time-barred as the same had been filed beyond period of ninety days---Findings on facts by Trial Court could not be interfered with by revisional court---Revisional court only had to see whether any material illegality, irregularity or wrong exercise of jurisdiction had been committed by Trial Court below---Both courts below had appreciated oral and documentary evidence in true perspective and no misreading and non-reading had been committed, and the same could not be interfered with in revisional jurisdiction---Revision petition was dismissed.

Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Jamshaid Ali Khan and another v. Ghulam Sayed and another, 2014 YLR 301; Muhammad Khan v. Messrs Murree Brewery Company Ltd. and others, 2014 YLR 1467; Noor-ul-Haq and others v. Liaqat Shah, 2014 YLR 1469; Bashir Ahmed Mirza v. Kamaluddin Alvi and others, 2014 YLR 1097; Ghulam Muhammad and another v. Mian Abdul Karim through L.Rs., 2014 YLR 774; Rab Nawaz and others v. Ghulam Rasul, 2014 SCMR 1181; Haider Ali Khan and another v. Razia Begum and others, 2014 MLD 766; Naimat Ullah v. Faizullah Khan, 2014 MLD 878; Muhammad Akbar v. Mst. Suraya Begum and others, 2014 MLD 1080; United Bank Limited and others v. Noor-Un-Nisa and others, 2015 SCMR 380; Allah Dino and another v. Muhammad Shah and others, 2001 SCMR 286; City District Government, Lahore through District Coordination Officer, Lahore v. Mian Muhammad

Saeed Amin, 2006 SCMR 676; Mst. Naeema Jehan v. Mst. Akbari and 4 others, 2014 YLR 116; Muhammad Iqbal and others v. Bagh Ali and others, 2010 YLR 1908; Dilbad Shah v. S.Rehmat Shah and others, PLD 2007 Pesh. 103 and Muhammad Idrees and others v. Muhammad Pervaiz and others 2010 SCMR 5 ref.

Ch. Muhammad Yousaf for Petitioner.

Ch. Zahid Javed for Respondents Nos.1 to 7.

Muhammad Nasir Sheikh and Muhammad Zia ud Din Ansari for Respondents Nos. 9(ii) to 9(vi).

Date of hearing: 27th May, 2015.

JUDGMENT

SHAHID BILAL HASSAN, J.---A civil suit for declaration and permanent injunction was filed before the learned Trial Court by the respondents, whereby they challenged the validity of gift mutation No.942, whereby father of the petitioner and respondents Ashiq and Arif namely Jani gifted the suit land to Allah Ditta (present petitioner).

2. The suit was resisted by the present petitioner/defendant and deceased respondent No.9-Ahmad Ali by filing their written statement.

3. The divergence in the pleadings was summed up into issues. Both the parties produced their evidence oral as well as documentary in pro and contra.

4. After hearing arguments, learned Trial Court vide judgment and decree dated 20.12.2000 decreed the suit in favour of the respondents. Being aggrieved of the said judgment and decree, present petitioner/defendant and

respondent No.9 preferred an appeal before the learned Appellate Court, which was subsequently dismissed vide impugned judgment and decree dated:05.07.2007.

5. Being aggrieved of the impugned judgments and decrees passed by the learned Courts below, the petitioner/defendant has filed the present civil revision.

6. Learned counsel for the petitioner has argued that both the learned Courts below have not appreciated the evidence brought on record in a proper manner. Further maintains that the learned Courts below have committed illegality while passing the impugned judgments and decrees and the same are against law and facts. Adds that both the learned Courts below have passed the impugned judgments and decrees in a hasty, fanciful and mechanical manner. There are material irregularities and illegalities while passing the impugned judgments and decrees and the same suffer from misreading and non-reading of evidence, therefore, the impugned judgments and decrees, being not sustainable in the eye of law, may be set-aside by allowing the present civil revision and suit of the respondents may be dismissed.

7. By controverting the above submissions made by the learned counsel for the petitioner, learned counsel for the respondents, by favoring the impugned judgments and decrees, has prayed for dismissal of the present civil revision. Reliance is placed upon Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others, 2014 SCMR 161, Jamshaid Ali Khan and another v. Ghulam Sayed and another, 2014 YLR 301; Muhammad Khan v. Messrs Murree Brewery Company Ltd. and others, 2014 YLR 1467; Noor-ul-Haq and others v. Liaqat Shah, 2014 YLR

1469; Bashir Ahmed Mirza v. Kamaluddin Alvi and others, 2014 YLR 1097; Ghulam Muhammad and another v. Mian Abdul Karim through L.Rs., 2014 YLR 774; Rab Nawaz and others v. Ghulam Rasul, 2014 SCMR 1181; Haider Ali Khan and another v. Razia Begum and others, 2014 MLD 766; Naimat Ullah v. Faizullah Khan, 2014 MLD 878; Muhammad Akbar v. Mst. Suraya Begum and others, 2014 MLD 1080; United Bank Limited and others v. Noor-Un-Nisa and others, 2015 SCMR 380; Allah Dino and another v. Muhammad Shah and others, 2001 SCMR 286; City District Government, Lahore through District Coordination Officer, Lahore v. Mian Muhammad Saeed Amin, 2006 SCMR 676; Mst. Naeema Jehan v. Mst. Akbari and 4 others, 2014 YLR 116; Muhammad Iqbal and others v. Bagh Ali and others, 2010 YLR 1908 and Dilbad Shah v. S.Rehmat Shah and others, PLD 2007 Peshawar 103.

8. Heard.

9. The beneficiary of a gift oral or written, when challenged by the rival party, was under burden to prove that the same was validly executed after fulfillment of all the ingredients, which are as follows:--

(i) Offer.

(ii) Acceptance.

(iii) Delivery of possession.

10. Now it is to be seen whether gift was validly made in favour of petitioner by the donor. In order to substantiate his stance, the petitioner produced witnesses; when depositions of D.Ws. are scanned, it divulges that DW-3 Allah Ditta in his statement has stated that possession of the disputed land was handed over at the time of making gift, however, later on, the respondents forcibly dispossessed the petitioner (date not mentioned). After

that Allah Ditta filed a suit for possession regarding the disputed land. However, there is nothing on record to show that he was forcibly dispossessed by the respondents. No other independent evidence supporting his stance has been produced. Hence, his statement regarding dispossession is self-made and is not trustworthy. Perusal of statements of Ahmed Ali and DW-5 reveals that they have no knowledge of killa number and square number of exchange land, therefore, their statements cannot be relied upon.

11. Moreover, there are many contradictions in the statements of DWs regarding presence of witnesses. DW-3 is the present petitioner, who stated that he along with his father visited Tehsildar, who verified the gift mutation No.942 in their presence. As per his statement, entry of said mutation was made on 01.03.1995 and its verification was made on 29.03.1995, whereas according to statement of DW-4 Haji Arshad Ali, who is the marginal witness of the alleged gift mutation, when he visited the Tehsildar, he (Tehsildar) was not present there at that time. Above all these facts, it is admitted by DW-2 Bashir Ahmed Halqa Patwari that it is not clear from the mutations who was present at the time of execution of the said mutation. Moreover, thumb impressions affixed upon the mutations No.942 and 952 also not proved who have affixed these thumb impressions. DW-2 Bashir Ahmed on one side stated that the entry was made in Roznamcha Waqiati but he could not produce any Roznamcha to prove his stance.

12. It is noteworthy that second Marginal witness namely Manzoor Ahmed was not produced before the Trial Court. His statement was necessary to be recorded in order to prove the execution of disputed mutation; because under Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, for proving a document production of two truthful witnesses is sine qua non, which is lacking in this case. So an adverse presumption can be

made that had he appeared in the Court, he would not have supported the stance of petitioner.

13. In addition to above, the impugned judgment and decree was passed by the learned Appellate Court on 05.07.2007, whereas the present civil revision was filed on 24.11.2007; according to law the petitioner has to file the civil revision within ninety days of passing the impugned judgment and decree or when certified copies of the same were obtained. In this view of the matter, present civil revision is clearly time-barred. Reliance is placed on 'City District Government, Lahore through District Coordination Officer, Lahore v. Mian Muhammad Saeed Amin, 2006 SCMR 676.

14. At revisional stage, the finding of the learned Trial Court below on facts cannot be interfered by this Court, which has limited scope and the Court only has to see whether any material illegality, irregularity or wrong exercise of jurisdiction was committed by the learned Court below but in the instant case, there is no such occasion to warrant interference by this Court in the impugned judgments and decrees. In this regard, guideline can be sought from Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), wherein it has invariably been held that:--

> "Revisional jurisdiction of High Court could not be invoked against conclusions of law or fact, which did not, in any way, affect jurisdiction of the Court---High Court could not have investigated into facts or exercised its jurisdiction on the basis of facts of grounds, which were already proved by parties by leading evidence---High Court was justified in not interfering in concurrent findings of facts which were based on material brought on record and proper

appreciation of evidence."

15. In view of the above discussion, both the learned Courts below have appreciated the evidence oral as well as documentary brought on record in its true perspective and no misreading and non-reading has been committed, therefore, the same cannot be interfered with in revisional jurisdiction. In this regard, reliance has been placed on Muhammad Idrees and others v. Muhammad Pervaiz and others 2010 SCMR 5.

16. Crux of above discussion is that the present civil revision being devoid of any force and substance stands dismissed.

17. No order as to costs.

SL/A-83/L **Petition dismissed.**

2016 M L D 1077

[Lahore]

Before Shahid Bilal Hassan, J

Messrs COCA COLA BEVERAGES PAKISTAN LIMITED through Company Secretary---Appellant

Versus

Messrs ECHO WEST INTERNATIONAL (PVT.) LTD. through Chief Executive Officer and another---Respondents

F.A.O. No.330 of 2014, decided on 30th June, 2014.

(a) Civil Procedure Code (V of 1908)---

----S.11, O. II, R. 2, O. VII, R. 11, O. XXXIX, Rr. 1, 2, O. XLIII, Rr.1 & 3---Suit for declaration and injunction---Appeal, maintainability---Non-issuance of statutory notice---Res judicata---Rejection of plaint---Filing of second suit on same cause of action---During pendency of earlier suit filed by plaintiff, second suit on same cause of action was filed by plaintiff against same defendant---Grievance of defendant was that Trial Court instead of granting ad interim injunction, should have rejected the plaint---Plea raised by plaintiff was that appeal was not maintainable as notice required under O. XLIII, R. 3, C.P.C. which was mandatory under law, had not been given to plaintiff---Validity---When appeal was admitted for regular hearing and defendant's side had put in appearance before court, it was presumed that provision of law had been met with---Second suit instituted by plaintiff during pendency of earlier Arbitration suit, was not maintainable being hit by O. II, R. 2 , C.P.C. as well as under S. 11, C.P.C., i.e. res judicata---High Court in exercise of jurisdiction under O. VII, R. 11, C.P.C., rejected second suit filed by plaintiff---Appeal was allowed in circumstances.

Associate Construction v. Federation of Pakistan and others 2010 MLD 627; Faisal Kapadia and another v. Motorola Ltd. and 2 others 2010

MLD 518; Munda Hydropower Ltd. through Habib H. Paracha and 2 others v. Federation of Pakistan through Secretary Ministry of Water and Power and 2 others 2009 MLD 526; Muhammad Naved Aslam and 3 others v. Mst. Aisha Siddiqui and 14 others 2011 CLC 1176; Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others 2011 CLC 1450; XEN, Highway Division, Abbottabad and another v. Habib Ur Rahman 1996 CLC 279;, Sh. Fazal Hussain v. Board of Governors, Divisional Public High School, Lyallpur 2001 MLD 407; Messrs Mono Engineering (Pvt.) Limited v. The Karachi Development Authority 1999 YLR 1340; Malik Maqsood Asghar and 5 others v. Malik Sultan Asghar and 2 others 2008 CLC 1150; Hafiz Muhammad Abrar and another v. Addl. District Judge, Multan and 17 others 2012 YLR 2471; Muhammad Anwar v. Messrs Associated Trading Co. Ltd. and 2 others PLD 1987 Kar. 535, Syed Altaf Hussain through Attorney v. Irshad Ahmed and 9 others 2014 MLD 457; Zulqarnain v. SNGPL through General Manager and 2 others 2013 YLR 503; Syed Saqlain Abbas v. Syed Hayat Shah 2012 CLC 945; Messrs James Construction Company (Pvt.) Ltd., Lahore through Executive Director v. Province of Punjab through Secretary to the Government of Punjab (Communication and Works) Department, Lahore and 3 others PLD 2002 SC 310; Oil and Gas Development Corporation Ltd. Pakistan v. Claugh Engineering Ltd. through Local Representative Mr. Martin Harris 1999 MLD 254; Messrs China Harbour Engineering Co. v. Water and Power Development Authority and others 2001 YLR 1781; Ch. Bashir Ahmad and 4 others v. Province of Punjab through Collector, Sargodha and 4 others 1990 MLD 986; Salahud Din v. Syed Mansoor Ali Shah and others 1997 SCMR 414; United Bank Limited v. Messrs Khawaja Radio House through Proprietor and 2 others 2004 CLD 1609 and Mrs. Dino Manekji Chinoy and 8 others v. Muhammad Matin PLD 1983 SC 693 rel.

Roomi Enterprises (Pvt.) Ltd. v. Stafford Miller Ltd. and others 2005 CLD 1805; (Messrs) The Associated Cement Companies Ltd. v. The Province of Punjab PLD 1954 Lah. 151; Shah Muhammad Khan v. Ghulam Qadir, and others PLD 1971 Baghdad Ul Jadid 9; Mirza Muhammad Iqbal Beg and others v. International Estate Developers Ltd. 1986 MLD 2785; Mst. Sajida Yousaf v. Lahore Development Authority 1989 MLD 225; N.R. Dongre and others v. Whirlpool Corporation and another 1997 MLD 2124; Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 PLC (C.S.) 971; Mirza Iftikhar Beg v. Government of the Punjab through Secretary Health, Lahore and another 1990 CLC 851; Pioneer Pakistan Seed Ltd. v. United Distributors Pakistan Ltd. and 5 others 1998 CLC 61; Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 SCMR 1508; Karachi Electric Supply Company through duly authorized officer v. Muhammad Shahnawaz and 46 others 2010 YLR 2426; Government of Pakistan through Secretary Ministry of Interior, Islamabad v. Dr. Abdul Qadeer Khan 2010 MLD 533; West Pakistan Industrial Development Corporation v. Messrs Sheikh Muhammad Amin and Co. 1992 CLC 2047; Bangladesh Shipping Corporation v. Syed Muhammad Anwar Iqbal 1992 CLC 1500; Ghulam Farid and others v. Province of Punjab and others 2013 MLD 77; Messrs James Construction Company (Pvt.) Ltd. through Executive Director v. Province of Punjab through Secretary to the Government of Punjab (Communication and Works) Department, Lahore and 3 others PLD 2002 Supreme Court 310; United Bank Limited and others v. Ahsan Akhtar and others 1998 SCMR 68; Habib Bank Limited and others v. Syed Zia Ul Hassan Kazmi 1998 SCMR 60 and Messrs Chas A. Mendoza Pharmaceutical Laboratories v. Syed Tausif Ahmad Zaidi and 2 others PLD

1993 Kar. 790 distinguished.

(b) Arbitration Act (X of 1940)---

----Ss.20 & 33---Arbitration through court---Proceedings as civil suit---Scope---Although proceedings under provisions of Ss. 20 & 33 of Arbitration Act, 1940, are not suit in stricto sensu, yet the proceedings are to be treated as a civil suit---Though said proceedings are not full-fledged civil suit in stricto sensu, but these are legal proceedings with limited scope---Application under S. 20 of Arbitration Act, 1940, is treated as a suit and order directing filing of agreement and making reference to arbitration being final in circumstances amounts to a decree.

Messrs Mono Engineering (Pvt.) Limited v. The Karachi Development Authority 1999 YLR 1340 and Messrs China Harbour Engineering Co. v. Water and Power Development Authority and others 2001 YLR 1781 rel.

(c) Civil Procedure Code (V of 1908)---

----S.104, O.VII, Rr.10 & 11---Appellate jurisdiction---Powers of court---When from facts of a case it becomes clear that plaint is not entertainable being barred by law, the same can be rejected or returned.

Muhammad Anwar v. Messrs Associated Trading Co. Ltd. and 2 others PLD 1987 Kar. 535 rel.

(d) Civil Procedure Code (V of 1908)---

----S.20, O.VII, R.10 & O.XXXIX, Rr.1 & 2---Territorial jurisdiction---Return of plaint---Grant of interim injunction---Scope---Subject matter of case was within territorial jurisdiction of place "M", whereas plaintiff instituted suit in Civil Court at place "L", which court lacked territorial jurisdiction to entertain the suit---Trial Court instead of passing ad-interim

injunction, while entertaining the suit, should have returned the plaint for its presentation before proper forum for adjudication in accordance with law.

Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others 2011 CLC 1450 rel.

Ashtar Ausaf Ali, Muhammad Azam Chughtai, Miss Nida Aftab and Sardar Muhammad Omer Khan Khosa for Appellant.

Asjad Saeed for Respondent No.1.

Date of hearing: 23rd June, 2014.

JUDGMENT

SHAHID BILAL HASSAN, J.---Through this appeal, the appellant has called into question the order dated 02.06.2014, passed by learned trial Court, whereby in a suit for declaration, permanent injunction and recovery of damages, status quo has been issued.

2. Tersely, the facts leading towards this appeal may be summarized as such that appellant is a multinational company engaged in the business of manufacturing and bottling of aerated waters and beverages. In order to expand its business, the appellant has undertaken to set up another plant at Multan at the cost of US $ 34,600,000 in direct foreign investment while the total cost of plant and machinery is estimated at US $ 70 Million. The construction contract for the project was awarded to the respondent vide contract dated 26.04.2013. The said construction was to be completed by the respondent on or before 15.02.2014. A mobilization advance equivalent to 25% of the contract price was paid to the respondent and in lieu thereof unconditional and irrevocable advance payment guarantees dated 16.05.2013 were furnished on behalf of the respondent in favour of the appellant. Allegedly, the respondent failed to fulfill its contractual obligations and remained in default for which the appellant served notices in order to give time

to the respondent to rectify the default in performance and respondent practically abandoned the project in September, 2013. The appellant appointed Messrs Harvester Services (Pvt.) Ltd. to assess the site, which carried out inspection. The contract was cancelled on 20.09.2013, against which the respondent filed an application under sections 20 and 33 of the Arbitration Act, 1940 on 21.09.2013 and also filed an application for temporary injunction to restrain the appellant from en-cashing the bank guarantees, which was dismissed by learned trial Court on 19.02.2014, against which a Civil Revision bearing No.553 of 2014 has been filed by the respondent, which is pending adjudication before this Court. During pendency of earlier suit filed under section 20 of the Arbitration Act, 1940, the respondent filed another suit for declaration, permanent injunction and recovery of damages before the learned Senior Civil Judge, Lahore on 27.05.2014; along with the suit an application for temporary injunction was also filed and learned trial Court vide impugned order dated 02.06.2014 restrained the appellant from making further construction at the site in Multan.

3. Learned counsel for the appellant while advancing arguments has submitted that since there was no injunctive order, the construction contract was awarded to ORA-HRL_JV vide contract dated 04.04.2014, but the respondent has not arrayed the said contractor as party to the suit. Adds that in suit for grant of damages, injunctions are not granted under section 21 of the Specific Relief Act, since the contract was not such which could have been specifically enforced, therefore, no injunction could have been issued, especially when damages were claimed as a final relief. Submits that balance of convenience tilts in favour of the appellant as construction work could not be stopped without hearing the appellant, because after termination of contract with the respondent, the Contract has further been awarded to ORA-HRL-JV vide Contract dated 04.04.2014 and by not impleading the said Contractor in the suit, the same is bad due to non-joinder of necessary party.

Further adds that respondent is not entitled to any injunction on account of its own breach, because the project was to be handed over on or before 15.02.2014, but despite having received huge amount, the respondent stopped work at the project site; the conduct of the respondent is indicative of its mala fide and disentitles it from claiming any equitable relief. States that second suit was barred and the application ought not to have been entertained as it was the same subject matter, the same cause of action and the same parties as in the earlier suit, which is pending adjudication. Submits that when suit from which the proceedings have arisen is barred by law and when the suit itself cannot proceed, an injunction as prayed for could not be granted. Further states that property i.e. subject matter in question is admittedly in Multan and not within the jurisdiction of Civil Courts Lahore, therefore, the suit was not entertainable at Lahore. Adds that application under section 20 of the Arbitration Act, 1940 is to be treated as suit. Contends that on one hand the respondent wants settlement of dispute by arbitration and on the other hand has filed a suit for damages on the same set of facts, the result would be failure of both. Adds that earlier application filed under sections 20 and 23 of the Arbitration Act, 1940 as well as suit in hand have been entertained by one and same court, in the circumstances, there being a clear bar of Order II, Rule 2 of Code of Civil Procedure, 1908, no injunction could be prayed for or granted even ad interim more so by the same learned Judge. Submits that decision in one proceedings operates as Res Judicata in the subsequent proceedings. Adds that appeal in hand is maintainable, when same is admitted for regular hearing. Finally submits that the impugned order is not sustainable in the eye of law; same may be set aside by accepting the appeal in hand. Relies on Associate Construction v. Federation of Pakistan and others 2010 MLD 627-Karachi, Faisal Kapadia and another v. Motorola Ltd. and 2 others 2010 MLD 518-Karachi, Munda Hydropower Ltd. through Habib H. Paracha and 2 others v. Federation of

Pakistan through Secretary Ministry at Water and Power and 2 others 2009 MLD 526-Islamabad, Muhammad Naved Aslam and 3 others v. Mst. Aisha Siddiqui and 14 others 2011 CLC 1176-Karachi, Muhammad Bachal v. Province of Sindh through Home Secretary and 12 others 2011 CLC 1450-Karachi, XEN, Highway Division, Abbottabad and another v. Habib Ur Rahman 1996 CLC 279-Peshawar, Sh. Fazal Hussain v. Board of Governors, Divisional Public High School, Lyallpur 2001 MLD 407-Lahore, Messrs Mono Engineering (Pvt.) Limited v. The Karachi Development Authority 1999 YLR 1340-Karachi, Malik Maqsood Asghar and 5 others v. Malik Sultan Asghar and 2 others 2008 CLC 1150-Lahore, Hafiz Muhammad Abrar and another v. Addl. District Judge, Multan and 17 others 2012 YLR 2471-Lahore, Muhammad Anwar v. Messrs Associated Trading Co. Ltd. and 2 others PLD 1987 Karachi 535, Syed Altaf Hussain through Attorney v. Irshad Ahmed and 9 others 2014 MLD 457-Sindh, Zulqarnain v. SNGPL through General Manager and 2 others 2013 YLR 503-Lahore, Syed Saqlain Abbas v. Syed Hayat Shah 2012 CLC 945-Lahore, Oil and Gas Development Corporation Ltd. Pakistan v. Claugh Engineering Ltd. through Local Representative Mr. Martin Harris 1999 MLD 254-Lahore, Messrs China Harbour Engineering Co. v. Water and Power Development Authority and others 2001 YLR 1781-Karachi, Ch. Bashir Ahmad and 4 others v. Province of Punjab through Collector, Sargodha and 4 others 1990 MLD 986-Lahore, Salahud Din v. Syed Mansoor Ali Shah and others 1997 SCMR 414, United Bank Limited v. Messrs Khawaja Radio House through Proprietor and 2 others 2004 CLD 1609-Lahore, Messrs James Construction Company (Pvt.) Ltd. through Executive Director v. Province of Punjab through Secretary to the Government of Punjab (Communication and Works) Department, Lahore and 3 others PLD 2002 Supreme Court 310 and Mrs. Dino Manekji Chinoy and 8 others v. Muhammad Matin PLD 1983 Supreme Court 693.

4. On the contrary, learned counsel appearing on behalf of the

respondent No.1 by favouring the impugned order has further argued that the appeal in hand is not maintainable as the mandatory provision of Order XLIII, Rule 3 of the Code of Civil Procedure, 1908 have not been complied with. Adds that against interim order, no appeal lies and maintainable. Stresses that earlier was an application under sections 20 and 33 of Arbitration Act, 1940 and not suit, therefore, the present suit is not barred under Order II, Rule 2 of the Code of Civil Procedure, 1908. Adds that respondent No.1/plaintiff has consumed a huge amount on construction of the project at site pursuant to the contract given to the respondent No.1/ plaintiff; therefore, the learned trial Court has rightly granted interim injunction. Lastly prayer for dismissal of the appeal in hand has been made. Relies on Roomi Enterprises (Pvt.) Ltd. v. Stafford Miller Ltd. and others 2005 CLD 1805-Karachi, (Messrs) The Associated Cement Companies Ltd. v. The Province of Punjab PLD 1954 Lahore 151, Shah Muhammad Khan v. Ghulam Qadir, and others. PLD 1971 Baghdad Ul Jadid 9, Mirza Muhammad Iqbal Beg and others v. International Estate Developers Ltd. 1986 M L D 2785-Lahore, Mst. Sajida Yousaf v. Lahore Development Authority 1989 MLD 225-Lahore, N.R. Dongre and others v. Whirlpool Corporation and another 1997 MLD 2124-Supreme Court of India, Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 PLC (C.S.) 971-Supreme Court of Pakistan, Mirza Iftikhar Beg v. Government of the Punjab through Secretary Health, Lahore and another 1990 CLC 851-Lahore, Pioneer Pakistan Seed Ltd. v. United Distributors Pakistan Ltd. and 5 others 1998 CLC 61-Lahore, Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others 1997 SCMR 1508, Karachi Electric Supply Company through duly authorized officer v. Muhammad Shahnawaz and 46 others 2010 YLR 2426-Karachi, Government of Pakistan through Secretary Ministry of

Interior, Islamabad v. Dr. Abdul Qadeer Khan 2010 MLD 533-Lahore, West Pakistan Industrial Development Corporation v. Messrs Sheikh Muhammad Amin and Co. 1992 CLC 2047-Karachi, Bangladesh Shipping Corporation v. Syed Muhammad Anwar Iqbal 1992 CLC 1500-Karachi, Ghulam Farid and others v. Province of Punjab and others 2013 MLD 77-Lahore, Messrs James Construction Company (Pvt.) Ltd. through Executive Director v. Province of Punjab through Secretary to the Government of Punjab (Communication and Works) Department, Lahore and 3 others PLD 2002 Supreme Court 310, United Bank Limited and others v. Ahsan Akhtar and others 1998 SCMR 68, Habib Bank Limited and others v. Syed Zia Ul Hassan Kazmi 1998 SCMR 60 and Messrs Chas A. Mendoza Pharmaceutical Laboratories v. Syed Tausif Ahmad Zaidi and 2 others PLD 1993 Kar. 790.

5. Heard.

6. First and foremost question in the present case is that whether this appeal is maintainable or not, because according to version of learned counsel for the respondent, notice as required under Order XLIII, Rule 3 of the Code of Civil Procedure, 1908, which is mandatory under the law, has not been given to the respondent. In this regard it is observed that when the appeal has been admitted for regular hearing and the respondent's side has put appearance before this Court, it would be presumed that provision of law has been met with. In this regard reliance is placed on Salahud Din's case 1997 SCMR 414, wherein it has been held that, 'Respondents being duly represented before High Court before admission of appeal, object of serving notice on respondents under O. XLIII, R.3, C.P.C. before filing of appeal was fully met and, therefore, appellant could not have been non-suited in appeal on such ground'. Even in Hafiz Muhammad Abrar and another's case 2012 YLR 2471-Lahore, it has been observed by this Court that, 'Once appeal had been admitted, the same could not be dismissed for non-

compliance of the provisions of O. XLIII, R.3, C.P.C.---Objection as to non-service of notice under O. XLIII, R.3, C.P.C. was only available up to the preliminary stage of hearing of the appeal---Such objection could not be entertained when the respondents to the appeal appeared and contested the same'. Similar view has been adopted in Syed Saqlain Abbas' case 2012 CLC 945-Lahore, wherein it has been observed that, 'O. XLIII, R.3----Appeal against an interim order---Non-service of notice of appeal on respondent prior to its filing---Appearance of respondent's counsel in response to court's notice---Effect---Objection regarding non-service of such notice became immaterial'. Even otherwise, the appellant has appended copy of notice issued under Order XLIII, Rule 3 of the Code of Civil Procedure, 1908 as well as postal receipts Nos.867 and 868, divulging that notice germane to filing of this appeal was issued to the respondents' side in accordance with the mandate of law; therefore, contention of the appellant stands proved; in this regard reliance can be placed on Zulqarnain's case 2013 YLR 503-Lahore, wherein it has been observed, 'Perusal of record revealed that petitioner had served the respondent with legal notice that was sent through post and postal receipts duly certified by the Post Master were annexed with the civil revision----Contention of petitioner stood proved, in the light of such documents '. Even in Malik Maqsood Asghar and 5 others' case 2008 CLC 1150-Lahore, it has been maintained, 'Lack of service of notice in terms of O. XLIII, R.3, C.P.C. was of no legal significance after admission of appeal and the same should not be dismissed for non-compliance with the provisions of O. XLIII, R. 3, C.P.C .'. Therefore, the arguments of learned counsel for the respondents in this regard, regarding maintainability of the appeal in hand, have no force to be considered.

7. Now comes the second divergence inter se the parties; it is contention of the appellant's counsel that in presence of proceedings taken under sections 20 and 33 of the Arbitration Act, 1940, the second suit is not

maintainable, whereas the respondent/plaintiff's counsel has submitted that earlier was the application and not suit, therefore, the present suit is not barred under the law. In this regard, it is observed that though the proceedings under the provisions of sections 20 and 33 of the Arbitration Act, 1940 are not suit in stricto sensu, yet the proceedings under said sections are to be treated as a civil suit, though it is not a full-fledged civil suit in stricto sensu, but it is a legal proceedings with limited scope. Application under section 20 of the Arbitration Act, 1940 is treated as a suit and order directing filing of agreement and making reference to arbitration being final, in circumstances, amounts to a decree. In this regard reliance is placed on Messrs China Harbour Engineering Co.'s case 2001 YLR 1781-Karachi and Sh. Fazal Hussain's case 2001 MLD 407-Lahore. Even otherwise, it is manifested from bare reading of the contents of application filed under sections 20 and 33 of the Arbitration Act, 1940, that in whole of the application words 'Plaintiff' and 'Defendant' as well as 'Arbitration Suit' have been used, which clear the intention and nature of the proceedings. For ready reference only two paragraphs are reproduced as under:--

> 29. That Clause 52 of the Contract between the parties is the Dispute Resolution/Arbitration Clause. This clause provides for the settlement of the disputes between the parties through amicable settlement process and/or arbitration under provisions of the Arbitration Act 1940 as amended or any statutory modification or re-enactment thereof for the time being in force.
>
> 30. That the Plaintiff wants to commence arbitration proceedings against Defendant No.1 and 2 in accordance with Clause 52 of the Contract in order to settle dispute in issue. It is in these arbitration proceedings that it shall be determined whether the Plaintiff or Defendants Nos.1 and 2 was in default of its obligations under the Contract.'

In view of above discussion and judgments supra, it can be safely held that application filed under sections 20 and 33 of the Arbitration Act, 1940 is treated to be a suit and not an application.

Moreover, when we place the contents of the application filed under sections 20 and 33 of the Arbitration Act, 1940 and second suit, even prayer made in both the cases, it reflects that same are more or less the same; therefore, the respondent/ plaintiff cannot be allowed to split up claim in order to vex the opponent twice for the same cause of action. Because in the preset case, at one hand, the respondent/ plaintiff seeks settlement of accounts through arbitration and on the other hand claims damages, which is hit by Order II, Rule 2 of the Code of Civil Procedure, 1908. In this regard reliance is placed on Muhammad Bachal's case 2011 CLC 1450-Karachi, wherein it has been observed, 'O. II, R.2---Same cause of action---Splitting up of claims---Validity---Provision of O. II, R. 2, C.P.C. is devised to prevent a party from splitting up claims and remedies arising out of same cause of action against same party---Such provision is based on the principle that defendant should not be vexed twice for the same cause of action---Provision of O. II, R. 2, C.P.C. is penal in nature and precludes plaintiff to sue for the portion of claim or remedy so omitted'. More so, the order dated 19.02.2014 passed by learned trial Court while deciding application under section 41(b) read with Para 4 of the Second Schedule to the Arbitration Act, 1940, reflects that it was in the knowledge of the respondent/plaintiff as well as learned trial Court that Contract between the parties stood terminated, which was terminated on 20.09.2013 and the respondent/plaintiff filed application under sections 20 and 33 of the Arbitration Act, 1940 on 21.09.2013, whereas the present suit was instituted on 27.05.2014; so the said findings on facts and law recorded in earlier proceedings are binding on learned trial Court. In this regard reliance is placed on Messrs Mono Engineering (Pvt.) Limited's case 1999 YLR 1340-Karachi, wherein it has

been observed, 'An earlier finding on the point of law by a Judge is binding on him in subsequent proceedings'. But the learned trial Court while passing injunctive order in the present suit has not kept in view the earlier findings recorded by him in earlier proceedings, under sections 20 and 33 of the Arbitration Act, 1940.

8. In view of above, when the earlier proceedings, having same cause of action, are between the same parties, the principle of Res Judicata clearly applies in the present suit. Though at present, before this Court, the appeal is regarding order passed by learned trial Court granting ad interim injunction, but when from the above state of affairs, it becomes very much clear that the plaint is not entertainable being barred by law, the same can be rejected while applying principle of Res Judicata or plaint can be returned at any stage of the suit even in appeal or revision. In this regard reliance can safely be placed on Muhammad Anwar's case PLD 1987 Karachi 535, wherein it has been observed, 'Applicability of section 11, C.P.C. is not restricted only to suits but its principles apply to the proceedings which may not be provided in the former suit or proceeding the same parties were heard and the same dispute between them was agitated and decided by Court of competent jurisdiction. Once these conditions have been complied with, a subsequent suit on the same facts in respect of the same dispute between the same parties will be barred by the principle of res judicata. It is not necessary that the former proceedings should be only a suit. Section 11 is not exhaustive and the principles of res judicata can be invoked in respect of proceedings to which it does not strictly apply'. When the suit is not competent and barred by law, what to talk of the ad interim injunction granted by the learned trial Court; especially when one and the same court has already observed that the contract between the parties has been terminated and it has manifested from the record that admittedly after termination of the contract, the appellant has further awarded the Contract to other Company/Contractor. Therefore, three ingredients for grant or refusal of

injunction i.e. (i). Prima facie arguable case (ii). Balance of convenience and (iii). Irreparable loss also tilt in favour of the appellant.

The other factor in the present case is that admittedly the subject matter in this case is within the territorial limits of District Multan, whereas the respondent/plaintiff has instituted the suit in Civil Court, Lahore; meaning thereby the learned Civil Court at Lahore lacks territorial jurisdiction to entertain the suit in hand and the learned trial Court ought to have returned the plaint instead of passing the ad interim injunction while entertaining the suit, for its presentation before the proper forum for adjudication in accordance with law. In this regard, reliance is placed on Muhammad Bachal's case 2011 CLC 1450-Karachi, wherein it has been observed that, 'Return of plaint---Cause of action---Territorial jurisdiction---Property of plaintiff was demolished and bulldozed unlawfully and illegally by defendants---Suit property was situated at place "N" whereas the suit was filed at place "K" before High Court in its original civil jurisdiction---Validity---Provisions of O.VII, R. 10, C.P.C. were mandatory and adjudication by a court without jurisdiction was a determination coram non judice and not binding---When court lacked pecuniary or territorial jurisdiction, in such cases, plaint must be returned for presentation to proper court and Court could not pass any judicial order except that of returning the plaint---Cause of action described by plaintiff in plaint showed that no cause of action accrued to plaintiff within territorial limits and jurisdiction of High Court, therefore, plaint was returned to plaintiff for institution before the court of appropriate jurisdiction ...'

9. So far as the case law cited by learned counsel for the respondent/plaintiff is concerned, with utmost respect, same has no relevance to the peculiar facts and circumstances of the present case; therefore, it does not render any assistance or help to the respondent/ plaintiff's cause. Even

otherwise, each and every case has its own peculiar facts and circumstances and the Courts have to evaluate the same with independent mind, so as to administer safe justice.

10. The discussion made above ends with the conclusion that second suit instituted by the respondent/plaintiff, during pendency of earlier Arbitration Suit, is not maintainable, being hit by O. II, Rule 2 of the Code of Civil Procedure, 1908 as well as under section 11 i.e. Res Judicata; resultantly, while placing reliance on the judgments supra, the instant appeal is allowed, consequent whereof, the plaint in second suit i.e. present suit, is rejected under Order VII, Rule 11(d) of the Code of Civil Procedure, 1908. No order as to costs.

MH/C-12/L **Appeal allowed.**

2016 M L D 1787

[Lahore]

Before Ijaz Ahmad and Shahid Bilal Hassan, JJ

PROVINCE OF PUNJAB through District Officer (Revenue) Bhakkar and another---Appellants

Versus

NOOR MUHAMMAD and 3 others---Respondents

R.F.A. No. 696 of 2012, decided on 29th January, 2014.

(a) Limitation Act (IX of 1908)---

----Ss. 5 & 14---Land Acquisition Act (I of 1894), S.54---Delay in filing of appeal---Condonation of delay---Wrong advice of counsel---Appeal filed before wrong forum---Scope---Plea of the petitioner/government department was that initially they had filed appeal before District Judge (wrong forum) instead of High Court, and some time had also been spent in completion of departmental proceedings---Validity---Valuable rights having been created in favour of respondents/other party, could not be taken away---Government that made laws, must follow the same and could not claim a concessional treatment--- State having made the laws had to adhere to same more strictly than an individual who had no role to play in the scheme of law making---Gross negligence of a counsel in selection of the forum had no ground for exclusion of time or condonation of delay---Application for condonation of delay along with appeal was dismissed.

Abdul Ghani v. Ghulam Sarwar PLD 1977 SC 102; Mirza Muhammad Saeed v. Shahab ud Din and 8 others PLD 1983 SC 385; Manzoor Hussain and 2 others v. Muhammad Ali and another 1989 SCMR 1498; Ferro Alloys v. Toyo Menka Kaisha 1992 CLC 712; Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera 1999 SCMR 1892; Abdul Rehman Qamar v. Government of N.W.F.P through

Secretary Education, Peshawar and 5 others 2003 PLC (C.S) 1171; Monazah Parveen v. Bashir Ahmad and 6 others 2003 SCMR 1300; Br. Jehanzaib Rahim v. Dr. Shaukat Pervez and others PLD 2007 SC 560; Abdul Majid and others v. Mst. Zubeda Begum etc. 2007 SCMR 866; Chairman, District Govt. Evacuee Trust, Jhelum v. Abdul Khaliq through Legal Heirs and others PLD 2002 SC 436; Collector, Land Acquisition, Chashma Right Bank Canal Project WAPDA, D.I. Khan and others v. Ghulam Sadiq and others 2002 SCMR 677 rel.

Karachi Electric Supply Corporation Ltd v. Lawari and 4 others PLD 2000 SC 94; Board of Governors Area Study Centre for Africa and North America, Quaid-e-Azam, University, Islamabad and another v. Ms Farah Zahra PLD 2005 SC 153 and Government of Balochistan through Secretary Board of Revenue, Balochistan Quetta and others. v. Muhammad Ali and 11 others 2007 SCMR 1574 distinguished.

Abrar-al-Haq Shami, Deputy Secretary, Establishment Division, Islamabad and another v. Federation of Pakistan through Secretary Ministry of Overseas Pakistanis, Islamabad 2012 SCMR 1292 and 1. Tanveer Jamshed 2. Major (Rtd.) Jamshed Alam Khan v. Raja Ghulam Haider 1992 SCMR 917 ref.

(b) Interpretation of statutes---

----Where two interpretations were possible the one more favouring the feeble individual vis-a-vis the omnipotent state and its functionaries should be adopted.

Miss Samia Khalid, A.A.G. for Appellants.

Saif ul Malook for Respondents.

ORDER

C.M. No.1-C/12

This is an application made under Section 5 of the Limitation Act,

1908 seeking condonation of delay in preference of the instant appeal. The L.A.C. determined the compensation of the acquired land at the rate of Rs.27000/- per Kanal. The respondents made an application seeking enhancement. It was referred to the learned Senior Civil Judge, Bhakkar. The referee Court passed the award dated 12.3.2011 wherein the compensation was fixed at Rs.1,00,000/- per Kanal. The appellants preferred an appeal before the learned District Judge. It was returned for presentation before the proper forum vide order dated 28.5.2012. The instant appeal was preferred on 04.09.2012.

2. It is contended that the petitioners/appellants were prosecuting the appeal before a wrong forum in good faith as according to the value of the subject matter, prima facie an appeal in a suit would have been preferred before the learned District Judge; that the appeal, after its return, could not be immediately preferred as the petitioner had to obtain the certified copy of the order of return dated 28.5.2012. It took some days to obtain he sanction for preferring the appeal from the concerned quarters. Then High Court was closed for summer vacation. The Registry of High Court was not receiving the un-urgent cases. It could only be filed on the 1st day after the Court opened after summer vacation, as is permitted under Section 4 of the Limitation Act, 1908. Relies on Karachi Electric Supply Corporation Ltd v. Lawari and 4 others (PLD 2000 Supreme Court 94), Board of Governors Area Study Centre for Africa and North America, Quaid-e-Azam, University, Islamabad and another v. Ms Farah Zahra PLD 2005 Supreme Court 153), Government of Balochistan through Secretary Board of Revenue, Balochistan Quetta and others. v. Muhammad Ali and 11 others (2007 SCMR 1574) and Abrar-al-Haq Shami, Deputy Secretary, Establishment Division, Islamabad and another v. Federation of Pakistan through Secretary Ministry of Overseas Pakistanis, Islamabad (2012 SCMR 1292).

3. On the other hand, this application is opposed by the learned counsel

appearing on behalf of the respondents. Contends that instead of preference of an appeal under Section 54 of the Land Acquisition Act, 1894, in High Court. The preference of an appeal before the learned District Judge cannot be termed to be prosecution of appeal in good faith before a wrong forum; that if it is considered to be a case where condonation of delay is sought under Section 5 or exclusion of period is required under Section 14 of the Limitation Act, 1908, each and every day spent after the expiry of requisite period of limitation has not been explained. The instant appeal preferred on 5.9.2011 is hopelessly time barred. Further contends that elapse of period creates rights in favour of the other party. That cannot be taken away. The Government, who makes laws must adhere to it, he argues. Relies on Abdul Ghani v. Ghulam Sarwar (PLD 1977 Supreme Court 102), Mirza Muhammad Saeed v. Shahab ud Din and 8 others (PLD 1983 Supreme Court 385), Manzoor Hussain and 2 others v. Muhammad Ali and another (1989 SCMR 1498), 1. Tanveer Jamshed 2. Major (Rtd.) Jamshed Alam Khan v. Raja Ghulam Haider (1992 SCMR 917), Ferro Alloys v. Toyo Menka Kaisha (1992 CLC 712), Raja Karamatullah and 3 others v. Sardar Muhammad Aslam Sukhera (1999 SCMR 1892), Abdul Rehman Qamar v. Government of N.W.F.P through Secretary Education, Peshawar and 5 others [2003 PLC (C.S) 1171] Monazah Parveen v. Bashir Ahmad and 6 others (2003 SCMR 1300), Br. Jehanzaib Rahim v. Dr. Shaukat Pervez and others (PLD 2007 SC 560), Abdul Majid etc. v. Mst. Zubeda Begum etc. 2007 SCMR 866, Chairman, District Govt. Evacuee Trust, Jhelum v. Abdul Khaliq through Legal Heirs and others (PLD 2002 Supreme Court 436) and Collector, Land Acquisition, Chashma Right Bank Canal Project WAPDA, D.I. Khan and others v. Ghulam Sadiq and others (2002 SCMR 677).

4. Heard. Record perused.

5. The impugned award was passed by the referee Court on 12.3.2011. The appeal preferred before the learned District Judge, Bhakkar was returned vide order dated 28.5.2012. Even if the requisite period spent in obtaining a

copy of the order dated 28.5.2012, which if calculated comes to 14 days, is excluded, still delay of each and every day after 13.6.2012 when the copy of the order dated 28.5.2012 was delivered to the appellants till 02.07.2012, when High Court closed for summer vacation, which has to be explained, goes unexplained. This appeal was preferred on 04.09.2012, the first day when the High Court opened after the summer vacation. The delay till 02.07.2012 is fatal for petitioner/appellant's case. Reliance is placed on PLD 2007 SC 560. The valuable rights that have been created in favour of respondents can not be taken away. Reliance is placed on 2007 SCMR 860. The Government that makes laws, must follow the laws and cannot claim a concessional treatment. The cardinal principle that where two interpretations are possible the one more favouring the feeble individual vis-a-vis the omnipotent state and its functionaries should be adopted, also stems out from the same logic that it is the State that makes the laws, who has to adhere to the law more strictly than an individual who has no role to play in the scheme of law making. Reliance is placed on PLD 2002 Supreme Court 436 and 2002 SCMR 677. The gross negligence of a counsel in selection of the forum, like the case in hand where section 54 of Land Acquisition Act, 1894 provides the remedy of appeal before High Court, furnishes no ground for exclusion of time or condonation of delay. Reliance is placed on PLD 1977 Supreme Court 102, PLD 1983 Supreme Court 385, l989 SCMR 1498, 1992 CLC 712, 1999 SCMR 1892, 2003 PLC (C.S.) 1171 and 2003 SCMR 1300.

6. With due reverence, we dare opine that the Judgments cited by the petitioners/appellants render them little help. In case law referred as PLD 2005 Supreme Court 153, the question was relating to exclusion of time spent for obtaining the copy of the judgment of the learned Single Judge for preferring an ICA. Whether the copy was required or not is an intricate question of law. In the referred case even due diligence could give way to a mistake in selection of forum. In PLD 2000 Supreme Court 94, the due care and caution exercised in making selection of forum has been held to be the

core point in determining whether a party had acted in good faith or not. But in the instant case, the mistake is so Himalayan and the indolence is so glaring in selection of forum that no question arises for exclusion of time under section 14 or condonation of delay under section 5 of Limitation Act 1908. In the case law referred as 2007 SCMR 1574, the condonation of delay of 320 days has a corresponding deterrence. The august Supreme Court of Pakistan directed competent authority to proceed against all the concerned delinquent officers and public functionaries by taking disciplinary action under the appropriate law and rules for not having approached the lower appellate Court and the august Supreme Court within the prescribed period of limitation. In spite of the action directed to be taken against the public functionaries, they have not mended themselves and have again, on account of their gross negligence preferred the instant appeal before the learned District Judge in a case of compensation falling under the Land Acquisition Act, 1894. This appeal was preferred after another long delay after receipt of the copy of order dated 28.5.2012 on 13.6.2012. The august Supreme Court of Pakistan had given that relaxation with an expectation that the functionaries will mend themselves and will act with diligence in future. The condonation of delay and the relaxation granted by the apex Court has been responded with repetition of the same deplorable conduct and attitude by the public functionaries. The same leniency cannot always be extended to the Governments and the authorities.

7. In our view, this application which does not contain sufficient grounds for condonation of delay and exclusion of time, merits dismissal. Relying on the judgments referred to by the learned counsel for the respondents, this application is dismissed. Resultantly R.F.A. No.696/12 is also dismissed.

JJK/P-5/L **Appeal dismissed.**

2016 Y L R 2575

[Lahore]

Before Shahid Bilal Hassan, J

ABDUL RASHEED KHAN through L.Rs. and others---Petitioners

Versus

SAFDAR ALI through L.Rs. and others---Respondents

Civil Revision No.1758 of 2006, decided on 11th March, 2016.

(a) Specific Relief Act (I of 1877)---

----S. 42---Limitation Act (IX of 1908), Art. 120---Punjab Land Revenue Act (XVII of 1967), S. 42---Suit for declaration---Limitation---Sale mutation---Proof---Procedure---Contention of plaintiff was that he was owner of suit property and alleged sale mutation was result of fraud---Suit was decreed by the Trial Court but Appellate Court dismissed the same---Validity---Beneficiary of a document had to prove its valid execution after denial of the same by its executant---Defendants were bound to prove the valid execution of oral sale and mutation in question thereof---Written statement and evidence were silent with regard to entrance of actual transaction i.e. oral sale as no date, time and place of the same had been mentioned---Nothing was on record as to when and where the possession of suit property was delivered to the defendants---Mandatory provisions of S. 42 of Punjab Land Revenue Act, 1967 were not followed in stricto sensu which had vitiated whole proceedings with regard to attestation of impugned mutation---Impugned mutation was result of fraud, forgery, impersonation and without consideration and was void---Limitation did not run against a void order---Present suit was within time---Impugned judgment and decree passed by the Appellate Court were set aside and those of Trial Court were restored---Revision was allowed in circumstances.

Aurangzeb through L.Rs. and others v. Muhammad Jaffar and another 2007 SCMR 236; Meraj Din v. Mst. Sardar Bibi and 5 others 2010

MLD 843; Muhammad Yaqoob through legal heirs v. Feroze Khan and others 2003 SCMR 41; Fida Hussain through Legal Heirs Muhammad Taqi Khan and others v. Murid Sakina 2004 SCMR 1043; Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. 2008 SCMR 855; Bakht Baidar and another v. Naik Muhammad and another 2004 MLD 341; Mst. Hassan Bano v. Wali-ur-Rehman and 2 others 2007 SCMR 1344; Sughran Bibi v. Mst. Aziz Begum and 4 others 1996 SCMR 137; Muhammad Luqman v. Bashir Ahmad PLD 1994 Kar. 492; Sh. Fateh Muhammad v. Muhammad Adil and others PLD 2007 SC 460; Major (Retd) Barkat Ali and others v. Qaim Din and others 2006 SCMR 562; Muhammad Sajjad Hussain v. Muhammad Anwar Hussain 1991 SCMR 703; Unair Ali Khan and others v. Faiz Rasool and others PLD 2013 SC 190 and Hakim Khan v. Nazeer Ahmad Lughmani and 10 others 1992 SCMR 1832 ref.

Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688 rel.

(b) Limitation Act (IX of 1908)---

----Art. 120---Specific Relief Act (I of 1877), S. 42---Suit for declaration---Limitation---Suit for declaration could be filed within six years from the date of knowledge.

(c) Civil Procedure Code (V of 1908)---

----S. 115---Revision---Scope---When subordinate forum had committed jurisdictional error or misread evidence or ignored material aspects affecting root of case then judgment/order could be interfered while exercising revisional powers.

Iqbal Ahmed v. Managing Director Provincial Urban Development Board, N.W.F.P. Peshawar and others 2015 SCMR 799 and Nazim-ud-Din and others v. Sheikh Zia-ul-Qamar and others 2016 SCMR 24 rel.

(d) Limitation---

----Void order---Principle---Limitation did not run against a void order.

A.D. Nasim and Malik Amjad Pervaiz for Petitioners.

Ahmad Waheed Khan and Abdul Qayyum Bhatti for Respondents.

Date of hearing: 19th February, 2016.

JUDGMENT

SHAHID BILAL HASSAN, J.---This civil revision challenges the judgment and decree dated 15.07.2006 passed by learned Additional District Judge, Ferozewala, District Sheikhupura whereby the appeal filed by the respondents' side against the judgment and decree dated 05.11.1995 passed by learned Civil Judge 1st Class, Ferozewala, District Sheikhupura decreeing the suit of the petitioner(s); has been allowed by dismissing the petitioner's suit.

2. Pithily, the facts leading to filing of the instant civil revision are that the present petitioner(s) filed a suit for declaration and permanent injunction against the respondents claiming that he being an exclusive owner of a Banjar (Barren) agricultural land, gave it to respondent No.4 by allowing him to make the same cultivable as tenant under the petitioner (s) with an undertaking that the petitioner(s) would not demand any share of Batai from respondent No.4 until and unless the land in question turned fully cultivable; that subsequently he left Pakistan for his livelihood and appointed his brother as attorney to look-after his interest in his absence qua the land in question; that later on, when his brother, being attorney of the petitioner(s), contacted respondent No.4 for rendition of accounts and also for arrears of rent regarding tenancy, it transpired to him that respondents Nos.1 and 2 have fraudulently got the sale mutation No.49 attested on 14.11.1973 in their favour whereby the land in question was shown to have been transferred by the petitioner(s) by way of oral sale in favour of respondents Nos.1 and 2 against a consideration of Rs.22,000/-; that it also came to the knowledge of his brother that respondents Nos.1 and 2 had further transferred 3 Kanals out of the said land to respondent No.3 fraudulently through mutation No.370 dated 27.3.1985; that both the mutations are the result of fraud and forgery

committed by the respondents in connivance with the revenue staff; that petitioner(s) neither transferred the land in question to respondents Nos.1 and 2 by receiving any consideration amount nor he appeared before the concerned officer for attestation of mutation No.49.

3. The suit was contested and out of divergent pleading of the parties, the learned trial court by framing issues, going through the oral as well as documentary evidence adduced by the parties and hearing their arguments, decreed the suit of the petitioner(s) against the respondents, vide judgment and decree dated 05.11.1995. The respondents Nos.1 and 2 preferred appeal against the said judgment and decree before learned lower Appellate Court, which was subsequently allowed vide judgment dated 04.06.1999 and by setting aside judgment and decree passed by the learned Trial Court, the matter was remanded to the learned Trial Court. Being aggrieved by remand order, the present petitioner(s) filed Civil Revision No.1383 of 1999; which was allowed by this Court and matter was remanded to the learned lower Appellate Court, with the direction to decide the appeal on merits after hearing both the parties.

Thereafter, the learned first appellate Court vide impugned judgment and decree dated 15.07.2006, accepted the appeal filed by the respondents Nos.1 and 2, set aside judgment and decree dated 05.11.1995 passed by the learned Trial Court and dismissed suit of the petitioner(s), which culminated in filing of the civil revision in hand.

4. Learned counsel for the petitioner(s) has argued that the impugned judgment and decree is against law and facts of the case. The petitioner(s) through cogent, reliable and confidence inspiring evidence proved fraud and forgery allegedly committed by the respondents at the time of attestation of mutation in question but the learned first Appellate Court by committing misreading and non-reading of evidence passed the impugned judgment and decree. The findings of the learned Trial Court with regard to question of limitation have wrongly been discarded by the learned first Appellate Court without assigning any cogent reasons. After denial of the petitioner(s)

regarding oral sale and execution of any mutation pursuant to said oral sale in favour of respondents Nos.1 and 2 by appearing before revenue officer, the onus to prove valid execution of the mutation in question shifted upon the beneficiaries i.e. respondent Nos.1 and 2, but they have badly failed to discharge the same; even then, the learned first Appellate Court passed the impugned judgment and decree, which is nothing but a nullity in the eye of law, as the same is based on surmises and conjectures as well as wrong assumption of law. Impugned judgment and decree suffers from material irregularities and illegalities. Well reasoned judgment and decree passed by the learned Trial Court has been set aside by the learned first Appellate Court without proper appraisal of evidence and without giving sound reasoning, which resulted in miscarriage of justice. Findings of the learned first Appellate Court are erroneous, which cannot be allowed to hold field further. Therefore, by allowing the civil revision in hand, the impugned judgment dated 15.07.2006 and decree signed by the learned lower Appellate Court on 15.06.2006 may be set aside, consequent whereof, the judgment and decree dated 05.11.1995 passed by the learned Trial Court, may be restored. Relies on Muhammad Akram and another v. Altaf Ahmad PLD 2003 Supreme Court 688, Aurangzeb through L.Rs. and others v. Muhammad Jaffar and another 2007 SCMR 236 Supreme Court of Pakistan, Iqbal Ahmed v. Managing Director Provincial Urban Development Board, N.W.F.P. Peshawar and others 2015 SCMR 799-Supreme Court of Pakistan, Meraj Din v. Mst. Sardar Bibi and 5 others 2010 MLD 843-Lahore, Muhammad Yaqoob through legal heirs v. Feroze Khan and others 2003 SCMR 41; Fida Hussain through Legal Heirs Muhammad Taqi Khan and others v. Murid Sakina 2004 SCMR 1043 and Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. 2008 SCMR 855-Supreme Court of Pakistan.

5. Nay-saying the submissions made by the learned counsel for the petitioner(s), the learned counsel appearing on behalf of the respondents Nos.1-a to 1-e and 2 has argued that the respondents/defendants proved their case by producing witnesses in whose presence, the deceased petitioner/ plaintiff by appearing before revenue officer got attested the mutation in

dispute. The stance taken up by the petitioner that he was out of the country has not been proved as no evidence in a shape of passport was produced by the petitioner(s), while power of attorney was with regard to tenancy but the said attorney acted beyond his powers. The learned first Appellate Court has rightly passed the impugned judgment and decree while discussing each and every point as well as evidence in a minute way. Even otherwise, revision jurisdiction has limited scope. Therefore, civil revision in hand, may be dismissed. Relies on Bakht Baidar and another v. Naik Muhammad and another 2004 MLD 341 Peshawar, Mst. Hassan Bano v. Wali-ur-Rehman and 2 others 2007 SCMR 1344, Sughran Bibi v. Mst. Aziz Begum and 4 others 1996 SCMR 137, Muhammad Luqman v. Bashir Ahmad PLD 1994 Karachi 492, Sh. Fateh Muhammad v. Muhammad Adil and others PLD 2007 Supreme Court 460, Major (Retd) Barkat Ali and others v. Qaim Din and others 2006 SCMR 562, Muhammad Sajjad Hussain v. Muhammad Anwar Hussain 1991 SCMR 703, Unair Ali Khan and others v. Faiz Rasool and others PLD 2013 Supreme Court 190 and Hakim Khan v. Nazeer Ahmad Lughmani and 10 others 1992 SCMR 1832.

6. Heard.

7. There is no cavil to the proposition that the beneficiary of a document has to prove its valid execution especially after denial of the same by its executant. In the present case, the petitioner, who is allegedly the owner of the said suit land has denied any oral sale or execution of mutation in question in favour of respondents Nos.1 and 2 by appearing before revenue officer or receipt of any sale consideration in this regard; therefore the respondents Nos.1 and 2 were under heavy burden to prove the valid execution of oral sale and pursuance to that mutation in question i.e. mutation No.49 dated 14.11.1973 but the witnesses produced by the respondents/defendants as D.W-1, D.W-2 had deposed that they did not know Abdul Rasheed nor they ascertained the identification but they made signatures on the asking of Tehsildar and Nazir Shah Patwari Halqa on the mutation in question i.e. mutation No. 49 dated 14.11.1973. Moreso, DW-3

deposed that signatures of Abdul Rasheed were not obtained on the mutation in question. In Fida Hussain through Legal Heirs Muhammad Taqi Khan and others v. Murid Sakina 2004 SCMR 1043 and Muhammad Iqbal and another v. Mukhtar Ahmad through L.Rs. 2008 SCMR 855-Supreme Court of Pakistan, it has been held:--

> "Before entering into appreciation of evidence, we may recall that this Court on numerous occasions has categorically held that the mutation proceedings are not judicial proceedings and mutation do not at all happen to confer title. That, therefore, whenever the genuineness of any such mutation is challenged, the burden squarely lies on the parties relying upon the mutation to prove the actual transaction. Hakim Khan v. Nazeer Ahmed Lughmani 1992 SCMR 1832 can be referred to in this behalf. This Court in a recent judgment rendered in Muhammad Akram v. Altaf Ahmad PLD 2003 SC 688 has categorically declared that mutation confers no title and once a mutation is challenged, the party relying thereon is bound to revert to the original transaction and to prove such original transaction which resulted into the entry of attestation of any such mutation".

Even, the written statement and evidence is silent with regard to entrance of actual transaction i.e. oral sale, because no date of agreement on which the parties agreed to sell the property in dispute or terms and conditions as well as time and place of such agreement and even names of witnesses have not been disclosed by the respondents/defendants in their written statement and evidence. Moreover, there is no evidence on record to suggest that when and where the possession of the suit property was delivered to the respondents, rather it was proved on record that possession of the suit property was with the respondent No.4, who was tenant under the petitioner(s). All these factors make the transaction in question result of fraud and misrepresentation.

In addition to the above, Tehsildar while appearing in witness box deposed that proceedings of mutation were done in a common assembly at Qila Bhatian Wala on 14.11.1973 but statements of P.W-1 and P.W-2, who

are previous and present Patwari of Qila Bhatian Wala show that register Parrtal and Rappat Roznamcha Waqiati do not find mention the attesting of mutation No.49 in estate. Another aspect, which makes, it clear that mutation No.49 was not rightly executed is that same was allegedly attested by Tehsildar consolidation at Rehmanpura, Lahore despite the fact that consolidation proceedings were concluded prior to 1973 and he had no authority as such to attest the mutation in question. The above contradiction with regard to attestation of mutation leads to the conclusion that mandatory provisions of Section 42 of West Pakistan Land Revenue Act, 1967 were not adhered to/followed in stricto sensu which vitiate the whole proceedings germane to attestation of mutation No.49 dated 14.11.1973. This factum further finds support from the report of hand writing expert with regard to signatures of Abdul Rasheed on Ex.P-2, who reported that the same were not made by Abdul Rasheed. Therefore, it has been proved indubitably that mutation No.49 dated 14.11.1973 was result of fraud, forgery, impersonation, illegal, fictitious, without consideration, without authority and of course void as such ineffective on the rights of petitioner(s)/plaintiff. All facts have been overlooked rather ignored by the learned first Appellate Court and the cogent reasoning given by the learned Trial Court while passing the judgment and decree dated 05.11.1995 have been discarded illegally. In Muhammad Akram and another v. Altaf Ahmad PLD 2003 Supreme Court 688, it has invariably been held that:--

> "Mere entry of Roznamcha Waqiati alone is not the only requirement of section 42 of the Land Revenue Act. Numerous other steps were also to be necessary taken regarding which the High Court had no reason to advance."

8. Apart from the above, the issue with regard to limitation has also not been rightly tackled and taken up by the learned lower Appellate Court because it is, by now, a settled law that limitation does not run against a void order. Even otherwise, it was proved on record that petitioner through attorney gained knowledge about the attestation of mutation in question in

late 1988 and instituted a suit on 29.04.1989. Article 120 of Limitation Act, 1908 provides filing of such suit within a period of six years from date of knowledge; meaning thereby, the suit after knowledge was within time, which fact and legal proposition was rightly discussed and interpreted by the learned Trial Court whereas the learned Appellate Court failed to interpret law on the subject in a proper and judicious way with independent mind. It is noteworthy that learned lower Appellate Court passed the impugned judgment and decree in a haphazard manner, as the decree sheet shows that appeal came up before it for hearing on 20.06.2006, while the judgment was recorded and signed on 15.07.2006 and the decree sheet has been shown to have been signed on 15.06.2006.

9. The learned first Appellate Court ought to have minutely scanned the evidence produced by the parties and would have interpreted law on the point of limitation in a proper way while applying independent judicious mind but it failed to do so.

10. So far as the argument of the learned counsel for the respondents that revisional jurisdiction has limited scope is concerned, it can be observed that when the sub-ordinate forums commit jurisdictional error or misread evidence or ignores material aspects affecting very root of case suggesting perversity, the impugned judgment/order, can be interfered with while exercising revisional powers. In this regard, reliance is placed on Iqbal Ahmed v. Managing Director Provincial Urban Development Board, N.W.F.P. Peshawar and others 2015 SCMR 799-Supreme Court of Pakistan, wherein, the Apex Court of the Country held:--

> "So far as the point raised by the learned counsel for the appellant that the scope of civil revision is limited is concerned, this Court in Rozi Khan v. Nasir (1997 SCMR 1849) has candidly held that the scope of revisional jurisdiction could be appropriately invoked where subordinate forums had committed jurisdictional error or had misread evidence or had ignored material aspects affecting very root of case suggesting perversity. In Muhammad Mian v. Shamimullah (1995

SCMR 69) it is held that scope of revisional powers though hedged by conditions, is nevertheless vast and corresponds to a remedy of certiorari."

Further guidance in this regard has been sought from Nazim-Ud-Din and others v. Sheikh Zia-Ul-Qamar and other 2016 SCMR 24 wherein it has been held:--

> "It is settled law that ordinarily the revisional Court would not interfere in the concurrent findings of fact recorded by the first two courts of fact but where there is misreading and non-reading of evidence on the record which is conspicuous, the revisional court shall interfere and can upset the concurrent findings, as well as where there is an error in the exercise of jurisdiction by the courts below and/or where the courts have acted in the exercise of its jurisdiction illegally or with material irregularity."

11. Each and every case has its peculiar facts and circumstances and the Courts have to evaluate the same with independent mind in order to administer safer justice. In this backdrop it is observed that the case law relied upon by the learned counsel for the respondents, with utmost respect to the same, has no relevance to the facts and circumstances of the case in hand. Therefore, it does not render any assistance or help to the respondents.

12. For the foregoing reasons and discussion while placing reliance on the judgments supra, the instant civil revision is allowed, impugned judgment and decree dated 15.07.2006 passed by the learned lower Appellate Court is set aside, consequent whereof the judgment and decree dated 05.11.1995 passed by the learned Trial Court decreeing the suit of the petitioner(s) stands restored. No order as to costs.

ZC/A-67/L **Revision allowed.**

PLJ 2016 Cr.C. (Lahore) 115

[Multan Bench Multan]

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD SAMRAN ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 3336-B of 2015, decided on 8.7.2015.

Criminal Procedure Code, 1898 (V of 1898)--

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324 & 34--Bail, dismissal of--Nominated in FIR--Specific role of causing injuries on person of deceased--Recovery had been effected from possession of accused--Charged curtail maximum punishment--Validity--At bail stage only tentative assessment of record was required to be made and deeper appreciation is not warranted under law; sufficient incriminating material is available on record to connect petitioner with commission of heinous crime.[Pp. 116 & 117] A

Ch. Umar Hayat, Advocate for Petitioner.

Mr. Sarfraz Khan Khichi, DPG for State.

Ch. Muhammad Shafique, Advocate for Complainant.

Date of hearing: 8.7.2015.

ORDER

Seeks post-arrest bail in case FIR No. 633 of 2013 dated, 26.08.2013, registered under Sections 302, 34, 324, 109 of The Pakistan Penal Code, 1860 at Police Station Gagoo District Vehari.

2. The precise allegation against the petitioner and co-accused namely Qurban Ali as narrated by the complainant of this case namely Fazal Ahmad is to the effect that they both while being armed with Kalashnikovs fired on the person of the deceased namely. Mukhtar Ahmed. The fire/burst of the petitioner hit the chest of the deceased, whereas the fire of the co-accused hit on the right side of the head of the deceased. The petitioner also

made straight fire on Muhammad Akram injured, which hit him on his left eye.

3. Heard. Record perused.

4. Considering the arguments advanced by the learned counsel for the parties, it has been noticed that the petitioner is nominated in the FIR with specific role of causing injuries on the person of deceased and injured Muhammad Akram, who lost one of his eye. Recovery has been effected from the possession of the petitioner. In addition to this, all the witnesses of the prosecution are intact and after thorough investigation by the police, the petitioner has been declared guilty. The application seeking declaration to the effect that the petitioner is a Juvenile has been dismissed by the learned trial Court *vide* order dated 13.05.2015, whereby the age of the petitioner is 19 year 06 months and 24-days. Furthermore, the petitioner also committed murder of co-accused namely Qurban Ali in connection with which FIR No. 504/2013 dated 28.04.2013, offences under Section 302/34 of The Pakistan Penal Code, 1860 has been registered at P. S. Saddar Checchawatni. The offence with which the petitioner is charged curtails maximum punishment. At bail stage only tentative assessment of record is required to be made and deeper appreciation is not warranted under the law; sufficient incriminating material is available on record to connect the petitioner with the commission of heinous crime. Therefore, while relying on the dictums laid down by the Hon'ble Supreme Court of Pakistan in the case of *"Muhammad Faiz alias Bhoora vs. The State and another"* reported as 2015 SCMR 655, the petitioner has failed to make out a case for the grant of bail on Statutory ground.

5. Pursuant to above discussion, this petition for post-arrest bail is dismissed.

6. Before parting with this order, it is, however clarified that the findings recorded supra are tentative in nature and will have no effect whatsoever upon the merit of the case in any manner.

(R.A.) **Bail dismissed.**

PLJ 2016 Lahore 261 (DB)

[Multan Bench Multan]

***Present*: SHAHID BILAL HASSAN AND SHAHID MUBEEN, JJ.**

MUSHTAQ AHMAD--Appellant

versus

PRINCIPAL REGIONAL TRAINING INSTITUTE WELFARE & POPULATION, MULTAN and 2 others--Respondents

Intra-Court Appeal No. 267 and W.P. No. 4906 of of 2015,

decided on 8.10.2015.

Law Reform Ordinance, 1972 (XII of 1972)--

----S. 3--Constitution of Pakistan, 1973, Art. 199--Intra Court Appeal--Parental jurisdiction of High Court--Appellant failed to submit all required documents including certificate of five years experience as a driver, as pointed out by representative of department and observed by High Court; therefore, he could not be appointed as driver--It was prime duty of appellant to submit application, complete in all ways, as required by respondent through advertisement, but when he had failed to do needful, he had rightly been refused to induct in service--Therefore, impugned order passed was well reasoned and self-explanatory, calling for no interference through I.C.A., which had no force and stands dismissed. [P.] A

Malik Imtiaz Haider Maitla, Advocate for Appellant.

Sh. Irfan Ali and Mr. Muhammad Amjad Malik, Advocate for Private Respondent

Mr. Aziz-ur-Rehman Khan, Mehr Nazar Abbas Chawan, AAG with Bilal Ahmad, Admin Officer for Respondents.

Date of hearing: 8.10.2015.

ORDER

Calls into question the vires of the order dated 21.04.2015, passed by the learned Single Judge in Chambers of this Court, whereby W.P. No. 4906 of 2015 filed by the appellant was dismissed.

2. Facts in brief, collected from the file, are as such the appellant applied for the post of Driver (BPS-4) in the Welfare and Population Department at Regional Training Institute, Multan pursuant to an advertisement; Respondent No. 1 did not accept the application of the petitioner, which constrained him to invoke theparental jurisdiction of this Court by filing writ petition ibid, but the learned Single Judge in Chambers *vide* impugned order dismissed the same.

3. We have heard the learned counsel for the parties and perused the file.

4. Admittedly, the appellant failed to submit all the required documents including the certificate of five years experience as a driver, as pointed out by the representative of the department and observed by the learned Single Judge in Chamber; therefore, he could not be appointed as Driver. It was prime duty of the appellant to submit application, complete in all ways, as required by the Respondent No. 1 through advertisement, but when he has failed to do the needful, he has rightly been refused to induct in service. Therefore, the impugned order passed by the learned Single Judge in Chambers is well reasoned and self-explanatory, calling for no interference through this intra Court appeal, which has no force and stands dismissed.

(R.A.) **I.C.A. dismissed.**

2017 C L C 950

[Lahore]

Before Shahid Bilal Hassan, J

Chaudhary ASGHAR ALI----Petitioner

Versus

MAQBOOL MASEEH and 3 others----Respondents

C.M. No.662 of 2017 in Writ Petition No.2635 of 2017, decided on 7th March, 2017.

Civil Procedure Code (V of 1908)---

----O.XVIII, R.17 & O.XIV, Rr.1, 5---Suit for specific performance---Hearing of the suit and examination of witnesses---Framing of additional issue--- Cross-examination/examination of already examined witnesses---Application of defendant/petitioner for cross-examination of already examined witnesses, to the extent of an additional issue framed, was declined by Trial Court---Validity---Under O. XVIII, R.17, C.P.C., Trial Court could summon any witness for examination or cross-examination even if the said witness was already examined---Additional issue, in the present case, was framed after recording of examination and cross-examination on the witnesses produced by the plaintiff and mere recording of statement of plaintiff with regard to reliance upon earlier recorded evidence did not prevent the defendant from conducting cross-examination on witnesses on the said additional issue, which was framed later on---Framing of the additional issue had opened a new horizon for the parties, therefore, Trial Court should have allowed the application for cross-examination of witnesses to the extent of the additional issue---Impugned orders were set aside, and application of defendant for cross-examination of witnesses to the extent of the additional issue, was allowed---Constitutional petition was allowed, accordingly.

Saleem Jan alias Salman Khan v. Abdul Manan and 2 others 2009 MLD 1127 rel.

Zahid Sikandar and Ahmad Qayyum for Petitioner.

Zabi Ullah Nagra for Applicant/Respondent No.1

ORDER

C.M. No.662 of 2017.

SHAHID BILAL HASSAN, J.--- This is an application for documenting the main writ petition. Relying on the contents of this application, supported by affidavit and no objection from learned counsel representing the petitioner, this application is allowed subject to all just and legal exceptions.

Main Case.

Precisely, the respondent No.1 instituted a suit for specific performance against the present petitioner. During pendency of the suit, the petitioner/defendant filed an application for framing an additional issue, which was accepted being conceded by the respondent No.1/plaintiff and said issue was framed as issue No.3-A by the learned Trial Court vide order dated 14.07.2015. On 26.10.2015, the respondent No.1/plaintiff through his counsel stated that the plaintiff would not lead any further evidence in favour of additional issue. The petitioner/ defendant filed an application to re-cross-examine the plaintiff's witnesses on issue No.3-A. The said application was resisted by the respondent No.1 /plaintiff. The learned Trial Court vide impugned order dated 26.10.2015 dismissed the application filed by the petitioner/ defendant; against the said order, the petitioner filed a civil revision, which was dismissed vide impugned order dated 24.11.2016. Hence, this writ petition.

2. Learned counsel for the petitioner has argued that the impugned orders are against law and facts of the case; the same have been passed in slipshod, hasty, arbitrary and fanciful manner. Both the learned Courts have passed the impugned orders without applying their judicious mind and the same are based on surmises and conjectures. Adds that even if, the respondent No.1/plaintiff opted not to produce any further evidence on additional issue, it does not deprive the petitioner/defendant of his right to cross-examine the witnesses of respondent No.1/plaintiff, Order XVIII, rule 17 of C.P.C. is clear in this regard. Learned Courts below have misconstrued the law on the subject, which resulted in miscarriage of justice; therefore, by allowing the writ petition in hand, impugned orders passed by the learned Courts below may be set aside; consequent whereof application filed by the petitioner for cross-examination of witnesses of respondent No.1 with regard to issue No.3-A may be allowed. Relies on Saleem Jan alias Salman Khan v. Abdul Manan and 2 others (2009 MLD 1127).

3. On the other hand, learned counsel appearing on behalf of respondent No.1 by favouring the impugned orders has prayed for dismissal of the writ petition in hand.

4. Heard.

5. Provisions of Order XVIII, rule 17 of C.P.C. are clear on this proposition that the learned Trial Court can summon any witness for examination or cross-examination even if the said witness was already examined. Admittedly, issue No.3-A was framed after recording of examination and cross-examination on the witnesses produced by the respondent No. 1/plaintiff. Mere recording of statement of the learned counsel for the respondent No.1/plaintiff with regard to relying on the earlier

recorded evidence does not prevent the petitioner/defendant from conducting cross-examination on the witnesses on issue No.3-A, which was framed later on. The learned Courts below have misconstrued law on the subject and have failed to exercise vested jurisdiction in accordance with law while passing the impugned orders. As after framing of issue No.3-A new horizon had opened for the parties, therefore, the learned Trial Court ought to have allowed the application for cross-examination on the witnesses of respondent No.1/plaintiff only to the extent of issue No.3-A instead of declining the application filed by the petitioner because the petitioner/ defendant cannot be deprived of his vested right in this regard. Reliance in this regard is placed on Saleem Jan alias Salman Khan v. Abdul Manan and 2 others (2009 MLD 1127).

6. For the foregoing reasons, the instant constitutional petition is allowed, impugned orders are set aside, consequent whereof application moved by the petitioner/defendant for cross-examination on the witnesses produced by the respondent No.1/plaintiff only to the extent of issue No.3-A will be deemed to be accepted.

KMZ/A-51/l **Petition allowed.**

2017 C L C 1199

[Lahore]

Before Shahid Bilal Hassan, J

SHAMSHAD BIBI----Petitioner

Versus

RIYASAT ALI and others----Respondents

Civil Revision No.1748 of 2013, decided on 22nd December, 2016.

(a) Administration of justice---

----Party has to prove his/her case at its own and by using tool of court, party cannot be assisted or helped to create any evidence in his/her support---When one fails to prove his stance directly, he/she cannot be allowed to do the same indirectly.

Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551 ref.

(b) Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Expert opinion---Necessity---Scope---Application for DNA test to check legitimacy of an heir of deceased---Scope---Petitioner assailed order of Trial Court by way of which application of appellant for DNA test of the petitioner along with three others except respondent was allowed---Petitioner contended that she had been deprived of her share from the inheritance of her father who contracted three marriages and court had rightly decreed her suit for declaration---Petitioner further submitted that DNA test was a third person opinion and such application was never moved when full-fledged trial was conducted before the civil court---Validity---Parties had to prove their cases at their own and by using tool of court they could not be assisted or helped to create any evidence in their support; when one failed to prove his stance directly, could not be allowed to do the same indirectly---Respondent had not made any effort by way of moving application for DNA test to bring on record any evidence before

Trial Court and when Trial Court after thwarting and evaluating evidence brought on record by the parties recorded its findings, all of a sudden, that too, not at the time of filing of appeal, but during pendency of appeal, the respondent moved application for DNA test of the plaintiff along with three others but he kept himself away from that process, which spoke volumes against him as he was also from the blood of the deceased father---While passing the impugned order no consent from the petitioner and others with regard to sending them to the laboratory for DNA test, was obtained by appellate court, which was necessary, therefore, an irregularity was committed by appellate court---When the direct evidence to prove a fact was available in the shape of oral as well as documentary evidence, there was no need to seek expert opinion, which otherwise was a third person opinion and could not undo the direct evidence of the parties---High Court observed that tendency had been noticed that in order to deprive a legal heir from the legacy of deceased propositus, his/her legitimacy was called into question and he/she was dumped to get himself/herself cleaned from that stigma, that too through unskilled experts as any mistake or malpractice committed in the course of DNA test tantamount to stigmatize the child from the rest of his/her life, therefore, such practice could not be allowed to be carried on, especially when the parties enjoyed the liberty of producing direct evidence, oral as well as documentary, which had been done in the present case---Opinion of third person, not related to the parties, could not undo the direct evidence and law did not give a free license to individuals and particularly unscrupulous fathers, to make unlawful assertions and thus to cause harm to children as well as their mothers---Appellate court while passing the impugned order had wrongly construed law on the subject and had reached to a wrong conclusion---Impugned order was set aside, consequent whereof the application for DNA test of the petitioner and three others, filed by respondent stood dismissed---Revision petition was allowed accordingly.

Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551; Qazi Abdul Ali and others v. Khawaja Aftab Ahmad 2015 SCMR 284; Mst. Shamim Akhtar v. Additional District Judge, Gujranwala

PLD 2015 Lah. 500; Khizar Hayat v. Additional District Judge, Kabirwala and 2 others PLD 2010 Lah. 422; Aman Ullah v. The State PLD 2009 SC 542 and Ghazala Tehsin Zhora v. Mehr Ghulam Dastagir Khan and another PLD 2015 SC 327 ref.

Ghulam Farid Sanotra for Petitioner.

Rana Maqsood Ul Haq for Respondents Nos.1 and 2.

Malik Muhammad Wasim Mumtaz, Addl. A.G.

Date of hearing: 8th December, 2016.

JUDGMENT

SHAHID BILAL HASSAN, J.--- The present petitioner instituted a suit for declaration with permanent injunction against the respondents alleging therein that the suit land belonged to her father Jabar Din and further to her mother. Besides Fatima Bibi, real mother of the petitioner, Jabar Din had contracted Nikkah with two other ladies, who were Siddiqan Bibi (divorcee) and Zubaidan Bibi. Out of the wedlock of Jabar Din and Siddiqan Bibi one Shabbiran Bibi was born and present petitioner was born out of the wedlock of Fatima Bibi and Jabar Din while out of wedlock of Zubaidan and Jabar Din Riyasat Ali, who is impleaded as respondent/defendant No.1 and Nusrat Bibi were born but the present petitioner was deprived of her share from the inheritance. The respondents entered appearance and filed their written statement. Issues were framed and after recording evidence, the learned Trial Court vide judgment and decree dated 19.12.2012 decreed the suit in favour of the present petitioner. The respondents preferred an appeal before the learned Appellate Court and during pendency of the appeal Riyasat Ali, respondent No.1 filed an application for DNA test of the present petitioner along with three others except Riyasat Ali. The application was contested by the present petitioner but the same was accepted vide impugned order dated 22.06.2013. Hence, this civil revision.

2. Learned counsel for the petitioner has argued that the impugned order is illegal, perverse and erroneous. Submits that a full-fledged trial was

conducted before the learned Trial Court but during said period no such application was ever moved by the respondents. Even otherwise, DNA test is third person opinion, which cannot undo direct evidence of the parties. Adds that nobody can be given premium to have relief indirectly which he failed to obtain directly, moreover, DNA test has no importance in such affairs as the Hon'ble Supreme Court of Pakistan has already given verdict in this regard in Aman Ullah v. The State PLD 2009 Supreme Court 542. The learned Appellate Court has acted against the mandate of law, domain, jurisdiction and has gone beyond vested jurisdiction, which resulted in miscarriage of justice. States that oral as well as documentary evidence is on record, the expert opinion is third person opinion and cannot be used to undo the legal and lawful findings recorded by the learned Trial Court. Therefore, by allowing the civil revision in hand, impugned order may be set aside, consequent, whereof, the application for DNA test may be dismissed. Relies on Qazi Abdul Ali and others v. Khawaja Aftab Ahmad 2015 SCMR 284, Azeem Khan and another v. Mujahid Khan and others 2016 SCMR 274 and Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551.

3. Contrarily, learned counsel for the respondents Nos.1 and 2 by favouring the impugned order has prayed for dismissal of the civil revision in hand. Relies on Aman Ullah v. The State PLD 2009 Supreme Court 542, Muhammad Azhar v. The State PLD 2005 Lahore 589, Mst. Shamshad Bibi v. Bushra Bibi and 3 others PLD 2009 Islamabad 11; Muhammad Shahid Sahil v. The State and another' PLD 2010 Federal Shariat Court 215, Khizar Hayat v. Additional District Judge, Kabirwala and 2 others PLD 2010 Lahore 422, Naseer Ahmed v. Mst. Azrah and another PLD 2010 Karachi 61 and Salman Akram Raja and another v. Government of Punjab through Chief Secretary and others 2013 SCMR 203.

4. Heard.

5. It is a settled principle of law that parties have to prove their cases at their own and by using tool of Court they cannot be assisted or helped to

create any evidence in their support. Moreover, when one fails to prove his stance directly, one cannot be allowed to do the same indirectly as has been held in reported judgment Malik Shahid Mehmood v. Malik Afzal Mehmood and others 2011 SCMR 551 by the Hon'ble Apex Court of country.

Coming to the present case, it is observed that at trial stage both the parties were given ample opportunities including right to cross examine the witnesses of rival parties, to lead evidence in support of their respective stances, but during that exercise none of the respondents bothered to make any exertion by way of moving application for DNA test to bring on record any evidence and when the learned trial Court after thwarting and evaluating evidence brought on record by the parties recorded its findings, all of a sudden, that too, not at the time of filing of appeal, but during pendency of appeal, the respondent No.1 moved an application for DNA test of the petitioner along with three others but he kept himself away from that process, which speaks volume against him as he is also from the blood of Jabar Din. Moreover, while passing the impugned order no consent from the petitioner and respondents except the respondent No.1, with regard to sending them to the Laboratory for DNA test, was obtained by the learned appellate Court, which was necessary to be taken before passing the impugned order, therefore, irregularity has been committed by the learned Appellate Court while passing the impugned order. In addition to the above, when the direct evidence to prove a fact was available in the shape of oral as well as documentary evidence then there was no need to seek expert opinion, which otherwise was a third person opinion and cannot undo the direct evidence of the parties; reliance is placed on Qazi Abdul Ali and others v. Khawaja Aftab Ahmad 2015 SCMR 284 and Mst. Shamim Akhtar v. Additional District Judge, Gujranwala PLD 2015 Lahore 500.

7. (sic) It is now a days a tendency that in order to deprive a legal heir from the legacy of deceased propositus, his/her legitimacy is called into question and he/she is dumped to get himself/herself cleaned from that stigma, that too, through unskilled experts as any mistake or malpractice committed in

the course of DNA Test tantamount to stigmatize the child from the rest of his/her life, therefore, such practice cannot be allowed to be carried on, especially when the parties enjoy the liberty of producing direct evidence, oral as well as documentary, which has been done in the present case. Reliance is placed on Khizar Hayat v. Additional District Judge, Kabirwala and 2 others PLD 2010 Lahore 422. Even in Aman Ullah v. The State PLD 2009 Supreme Court 542, it was invariably held that:

> `We, therefore, feel compelled to place our warning on record that unless one was absolutely sure and confident of the capacity the competence and the veraity of the Laboratory and the integrity of the one conducting such a test, taking recourse to the same would be fraught with immense dangers and could in fact lead to disastrous consequences not only in criminal cases but even in cases, for example, of paternity and inheritance etc.'

8. Pursuant to the above, when the direct evidence is available on record, there is no need to seek expert opinion, which otherwise cannot undo the direct evidence being an opinion of a third person, not related to the parties because law does not give a free licence to individuals and particularly unscrupulous fathers, to make unlawful assertions and thus to cause harm to children as well as their mothers, as has been held by the Hon'ble Supreme Court of Pakistan in reported case Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan and another PLD 2015 Supreme Court 327.

9. The crux of the above discussion is that the learned Appellate Court while passing the impugned order has wrongly construed law on the subject and has reached to a wrong conclusion. Resultantly, the instant civil revision is allowed, impugned order is set aside, consequent whereof the application for DNA Test of the petitioner and three others, filed by the respondent No.1, stands dismissed. No order as to the costs.

MQ/S-28/L **Revision allowed.**

2017 C L C 1426

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD HUSSAIN and 2 others----Petitioners

Versus

Mst. ZARINA AKBAR and 6 others----Respondents

W.P. No.38404 of 2016, decided on 8th February, 2017.

(a) Civil Procedure Code (V of 1908)---

----O. IX, R. 13 & O. I, R. 10---Limitation Act (IX of 1908), Arts.181 & 164---Constitution of Pakistan, Art.199---Constitutional petition---Ex parte decree, setting aside of---Limitation---Void order---Effect---Suit was fixed for arguments on the application under O.I, R.10, C. P. C---Applicants-defendants did not appear and Trial Court initiated ex parte proceedings against them and passed ex parte decree---Application moved for setting aside of ex parte decree was dismissed being time-barred---Validity---Applicants-defendants joined the proceedings and submitted their written statement---Provision of Art.181 instead of Art.164 of Limitation Act, 1908 would attract in the present case---Period for filing application for setting aside of ex parte judgment and decree was three years---Trial Court had failed to appreciate law on the subject properly---Application for setting aside of ex parte judgment and decree was within time---Application filed under O.I, R.10, C.P.C. was fixed for arguments when ex parte proceedings were initiated against the applicants-defendants---Trial Court ought to have proceeded and decided the said application in absence of applicants rather to initiate ex parte proceedings against them in the suit---Said order for initiation of ex parte proceedings and subsequent ex parte judgment and

decree could not be said to be legal one rather it was without jurisdiction and void---When order was illegal and had been passed in violation of law then High Court had powers to rectify the same while exercising its constitutional jurisdiction---When initial order was void and against the mandatory provision of law, then subsequent superstructure could not stand---High Court had power to rectify such jurisdictional error---Impugned orders passed by the Courts below were declared illegal and void as well as without jurisdiction and were set aside---Case was remanded to the Trial Court with the direction to decide application under O.I, R.10, C.P.C. on merits---Constitutional petition was allowed accordingly.

Water and Power Development Authority through Chairman and 3 others v. Mir Khan Muhammad Khan Jamali and another 2006 CLC 92; Messrs Eastern Steels v. National Shipping Corporation 1984 CLC 2778; Assistant Controller of Imports and Exports and 2 others v. Muhammad Iqbal Bhirviya 1989 CLC 398; Qazi Laeeq v. Najeebur Rehman and others 2012 MLD 50; Muhammad Anwar v. Muhammad Masood Akhtar and others 1993 MLD 1889; Syed Qaim Ali Shah through Attorney v. Election Commission of Pakistan through Secretary and 3 others PLD 2015 Sindh 408; Honda Atlas Cars (Pakistan) Ltd. v. Honda Sarhad (Pvt.) Ltd. and others 2005 SCMR 609; Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen 2006 SCMR 631 and Secretary Education Department, Government of N.-W.F.P., Peshawar and others v. Asfandiar Khan 2008 SCMR 287 ref.

Qazi Muhammad Tariq v. Hasin Jahan and 3 others 1993 SCMR 1949; Hashim Khan v. National Bank of Pakistan 1992 SCMR 707 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---When order was illegal and had been passed in violation of law, High Court had powers to rectify the same while exercising its constitutional jurisdiction.

Qazi Muhammad Tariq v. Hasin Jahan and 3 others 1993 SCMR 1949 rel.

(c) Administration of justice---

----Each and every case had its peculiar facts and circumstances and Court had to evaluate and adjudge the same with an independent mind.

(d) Void order---

----When initial order was void and against the mandatory provision of law then subsequent superstructure could not stand.

Rana Muhammad Anwar for Petitioners.

Aftab Hussain Bhatti for Respondents Nos.1 to 4.

Wasim Mumtaz Malik, Addl. Advocate General.

ORDER

SHAHID BILAL HASSAN, J.--- Tersely, the respondents Nos.1 to 3 instituted a suit for declaration against the present petitioners (defendants Nos.3 to 5) and respondents Nos.4 and 5 (defendants Nos.2 and 1, respectively) regarding the suit property. The defendant No.2/respondent No.4 submitted written statement and conceded the plaint. The petitioners moved an application under Order I, Rule 10 of the C.P.C. for deleting the Province of Punjab being unnecessary party. Allegedly, the matter was settled in Punchayat that the plaintiffs would withdraw their suit and

defendant No.2 would give them their share out of remaining six acres, but the plaintiffs continued their proceedings and ultimately on 04.11.2015, ex parte proceedings were ordered against the petitioners/defendants Nos.3 to 5 and resultantly, on 08.01.2016, ex parte judgment and decree was passed in favour of the plaintiffs/ respondents Nos.1 to 3. The petitioners filed an application for setting aside the order dated 04.11.2015 with regard to initiation of ex parte proceedings and ex parte judgment and decree dated 08.01.2016, which was contested and the same was dismissed vide impugned order dated 13.04.2016, which necessitated in filing of the civil revision before the learned lower Revisional Court, but it was dismissed vide impugned order dated 18.11.2016.

2. The main thrust of the learned counsel for the petitioners is upon the fact that on the fateful date i.e. 04.11.2015, the suit was fixed for arguments on the application filed under Order I, Rule 10 of the C.P.C. and at the most, due to absence of the petitioners and their counsel, the learned trial Court ought to have decided the fate of the said application instead of initiating ex parte proceedings against the present petitioners, as such, the learned Court committed illegality as well as failed to consider law on the subject, which resulted in miscarriage of justice. Relies on Qazi Muhammad Tariq v. Hasin Jahan and 3 others (1993 SCMR 1949) and Hashim Khan v. National Bank of Pakistan (1992 SCMR 707). Submits that when the initial order dated 04.11.2015 is illegal, void ab initio, without jurisdiction and without lawful authority, the ex parte judgment and decree dated 08.01.2016 based on the said void order is nullity in the eye of law. Relies on Water and Power Development Authority through Chairman and 3 others v. Mir Khan Muhammad Khan Jamali and another (2006 CLC 92-Quetta). Adds that the learned Courts below have passed the impugned orders and ex parte

judgment and decree clearly in violation of the principles laid down by the Higher Courts. Further adds that law leans in adjudication of cases on merits rather on technicalities. Asserts that the learned Courts below have committed jurisdictional error, which needs to be rectified in exercise of constitutional jurisdiction. As such, by allowing the writ petition in hand, the impugned orders and ex parte judgment and decree may be set aside and the matter may be remanded to the learned trial Court for decision afresh in accordance with law. It has further been prayed that application filed under Order I, Rule 10 of the C.P.C. may also be accepted. Relies on Messrs Eastern Steels v. National Shipping Corporation (1984 CLC 2778-Karachi), Assistant Controller of Imports and Exports and 2 others v. Muhammad Iqbal Bhirviya (1989 CLC 398-Karachi), Qazi Laeeq v. Najeebur Rehman and others (2012 MLD 50-Peshawar), Muhammad Anwar v. Muhammad Masood Akhtar and others (1993 MLD 1889-Lahore) and Syed Qaim Ali Shah through Attorney v. Election Commission of Pakistan through Secretary and 3 others (PLD 2015 Sindh 408).

3. Naysaying the above submissions, the learned counsel for the respondents Nos.1 to 4, by favouring the impugned orders, ex parte judgment and decree, has prayed for dismissal of the writ petition in hand. Relies on Honda Atlas Cars (Pakistan) Ltd. v. Honda Sarhad (Pvt.) Ltd. and others (2005 SCMR 609), Shahid Pervaiz alias Shahid Hameed v. Muhammad Ahmad Ameen (2006 SCMR 631) and Secretary Education Department, Government of N.-W.F.P., Peshawar and others v. Asfandiar Khan (2008 SCMR 287).

4. Heard.

5. In the present case, the provisions of Article 181 of the Limitation

Act, 1908 attracts instead of Article 164 of the Act, as the petitioners joined the proceedings, submitted their written statement and when the suit was fixed for arguments on the application filed under Order I, Rule 10 of the C.P.C., due to their absence, they were proceeded against ex parte and later on ex parte judgment and decree was passed against them; as such, the period for filing application for setting aside of ex parte judgment and decree is three years under the above said Article of the Act. Hence, the learned Courts below have failed to appreciate law on the subject properly; the said observations recorded by the learned Courts below being beyond mandate of law and not sustainable are reversed, set aside; it is held that the application for setting aside of ex parte judgment and decree was well within time.

6. Admittedly, when ex parte proceedings were initiated against the petitioners, the date was fixed for arguments on the application filed under Order I, Rule 10 of the C.P.C., therefore, at the most, the learned trial Court ought to have proceeded and decided the said application in absence of the petitioners, rather to initiate ex parte proceedings against them in the suit; therefore, such order and subsequent ex parte judgment and decree cannot be said to be legal one, rather it is without jurisdiction and void. Illumination in this regard can be sought from reported case Hashim Khan v. National Bank of Pakistan (1992 SCMR 707) and Qazi Muhammad Tariq v. Hasin Jahan and 3 others (1993 SCMR 1949), which speaks:

> "It seems difficult to support the order dated 27-3-1986 of the trial Court and the orders of the Additional District Judge and the High Court. A perusal of the record indicates that the suit of the appellant was dismissed on a day which was not fixed for its hearing; it was day appointed for hearing arguments on the application for temporary injunction filed by the appellant. In the absence of the appellant all

that the learned trial Judge could do was to dismiss the application for temporary injunction. It could not proceed beyond that and dismissed the suit as well. Quite clearly its order in this regard was without jurisdiction and void."

When the order is patently illegal and has been passed in violation of law, this Court has powers to rectify the same while exercising its constitutional jurisdiction; in this regard reliance can be placed on Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 Supreme Court 255), wherein it has been held:

> `Article 4 (ibid) mandates that it is the inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law and thus where an order has been passed by any forum or Court, including the Revisional Court, which is patently illegal and violative of law, especially the express provisions and the spirit of law, which (order) if allowed to stay intact tantamounts to, and shall cause serious breach to the legal rights of the litigants and shall cause prejudice to them, the learned High Court in appropriate cases while exercising its constitutional jurisdiction can ratify the illegality and violation of law, and undo the harm caused by the order of such (revisional) Court .."

7. So far as the case law relied upon by the learned counsel for the respondents is concerned, with utmost respect, the same is on different ratio, therefore, the same does not enhance the cause of the respondents. Even otherwise, each and every case has its peculiar facts and circumstances and the Courts have to evaluate and adjudge the same with an independent mind so as to administer safer justice.

8. Compendium of the above discussion is that as the initial order dated 04.11.2015 was void and against the mandatory provisions of law, the subsequent superstructure could not stand on the same and this Court has ample power to rectify such jurisdictional error. As such, the instant writ petition is allowed, the impugned orders dated 04.11.2015, 13.04.2016 passed by the learned trial Court and ex parte judgment and decree dated 08.01.2016 and order dated 8.11.2016 passed by the learned Revisional Court, being based on wrong assumption of law are declared illegal and void as well as without jurisdiction and are set aside. Case is remanded to the learned trial Court, where the suit shall be deemed to be pending along with application filed under Order I, Rule 10 of the C.P.C., with a direction to decide the same afresh on merits in accordance with law. The adversaries are directed to appear before the learned trial Court on 11.03.2017. No order as to the costs.

ZC/M-66/L **Case remanded.**

2017 C L C Note 99

[Lahore]

Before Shahid Bilal Hassan, J

ABDUL QAYYUM KHAN---Appellant

Versus

Sheikh MUHAMMAD AZEEM through Legal Heirs---Respondent

Regular Second Appeal No. 18 of 2009, heard on 27th January, 2017.

Punjab Pre-emption Act (IX of 1991)---

----Ss. 3 & 13(3)---Right of pre-emption---Commercial property---Fulfilment of required Talbs---Scope---Plaintiff contended that he made immediate demand to exercise his right of pre-emption as shafi shareek and had fulfilled all demands/Talbs---Vendee contended, at the first instance, that right of pre-emption could not be exercised in case of commercial property and even if such right could be invoked, pre-emptor must prove his case fulfilling all the requirements of Talbs---Validity---Right of pre-emption was only to safeguard the privacy of Muslim families and the same could not be enforced in case of commercial property because the question of disagreeable neighbour in such would not arise---Evidence showed that vendee had specifically denied the receipt of any notice of Talb-i-Ishhad, it was imperative upon the pre-emptor to prove dispatch and delivery of said notice to the vendee but none of the witnesses had stated that notice under S. 13 of the Act under registered cover A.D as well as receiving the same by the vendee---Neither the scribe of the notice was produced nor the detail of sale was given by the concerned witness---No suggestion had been put to the vendee that he had received the said notice and the copy of postal receipt A.D. had been exhibited in counsel's statement; it emerged that dispatch of notice was neither alleged nor proved; said Talb had not been proved, which was sine qua non---Even if it was admitted that pre-emptor performed and proved Talb-i-Muwathibat, non-performing of Talb-i-Ishhad was sufficient to disbelieve the version of pre-emptor, as performance and proving of all Talbs was essential in order to succeed in such suit---Two courts below had failed to appreciate evidence and law on the subject in its true perspective---Judgments and decrees of two courts below were set aside and suit was

dismissed---Regular second appeal was allowed accordingly. [Paras. 5, 6, 7 & 9 of the judgment]

Haji Muhammad Ameen and others v. Islamic Republic of Pakistan and others PLD 1981 FSC 23; Government of N.-W.F.P. through Secretary Law Department v. Malik Said Kamal Shah PLD 1986 SC 360; Messrs M.R. Sons v. Messrs Junaid Associates (Private) Ltd. PLD 1990 Kar. 387; Bashir Ahmed v. Ghulam Rasool 2011 SCMR 762; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Allah Ditta through L.Rs. and others v. Muhammad Anar 2013 SCMR 866; Muhammad Jamil Lambardar v. Ghulam Bheek (Deceased) through Legal Heirs 2014 UC 201 and Dayam Khan and others v. Muslim Khan 2015 SCMR 222 ref.

Muhammad Farooq v. Abdul Waheed Siddiqui and others 2014 SCMR 630; Muhammad Iqbal v. Mehboob Alam 2015 SCMR 21; Dost Muhammad (Deceased) through L.Rs. v. Muhammad Yousaf and others 2008 SCMR 1339 and Abdul Rehman and others v. Mahar Bakhsh and others 2005 SCMR 1364 distinguished.

Hamid Iftikhar Pannu for Appellant.

Syed Kaleem Ahmad Khurshid and Muhammad Akbar Hayat for Respondent.

Date of hearing: 27th January, 2017.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the facts leading to filing of the instant regular second appeal are as such that the appellant purchased a shop No.F-426, which was owned by Noor Jahan Begum and others through a sale deed dated 02.09.2003 in lieu of Rs.500,000/-, however, allegedly ostensible sale price was shown as Rs.725,000/-, only to debar the respondent from exercising right of pre-emption. The respondent allegedly gained knowledge about the transaction in question on 22.09.2003 through Fateh Muhammad (P.W.2) in presence of Sheikh Ameer Hashim (P.W.3) and Muhammad Fayyaz, there and then he made jumping demand, whereafter on the same day he sent notice of Talb-e-Ishhad (P-1) to the appellant, but on refusal, he instituted suit for possession on the basis of pre-emption being Shafi Shareek.

The suit was contested by the appellant through filing written statement. Out of the divergent pleadings of the parties, as many as 09 issues

including "Relief" were framed by the learned trial Court. Both the parties were invited to lead their evidence, which was adduced in pro and contra. The learned trial Court vide impugned judgment and decree dated 08.10.2007 decreed the suit in favour of the respondent and against the present appellant. The appellant being aggrieved of the said judgment and decree preferred an appeal, but the same was dismissed vide impugned judgment and decree dated 11.11.2008.

2. Opening brief the learned counsel for the appellant has submitted that the impugned judgments and decrees are against law and facts of the case; the same suffer from gross misreading and non-reading of the material available on the record. Contends that the learned Courts below have acted mechanically while decreeing the suit of the respondent regarding a commercial property, which is not sustainable in the eye of law as the learned Courts below have failed to apply section 3 of the Punjab Pre-emption Act, 1991 in its true spirit, because the commercial property is not open to pre-emption as per the spirit of Islamic Law, hence, the transaction was not pre-emptible. Adds that the right of pre-emption cannot be enforced in case of commercial properties because a question of privacy of property or disagreeable neighbor as envisaged by Islam, does not arise in such case; as such the findings of the learned Courts below on issues Nos.1 and 3 are erroneous. States that the findings on issues No.7 are also not maintainable as the appellant has proved his stance through confidence inspiring evidence. Maintains that the learned Courts below have failed to exercise vested jurisdiction in accordance with law and by travelling beyond the same, non-suited the appellant mere on the basis of surmises and conjectures. Submits that even if the right of pre-emption is admitted for the sake of arguments, the respondent has failed to perform and prove the requisite talbs as per mandate of section 13(3) of the Punjab Pre-emption Act, 1991. Therefore, by allowing the appeal in hand, impugned judgments and decrees may be set aside and suit instituted by the respondent may be dismissed with costs throughout. Relies on Mst. Hameeda Begum and others v. Mst. Irshad Begum and others (2007 SCMR 996), Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105), Bashir Ahmed v. Ghulam Rasool (2011 SCMR 762) and Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866).

3. Contrarily, the learned counsel appearing on behalf of the respondent by favouring the impugned judgments and decrees has prayed for dismissal of the appeal in hand. Adds that in the grounds of appeal it was not alleged that notice was not received, therefore, this plea cannot be agitated before this forum. Relies on Muhammad Farooq v. Abdul Waheed Siddiqui and others (2014 SCMR 630), Muhammad Iqbal v. Mehboob Alam (2015 SCMR 21), Dost Muhammad (Deceased) through L.Rs. v. Muhammad Yousaf and others (2008 SCMR 1339) and Abdul Rehman and others v. Mahar Bakhsh and others (2005 SCMR 1364).

4. Heard.

5. First of all this court has to dilate upon the question whether commercial property is pre-emptible or not, as section 5 of the Punjab Pre-emption Act, 1913 exempts a shop, Sarai or Katra from the right of pre-emption, whereas section 3 of the Punjab Pre-emption Act, 1991 provides that In the interpretation and the application of provisions of this Act, the Court shall seek guidance from the Holy Qur'an and Sunnah, meaning thereby the interpretation made in this regard in a reported judgment Haji Muhammad Ameen and others v. Islamic Republic of Pakistan and others (PLD 1981 FSC 23) is applicable to the present case, as when a question with regard to repugnancy of section 5 of the Punjab Pre-emption Act, 1913 came before the Hon'ble Federal Shariat Court, it was held:

> 'Now section 5 of the Punjab Pre-emption Act exempts commercial properties like shop, Sarai or Katra from the operation of the Act. There is no specific tradition of the Prophet (p.b.u.h.) conferring right of pre-emption on such properties. The specific right of pre-emption has been held to accrue on sale of house, garden or land only. For this reason the provision is not repugnant to the Sunnah of the prophet. Even otherwise no Zarar is caused by the sale of such properties to strangers.'

When the above ratio is read with section 3 of the Punjab Pre-emption Act, 1991 (prevalent Act), it can safely be observed and held that the commercial properties are not pre-emptible; even otherwise, the right of Pre-emption is only to safeguard the privacy of Muslim families and the same cannot be enforced in case of commercial properties because the question of disagreeable neighbor in such cases does not arise. In this regard reliance can

safely be placed on Government of N.-W.F.P. through Secretary, Law Department v. Malik Said Kamal Shah (PLD 1986 Supreme Court 360) and Messrs M.R. Sons v. M/s. Junaid Associates (Private) Ltd. (PLD 1990 Karachi 387). Moreover, the law of pre-emption is not a way of accumulating wealth, because our religion (Islam) stresses upon distribution of properties and does not support monopoly of certain person(s).

6. Apart from the above, if for the sake of arguments, it is admitted that the property in question is pre-emptible, even then the respondent had to prove performance of requisite talbs in accordance with law, as in order to succeed in such a suit, performance of talbs and proving of the same in accordance with the mandate of law by producing unimpeachable and confidence inspiring evidence is necessary and any lacuna, even the slightest, turns fatal to the pre-emptor.

In the present case, when the evidence produced by the parties is looked into, it appears that when the appellant/defendant has specifically denied the receipt of any notice of Talb-i-Ishhad, it was imperative upon the respondent/plaintiff to prove the dispatch and delivery of notice to the appellant/ defendant; but he has badly failed in this regard as none of the attesting witnesses has uttered a word as to sending notice under section 13 of the Act under registered cover A.D. as well as receiving of the same by the present appellant, even they failed to attest their signatures on the alleged notice. Moreover, the scribe of the notice was also not produced and even no detail of sale was given by P.W.1. In addition to the above, not a single suggestion had been put to the appellant that he had received notice A.D. and the copy of postal receipt A.D. had been exhibited in counsel's statement, therefore, it emerges that dispatch of notice is neither alleged nor proved; thus, this talb has not been proved, whereas performance and proving of the same is sine qua non. In this regard light can be sought from cases of Bashir Ahmed v. Ghulam Rasool (2011 SCMR 762), Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105), Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866), Muhammad Jamil Lambardar v. Ghulam Bheek (deceased) through his legal heirs (2014 UC 201) and Dayam Khan and others v. Muslim Khan (2015 SCMR 222).

7. Pursuant to the above discussion, even if it is admitted that the respondent performed and proved Talb-e-Muwathibat, non-proving of

second talb i.e. Talb-e-Ishhad is sufficient to disbelieve the version of the respondent, as performance and proving of all talbs is essential in order to succeed in such suit. When the respondent/plaintiff has failed to prove performance of Talbs, as per requirement of law enunciated under section 13 of the Punjab Pre-emption Act, 1991, no decree for possession on the basis of pre-emption, even if the pre-emptor enjoys superior right, can be passed in his favour. Reliance is placed on Mst. Sahib Jamala v. Fazal Subhan and 11 others (PLD 2005 Supreme Court 977).

8. As far as, the case law relied upon by the learned counsel for the respondent is concerned, with utmost respect, the same does not apply to the present case, as the peculiar facts and circumstances of the case in hand are different from that which are narrated in the said precedents; therefore, it does not render any assistance or help to the respondent's case.

9. For the foregoing reasons, while placing reliance on the judgments supra, it is observed that the learned Courts below have failed to appreciate evidence and law on the subject in its true perspective and have failed to exercise jurisdiction vested in them in accordance with law; as such, material illegalities and irregularities have been committed while passing the impugned judgments and decrees. Resultantly, by allowing the appeal in hand, the impugned judgments and decrees passed by the learned Courts below, being not sustainable in the eye of law are set aside; consequent whereof the suit instituted by the respondent/plaintiff stands dismissed. No order as to the costs.

MQ/A-40/L **Appeal allowed**.

2017 C L C Note 192

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan and Mushtaq Ahmad Tarar, JJ

MANZOOR AHMED PARACHA and 5 others---Petitioners

Versus

HABIB BANK LIMITED through President and 2 others---Respondents

Review Application No. 24-C of 2011 in R.F.A No. 116 of 2011, decided on 15th October, 2015.

Civil Procedure Code (V of 1908)---

----S. 114 & O. XLVII, R. 1---Review---Grounds---Scope---Scope of review was limited---No new evidence or any matter which could not be produced at the stage of passing impugned order or any error apparent on the face of record existed in the present case---Court while hearing review could not sit as a court of appeal---Findings on facts might be erroneous but petitioner had efficacious remedy of higher forum which could not be dealt with in exercise of review jurisdiction---Grounds of review cited by the petitioner might be taken in an appeal but same could not be basis of a review petition---Review petition was dismissed in circumstances. [Paras. 10, 13 & 14 of the judgment]

Muhammad Akram v. Mst. Farman Bi PLD 1990 SC 28; Sikandar Abdul Karim v. State 1998 SCMR 908; Ali Muhammad Mirza and others v. Mst. Sardaran and others PLD 2014 SC 185; Land Acquisition Officer and Assistant Commissioner, Hyderabad v. Gul Muhammad through Legal Heirs PLD 2005 SC 311 and Muhammad Ibrahim v. Irshad Begum and 7 others 2006 MLD 924 distinguished.

Smti Meera Bhanja v. Smti Nirmala Kumari (Choudhary) AIR 1995 SC 455; Messrs Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur AIR 1964 SC 1372; Daewoo Corporation v. Zila Council, Jhang and 2 others 2004 SCMR 1213; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma AIR 1979 SC 1047; Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tiruymale AIR 1960 SC 137; Parsion Devi v. Sumitri Devi 1997 (8) SCC 715 and Muhammad Khaliq (decd.) through Legal Heirs v. Gul Afzal Khan and others PLD 2015 SC 247 rel.

Tariq Zulfiqar Ahmad Choudhry for Petitioners.

Muhammad Masood Sabir for Respondents.

ORDER

SHAHID BILAL HASSAN, J.---The facts which culminated in filing of this review petition are as such that father of the present petitioners namely Dur Muhammad Paracha, Proprietor Paracha Export availed finance facility from Habib Bank Limited, Husain Agahi Branch, Multan but he failed to adjust his liability. Habib Bank Limited instituted a suit for recovery of Rs.131,577.90 in the Court of learned Addl. District Judge, Multan on 06.04.1974 against said Dur Muhammad Paracha, which was later on transferred to the Judge Banking Court, Lahore and then to Judge Banking Court No.1, Multan. Due to economic position of the party, the bank wrote-off outstanding amount against Dur Muhammad Paracha, father of the present petitioners and suit of the bank was accordingly disposed off by learned Judge Banking Court No.1, Multan. During pendency of these proceedings, Dur Muhammad Paracha expired.

2. The present petitioners being daughters and sons of Dur Muhammad Paracha instituted a suit for recovery of damages on the basis of malicious prosecution against the Bank, which was dismissed by the learned Judge

Banking Court No.1, Multan under Order VII, Rule 11 of the C.P.C. on 16.06.2004, against which the present petitioners preferred an appeal vide F.A.O. No.143/2004 in the High Court, which was also dismissed on 29.11.2006.

3. The present petitioners, instead of approaching to higher forum, again instituted suit for recovery of damages before the learned Civil Judge Ist Class, Multan, who rejected the plaint of the petitioners vide judgment and decree dated 19.04.2011; against which the petitioners brought appeal vide R.F.A. No.116 of 2011 before this Court, but same was ultimately dismissed vide order dated 02.05.2011, which has been sought to be reviewed by filing the instant review petition.

4. Learned counsel for the petitioner has argued that the learned Judge while passing the impugned order dated 02.05.2011 failed to consider the true aspects of the case and failed to construe the factum that the petitioners, after death of their father, were arrayed as defendants being Dur Muhammad Paracha's legal heirs and they had suffered a lot in pursuing the proceedings, so no question of abatement arises, but even then the petitioner's appeal was dismissed in limine, which resulted into miscarriage of justice. The learned Civil Judge wrongly accepted the application of the respondents/defendants on the plea of abatement whereas such like application was earlier dismissed by the learned trial Court on 10.05.2010, thus, on the same subject second application was not maintainable, all this was not considered by the learned Judge while passing the impugned order and in a haste wrongly dismissed the appeal of the petitioners. It was also not considered while passing the impugned order that suit was dismissed on statement of the representative of the bank that nothing was due against the petitioners, so the cause of action was well available to them to institute suit for recovery of damages on the basis of malicious prosecution. Learned Judge mistook the abatement when

after the death of petitioners' father, they were wrongly dragged in litigation for 10 years, the cause of action was well available to them. Impugned order is result of wrong exercise of jurisdiction and law on the subject has been misconstrued, rather defiled; therefore, by reviewing the order dated 02.05.2011, the same may be declared illegal, null and void, against the rights of the petitioners; same may be set aside and appeal of the petitioners may be treated as pending. Relies on Muhammad Akram v. Mst. Farman Bi (PLD 1990 Supreme Court 28), Sikandar Abdul Karim v. State (1998 SCMR 908), Ali Muhammad Mirza and others v. Mst. Sardaran and others (PLD 2004 Supreme Court 185), Land Acquisition Officer and Assistant Commissioner, Hyderabad v. Gul Muhammad through Legal Heirs (PLD 2005 Supreme Court 311) and Muhammad Ibrahim v. Irshad Begum and 7 others (2006 MLD 924-Lahore).

5. Nay-saying the above submissions, the learned counsel appearing on behalf of the respondents by favouring the impugned order has prayed for dismissal of the instant review petition.

6. We have heard the arguments advanced before us and have gone through the record with able assistance of learned counsel for the parties.

7. In order to ascertain as to whether this is a fit case for exercising the powers for review, it will be appropriate to peruse the principles of law with regard to review power.

In the case of Smti Meera Bhanja v. Smti Nirmala Kumari (Choudhury), reported in AIR 1995 SC 455 it was observed:

> "The limits to exercise the power of review is limited, Review Court not to act as appellate court."

In the above cited case, it was further observed that:-

> "The power of review may be exercised on the discovery of new and

important matter or evidence which, after the exercise of due diligence was not within the knowledge of the persons seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

8. In addition to the above, in order to appreciate the scope of a review, section 114 of the C.P.C. has to be read, but this section does not even insinuate or adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the C.P.C. and for the purposes of this lis, permit the aggrieved person to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason." The former part of the Rule deals with a situation attributable to the applicant and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulates a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII of the C.P.C. which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a Superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and

efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection. In M/s Thungabhadra Industries Ltd. (in all the Appeals) v. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur (AIR 1964 SC 1372), it was held:-

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states one in the face and there could reasonably by no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."
>
> In Meera Bhanja case ibid it was held that:-
>
> "It is well settled law that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, C.P.C. .."

9. From the above scenario, it is manifestly clear that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of record or any other sufficient reason; but in the case in hand, there appears no such situation to review the impugned order, rather the petitioner, if aggrieved, has ample opportunity to approach the higher

forum in order to get his grievance redressed. In this regard further reliance can be placed on Daewoo Corporation v. Zila Council, Jhang and 2 others (2004 SCMR 1213), wherein it has been held:-

> "It is well-settled by now that "a review petition is not competent where neither any new and important matter or evidence has been discovered nor is any mistake or error apparent on the face of the record. Such error may be an error of fact or of law but it must be self-evident and floating on surface and not requiring any elaborate discussion or process of ratiocination". Master Tahilram v. Lilaram 1970 SCMR 622, Abdul Khaliq Qureshi v. Chief Settlement and Rehabilitation Commissioner 1968 SCMR 800, Rehmatullah v. Abdul Majid 1968 SCMR 838, Hassan Din v. Claims Commissioner, Lahore 1968 SCMR 1047 (2), Qamar Din v. Maula Bukhsh 1968 SCMR 1042(1), Muhammad Akram v. State 1970 SCMR 418 and Nawab Bibi v. Hamida Begum 1968 SCMR 104. There is no cavil with the proposition that "if judgment or finding, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on record, review is not justifiable notwithstanding error being apparent on the face of the record". Zulfiqar Ali Bhutto v. State 1979 SCMR 427."

In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (AIR 1979 SC 1047) it was held that:-

> "It is true as observed by this Court in Shivdeo Singh v. State of Punjab (AIR 1963 SC 1909) there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inherent in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the

power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

The following observations in connection with an error apparent on the face of the record in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tiruymale (AIR 1960 SC 137) were also noted:-

> "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

Even in Parsion Devi v. Sumitri Devi (1997 (8) SCC 715), relying upon the judgments in the cases of Aribam's (supra) and Smt. Meera Bhanja (supra) it was observed as under:

> "Under Order XLVII, Rule 1, C.P.C. a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be

detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, C.P.C. In exercise of the jurisdiction under Order XLVII, Rule 1, C.P.C. it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

10. Now when we weigh the facts and circumstances of the case in hand on the above standard it appears that there is no new evidence or any matter, which could not be produced at the stage of passing of impugned order or any error apparent on the face of the record, which could be cured by reviewing the impugned order, because this Court cannot sit as a Court of appeal, as the scope of review is limited. Findings on facts may be erroneous, but the petitioners have efficacious remedy of knocking the door of higher forum, which cannot be dealt with in exercise of review jurisdiction.

11. Manifestly, the suit was filed against Dur Muhammad Paracha by the bank, who died during the proceedings and the representative of the bank made statement that nothing was due against the present petitioners, the suit was rightly disposed of being abated and said observation was upheld through the impugned order, which may be erroneous, but cannot be reviewed in view of the above discussion.

12. For the foregoing reasons, the case law relied upon by the learned counsel for the applicants/ petitioners, with utmost respect, has no relevance to the matter in hand; therefore, it does not render any assistance or help to the applicants/petitioners.

13. In the light of the above discussions, we are of the considered opinion that, though the grounds cited by the review petitioners may possibly be taken in an appeal, the same cannot be basis for a review petition.

14. Therefore, we find no sufficient merit in this review petition, and accordingly, by placing reliance on the judgments supra as well as on Parsion Devi and others v. Sumitri Devi and others (1997) 8 Supreme Court Cases 715 and Muhammad Khaliq (decd.) through Legal Heirs v. Gul Afzal Khan and others (PLD 2015 Supreme Court 247), wherein it has been held that, 'Laws such as the law relating to review or other laws such the Civil Procedure Code, 1908, or the Limitation Act, 1908 etc. had a rationale--- Such laws were always made for the furtherance of the collective public good and if individuals suffered because of such laws, it was but a natural and logical consequence of protecting the larger public good for the purpose of bringing an end to litigation particularly through review petitions, which were frivolous.', the same is dismissed. No order as to cost.

ZC/M-335/L **Revision dismissed.**

P L D 2017 Lahore 219

Before Shahid Bilal Hassan, J

JAMIA KHAIR UL MADARIS, AURANGZEB ROAD, MULTAN---Petitioner

Versus

MANZAR and 5 others---Respondents

Writ Petition No.4299 of 2016, decided on 9th August, 2016.

(a) Civil Procedure Code (V of 1908)---

----O. III, R. 4 & O.I, R.10 & Ss. 119 & 12(2)---High Court (Lahore) Rules and Order, Vol. I, Chap. 16, Part A and Vol. V, Chap. 6, Part B---Appointment of pleader by client---Requirements---Power-of-attorney---Necessity---Application for impleadment of a party was filed without any power-of-attorney or authorization which was accepted---Validity---Counsel should have a duly executed power of attorney in his favour so as to represent any litigant before any legal forum---Unauthorized person could not address a court---No counsel could represent a client or litigant unless and until he was authorized by execution of power-of-attorney---Neither memorandum of appearance nor power-of-attorney was submitted at the time of filing of application for impleadment of a party in the present case---Such practice could not be endorsed or permitted to carry the day merely on the assumption and presumption that it was an irregularity and curable---No exertion had been made by the applicant to file power-of-attorney or to appear before the court in person or through a special attorney or general attorney for making his better statement in order to rectify the acts done by his counsel retrospectively---Appointment of pleader should be in writing and duly signed by persons(s) who appointed the pleader and such instrument must be before the court---When pleader who filed an application under O.I, R.10, C.P.C. was neither authorized through a written instrument

i.e. power-of-attorney nor he filed any memorandum of appearance with the undertaking of production of power-of-attorney, said application was not entertainable and was incompetent to proceed on---Impugned orders had been passed beyond jurisdiction which could not be allowed to remain in field---Revisional Court had committed illegality by not applying the correct law---Impugned order passed by the courts below were set aside and application for impleadment of a party was dismissed---Constitutional petition was allowed in circumstances.

Khayam Films and another v. Bank of Bahawalpur Ltd. 1982 CLC 1275; Said Muhammad and others v. M. Sardar and others PLD 1989 SC 532; Mst. Sardar Begum v. Muhammad Anwar Shah and others 1993 SCMR 363; Messrs Adamjee Construction Company Ltd. through Chief Executive v. Government of Punjab through Director-General, Punjab Sports Board, National Hockey Stadium, Lahore 1999 MLD 2202; and Fazal-Ur-Rehman and 2 others v. Begun Sughra Haque 2000 MLD 562 distinguished.

Azad Jammu and Kashmir Government v. Habibullah Lone PLD 1984 SC (AJ&K) 13; Abdul Hameed Khan v. Mrs. Saeeda Khalid Kamal Khan and others PLD 2004 Kar. 17; Muhammad Ali and 21 others v. Abdul Jalil 2015 CLC 1315; Qamar-ud-Din v. Muhammad Din and others PLD 2001 SC 518; Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 and Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others PLD 1987 SC 447 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---When basic order passed by the courts below was illegal, same could be interfered with while exercising constitutional jurisdiction.

Mian Habib ur Rehman Ansari and Mirza Muhammad Kaleem for

Petitioner.

Saghir Ahmad Bhatti for Respondent No.6.

Date of hearing: 14th June, 2016.

JUDGMENT

SHAHID BILAL HASSAN, J.--Facts necessary for disposal of the instant constitutional petition are as such that petitioner instituted a suit for possession through declaration along with permanent injunction against the respondents Nos.1 to 5 and Province of Punjab by pleading that Muhammad Siddique, predecessor in interest of the respondents Nos.1 to 5, declared the petitioner as owner of 1/3rd of the suit land through his will - deed/Wasiyatnama No.773 dated 18.04.1996 and that will-deed was entrusted to his real sister Mst. Habib Ashraf and her husband Muhammad Ashraf by the deceased Muhammad Siddique, who bound them that they would pay 1/3rd of total amount of said property to the petitioner or the petitioner would be considered as owner of 1/3rd of property. Muhammad Siddique died on 22.12.2004, that will-deed was opened by his relatives after his death and nobody challenged the said deed; hence, the suit. The respondents Nos.1 to 5 were summoned but none appeared on their behalf, therefore, they were proceeded against ex parte while the Province of Punjab was deleted being unnecessary party.

After recording ex parte evidence, when the suit was fixed for final arguments on 24.04.2015, Ch. Shabbir Hussain Khan, Advocate (without any power of attorney or authorization) filed an application under Order I, Rule 10 of the C.P.C. on behalf of the respondent No.6 (Muhammad Yaseen), which was resisted by the petitioner with the specific objection that the application was incompetent due to non-embellishing of power of attorney. The learned trial Court vide impugned order dated 08.07.2015 allowed application filed on behalf of the respondent No.6; against which a civil revision was filed by the petitioner, which was dismissed vide impugned

judgment dated 02.03.2016.

2. Learned counsel for the petitioner has argued that the impugned order and judgment are illegal, unjust, void, unlawful, arbitrary, against facts and law as well as against the principle of natural justice. Argues that the respondent No.6 filed application under Order I, Rule 10 read with section 151 of the C.P.C., through counsel, without his Wakalatnama, without signatures and thumb impression of the respondent No.6 on the application as well as affidavit and no document was attached with the said application but the learned Courts below ignored all these facts and passed the impugned order and judgment. Submits that learned Addl. District Judge ignored the fact that the suit instituted by the respondent No.6 for specific performance was dismissed on 18.09.2015 and it is also noteworthy that the application under Order I, Rule 10 read with section 151 of the C.P.C. and suit for specific performance were filed on the same date i.e. 24.04.2015, which shows mala fide on the part of the respondent No.6 as in the application under Order I, Rule 10 of the C.P.C. true facts were not mentioned. Moreover, Muhammad Siddique died on 22.12.2004 while the alleged suit for specific performance was filed on 24.04.2015, which is nothing but an attempt to harm the rights of the petitioner, even the said suit was instituted without any power of attorney, signature or thumb impression on the plaint or affidavit of the respondent No.6 but the learned trial Court not only entertained the suit but also granted temporary injunction. Maintains that the learned Courts below have failed to consider and appreciate the provisions of Order III, Rule 4 of the C.P.C. which provides that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment. Contends that the impugned order and judgment are result of non-reading and misreading of record. Adds that both the learned Courts below failed to exercise vested jurisdiction and

exercised that jurisdiction which was not vested in them; therefore, by committing material illegalities and irregularities, the impugned order and judgment have been passed, which resulted in miscarriage of justice. Therefore, by allowing the constitutional petition in hand, the impugned order and judgment may be set aside and application filed by the respondent No.6 under Order I, Rule 10 read with section 151 of the C.P.C. may be dismissed. Relies on Azad Jammu and Kashmir Government v. Habibullah Lone PLD 1984 SC (AJ&K) 13, Abdul Hameed Khan v. Mrs. Saeeda Khalid Kamal Khan and others PLD 2004 Kar. 17 and Muhammad Ali and 21 others v. Abdul Jalil 2015 CLC 1315-Balochistan.

3. Contrarily, the learned counsel appearing on behalf of the .respondent No.6 has argued that the relationship inter se the counsel and client is that of Principal and Agent; if an agent acted on behalf of the principal, even though he was not authorized in the prescribed manner for acting as such at the relevant time, principal was vested with the authority to ratify the act of his agent with retrospective effect; therefore, the learned Courts below have exercised jurisdiction vested in them legally and there is no jurisdictional defect in the impugned order and judgment, calling for interference by this Court in exercise of constitutional jurisdiction; therefore, the instant constitution petition merits dismissal. Relies on Khayam Films and another v. Bank of Bahawalpur Ltd. 1982 CLC 1275 Lahore, Said Muhammad and others v. M Sardar and others PLD 1989 Supreme Court 532, Mst. Sardar Begum v. Muhammad Anwar Shah and others 1993 SCMR 363, Messrs Adamjee Construction Company Ltd. through Chief Executive v. Government of Punjab through Director-General, Punjab Sports Board, National Hockey Stadium, Lahore 1999 MLD 2202-Lahore and Fazal-Ur-Rehman and 2 others v. Begum Sughra Haque 2000 MLD 562-Lahore.

4. Heard.

5. Considering the prevailing trend in our society germane to negating

delegation of powers upon any person especially the lawyers by executing power of attorney to represent any litigant public before a legal forum, which culminates in filing of applications under section 12(2) of the C.P.C. by alleging commission of fraud and misrepresentation, it is mandated rather need of the time that for filing or instituting any application or suit or for putting-forth any claim, an advocate or counsel should have a duly executed power of attorney in his favour so as to represent any litigant before any legal forum, as enunciated in Part-A, Chapter 16, Volume-I of High Court Rules and Order, which runs:

> **'Pleading and acting by pleaders.-**Whereas by Order III, rule 4, of the Code of Civil Procedure, no pleader shall 'act', for any person in any Court unless he has been appointed by an instrument in writing, nor shall any pleader, who has been engaged for the purpose of pleading only, plead on behalf of any person unless he has filed in Court a memorandum-of-appearance or unless he has been engaged by another pleader duly appointed, and no such pleader can be recognized in the absence of a written authority or memorandum-of-appearance as aforesaid as empowered to plead or act for any person in any proceeding governed by the Code of Civil Procedure and it is expedient to provide for ascertaining that every such pleader is duly authorized to appear, plead or act in any such proceeding before subordinate Courts, the following instructions have been issued by the High Court:-
>
> (1) **Power of attorney to act to be executed by the principal.-**Every appointment of a pleader to act shall contain in full the name of the person, or where there are more than one, of every person who thereby appoints the pleader to act on his behalf, and shall be executed by every such person.
>
> (2) **Proof required when power of attorney not executed by the**

principal:-- When such appointment or power is not executed by the principal himself but by some person claiming to appoint or give authority on his behalf the pleader will not be recognized by the Court without proof that such person was duly authorized by the principal to execute such appointment or power.

(3) **Power of attorney or memorandum of appearance in cross-appeals.-**In cross-appeals a pleader who has already filed a power-of-attorney or memorandum-of-appearance for the appellant shall not be required for his client as respondent in the cross-appeal.'

The above scenario makes it clear that presentation of a written instrument in the shape of power of attorney duly executed by a person who has engaged such counsel or advocate is sine qua non, as stated above, in order to curb or curtail any ambiguity or element of fraud and misrepresentation. Volume V, Chapter 6, Part-B of the High Court Rules and Orders further ornate this issue. Moreover, an unauthorized person cannot address a Court as provided under section 119 of the Code of Civil Procedure. 1908, which reads:

'119.-Unauthorized persons not to address Court.--Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.'

The excerpts of the High Court Rules and Order and section 119 of the C.P.C. are sufficient to conclude that unless and until a person/advocate is duly authorized by execution of a power of attorney, he/she cannot represent a client or litigant before any Court of law; either he/she has to file a power of attorney, delegating powers of representation or memorandum-of - appearance, that too, with undertaking to present power of attorney later on

and when the rival party objects, it is mandatory and obligatory to prove that such power of attorney is executed by the assignee in favour of such advocate/counsel, but in the present case, at the time of filing application under Order I, Rule 10 of the C.P.C. neither memorandum-of appearance nor power of attorney was submitted but it was averred that the assignee/respondent No.6 was abroad and on his arrival in the country, he would sign the application and affidavit as well as execute power of attorney; if such a practice is allowed to prevail, it will not only create an anomalous situation but also open a door for filing of applications under section 12(2) of the C.P.C. by alleging commission of fraud and misrepresentation; therefore, such practice cannot be endorsed or permitted to carry the day mere on the assumption and presumption that it is an irregularity and curable, especially in the present case, uptill now, no exertion has been made by the respondent No.6 to file power of attorney or to appear before the Court of competent jurisdiction in person or through a special attorney or general attorney for making his better statement in order to ratify the acts done by his counsel, retrospectively; therefore, the case law relied upon by the learned counsel for the respondent No.6, which are Khayam Films and another v. Bank of Bahawalpur Ltd. 1982 CLC 1275-Lahore, Said Muhammad and others v. M. Sardar and others PLD 1989 Supreme Court 532, Mst. Sardar Begum v. Muhammad Anwar Shah and others 1993 SCMR 363, Messrs Adamjee Construction Company Ltd. through Chief Executive v. Government of Punjab through Director-General, Punjab Sports Board, National Hockey Stadium, Lahore 1999 MLD 2202-Lahore and Fazal-ur-Rehman and 2 others v. Begum Sughra Haque 2000 MLD 562- Lahore, cannot provide sustenance to the stance of the respondent No.6 to stand on.

Moreover, it is an era of Information Technology and the world has become a Global Village, distance has shortened, anything can easily be transported or communicated or conveyed to some other place in minutes by e-mail, fax or other sources of such like nature; but, there is nothing, as

hinted above, showing any such exertion, made by the respondent No.6, sending power of attorney duly attested by the Consulate/Embassy of Pakistan, appointing his counsel/advocate, which demonstrate something colourful only to create hurdle in the way of the petitioner.

6. Apart from the above, Order III, Rule 4 of the Code of Civil Procedure, 1908 elaborates enough to deal with all possible situations but basic requirement of appointment of pleader or advocate shall always be the same. Appointment of pleader shall be in writing and duly signed by a person(s) who appoints the pleader and this instrument must be before the Court. For ready reference said Order is reproduced infra:

> '**4. Appointment of pleader**.--(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.
>
> (2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.
>
> (3) ----------
>
> (4) ----------
>
> (5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating:-
>
> (a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorized to appear.

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

In this regard safer reliance can be placed in the cases of Azad Jammu and Kashmir Government v. Habibullah Lone PLD 1984 SC (AJ&K) 13, Abdul Hameed Khan v. Mrs. Saeeda Khalid Kamal Khan and others PLD 2004 Karachi 17 and Muhammad Ali and 21 others v. Abdul Jalil 2015 CLC 1315-Balochistan.

7. The above discussion ends with the observation that when the advocate who filed application under Order I, Rule 10 of the C.P.C. on behalf of the respondent No.6 was neither duly authorized through a written instrument i.e. power of attorney nor he filed any memorandum-of-appearance with the undertaking of production of power of attorney, the application was not entertainable and incompetent to proceed on; therefore, the learned Courts below, without considering and keeping in view this aspect, passed the impugned order and judgment while travelling beyond jurisdiction vested in them by law; as such, the impugned order and judgment cannot be allowed to remain in field further.

8. When the basic order passed by the learned trial Court is illegal and has been passed without jurisdiction, the judgment passed while exercising revisional jurisdiction can also be interfered with in exercise of constitutional jurisdiction. Moreover, pursuant to the above discussion, it can safely be held that the learned revisional Court has failed to interpret law on the subject in a true perspective while exercising jurisdiction vested in it by law at the time of passing the impugned judgment, which cannot be allowed to hold field further and this Court in exercise of extraordinary constitutional jurisdiction,

when the revisional order does not qualify the test of Article 4 of the Constitution and suffers from a patent error, of fact, such as non-reading/ misreading of the facts on the record or has committed a grave illegality in applying the correct law, such as the error of misapplication and non-application of correct law, can make interference. Reliance in this regard is placed on Qamar-ud-Din v. Muhammad Din and others PLD 2001 Supreme Court 518, Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 Supreme Court 905 and Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 Supreme Court 255, wherein the august Supreme Court of Pakistan has held:

> "..... thus it is obvious and clear that no court in the country has the jurisdiction to decide about the rights of the parties wrongly and in violation of the law, and the revisional court is no exception to this rule. This is the mandate of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 and we are not persuaded if there is any specific bar on the learned High Courts, that while exercising its authority in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, no interference can be made in the revisional orders. It should in fact be left to the High Courts to decide in which cases the interference is warranted, as it is the matter about the regulation of High Courts jurisdiction, obviously on the touchstone of the grounds laid down and the parameters set forth in Article 199 of the Constitution. Therefore, the argument of the learned counsel for the petitioners that the High Court cannot interfere in the revisional orders has no force, which is hereby discarded.'

Even in Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others PLD 1987 SC 447, it was held:

> 'When the Tribunal goes wrong in law, it goes outside the jurisdiction

conferred on it because the Tribunal has the jurisdiction to decide rightly but not the jurisdiction to decide wrongly. Accordingly, when the tribunal makes an error of law in deciding the matter before it, it goes outside its jurisdiction and, therefore, a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground that it is in excess of its jurisdiction.'

9. For the foregoing reasons and discussions, while placing reliance on the judgments supra, the instant constitutional petition stands allowed, impugned order and judgment passed by the learned Courts below are set aside, consequent whereof the application under Order I, Rule 10 of the Code of Civil Procedure, 1908, filed by the respondent No.6 stands dismissed. No order as to the costs.

ZC/J-9/L **Petition allowed.**

PLJ 2017 Lahore 482

Present: SHAHID BILAL HASSAN, J.

GHULAM HUSSAIN--Petitioner

versus

MUHAMMAD RASHEED, etc.--Respondents

C.R. No. 2301 of 2011, decided on 20.3.2017.

Punjab Pre-emption Act, 1991 (IX of 1991)--

----S. 13--Suit for pre-emption--Co-sharer--Original pre-emptor--Failed to substantiate stance by producing truthful witnesses--Essentials--It is, by now, a settled principle of law that in order to succeed in a suit for possession on basis of pre-emption, it is mandatory and imperative as well as essential to prove performance of talbs in accordance with law, as elaborated under Section 13 of Punjab Pre-emption Act, 1991 and when talbs are not proved as per dictates and requirement of law, same results fatal to pre-emptor's.

[Pp. 485 & 486] A

Punjab Pre-emption Act, 1991 (IX of 1991)--

----S. 20--Civil Procedure Code, (V of 1908), O.VI, R. 14--Suit for pre-emption--Co-sharer--Statement is inadmissible in evidence--Neither his name is depicted in plaint nor in notice talb-e-ishhad--Essential of law--Missed--Substantive illegalities and irregularities--Notice of talb-i-ishhad--No special power of attorney--Right to acquire suit property by exercising right of pre-emption accrues on date of sale but when at that time respondents did not have such right, coupled with. non-presence of PW at time of making of talb-i-muwathibat, suit ought to have been dismissed on that single score, as making of talb-i-muwathibat has not been proved by respondents/plaintiffs in accordance with law--Plaintiffs had failed to prove performance of talb-e-muwathibat as per mandate of law, question of subsequent talb loses its value and no decree for

possession through pre-emption can be passed in their favour.[Pp. 486 & 487] B & E

Right of Pre-emption--

----Scope of--Right, which can be exercised personally, which is missing in instant case. [P. 486] C

2007 CLC 819 Lah.

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 129(8)--Independence witness--Original pre-emptor--Interested witness--Adverse presumption under Art. 129(g) of Q.S.O. arises against respondents/plaintiffs due to withholding of essential witness that had he been produced, he would not have supported their stance.[P. 486] D

Mr. Muhammad Anwar Chaudhry, Advocate for Petitioner.

Malik Abdul Wahid, Advocate for Respondents.

Date of hearing: 20.03.2017.

ORDER

By this single order, the instant civil revision and connected C.R.No. 2454 of 2011, being outcome of one and the same impugned judgment and decree, in order to avoid any conflicting order or judgment, are decided, conjointly.

2. A patch of land measuring 10 marlas situated in Revenue Estate of Dait, Tehsil & District Sialkot (disputed property) was owned by one Ghulam Rasool son of Noor Din, who sold the same to Ghulam Hussain, the petitioner, on 15.01.2008 through Mutation No. 454 for an ostensible consideration of Rs. 200,000/-. The deceased father of the Respondents No. 1 to 7 instituted a suit for pre-emption on 11.02.2008 on the ground that he was co-sharer in the Khata and after the death of Muhammad Ramzan, the original pre-emptor, the Respondents No. 1 to 7 were arrayed as plaintiffs through amended plaint.

The petitioner/defendant contested the suit by filing written statement and controverted the averments of the plaint. The learned trial Court framed issues; both the parties adduced their evidence, oral as well as documentary, in pro and contra. The learned trial Court after hearing arguments *vide* impugned judgment and decree dated 31.07.2010 decreed the suit in favour of the respondents/plaintiffs; against which the petitioner preferred an appeal. The learned appellate Court *vide* impugned judgment and decree dated 06.05.2011 set aside the judgment and decree passed by the learned trial Court with the observation that the petitioner/defendant and the respondents enjoy equal rights, so in view of Section 20 of the Punjab Pre-emption Act, 1991 the disputed land would be shared by them jointly and decreed the suit of the respondents/plaintiffs to the extent of 1/2 share; hence, this civil revision.

The respondents/plaintiffs being aggrieved of the judgment and decree dated 06.05.2011 passed by the learned Appellate Court have filed the separate Civil Revision Bearing No. 2454 of 2011.

3. Learned counsel for the petitioner/defendant has argued that impugned judgments and decrees are result of misreading and non-reading of evidence on record. The pre-emptors have failed to substantiate their stance by producing two truthful witnesses as per mandate of Section 13 of the Punjab Pre-emption Act, 1991 as Fazal Elahi, the other witness was not produced. Moreover, Muhammad Rasheed (P.W.7) deposed during his deposition that he alongwith his father made talb-e-muwathibat, but neither his name is depicted in the plaint nor in the notice talb-e-ishhad as such, meaning thereby he was not present at the time of making of talb-e-muwathibat, therefore, his statement is inadmissible in evidence but this aspect of the case has been ignored totally by the learned Courts below. Furthermore, there is no special power of attorney on behalf other legal heirs in favour of Muhammad Rasheed (P.W.7) as has been stated by him and the amended plaint has not been signed by all the legal heirs, so the requirements of provisions of Order VI, Rule 14 of the C.P.C. are missing, thus, the suit ought to have been dismissed instead of decreeing the same. There are

material contradictions in the statements of the witnesses, but the same have been ignored and on the basis of surmises and conjectures, the impugned judgments and decrees have been passed, which resulted in miscarriage of justice. Both the learned Courts below while passing the impugned judgments and decrees have committed procedural and substantive illegalities and irregularities; hence, they have failed to exercise vested jurisdiction in accordance with law. Therefore, by allowing the Civil Revision (No. 2301 of 2011), the impugned judgments and decrees may be set aside and suit instituted by the respondents/plaintiffs may be dismissed. Relies on *Humayun Naseer Cheema and 3 others v. Muhammad Saeed Akhtar and others* (2007 CLC 819-Lahore), *Muhammad Hussain and others v. Ehsan Ullah* (2008 MLD 382-Lahore), *Jamal Din and others v. Muhammad Ishaq* (2010 MLD 743-Lahore), *Ghafoor Khan (deceased) through LRs. v. Israr Ahmed* (2011 SCMR 1545) and *Muzaffar Hussain v. Mst. Bivi and 7 others* (PLD 2012 Lahore 12).

4. Contrarily, it has been argued by learned counsel for the respondents/plaintiffs that the respondents have fulfilled the required Talbs in accordance with law. Maintains that while reversing findings on Issue No. 10, misreading and non-reading of evidence has been done by the learned Appellate Court and law on the subject has wrongly been interpreted. Further submits that while passing the impugned judgment and decree, material irregularities and illegalities have been committed by the learned Appellate Court. Without application of independent judicious mind, the impugned judgment and decree has been passed mere on the basis of surmises and conjectures. Vested jurisdiction has not been exercised in a proper way by the learned Appellate Court and a well-versed judgment and decree passed by the learned trial Court has been outdone without any cogent reasons. Therefore, by allowing the civil revision (No. 2454 of 2011), impugned judgment and decree dated 06.05.2011 to the extent of Issue No. 10 may be set aside, consequent whereof suit of the respondents/plaintiffs may be decreed by restoring the judgment and decree dated 31.07.2010 passed by the learned trial Court.

5. Heard.

6. It is, by now, a settled principle of law that in order to succeed in a suit for possession on the basis of pre-emption, it is mandatory and imperative as well as essential to prove the performance of Talbs in accordance with law, as elaborated under Section 13 of The Punjab Pre-emption Act, 1991 and when Talbs are not proved as per dictates and requirement of law, the same results fatal to the pre-emptor's.

In the present case, Muhammad Rasheed (P.W.7) appeared as pre-emptor on his behalf and on behalf of the other legal heirs of original pre-emptor, but he failed to produce any power of attorney executed in his favour authorizing him to appear on their behalf and deposed that he was present at the time of making of talb-e-muwathibat by his deceased father Muhammad Ramzan, but the plaint as well as alleged notice talb-i-ishhad is silent in this regard as neither in the plaint nor in the alleged notice of talb-i-ishhad his name emerges, rather name of Muhammad Sarwar and Fazal Elahi besides Bashir Ahmad (informer) appear; meaning thereby the statement of P.W.7 is beyond the pleadings and the same is inadmissible. A further question arises here that right to acquire suit property by exercising right of pre-emption accrues on the date of sale but when at that time the present respondents did not have such right, coupled with above scenario *i.e.* non-presence of Muhammad Rasheed (P.W.7) at the time of making of talb-i-muwathibat, the suit ought to have been dismissed on this single score, as making of talb-i-muwathibat has not been proved by the respondents/plaintiffs in accordance with law; reliance is placed on *Muzaffar Hussain v. Mst. Bivi and 7 others* (PLD 2012 Lahore 12).

Apart from the above, even if it is presumed and admitted for the sake of arguments that the respondents/plaintiffs have right of pre-emption against the present petitioner, even then non-appearance of the other respondents/plaintiffs except Muhammad Rasheed turns fatal to the respondents/plaintiffs, as right of pre-emption is a personal right, which can be exercised personally, which is missing in this case. In this regard reliance

is placed on *Humayun Naseer Cheema and 3 others v. Muhammad Saeed Akhtar and others* (2007 CLC 819-Lahore).

In addition to the above, the respondents/plaintiffs have failed to produce Fazal Elahi, before whom allegedly the original pre-emptor performed talb-i-muwathibat as his evidence can be termed as that of independent witness because the other witness namely Muhammad Sarwar is legal heir of Muhammad Ramzan, the original pre-emptor and is an interested witness; therefore, adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 arises against the respondents/plaintiffs due to withholding of essential witness that had he been produced, he would not have supported their stance. Reliance is placed on *Muhammad Hussain and others v. Ehsan Ullah* (2008 MLD 382-Lahore).

7. Pursuant to the above discussion, as the respondents/ plaintiffs have failed to prove performance of Talb-e-Muwathibat as per mandate of law, the question of subsequent talb loses its value and no decree for possession through pre-emption can be passed in their favour. Reliance is placed on *Mst. Sahib Jamala v. Fazal Subhan and 11 others* (PLD 2005 Supreme Court 977).

8. For the foregoing reasons and discussion, it is observed that the learned Courts below have failed to appreciate evidence on record and law on the subject in a true perspective; as such the impugned judgments and decrees being not sustainable in the eye of law while placing reliance on the judgments supra, the Civil Revision Bearing No. 2301 of 2011 is allowed and the impugned judgments and decrees passed by the learned Courts below are set aside, consequent whereof the suit instituted by the respondents/plaintiffs stands dismissed; whereas the connected civil revision bearing No. 2454 of 2011 will follow the result of the instant civil revision. No order as to the costs.

(R.A.) **Order accordingly.**

2018 C L C 292

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD KHAN----Petitioner

Versus

MUHAMMAD ABBAS and 15 others----Respondents

Civil Revision No.1386 of 2011, decided on 24th March, 2017.

Punjab Land Revenue Act (XVII of 1967)---

----S. 172---Suit for declaration---Correction of entries in revenue record---Bar on jurisdiction of Civil Court---Scope---Application was moved to the Revenue Officer for correction of Revenue Record which was accepted---Plaintiff instituted suit against the order of Revenue Officer correcting mutation but same was dismissed concurrently---Validity---Excess land was entered in the impugned mutation by the Revenue Officer while implementing judgment and decree passed by the Civil Court---In the present case, only the entries of mutation were challenged and were sought to be incorporated in accordance with the judgment and decree passed in the earlier suit---When there was no controversy with regard to title of any of the party, jurisdiction would lie with the Revenue Court---Section 172(2), Punjab Land Revenue Act, 1967 barred jurisdiction of Civil Court in the matter---No illegality or irregularity had been committed by the Courts below while passing the impugned judgments and decrees---Revision was dismissed in circumstances.

Malik Muhammad Nawaz and others v. Malik Hameedullah and others PLJ 2001 Revenue 5 ref.

Sameen Khan and 4 others v. Haji Mir Zad and others 2002 CLC 754; Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517 and

Mst. Mumtaz Begum through Legal Heirs and others v. Muhammad Shafique and others PLD 2009 Lahore 418 distinguished.

Dilmir and others v. Member, Board of Revenue, Punjab, Lahore and 9 others PLD 1991 Lah. 314 and Dildar Ahmad and others v. Member (Judicial-III) BOR Punjab, Lahore and another 2013 SCMR 906 rel.

Taki Ahmad Khan for Petitioner.

Sabir Hussain for Respondents Nos.1 to 5.

ORDER

SHAHID BILAL HASSAN, J.--- Muhammad Khan, the present petitioner instituted a suit for declaration with permanent injunction wherein it was averred that the land in dispute, detailed under paragraph No.1 of the plaint, was situated at Village Khan Jajja, Tehsil Pasrur, District Sialkot and he was lawful owner of the land measuring 27 kanals, 01 marla according to his legal share from the said land. On 26.09.2000, the plaintiff purchased 20 kanals, 04 marlas land from his father through registered Hibba-Nama and had become owner of the total land measuring 47 kanals, 05 marlas. It was further narrated that on 13.02.1965, the said land i.e. 27 kanals, 01 marla was purchased from Mst. Begum Bibi widow of Ali Gohar from his (Ali Gohar's) share of total land measuring 180 kanals, 18 marlas, her legal share as 1/6th became as 30 kanals, 03 marlas, on the basis of decree dated 16.06.1956 passed by the Civil Court and the said share was got mutated in her favour through Mutation No.1403 Dated 26.02.1960. It was further maintained that on 28.06.1995, defendants Nos.1 to 6 moved an application to the District Officer (Revenue), Sialkot for correction of the said mutation; the said application was accepted on 15.10.2003 by the said officer. Feeling aggrieved of the said order, the present petitioner assailed the same before the Collector/Executive District Officer, Sialkot by filing appeal, but the same was dismissed vide order dated 04.08.2004. In suit, it was prayed that in the light of the judgment and decree dated 16.06.1956, the orders dated

15.10.2003 and 04.08.2004 were void ab initio and had no legal effect on the rights of the petitioner and the same being nullity in the eye of law were liable to be declared as null and void.

The respondents Nos.1 to 5 instituted a separate suit for permanent injunction praying that petitioner be restrained from mortgaging the suit land with the bank. Both the suits were consolidated after submission of their respective written statements.

Out of the divergent pleadings of the parties, the learned trial Court framed consolidated issues and evidence of the parties was invited, which needful was done in pro and contra. The learned trial Court vide impugned consolidated judgment and decree dated 23.02.2010 dismissed both the suits. Both the parties preferred separate three appeals against the said judgment and decree; the learned appellate Court vide impugned consolidated judgment and decree dated 08.03.2011 dismissed all the appeals; hence, the instant civil revision.

2. During course of arguments, the main thrust of the learned counsel for the petitioner was on the score that the learned Courts below failed to apply correct law on the subject rather failed to adjudicate the matter with independent judicious mind, as correction of long standing entries in the revenue record did not come in the domain of the revenue hierarchy but to recourse the civil Court, being court of ultimate jurisdiction. Moreover, if at all the respondents were aggrieved of the judgment of learned trial court dated 16.06.1956, they would have filed an application under section 12(2) of the C.P.C. instead of moving an application for correction of entries incorporated in the mutation No.1403 dated 26.02.1960 but this aspect has totally been ignored by the learned Courts below while delivering the impugned judgments and decrees. Both the learned Courts below have neither read the evidence on record nor perused the documents with the suit and have rendered the impugned judgments and decrees mere on the basis of

surmises and conjectures, which has resulted in miscarriage of justice; hence, by allowing the civil revision in hand, the impugned judgments and decrees may be set aside, consequent whereof the suit instituted by the petitioner may be decreed, as prayed for. Relies on Sameen Khan and 4 others v. Haji Mir Zad and others (2002 CLC 754 Peshawar), Kala Khan and others v. Rab Nawaz and others (2004 SCMR 517) and Mst. Mumtaz Begum through Legal Heirs and others v. Muhammad Shafique and others (PLD 2009 Lahore 418).

3. Avowing the findings recorded by the learned Courts below in the impugned judgments, the learned counsel for the respondents Nos.1 to 5 has argued that the revenue authorities have not changed the verdict of the Civil Court dated 16.06.1956, rather have made correction with regard to implementation of the same in its true spirit and the revenue Courts enjoy ample jurisdiction under section 172(2)(vi) of the West Pakistan Land Revenue Act, 1967 in this respect; therefore, the learned Courts below have rightly reached to the conclusion and have rightly non-suited the petitioner. The impugned judgments and decrees being well-versed and well-balanced do not call for any interference in exercise of supervisory jurisdiction as both the learned Court below have exercised vested jurisdiction in an apt way. Dismissal of the instant revision petition has been prayed for. Relies on Dilmir and others v. Member, Board of Revenue, Punjab, Lahore and 9 others (PLD 1991 Lahore 314), Malik Muhammad Nawaz and others v. Malik Hameedullah etc. (PLJ 2001 Revenue 5) and Dildar Ahmad and others v. Member (Judicial-III) BOR Punjab. Lahore and another (2013 SCMR 906).

4. Heard.

5. In the present case, the matter is only with regard to correct implementation of the judgment and decree dated 16.06.1956 in the revenue record. For ready reference, the operative paragraph of the said judgment is reproduced as under:

'Issue No.2

From the parties evidence it is amply clear that the said Hukam Din left only two heirs i.e. the plaintiff and defendant No.1. The parties' counsel agree that the parties are governed by Hanfi Law of inheritance. The plaintiff and defendant No.1 are, therefore, entitled to share 1/3 and 2/3 of the land belonging to their father. As their father owned half of the suit land the plaintiff and defendant No.1 will get 1/6th and 1/3rd of it respectively. The issue is answered in these terms.

In view of my above findings the plaintiff's suit for joint possession of 1/6th share of the suit land is decreed with costs..... (Underline mine)

It is evident from the above lines of the judgment dated 16.06.1956 that father of Mst. Begum Bibi and Rehmat Ali, predecessor in interest of the respondents Nos.1 to 5 and a specific share i.e. 1/6th share in the half of the disputed property was decreed in favour of the plaintiff of that suit i.e. Mst. Begum Bibi, but while entering mutation No.1403 Dated 26.02.1960 excess land, involving total land instead of half of the land was decreed; therefore, matters wherein only correction with regard to rectifying any mistake in implementing the Courts' decrees or any other clerical mistake in the record of rights, periodical entry or register of mutation, especially when there appears no controversy regarding title of any of the party, the jurisdiction lies with the Revenue Courts and section 172(2) of the West Pakistan Land Revenue Act, 1967 bars jurisdiction of the Civil Court in this regard, as only entries of the mutation No.1403 were challenged and were sought to be incorporated in accordance with the judgment and decree dated 16.06.1956, which was still intact and had attained finality. In this regard enlightenment is sought from judgment of the Apex Court of Country reported as Dildar Ahmad and others v. Member (Judicial-III) BOR, Punjab, Lahore and

another (2013 SCMR 906) and Dilmir and others v. Member, Board of Revenue, Punjab, Lahore and 9 others (PLD 1991 Lahore 314).

In addition to the above, when the judgment and decree dated 16.06.1956 has not been challenged or said to be incorrect while moving application for correction before the revenue hierarchy, the arguments that application under section 12(2) of the C.P.C. ought to have been filed instead of the said application for correction, have no force, because no allegation of fraud or misrepresentation has been leveled; therefore, the same is discarded.

6. Pursuant to the above, the learned Courts below have not committed any illegality or irregularity while passing the impugned judgments and decrees, rather have exercised vested jurisdiction by appreciating and construing law on the subject in an apt way. The findings recorded by the learned Courts below, being upto the dexterity and based on proper appraisal of evidence on record, do not call for any interference by this court in exercise of revisional jurisdiction.

7. So far as the case law relied upon by the learned counsel for the petitioner is concerned, with utmost respect, the same has different facts and circumstances and does not render any assistance or help to the petitioner's case being on different footing.

8. Nutshell of the discussion above is that the instant civil revision being devoid of any force and substance stands dismissed. No order as to the costs.

ZC/M-85/L **Revision dismissed.**

2018 C L C Note 33

[Lahore]

Before Shahid Bilal Hassan, J

Mian ZAHEER AHMAD through Special Attorney---Appellant

Versus

MUHAMMAD SABIR and 3 others---Respondents

R.S.A. No. 216 of 2011, heard on 31st March, 2017.

(a) Civil Procedure Code (V of 1908)---

----O. XLI, R. 33---Specific Relief Act (I of 1877), S. 12---Suit for specific performance---Appellate Court, powers of---Scope---Suit was dismissed by the Trial Court but Appellate Court found the plaintiff entitled to recover the amount he had paid to the defendant along with the profit payable under profit and loss sharing account of a scheduled Bank till the realization of suit amount---Contention of defendant was that Appellate Court had travelled beyond vested jurisdiction---Validity--- Plaintiff though had not prayed for recovery of said amount in the plaint but Appellate Court having similar powers as that of Trial Court while deciding the appeal could grant such relief when the Trial Court had not read the evidence on such regard---Appellate Court, in circumstances, had not travelled beyond vested jurisdiction and could extend that relief even if the same was not prayed for---Second appeal was dismissed in circumstances. [Paras. 5 & 7 of the judgment]

Dr. Faqir Muhammad v. Maj. Amir Muhammad and others 1982 SCMR 1178; Muhammad Gohar and others v. Pakistan and others 1982 CLC 1621 and Government of Khyber Pakhtunkhwa and others v. Mst. Zubaida 2013 YLR 372 distinguished.

Basharat Ali and others v. Muhammad Anwar and others 2010 SCMR 1210 and Khaliqdad Khan and others v. Mst. Zeenat Khatoon and others 2010 SCMR 1370 rel.

(b) Civil Procedure Code (V of 1908)---

----S. 100---Second appeal---Judgment of Trial Court and Appellate Court---Inconsistency---Preference---In case of such inconsistency findings of Appellate Court was to be given preference. [Para. 5 of the judgment]

Muhammad Hafeez and another v. District Judge, Karachi East and another 2008 SCMR 398 rel.

Sheikh Muhammad Waqas for Appellant.

Ijaz Hussain Naqvi and Raheel Kamran Cheema for Respondent No.1.

Date of hearing: 31st March, 2017.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the respondent No.1 instituted a suit for declaration, possession, specific performance and permanent injunction against the present appellant and the respondents Nos.2 to 4 claiming therein the possession along with declaration through Specific Performance with regard to two shops. It was averred in the plaint that the appellant had received Rs.300,000/- from the respondent No.1 as loan on 13.01.2000 with an undertaking to return the same till 30.06.2000 and he was liable to pay Rs.100,000/- as compensation if amount of Rs.300,000/- would not be returned in time. Mian Bashir Ahmad, respondent No.2 stood guarantor for his son and he promised to alienate his two shops mentioned in para No.1-A of the plaint in consideration of Rs.300,000/- already paid to the respondent No.1. The agreement dated 13.01.2000 was written by the respondent No.4; the respondent No.1 was an uneducated simple villager

while the appellant and respondents Nos.2 to 4 were wily and astute people, so in the above noted agreement, by playing fraud the shops were shown to be owned by the appellant while the respondent No.2 was cited as marginal witness instead of guarantor of his son. On 04.08.2000, the appellant received further amount of Rs.140,000/- which was to be disbursed till 10.09.2000; that time the respondent No.3 emerged as a guarantor for payment of the disputed amount and in default he was to transfer his shop mentioned in para No.1-B of the plaint in favour of the respondent No.1. That agreement was also reduced into writing by the respondent No.4, but instead of showing the respondent No.3 as guarantor for return of loan amount, his name was cited as marginal witness. Allegedly, the respondents did not pay above said amount of Rs.440,000/- till 10.09.2000. On the intervention of the respectables of the area, the period for payment of disputed amount was extended on 10.07.2001 and it was agreed that appellant and respondents Nos.2 and 3 would pay Rs.150,000/- till 10.10.2001 and rest of the loan amounting to Rs.290,000/- would be paid on 10.01.2002. In this regard, agreement dated 10.07.2000 was scribed in the Punchayat. It was further averred that the respondent No.4 joined hands with the remaining respondents/defendants and the appellant and for that reason he mentioned outstanding amount as Rs.307,000/- only in agreement dated 10.07.2001. Moreover, the previous agreements were also shown to have been cancelled. The appellant and the respondents Nos.2 to 4 were required to return the loan amount of Rs.440,000/- but demand of the respondent No.1 was not met. He thus had become owner of the shops mentioned in Paras Nos.1-A and B of the plaint. The appellant and respondents Nos.2 to 4 were required to execute sale deed regarding disputed shops but they refused. He prayed for declaration to the effect that he had become owner of the disputed shops and in the alternative he prayed for decree of specific performance with injunction.

The appellant and respondents Nos.2 to 4 being defendants filed joint written statement and took the stance that the respondent No.1/plaintiff was a money lender by profession; the whole amount of loan was returned to him. The respondent No.1/plaintiff filed an application before the Deputy Superintendent of Police, Pasrur which was sent for inquiry to the Station House Officer, Police Station Sabiz Peer. Zaffar Iqbal, Sub-Inspector called the parties and it was resolved that an amount of Rs.137,000/- only was outstanding against the appellant and respondents Nos.2 to 4, which was to be paid in January to April 2003. Allegedly, the appellant and the respondents Nos.2 to 4 had paid the entire amount as per decision of Punchayat held under the supervision of Zaffar Iqbal SI and nothing was left to be payable against them. It was further contended that the respondent No.1 had been demanding interest on the principal amount and he filed the suit with mala fide intention; the appellant and other defendants prayed for dismissal of the suit.

Out of the divergent pleadings of the parties, to resolve the controversy, the learned trial Court framed as many as 13 issues including "Relief" and invited evidence of the parties. The respondent No.1/plaintiff and the appellant as well as respondents Nos.2 to 4/defendants adduced their evidence in pro and contra. The learned trial Court vide judgment and decree dated 09.04.2010 dismissed the suit instituted by the respondent No.1, who being aggrieved of the same, preferred an appeal before the learned lower appellate Court, which was, vide impugned judgment and decree dated 15.09.2011, accepted with the following observation:-

> ' In the light of above stated facts and circumstances, the appellant is found entitled to recover Rs.137,000/- from respondents Nos.1 and 2 along with profit payable under PLS account of scheduled bank till the realization of suit amount. This appeal is accepted accordingly

leaving the parties to bear their own costs .'

The appellant being aggrieved of the impugned judgment and decree passed by the learned lower appellate Court has preferred the instant regular second appeal.

2. Learned counsel for the appellant has argued that the impugned judgment and decree is result of exercise of jurisdiction which is not vested in the learned lower appellate Court, as the respondent No.1/plaintiff did not plead the relief extended to him in his plaint. He further argues that the impugned judgment and decree is against law and facts of the case as well as based on sheer misreading and non-reading of evidence on record, because the respondent No.1 admitted in his statement that he had obtained the signatures and thumb impressions of the appellant on blank paper and he further admitted that there was nothing between the parties except the loan amount, but these aspects have been ignored by the learned appellate Court. Moreover, the respondent No.1 could not produce any marginal witness of the agreement in his favour. As such, the learned lower appellate Court by travelling beyond vested jurisdiction has passed the impugned judgment and decree; hence, the same is not sustainable in the eye of law. By allowing the appeal in hand, the impugned judgment and decree may be set aside and the judgment and decree dated 09.04.2010 passed by the learned trial Court, dismissing the suit of the respondent No.1, may be restored. Relies on Dr. Faqir Muhammad v. Maj. Amir Muhammad and others (1982 SCMR 1178), Muhammad Gohar and others v. Pakistan and others (1982 CLC 1621-Lahore) and Government of Khyber Pakhtunkhwa and others v. Mst. Zubaida (2013 YLR 372-Peshawar).

3. Perversely, the learned counsel appearing on behalf of the respondent No.1 has argued that the learned lower appellate Court being Court of fact coupled with appeal before it in continuation of the suit had ample powers as

contemplated under Rule 33 of Order XLI of the Code of Civil Procedure, 1908, to pass or make such or other decree or order as the case may require, even if the appeal or objection are not filed; therefore, the learned lower appellate Court has rightly exercised vested jurisdiction and has not committed any misreading and non-reading of evidence on record. Prays for dismissal of the appeal in hand.

4. Heard.

5. Convening of Punchayat under supervision of one Zaffar Iqbal, Sub-Inspector is admitted on record and the learned lower appellate Court while thrashing the record found an application filed by the respondent No.1 to the Deputy Superintendent of Police, Pasrur and inquiry report of the said Zaffar Iqbal SI dated 03.09.2002, which was accompanied by a writing duly signed/thumb marked by Muhammad Sabir (respondent No.1) as well as his real son Safdar Hussain, wherein it was resolved that amount of Rs.137,000/- only was outstanding against the appellant, which was undertaken to be paid by respondent No.2, being father of the appellant, as he had settled abroad and the learned lower appellate Court taking notice of the same, as the parties concealed true facts and could not bring on record substantive material assisting the learned Courts below in reaching just conclusion of the case. Moreover, in order to negate the factum with regard to convening of Punchayat, neither the appellant nor his father Bashir Ahmad, respondent No.2, jumped in the witness box.

In addition to the above, though the respondent No.1 did not plead his claim for recovery of amount in his plaint, but Rule 33 of Order, XLI of the Code of Civil Procedure, 1908 is much clear on the point of powers to be enjoyed by the learned appellate Court while dealing with appeal. For ready reference, the same is reproduced infra:

'**33. Power of Court of Appeal.---**The Appellate Court shall have

power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:

Provided '

In view of the above provision of law, the learned lower appellate Court has not travelled beyond vested jurisdiction, rather to bring the litigation to an ultimate end has aptly exercised the same and has reached to a just conclusion. In this regard reliance is placed on Basharat Ali and others v. Muhammad Anwar and others (2010 SCMR 1210), wherein it was invariably held:

'No doubt, Adalat Khan did not prefer appeal before the District Court but the dispute was common as the entry was affecting all the plaintiffs. The appellate Court allowed the prayer in toto, which can be done under Order XLI, rules 4, 20 and 33 of Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C.) as held in the case of PRTB v. Abdul Ghafoor PLD 1989 SC 541.'

Moreover, it is settled principle of law that the learned Appellate Court while deciding the appeal enjoys powers similar to that of learned Trial Court and when it is established on record that the learned trial Court non-read the evidence produced by the parties, the learned Appellate Court by exercising powers delegated on it Under Order XLI, rule 33 of the C.P.C. could extend that relief even the same was not prayed. In this regard reliance is placed on Khaliqdad Khan and others v. Mst. Zeenat Khatoon and others (2010 SCMR 1370).

In addition to the above, in case of conflicting judgments of learned Trial Court and Appellate Court, the findings of the Appellate Court would be preferred and respected. In this regard reliance is placed on Muhammad Hafeez and another v. District Judge, Karachi East and another (2008 SCMR 398).

6. As far as the case law relied upon by the learned counsel for the appellant is concerned, with utmost respect, the same has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the appellant's case.

7. For the foregoing reasons and discussion, while placing on the judgments supra, the appeal in hand being devoid of any force and substance stands dismissed. No order as to the costs.

ZC/Z-18/L **Appeal dismissed.**

2018 C L C Note 90

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD ALI and 3 others---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and 9 others---Respondents

Writ Petition No. 38940 of 2016, decided on 25th April, 2018.

Civil Procedure Code (V of 1908)---

----S. 12 (2)---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Decree, setting aside of---Suit with regard to claims made in the present application was already pending for adjudication---Applicant made number of efforts to be impleaded as party in the main suit but his request was declined---Petitioner had concealed facts with regard to pending cases for adjudication---Application under S. 12(2), C.P.C., was not competent when suit for declaration was pending adjudication before the Civil Court---Impugned orders passed by the Courts below were set aside and application was dismissed---Constitutional petition was allowed accordingly. [Paras. 5, 7 & 9 of the judgment]

H.M. Saya and Co. Karachi v. Wazir Ali Industries Ltd., Karachi and another PLD 1969 SC 65; Ch. Jalal Din v. Mst. Asghari Begum and others 1984 SCMR 586; Noor Muhammad and others v. Province of Punjab and others 1985 MLD 1236; Mercantile Fire and General Insurance Co. of Pakistan Ltd. v. Messrs Imam and Imam Ltd. 1989 CLC 2117; Khawaja Muhammad Yousaf v. Federal Government through Secretary, Ministry of Kashmir Affiars and Northern Areas and others 1999 SCMR 1516; Raja Wali v. Mansha Ahmed PLD 1996 Lah. 354 and Ardeshir Cowasjee and others v. K.B.C.A. and others PLD 2003 Kar. 314 ref.

Ahmad Waheed Khan for Petitioners.

Syed Ijaz Qutub for Respondent No.3.

Muhammad Yaseen Bhatti for Respondents Nos. 4 to 10.

ORDER

SHAHID BILAL HASSAN, J.---Succinctly, one Javed died issueless leaving two widows to inherit his legacy. Mst. Mehti agreed through agreement to sell dated 12.09.1971 to sell her land measuring 216 kanals in favour of Mst. Sakina Bibi. As she did not honour the terms and conditions of the agreement of sale a suit for specific performance was filed, wherein a decree was passed on 16.10.2014. An appeal was filed by respondent No.3 but the same was rejected on 28.03.2015 being non-maintainable. To challenge the said judgment and decree an application under section 12(2), C.P.C. was filed by respondent No.3 on the ground that he was legal representative of Mst. Mehti deceased. There was a checkered history with respect to the status claimed by respondent No.3. He had earlier claimed himself to be a legal representative on the basis of an order of an Additional District Judge dated 15.09.1983 and got mutation No.1192 entered on 01.04.1999, but as this Court issued injunction, therefore, the same stood rejected on 12.02.2000. Another mutation bearing No.1624 was got entered by respondent No.3, that time claiming to be heir of deceased Mst. Mehti, but he failed to prove himself as an heir, hence it too was rejected on the basis of order dated 09.10.2004. Respondent No.3 again got mutation No.1637 entered on 08.10.2004 on the claim of a WILL dated 17.09.1980 allegedly executed by Mst. Mehti, but as the WILL was under challenge, the mutation bearing No.1637, too, stood rejected on 18.08.2009. Allegedly, these shifting stands taken by respondent No.3 to usurp the estate of Mst. Mehti were sufficient to hold his claims to be false and fabricated, upon which an FIR No.133/2005, under sections 419, 420, 467, 468, 471, P.P.C. was registered against him for having fabricated the WILL and he remained in jail till he was granted bail by this Court. To frustrate the agreement of sale in favour of late Mst. Sakina, respondent No.3 filed various applications but all these applications met with failure either on merits or on account of withdrawal which included the dismissal for non-prosecution on 30.10.2012 of Writ Petition No.5617/2011 from this Court.

At the moment a suit titled Jan Muhammad v. Province of Punjab and others was pending adjudication before the Civil Judge, Okara, which was filed on 31.03.2011. An application under section 12(2), C.P.C., the subject matter of present petition, was filed by respondent No.3 wherein a detailed reply was submitted by the petitioners, predecessor, wherein the learned trial Court vide order dated 07.04.2005 framed the issues. This order was challenged before the learned District Judge by the petitioners through Civil Revision No.15 of 2015 which was dismissed vide impugned order dated 23.04.2016 with the following observations:-

> "As so many controversies with respect to the suit property are involved under the umbrella of question of law and fact which could only be resolved through evidence produced by both the parties for the just decision, hence revision petition is hereby dismissed. Copy of the instant order be sent to the learned trial Court for information. Record be also sent back to the learned trial Court. Instant revision petition be consigned to record after its completion".

2. Learned counsel for petitioners has argued that the grounds enumerated justifying record of the evidence, either did not exist on the record or are the result of wrong appreciation of facts and law by the learned Revisional Court. Added to the above, the scope of proceedings under section 12(2), C.P.C. has completely been deviated by the Revisional Court, there has been a circumscribed jurisdiction invokeable under section 12(2), C.P.C. on the grounds that the impugned decree had been procured through fraud and misrepresentation played upon the Court. Learned Revisional Court has gone much beyond the said circumscribed limit while giving a free hand to the respondent No.3 to lead the evidence with respect to his status to justify his right to file an application under section 12(2), C.P.C., which is beyond the scope of said provision of law. Although Rule 10 of Order I, C.P.C. can be invoked by the courts of law at any time of the proceedings but if the conduct of a party proves beyond any shadow of doubt that it is acting with malicious intentions not only to falsely grab the estate left by an issueless lady but also is the accused of fabrication of the WILL, this

discretionary power has to be exercised with much more care and caution. In the instant case, quite a number of efforts were made by respondent No.3 to be impleaded on the basis of changed status but he was denied that induction for many years. Initially he was deleted on 14.12.2010 against which he filed a revision petition which was dismissed on 08.03.2011. He thereafter challenged that order through Writ Petition No.5617/2011 which stood dismissed for non-prosecution on 30.10.2012 and thereafter respondent No.3 took no step to have that order set aside. He had earlier filed an application to be impleaded on 21.03.2011 but then withdrew on 28.03.2011, this too estops him to be impleaded, yet another application under Order I, Rule 10, C.P.C. was filed which stood dismissed on 06.05.2013 and even civil revision against that order was dismissed on 11.10.2014 and now Writ Petition No.505/2014 is pending before this Court. Learned Revisional Court has committed a jurisdictional error in failing to appreciate the evidence while rendering the impugned order. The litigation in the instant case has commenced in the year 2000 and now another round of litigation is being illegally forced upon the petitioners under the garb of petition under section 12(2), C.P.C. The intention of law while introducing section 12(2), C.P.C. was in fact to curtail the agony of the parties but unfortunately it is being used as a weapon to prolong the miseries of the parties. The very shifting stands taken by respondent No.3 disentitle him to file a petition under section 12(2), C.P.C. There was no need to frame the issues, nor was there any requirement to lead the evidence. Petition under section 12(2), C.P.C. was incompetent in the eyes of law when a suit for declaration was already pending adjudication before the civil Court. This case safely be pleaded in the suit pending adjudication before the learned Civil Judge. The third ground which weighed with the learned Revisional Court was entirely beyond the scope of section 12(2), C.P.C., when it was observed that the decree dated 16.10.2014 has been passed in a suit filed on 09.05.2000 to seek the enforcement of an agreement dated 12.09.1971, can by no stretch of imagination be considered to be ground for the setting aside of the decree under section 12(2), C.P.C. because the merits of those proceedings cannot be allowed to be challenged through a maliciously motivated petition under

section 12(2), C.P.C. Submits that the impugned orders dated 23.04.2016 and 07.04.2015 passed by the learned Courts below are illegal, unlawful and thus without lawfully authority and in case the same are not so declared and set at naught the petitioners are bound to suffer irreparable loss and injury. He has prayed that by allowing the constitutional petition in hand, the impugned orders may be set aside and the learned trial Court may be directed to decide the application under section 12(2) of the C.P.C. after hearing arguments.

3. Contrarily, learned counsel for the respondent No.3 has supported the impugned orders and has further argued that any person aggrieved of any order or judgment or decree, if his rights are affected adversely, can call into question such order, judgment and decree by filing application under section 12(2) of the C.P.C. He has further argued that statutory right of appeal being available under law cannot be denied merely because law provided another remedy. Lastly, he has prayed for dismissal of the constitutional petition in hand. Relies on H. M. Saya and Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another (PLD 1969 Supreme Court 65), Ch. Jalal Din v. Mst. Asghari Begum and others (1984 SCMR 586), Noor Muhammad and others v. Province of Punjab and others (1985 MLD 1236-Lahore), Mercantile Fire and General Insurance Co. of Pakistan Ltd. v. Messrs Imam and Imam Ltd. (1989 CLC 2117), Khawaja Muhammad Yousaf v. Federal Government through Secretary, Ministry of Kashmir Affairs and Northern Areas and others (1999 SCMR 1516), Raja Wali v. Mansha Ahmed (PLD 1996 Lahore 354) and Ardeshir Cowasjee and others v. K.B.C.A. and others (PLD 2003 Karachi 314).

4. Heard.

5. After hearing arguments and going through the record it has come on surface that the respondent No.3/ applicant in application under section 12(2) of the Code of Civil Procedure, 1908 (Code) claims himself legal heir of Mst. Mahti as well as holder of a registered will in his favour, which is yet to be proved by him as a suit in this respect on his behalf is pending adjudication, meaning thereby he has yet to prove the valid execution of alleged WILL in his favour as well as being declared as legal heir of Mst.

Mahti. In the instant case, quite a number of efforts were made by respondent No.3 to be impleaded on the basis of changed status but he was denied that induction for many years. Initially he was deleted on 14.12.2010 against which he filed a revision petition which was dismissed on 08.03.2011. He thereafter challenged that order through Writ Petition No.5617/2011 which stood dismissed for non-prosecution on 30.10.2012 and thereafter respondent No.3 took no step to have that order set aside. He had earlier filed an application to be impleaded on 21.03.2011 but then withdrew on 28.03.2011, this too estops him to be impleaded, yet another application under Order I, Rule 10, C.P.C. was filed which stood dismissed on 06.05.2013 and even civil revision against that order was dismissed on 11.10.2014 and now Writ Petition No.505/2014 is pending before this Court, file of which has been summoned and has been gone through, which goes to evince that the same has been disposed of on 04.04.2017 with the following observation:

> '2. It has been highlighted that the main suit in which the afore-noted application was filed has been decreed on 16.10.2014, against which petitioner preferred an appeal which also stood dismissed on 28.03.2015, whereupon, Civil Revision No.1402/2015 was filed. It is also highlighted that the initial judgment and decree dated 16.10.2014 has been set aside by the learned trial Court on an application filed by the petitioner under section 12(2), C.P.C., against which a civil revision is pending before this Court.
>
> 3. In view of the fact that this petition emanates from an interim order passed by the learned trial Court and since the main suit has been decided, therefore, there is no live issue in this petition. Disposed of.'

The appeal filed by the respondent No.3 against the judgment and decree dated 16.10.2014 has also been dismissed on 28.03.2015 by the learned appellate Court, against which his Civil Revision bearing No.1402 of 2015 titled Jan Muhammad v. Mst. Sakina Bibi, etc. is also pending before this Court, which has been got adjourned sine die vide order dated 04.04.2017, which runs:

> '2. Learned counsel for the petitioner at the outset submits that the

initial judgment and decree passed by the learned trial Court was set aside on an application under section 12(2), C.P.C. filed by the petitioner, whereupon a civil revision has been filed before this Court, in which operation of the said judgment has been suspended. He submits that till the decision of the latter civil revision, this revision petition may be adjourned sine die.

3. In view of the above, this revision petition is adjourned sine die. In case there is any unresolved issue between the parties, either of the parties can get this appeal resurrected through an appropriate application.'

It is pertinent to note here that during pendency of C.R.No.1402 of 2015, the respondent No.3 filed an application under section 12(2) of the Code without disclosing the factum of pendency of the above said civil revision against judgments and decrees dated 16.10.2014 and 28.03.2015 passed by the learned trial Court and learned appellate Court respectively, before this Court and got suspended the operation of the decree dated 16.10.2014 vide impugned order dated 23.04.2016, against which otherwise the said Civil Revision No.1402/2015 was already pending adjudication before this Court and was not finally decided, rather, after filing of the instant constitutional petition and during its pendency, the same was got adjourned sine die. All these facts proceed to show how the respondent No.3 by twisting facts used powers of the Court in his favour. He must have approached the Court with clean hands but as stated above that during pendency of the Civil Revision No.1402/2015 (which is yet to be adjudicated upon and decided finally as the same was got adjourned sine die) he filed the application under section 12(2) of the Code. The intention of law while introducing section 12(2), C.P.C. was in fact to curtail the agony of the parties but unfortunately it is being used as a weapon to prolong the miseries of the parties. Petition under section 12(2) of the Code was incompetent in the eye of law when a suit for declaration was already pending adjudication before the civil Court and even the plea taken up by the respondent No.3 in his application under section 12(2) of the Code can safely be pleaded in the already filed Civil Revision

No.1402/2015.

6. The respondent No.3 despite having knowledge germane to pendency of the above mentioned civil revision set the law into motion by misguiding as well as concealing the facts and has wasted the precious time of Courts, not only of the learned trial Court and appellate Court but also of this Court, thus, the argument advanced by the learned counsel for the respondent No.3 that statutory right of appeal being available under law cannot be denied merely because law provided another remedy and the respondent No.3 could file application under section 12(2) of the Code, has no force, especially when the respondent No.3 had availed right of appeal against the judgment and decree dated 16.10.2014, which appeal was dismissed vide judgment and decree dated 28.03.2015 and against the said judgments and decrees Civil Revision No.1402 of 2015 was pending and alive, not finally adjudicated and decided.

7. Pursuant to the discussion, the application under section 12(2) of the Code was not competent and maintainable and has wrongly been filed by the respondent No.3 and has obtained the impugned orders through concealment of facts.

8. The case law relied upon by the learned counsel for the respondent No.3 has no relevance to the peculiar facts and circumstances of the case in hand; thus, with utmost respect to the same, it does not render any assistance or help to his case.

9. For the foregoing reasons, the constitutional petition is allowed, impugned orders dated 07.04.2015 and 23.04.2016 passed by the learned trial Court and learned revisional Court, respectively are set aside; the application under section 12(2) of the Code of Civil Procedure, 1908 filed by the respondent No.3 stands dismissed, with costs throughout.

ZC/M-82/L **Petition allowed.**

2018 C L D 1214

[Lahore]

Before Shahid Bilal Hassan, J

The LAHORE POLO CLUB through Secretary---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and 3 others---Respondents

Writ Petition No. 174637 of 2018, decided on 30th March, 2018.

(a) Civil Procedure Code (V of 1908)---

----S. 9---Social Club/Association---Disciplinary proceedings against member(s) of a club/association---Jurisdiction of civil court---Scope---Courts generally refused to interfere in decisions of a club on disciplinary matters if given without any irregularity in procedure unless it was proved either that rules were opposed to natural justice or that the same were not followed or that there was malice or mala fides in arriving at decision---Jurisdiction of court in such matters was therefore, limited within a very narrow compass.

(b) Companies Act (XIX of 2017)---

----Ss. 4 & 5---Civil Procedure Code (V of 1908), S. 9 & O. VII, R. 10---Constitution of Pakistan, Art. 199---High Court (Lahore) Rules and Orders, Vol. 1, Chapter 2 & S. 4---Club/Association incorporated as a company---Disciplinary proceedings against member(s) of a club/association---Jurisdiction of Civil Courts to entertain suit seeking to restrain disciplinary proceedings against a member of a club/association existing under the Companies Act, 2017---Special law---Constitutional jurisdiction of High Court---Scope---Petitioner Club, incorporated under the Companies Act, 1913 impugned order of Civil Court whereby it was held that Civil Court had jurisdiction to entertain a suit seeking to restrain disciplinary proceedings

against member of the club---Held, that Ss. 4 & 5 of the Companies Act, 2017 barred jurisdiction of Civil Courts in matters pertaining to Companies and word "shall" had been used in the same, which made said provisions mandatory and such bar was also contained in S. 4 of Chapter 2 of Volume-I of the High Court (Lahore) Rules and Orders---High Court observed that provision(s) of a special law always override provisions of a general law to the extent of any conflict or inconsistency between the two---Civil Court, therefore had no jurisdiction to entertain the suit as it had been provided in S. 5 of the Companies Act, 2017 that High Court was the court of first instance to deal with such matters---Impugned orders of the Civil Court were set aside, and plaint of the respondent was returned under O. VII, R. 10 of the C.P.C.--- Constitutional petition was allowed, accordingly.

Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543; Lahore Race Club through Secretary and others v. Raja Khushbakht-Ur-Rehman PLD 2008 SC 707; Mian Javed Amir and others v. United Foam Industries (Pvt.) Ltd, Lahore and others 2016 SCMR 213 = 2016 CLD 393; State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others 2017 CLD 1080; Syed Mushahid Shah and others v. Federal Investment Agency and others 2017 CLD 1198 and Muhammad Yasin Fecto and another v. Muhammad Raza Fecto and 3 others 1998 CLC 237 ref.

D. M. Malik v. Jockey Club of Pakistan and others PLD 1960 (W.P.) Karachi 325; Khawaja Muhammad Saeed v. Mr. Justice Shabbir Ahmad and 12 others PLD 1965 (W.P) Lahore 92; Mr. Muhammad Jamil Asghar v. The Improvement Trust, Rawalpindi PLD 1965 SC 698; Messrs Chalna Fibre Company Limited, Khulna and 4 others v. Abdul Jabbar and 9 others PLD 1968 SC 381; Muhammad Akram v. Mst. Farman Bi PLD 1990 SC 28; Mian Ejaz Siddique and others v. Mst. Kaneez Begum and 2 others 1992 CLC

1658; Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) through Manager and another v. Hakeem Hafiz Muhammad Ghaus and 5 others PLD 1997 SC 3; Muhammad Yasin Fecto and another v. Muhammad Raza Fecto and 3 others 1998 CLC 237; Federation of Pakistan and others v. Messrs Saman Diplomatic Bonded Warehouse 2004 PTD 1189; Hakam and others v. Tassadaq Hussain Shah PLD 2007 Lah. 261; Abdul Majeed and 5 others v. Province of the Punjab through District Collector, Layyah and 4 others 2010 CLC 146; Abdul Ghafar Jangda v. Haji Abdullah Haroon Muslim Gymkhana and 11 others 2011 YLR 2907; ICI Polyester Employees Union (CBA) Registered v. Trustees Union and 2 others 2013 CLD 108 and Sohail Najeeb v. Ministry of Finance and others 2014 CLD 848 distinguished.

Lahore Race Club through Secretary and others v. Raja Khushbakht-ur-Rehman PLD 2008 SC 707; Mehran Ginning Industries and others v. Sajid Shafique and others 2017 CLD 1165; Brothers Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543; Mian Javed Amir and others v. United Foam Industries (Pvt.) Ltd. Lahore and others 2016 SCMR 213; Syed Mushahid Shah and others v. Federal Investment Agency and others 2017 CLD 1198 and State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others 2017 CLC 1080 rel.

Taffazul Haider Rizvi and Muhammad Usman for Petitioner.

Imtiaz Rasheed Siddiqui and Shehryar Qusoori for Respondent No.3.

ORDER

C.M. Nos.2 and 3 of 2018

SHAHID BILAL HASSAN, J.---Through this application the applicant seeks permission to place on record certain additional documents and second

application is for dispensation.

2. Allowed subject to all just and legal exceptions.

Main Petition

Succinctly, the petitioner was incorporated on 06.06.1934 under the Companies Act, 1913 presently existing under the Companies Act, 2017. The respondent No.3 was a member of the petitioner Company but due to demeanour of the respondent No.3 in the past his membership was suspended, which was only restored upon his assurance to mend his ways but all this proved to be wishful thinking. The respondent No.3, once again, allegedly indulged in transgression due to which on 03.12.2017, the Secretary of the petitioner issued a Notice calling a meeting of the Disciplinary Committee to look into the misconduct of the respondent No.3 and gave its recommendations, in the meanwhile on 06.12.2017 his (respondent No.3's) membership was suspended. The recommendations of the Disciplinary Committee were considered by the Executive Committee on 12.12.2017, in which the respondent No.3 was also present as a Regular member rather he despite asking refused to recuse himself from the meeting. The Executive Committee approved the suspension of the respondent No.3 and a suspension letter was issued to the said effect on 18.12.2017. A Notice for calling an Extraordinary General Meeting was issued on 18.12.2017, in the meanwhile a requisition was also submitted by 14 Regular Members for calling of an Extraordinary General Meeting, which was convened on 09.01.2018 and the respondent No.3's membership was terminated by the requisite majority in the Extraordinary General Meeting as per Article 7(1) of the Articles of Association of the Company and his name stands removed from the Register of Members and Form 29 in this regard has also been submitted to the Securities and Exchange Commission of Pakistan.

The respondent No.3 instead of accepting his fate under the Companies Act, 2017 approached the Civil Court and instituted a suit for declaration, permanent and mandatory injunction with consequential relief titled "Naveed M. Sheikh v. The Honorary Secretary of the Lahore Polo Club and others" The present petitioner entered appearance and at the outset raised objection to jurisdiction by the Civil Court but vide impugned order dated 18.01.2018, the learned Civil Judge overruled the objection with regard to his jurisdiction and held that Civil Court has jurisdiction to entertain the lis in hand. Being aggrieved of the said order, the petitioner filed a revision petition, but the learned Additional District Judge vide impugned order dated 26.02.2018 dismissed the same; hence, the instant constitutional petition.

2. Main thrust of the learned counsel for the petitioner is on the ground that the Civil Court has no jurisdiction to entertain suit as the incorporated entities and all matters pertaining thereto are tried and adjudicated upon under the Special Law i.e. The Companies Act, 2017, because it is an established principle that a special law overrides the general law and section 4 of the Act ibid expressly overrides any other law; therefore, except the Company Bench of this Court no other Court has the jurisdiction to entertain any lis pertaining to an incorporated entity. He has prayed for acceptance of the constitutional petition in hand, setting aside of the impugned orders and return of plaint of the suit instituted by the respondent No.3 under Order VII, Rule 10 of the Code of Civil Procedure, 1908. Relies on Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others (PLD 1996 Supreme Court 543), Lahore Race Club through Secretary and others v. Raja Khushbakht-Ur-Rehman (PLD 2008 Supreme Court 707), Mian Javed Amir and others v. United Foam Industries (Pvt.) Ltd, Lahore and others (2016 SCMR 213) (2016 CLD 393), State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others (2017 CLD 1080-Supreme Court of Pakistan), Syed Mushahid Shah and others v. Federal

Investment Agency and others (2017 CLD 1198-Supreme Court of Pakistan) and Muhammad Yasin Fecto and another v. Muhammad Raza Fecto and 3 others (1998 CLC 237-Karachi).

3. On the contrary, learned counsel representing the respondent No.3 has supported the impugned orders by arguing that the orders sought to be declared illegal through suit for declaration are based on mala fide, therefore, the Civil Court, being Court of plenary jurisdiction, enjoys the powers and jurisdiction to entertain the suit; thus, the learned Courts below have rightly exercised vested jurisdiction. The instant constitutional petition may be dismissed. Reliance has been placed on D.M. Malik v. Jockey Club of Pakistan and others (PLD 1960 (W.P.) Karachi 325), Khawaja Muhammad Saeed v. Mr. Justice Shabbir Ahmad and 12 others (PLD 1965 (W.P) Lahore 92), Mr. Muhammad Jamil Asghar v. The Improvement Trust, Rawalpindi (PLD 1965 Supreme Court 698), Messrs Chalna Fibre Company Limited, Khulna and 4 others v. Abdul Jabbar and 9 others (PLD 1968 Supreme Court 381), Muhammad Akram v. Mst. Farman Bi (PLD 1990 Supreme Court 28), Mian Ejaz Siddique and others v. Mst. Kaneez Begum and 2 others (1992 CLC 1658-Lahore), Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) through Manager and another v. Hakeem Hafiz Muhammad Ghaus and 5 others (PLD 1997 Supreme Court 3), Muhammad Yasin Fecto and another v. Muhammad Raza Fecto and 3 others (1998 CLC 237-Karachi), Federation of Pakistan and others v. Messrs Saman Diplomatic Bonded Warehouse (2004 PTD 1189-Karachi High Court), Hakam and others v. Tassadaq Hussain Shah (PLD 2007 Lahore 261), Abdul Majeed and 5 others v. Province of the Punjab through District Collector, Layyah and 4 others (2010 CLC 146-Lahore), Abdul Ghafar Jangda v. Haji Abdullah Haroon Muslim Gymkhana and 11 others (2011 YLR 2907-Karachi), ICI Polyester Employees Union (CBA) Registered v. Trustees Union and 2 others (2013 CLD 108) and Sohail Najeeb v. Ministry of Finance and others

(2014 CLD 848-Islamabad).

4. Heard.

5. It is settled principle by now that Courts generally refuse to interfere in the decision of a club on disciplinary matters if given without any irregularity in procedure unless it is proved either that the rules were opposed to natural justice or that they were not properly followed or that there was malice or mala fides in arriving at the decision or that principles of natural justice were not being followed. Thus, the jurisdiction of the Court in such cases is limited within a very narrow compass and if the Managing Committee of a Club or an Association has acted bond fide and honestly, followed the principles of natural justice and has reasonably construed its rules in their application to the aggrieved party, the Civil Courts have no jurisdiction to interfere in a matter where disciplinary action is taken against its members.

In the present case, it is evident from the facts of the case that the respondent No.3's membership was cancelled and his name was removed from the Register of Members of the Company after giving him opportunity of hearing and to defend his stance before the Executive Committee of the Club and when he refused to recuse himself from the meeting, the Executive Committee approved the suspension of the respondent No.3 and a suspension letter was issued to the said effect on 18.12.2017; whereafter a Notice for calling an Extraordinary General Meeting was issued on 18.12.2017, in the meanwhile a requisition was also submitted by 14 Regular Members for calling of an Extraordinary General Meeting, which was convened on 09.01.2018 and the respondent No.3's membership was terminated by the requisite majority in the Extraordinary General Meeting as per Article 7(1) of the Articles of Association of the Company and his name was removed from the Register of Members and Form 29 in this regard was also submitted to

the Securities and Exchange Commission of Pakistan. Section 4 of the Companies Act, 2017 reads:-

> '**4. Act to override.-**Save as otherwise expressly provided herein--
>
> (a) the provisions of this Act shall have effect notwithstanding anything contained in any other law or the memorandum or articles of a company or in any contract or agreement executed by it or in any resolution passed by the company in general meeting or by its directors, whether the same be registered, executed or passed, as the case may be, before or after the coming into force of the said provisions; and
>
> (b) any provision contained in the memorandum, articles, contract, agreement, arrangements or resolution aforesaid shall, to the extent to which it is repugnant to the aforesaid provisions of this Act, become, or be, void, as the case may be.'
>
> Section 5 of the Act ibid reads:
>
> '**5. Jurisdiction of the Court and creation of Benches**.---(1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate.
>
> (2) Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 (Act V of 1908) or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act.
>
> (3) ----------
>
> ----------
>
> (4) ----------

---

(5) ---

---

(6) ---

---

(7) ---

---------- (underline for emphasis)

The above provision of law expressly bars jurisdiction of Civil Court in the matters pertaining of Company matters and word "shall" has been used in the same, which makes is mandatory, especially when there appears no mala fide or ill-will on the part of the Executive Committee of the Club, who, as stated above, has followed the rules after submission of requisition by 14 Regular Members for calling of an Extraordinary General Meeting, convened on 09.01.2018 and terminated the membership of the respondent No.3 by the requisite majority in the Extraordinary General Meeting as per Article 7(1) of the Articles of Association of the Company/Club and his name stands removed from the Register of Members and Form 29 in this regard has also been submitted to the Securities and Exchange Commission of Pakistan. Since the name of the respondent No.3 has been cancelled and his name has been removed from the Register of the Members of the Company, and Form 29 has already been submitted to the SECP, the matter strictly falls within the ambit of Companies jurisdiction, because it has converted to "rectification of the Register", which instance is dealt with under section 126 of the Act ibid, which provides:

'126. Power of Court to rectify register.---(1) If--

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from register of members or register of

debenture-holders of a company; or

(b) default is made or unnecessary delay takes place in entering on the register of members or register of debenture-holders the fact of the person having become or ceased to be a member or denture-holder;

the person aggrieved, or any member or debenture-holder of the company, or the company, may apply to the Court for rectification of the register.'

The "Court" in the above section 126 of the Act is the Company Judge of the High Court as has been provided in section 5 of the Act ibid. Reliance is placed on Lahore Race Club through Secretary and others v. Raja Khushbakht-Ur- Rehman (PLD 2008 Supreme Court 707), Mehran Ginning Industries and others v. Sajid Shafique and others (2017 CLD 1165) and Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others (PLD 1996 Supreme Court 543) wherein it was held:-

"The proceedings under the Ordinance are initiated in the High Court as a Court of first instance. While exercising such jurisdiction it has the characteristics and attributes of the original jurisdiction."

6. In addition to the above, Section 4 of Part-A of Chapter 2 of the Volume-I of the Rules and Orders of the Lahore High Court, Lahore provides:-

'4. Special Jurisdiction.---Under certain enactments, Courts of Civil Judges have no jurisdiction at all to take cognizance of proceedings under those enactments e.g. the Companies Ordinance, 1984 (XLVII of 1984), the Banking Companies Recovery of Loan Ordinance (XIX of 1979), the West Pakistan Family Courts Act, (XXXV of 1964), etc. There are proceedings under certain other enactments of which

> Civil Judges can take cognizance if specifically empowered in that behalf e.g. section 4-A of the Guardians and Wards Act, 1890, read with section 25 of the West Pakistan Family Courts Act, I964.'

This matter has been resolved once and for all in judgments reported as Mian Javed Amir and others v. United Foam Industries (Pvt.) Ltd., Lahore and others (2016 SCMR 213).

7. Apart from the above, it is, by now, settled principle of law, that provisions of special law always override the provisions of general law to the extent of any conflict or inconsistency between the two. In this regard reliance is placed on Syed Mushahid Shah and others v. Federal Investment Agency and others (2017 CLD 1198-Supreme Court of Pakistan) and State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others (2017 CLD 1080-Supreme Court of Pakistan) wherein it has invariably been held:

> 'Hence where a Special law determines a place of suing, which in the present case in terms of section 2(6) could be either the principal Civil Court of Original jurisdiction in a district or the special Civil jurisdiction of the Sindh High Court and Islamabad High Court, the same would prevail over the provisions of section 15 of the Code of Civil Procedure. It is now trite law that the provisions of special law always override the provisions of the general law to the extent of any conflict or inconsistency between the two. ----------
>
> ---
>
> ---
>
> ---

8. For the foregoing reasons, when there appears no mala fide and malice on the part of the Executive Committee in canceling the membership

and removing the name of the respondent No.3 from the Register, the Civil Court has no jurisdiction to entertain the suit as the High Court being Court of first instance has the jurisdiction to deal with such matters as has been provided under section 5 of the Companies Act, 2017. The learned Courts below have misconstrued law on the subject and have wrongly exercised jurisdiction vested in them.

9. So far as the case law relied upon by the learned counsel for the respondent No.3, with utmost respect, has no relevance to the peculiar facts and circumstances of the case in hand, as has been discussed above; therefore, it does not render any assistance or help to the respondent No.3's case, being distinguished one.

10. In view of the above, the constitutional petition in hand is allowed, impugned orders are set aside and the plaint in suit instituted by the respondent No.3 is ordered to be returned under Order VII, Rule 10 of the Code of Civil Procedure, 1908 for its presentation before the Court of competent jurisdiction, if desired and advised. No order as to the costs.

KMZ/L-3/L **Appeal allowed.**

2018 M L D 1215

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD ASHRAF and 3 others---Petitioners

Versus

MUHAMMAD BOOTA and 3 others---Respondents

Civil Revision No.2108 of 2009, decided on 2nd February, 2018.

(a) Limitation Act (IX of 1908)---

----Art.120---Suit for declaration---Limitation---Contention of plaintiff was that impugned sale deed in favour of defendants was against law and facts---Suit was decreed concurrently---Validity---Suit land purchased by the defendants was subsequently entered into revenue records---Present suit was filed after about twenty years while limitation for the same was six years---Nothing was on record as to why plaintiff remained mum for such a long period rather a vague plea of having cause of action accrued about one month earlier had been taken---Plaintiff having admitted the contents of sale deed, was bound to challenge the same within time---Plea of plaintiff that he was not aware of the facts was not believable---Courts below had failed to appreciate evidence on record---Material illegality and irregularity had been committed by the Courts below while passing the impugned judgments and decrees, which were set aside and suit was dismissed---Revision was allowed in circumstances.

Lal Khan (Decd.) through His LRs. v. Muhammad Yousaf (Decd.) through His LRs. and another PLD 2011 SC 657 and Muhammad Amir and others v. Mst. Beevi and others 2007 SCMR 614 rel.

(b) Civil Procedure Code (V of 1908)---

----S. 115---Revisional jurisdiction of High Court---Scope---Concurrent

findings cannot be considered as inviolable and High Court is competent to interfere if such findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous presumption of facts and consideration of inadmissible evidence.

Muhammad Sami v. Additional District Judge, Sargodha and 2 others 2007 SCMR 621; Muhammad Aslam v. Mst. Ferozi and others PLD 2001 SC 213; Barkat Ali v. Muhammad Nawaz PLD 2004 SC 489 and Dilawar Jan v. Gul Rehman and 5 others PLD 2001 SC 149 rel.

Malik Muhammad Arshad Awan and Ms. Saima Hanif Mughal for Petitioners.

Abdul Rehman Miyo for respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.---Tersely, the facts relevant are as such that respondent/plaintiff Muhammad Boota instituted a suit for declaration along with permanent injunction as a consequential relief maintaining therein that one Bashir Ahmad son of Noor Muhammad, who died some 1-1/2 years ago, was the uterine brother of the respondent/plaintiff. Hashim Bibi, the real mother of said Bashir Ahmad got divorce from her previous husband Noor Muhammad and was married to Lal Din, father of the respondent/plaintiff and he (plaintiff) was born out of the wedlock of Hashim Bibi and Lal Din. The respondent No.4/defendant No.3 (Sabran Bibi) was the widow of said Bashir Ahmad and the defendants Nos.4 to 7/the present petitioners were the step brothers and sisters of said Bashir Ahmad and they had the same father Noor Muhammad by name, while their mothers were different.

Lal Din, father of Muhammad Boota sold away 10 kanals 07 marlas land to the respondent No.1/plaintiff and the said Bashir Ahmad vide registered sale deed dated 06.09.1962 out of the land measuring 90 kanals 11 marlas bearing Khata No.23, Khatuni No.51, Khasra Nos. 1, 2, 3, 8, 9, 11 to

16, 112, 113 min, 127-13 min situated in Mauza Sanial, Tehsil Pasrur according to record of rights for the year 1990-91. Subsequently, the mutation was sanctioned on 03.08.1966 regarding the sold land measuring 10 kanals 06 marlas vide mutation No.234. About one month ago the respondent/plaintiff came to know that the said Bashir Ahmad, in the absence of the plaintiff, got 90 kanals 11 marlas land mutated in the revenue record in equal shares between the plaintiff and himself instead of the real land sold measuring 10 kanals 06 marlas; hence, the revenue entries subsequent to the sale deed dated 06.09.1962 were illegal, void and against the facts. The said Bashir Ahmad was only owner of land measuring 5 kanals 3 marlas vide registered sale deed and he had nothing to do with the rest of the land measuring 85 kanlas 8 marlas. Lal Din, the father of the plaintiff died in 1965 and the respondent/plaintiff was the only heir of his father, hence, the respondent/plaintiff was the owner of land measuring 85 kanals 8 marlas. After the death of the said Bashir Ahmad, the respondent/plaintiff got the inheritance of the deceased to the extent of 1/6, so the respondent/ plaintiff got 17 marlas of land out of the legacy of the said Bashir Ahmad as his uterine brother. Therefore, the plaintiff was now owner in possession of the land measuring 86 kanals 05 marlas while the defendants Nos.3 to 7/petitioners were entitled to the land only to the extent of 4 kanals and 6 marlas. They have nothing to do with the rest of the land. In view of his submission, the plaintiff prayed that he be declared to be owner in possession of the land measuring 86 kanals 05 marlas and further to declare that the mutation No.234 dated 03.08.1966 and entries of record of rights 1975-76 as well as the entries of record of rights till date were illegal and against the facts; as a consequential relief the defendants/petitioners be restrained from interfering in the land belonging to the respondent No.1/plaintiff measuring 86 kanals 05 marlas, perpetually.

2. The defendants Nos.1, 2 and 3 were proceeded against ex parte while the defendants Nos.4 to 7 raised legal objections upon the suit. The learned

trial Court, out of the divergent pleadings of the parties, framed issues. Both the parties led their evidence in support of their respective contentions.

The suit was decreed on 16.05.1996 and an appeal was preferred against the said judgment and decree by the present petitioners, which was accepted and case was ordered to be remanded by the learned Appellate Court vide judgment dated 19.09.1998 after framing an additional issue. However, the remand order was assailed by the decree holder/plaintiff vide C.R. No.1744/1998 before this Court, which was accepted vide order dated 07.10.2008 and the learned appellate Court was directed to dispose of the appeal. Therefore, the learned appellate Court vide impugned judgment and decree dated 17.07.2009 while deciding the appeal dismissed the same; which has culminated in filing of the civil revision in hand.

3. Learned counsel for the petitioners has argued that the impugned judgments and decrees are against law and facts of the case; that the respondent No.1 challenged mutation No.234 dated 03.08.1966 on the ground that it was illegal and inoperative, while Ex.P1, the registered sale deed was admitted by him and if the mutation and registered sale deed are put in juxtaposition, it appears that mutation is in consonance with the entries of the registered sale deed, but the learned Courts below have misread the contents of both the documents, thus, have erred in law while passing the impugned judgments and decrees. Submits that according to the averments of the sale deed whatever the property was owned by Lal Din or any property which was declared or added later on in his name was transferred to the petitioners and the respondent No.1/plaintiff in equal shares, but both the learned Courts misread this aspect. Adds that the Jamabandi had presumption of truth attached to it and same were continuously showing the ownership of the petitioners and the respondent No.1 in equal share. Further adds that the suit was badly barred by limitation because the matter in hand does not pertain to inheritance, therefore, the learned Courts below while passing the

impugned judgments and decrees have misconstrued law on the subject as Article 120 of the Limitation Act, 1908 provides six years period for assailing vires of such transaction, thus, have wrongly decided issue with regard to limitation, which has resulted in miscarriage of justice. Contends that material illegalities and irregularities have been committed while passing the impugned judgments and decrees and both the learned Courts below have travelled beyond vested jurisdiction. Thus, by allowing the civil revision in hand, the impugned judgments and decrees may be set aside, consequent whereof the suit instituted by the respondent No.1/plaintiff may be dismissed throughout with costs.

4. Naysaying the submissions made above, the learned counsel representing the respondent No.1/plaintiff while supporting the impugned judgments and decrees, which have been rendered concurrently, has argued that at this stage findings recorded by the learned Courts below on facts cannot be interfered with because the learned Courts below have minutely gone through evidence and have rightly reached to the conclusion. He has prayed for dismissal of the civil revision in hand.

5. Heard.

6. It is a settled principle that concurrent findings cannot be considered as inviolable and High Court is competent to interfere if such findings are based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous presumption of facts and consideration of inadmissible evidence; thus, the argument advanced by the learned counsel for the respondent No.1/plaintiff that this Court cannot make interference at this stage have no force and the same are discarded. Reliance is placed on Muhammad Sami v. Additional District Judge, Sargodha and 2 others (2007 SCMR 621), Muhammad Aslam v. Mst. Ferozi and others (PLD 2001 Supreme Court 213), Barkat Ali v. Muhammad Nawaz (PLD 2004 Supreme Court 489) and Dilawar Jan v. Gul Rehman and 5 others (PLD 2001

Supreme Court 149).

7. Now this Court adverts to the second question that whether the suit was barred by limitation? The present case does not pertain to inheritance, because vide registered sale deed (Ex.P1) dated 08.08.1964 the property was purchased by the petitioners and the respondent No.1/plaintiff, which was subsequently entered into mutation No.234 (Ex.P2) dated 03.08.1966, while the suit was instituted on 06.01.1993, meaning thereby after about 26 years, while Article 120 of the Limitation Act, 1908 provides six years limitation period as no specific explanation in respect of keeping mum for such a long period has been submitted, rather a vague plea that cause of action accrued about one month earlier has been taken by the respondent No.1/plaintiff. Moreover, the respondent No.1/plaintiff has admitted the contents of sale deed (Ex.P1), which is to be read harmoniously as a whole with attending circumstances giving effect to all the clauses contained in it which manifest the intention of the person who executed it, and has assailed the vires of mutation (Ex.P1), but when both the documents are read together and are put in juxtaposition, it appears that the same are in line with each other, because in sale deed (Ex.P1), Lal Din sold out his entire land present in the Khata as well as subsequently added land on equal share basis to Bashir Ahmad, the predecessor in interest of the present petitioners and the respondent No.1/plaintiff. Thus, when the position was as such, the same fact was in the knowledge and notice of the petitioners/plaintiffs, they would have challenged the entries, if not satisfied with the same, well within time, but they kept tightlipped for such a long period and all of a sudden after about 26 years they woke up from deep slumber and instituted suit. In this respect, guideline has been sought from Lal Khan (Decd.) through His LRs. v. Muhammad Yousaf (Decd.) through His LRs. and another (PLD 2011 SC 657), wherein it has invariably been held by Apex Court of the Country:-

'27. In the case in hand, a bare look at the plaint of respondent's suit

would indicate that he neither specified the date when he came about the impugned mutation nor gave any explanation tenable in law to justify condonation. In these circumstances, the findings on issue No.4 are violative of the law declared and therefore not sustainable.'

Thus, the plea that the respondent No.1/plaintiff was not aware of the facts and all of a sudden came to know about the same about one month prior to institution of the suit is also not believable in view of the facts narrated above. In a reported case titled Muhammad Amir and others v. Mst. Beevi and others (2007 SCMR 614) the August Court of the Country held:--

'14. We will like to add that the contention that the donor perhaps did not know the mutation is, in the circumstances, not believable for the reason that a landowner is required to pay a number of Government dues on each crop and it is not possible that till his death which occurred after almost 24 years of the gift Lala remained unaware of attestation of the mutation. D.W.3 had stated that after one year after the gift Muhammad Amir had taken back the land from him but after two years it was again given to him for cultivation and at that time consolidation had already taken place. Thus, according to his evidence, consolidation had taken place somewhere in 1969-70. Since the consolidation, wands are made afresh it is not possible for a land owner not to come to know of a transaction in which his property stands alienated in favour of somebody else.'

8. In addition to the above, a specific plea was taken by the present petitioners that land increased because of consolidation but this aspect has not been categorically denied by the respondent No.1/plaintiff, either by submitting rejoinder or leading evidence against it; meaning thereby the stance taken up by the petitioners has been admitted by the respondent No.1/plaintiff. Moreover, the respondent No.1/plaintiff has not led any evidence with regard to his minority at the time of attestation of mutation.

9. The crux of the above discussion is that the learned Courts below have failed to appreciate evidence on record rather misread the same and have failed to exercise vested jurisdiction in accordance with law while committing material illegality and irregularity. Thus, by placing reliance on the judgments ibid the civil revision in hand is allowed, impugned judgments and decrees are set aside, consequent thereof the suit instituted by the respondent No.1/plaintiff stands dismissed. No order as to the costs.

ZC/M-80/L **Revision allowed.**

P L D 2018 Lahore 830

Before Shahid Bilal Hassan, J

TASSADAQ NAWAZ---Petitioner

Versus

MASOOD IQBAL USMANI and others---Respondents

Writ Petition No.67546 of 2017, decided on 12th June, 2018.

Guardians and Wards Act (VIII of 1890)---

----Ss. 12 & 47---Family Courts Act (XXXV of 1964), Ss. 5, Sched. & S.14(3)---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Petition for interim custody of minors by father---Trial Court partially accepted the petition of the father allowing him to meet his minor son twice a month in Court premises---Interlocutory Order---Scope---Word "decision" used in S.14 of Family Courts Act, 1964---Scope---Question was whether enactment later in time would prevail---Petitioner/father contended that constitutional petition was maintainable as no appeal lay against interlocutory order passed under S.12 of Guardians and Wards Act, 1890---Respondent/mother contended that appeal lay before District Court as expression "a decision given" in S.14 of the Family Courts Act, 1964 did not qualify any such word as 'final'---Validity---Party, with regard to non-appealable order, had to wait till the same matured into a final order---Order under S.12 of the Guardians and Wards Act, 1890 was not appealable under S.47 of the Guardians and Wards Act, 1890 but after insertion of the word "Guardianship" in the First Schedule of the Family Courts Act, 1964, the provision of appeal was available available against an order under S.12 of the Guardians and Wards Act, 1890 before the District Court as per S.14 of the Family Courts Act, 1964---Provisions of Guardians and Wards Act, 1890 could not be read in isolation after bringing the matter pertaining to 'guardianship' under the jurisdiction of the Family Courts by the

Legislature---All matters pertaining to the guardianship would be exclusively triable by the Family Court created under Family Courts Act, 1964, which was later enactment comparing to Guardians and Wards Act, 1890 as the statute later in time would prevail---Impugned order fell within the purview of 'decision given' and was appealable under S.14 of the Family Courts Act, 1964---Impugned order passed by the Family Court was appealable before the District Court, therefore, the same could not be called into question in constitutional petition---Petitioner could prefer appeal against the impugned order, if so advised---Constitutional petition was dismissed accordingly.

Syed Saghir Ahmed Naqvi v. Province of Sindh through Chief Secretary and another 1996 SCMR 1165; Mumtaz Hussain alias Butta v. Chief Administrator of Auqaf, Punjab Lahore and another 1976 SCMR 450; Aley Nabi and others v. Chairman, Sindh Labour Court and another 1993 SCMR 328; Messrs Mehraj Flour Mills and others v. Provincial Government and others 2001 SCMR 1806; Suo Motu Case No.13 of 2007 (PLD 2008 SC 217); Mst. Zaibun Nisa v. Muhammad Mozammil PLD 1972 Kar. 410, Syed Shamim Ahmad v. Mst. Riaz Fatima PLD 1975 Kar. 448; Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others 2000 YLR 2652; Memoona Ilyas v. Additional District Judge and others 2017 CLC 1747 and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another 2018 MLD 727 ref.

Muhammad Azam Zafar Khan, Muhammad Rizwan Rasheed and Sheikh Muhammad Yar Zahoor for Petitioner.

Ch. Imtiaz Ullah Khan for Respondent No.2.

Date of hearing: 29th May, 2018.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the petitioner got married with respondent No.2 on 06.05.2011, out of the said wedlock a male child namely Muhammad Danial was born on 11.02.2012. Due to strained relations

between the petitioner and respondent No.2 divorce occurred with mutual understanding on 23.04.2012 vide an agreement. The respondent No.2 contracted second marriage with Muhammad Ikhalq on 21.06.2013. Allegedly, the respondent No.1 filed an application for his appointment as guardian of the minor namely Danial on 21.09.2015, in which he categorically stated that the minor has been residing with him since his birth and this fact has been admitted by respondent No.2 by appearing in the witness box on 09.10.2015 in that application. The petitioner submitted his detailed reply to the said guardian petition. Apart from this, the petitioner filed a guardian petition on 14.11.2015 for the custody of his son Danial under section 25 of the Guardian and Wards Act, 1890 along with petition under section 12 of the Act. The respondents Nos.1 and 2 submitted their written replies to the said petitions. The respondent No.2 filed a suit for recovery of maintenance, dower amount and dowry articles against the petitioner on 11.05.2016. The petitioner submitted his written statement to the said suit. After failure of pre-trial reconciliation proceedings, the learned trial Court consolidated that suit and guardian petition filed by the petitioner and framed consolidated issues on 29.05.2017. The learned trial Court dismissed the application under section 12 of the Act vide impugned order dated 12.06.2017, however, allowed the petitioner to meet his son only twice in a month on second and fourth Saturday of every month in the Court premises subject to payment of travelling charges Rs.300/-. Being dissatisfied the petitioner has filed the instant constitutional petition.

2. Learned counsel appearing on behalf of the respondent No.2 has challenged the maintainability of the constitutional petition in hand and has argued that against order passed on an application under section 12 of the Guardian and Wards Act, 1890, appeal lies under section 14(1)(b) of the West Pakistan Family Courts, Act, 1964 before the District Judge when the

order is passed by the Judge Family Court, because expression `a decision given' in section 14 of the Family Courts Act, 1964 does not, in any manner, qualify by any such word as 'final'. Thus, he has prayed for dismissal of the constitutional petition in hand. Reliance has been placed on Syed Shamim Ahmad v. Mst. Riaz Fatima PLD 1975 Karachi 448, Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others 2000 YLR 2652-Peshawar, Abdul Majeed v. Additional District Judge, Talagang and 2 others 2009 CLC 1143-Lahore, Memoona Ilyas v. Additional District Judge and others 2017 CLC 1747-Lahore and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another 2018 MLD 727 Sindh.

3. In response to the attack on maintainability of the constitutional petition, the learned counsel for the petitioner has argued that the word 'decision' used in section 14 of the Act is to be read in the garb of 'decree' and interlocutory order passed by the Family Judge is not appealable and only writ lies against the same, therefore, the instant constitutional petition is competent and maintainable. Relies on Syed Muhammad Raza Shah v. Syeda Salma Gilani and another PLD 1976 Lahore 1015, S. Azhar-UI-Hassan Naqvi v. Mst. Hamida Bibi and 2 others 1979 CLC 754- Lahore, Syed Maqsood Ali v. Mst. Soofia Noushaba and 2 others 1986 CLC 620-Karachi, Mst. Mahan Shabbir v. Salman Haider and others 2014 CLC 330-Islamabad and Maliha Hussain v. Additional District Judge-V and another 2017 MLD 485-Sindh. Thus, he has, while reiterating the grounds urged in the memorandum of the constitutional petition, prayed for acceptance of the same, setting of the impugned order and handing over interim custody of the minor son Danial to him.

4. Heard.

5. With regard to a non-appealable order, a full Bench of the apex Court of the country in a case reported as Syed Saghir Ahmed Naqvi v. Province of

Sindh through Chief Secretary and another (1996 SCMR 1165) has held:-

> The contention of the learned counsel for the appellant that where appeal lies only against the final order a Constitution petition challenging the interim orders can yet be maintained is erroneous. In the Lahore case PLD 1990 Lah. 352 relied upon by the learned counsel for the appellant itself where a final order was passed pending proceedings in the Constitutional jurisdiction it was held that jurisdiction stood barred final order having come in the field.
>
> It was further held:-
>
> The statute excluding a right of appeal from the interim order cannot be passed by bringing under attack such interim orders in Constitutional jurisdiction. The party affected has to wait till it matures into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders.

Similar view was adopted in a case reported as Mumtaz Hussain alias Butta v. Chief Administrator of Auqaf Punjab, Lahore and another (1976 SCMR 450) by the Hon'ble Supreme Court of Pakistan, wherein it was invariably held:-

> As the said Ordinance has taken away the right of petitioner to interim relief, learned counsel submitted that this was a ground which entitled the petitioner to prosecute a writ petition despite the pendency of the proceedings on the District Court. The argument is misconceived because the writ jurisdiction of the superior Courts cannot be invoked in aid of injustice and in order to defeat the express provisions of the statutory law.

6. The interim order passed in the instant case is under section 12 of the Guardian and Wards Act, 1890 and now it is to be seen whether the same is appealable or not. The learned Guardian Judge partially allowed the

application and the petitioner has been allowed to meet his son namely Danial only twice in a month on second and fourth Saturday of every month in the Court premises. The learned counsel for the petitioner has stressed upon filing of the constitution petition on the ground that the impugned order is not appealable as the matters pertaining to the guardianship issues shall be governed by the Family Courts Act, 1964 and under section 14(3) there is a restraint upon filing an appeal against an interim order. No doubt , order passed under section 12 of the Guardian and Wards Act, 1890 is not mentioned under appealable orders as provided within section 47 of the Act, 1890 but after insertion of the word "Guardianship" in the First Schedule of Family Courts Act, 1964, the provision of appeal is available against an order under section 12 of the Act, 1890 before the District Judge or Additional District Judge as per the provision of Section 14 of the Family Courts Act, 1964. In actual, the provisions of Guardian and Wards Act cannot be read in isolation after bringing the matter pertaining to 'guardianship' under the jurisdiction of the Family Courts by the Legislature. All the matters, now, pertaining to guardianship shall be exclusively triable by the Family Courts created under the Family Courts Act, 1964, which is a later enactment comparing to Guardian and Wards Act, 1890, because it is the settled principle of interpretation that the statute later in time shall prevail to the earlier; reliance is placed on Aley Nabi and others v. Chairman, Sindh Labour Court and another (1993 SCMR 328), Messrs Mehraj Flour Mills and others v. Provincial Government and others (2001 SCMR 1806) and Suo Motu Case No.13 of 2007 (PLD 2008 SC 217).

7. So far as the argument that section 14(3) of the Family Courts Act, 1964 bars appeal before the District Court in the matter in hand is concerned, plain reading of the language of section 14 of the Act, 1964 makes it vivid that notwithstanding anything provided in any other law for the time being in

force a decision given or a decree shall be appealable. The only exclusion is with regard to an interim order. While dealing with the similar situation earlier it was pronounced that such like order falls within the purview of 'decision given' and is appealable under section 14 of the West Pakistan Family Courts Act, 1964. In this regard reliance is placed on Mst. Zaibun Nisa v. Muhammad Mozammil PLD 1972 Karachi 410, Syed Shamim Ahmad v. Mst. Riaz Fatima PLD 1975 Karachi 448, Mst. Akbar Jan v. Mst. Bibi Nasim and 4 others 2000 YLB/2652-Peshawar, Memoona Ilyas v. Additional District Judge and others 2017 CLC 1747-Lahore and Mst. Eram Raza and 2 others v. Syed Mutaqi Muhammad Ali and another 2018 MLD 727-Sindh.

8. For the foregoing reasons, it is much clear on the subject that the impugned order passed by the learned Judge Family Court is appealable before the District Court; therefore, the same cannot be called into question in a constitutional petition. Be that as it may, I hold my hand back from entering into any discussion on merits of the case, may it prejudice case of either side, because after disposal of an application under section 12 of the Act, 1890 any of the parties of a guardianship proceedings may resort to move another application and such practice is not contrary to law as well as principle of res judicata, because orders with regard to interim custody of the minors are tentative and with the material changes in the situations, the Guardian Court can always be moved for modification of the orders so as to uphold welfare of the minors.

9. The case law relied upon by the learned counsel for the petitioner, with utmost respect to the same, has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the petitioner's case.

10. In view of the above discussion and while placing reliance on the

judgments supra, the constitutional petition in hand stands dismissed.

11. Before parting with this judgment, it is, however, observed that the petitioner may prefer appeal against the impugned order before the learned appellate Court, if so advised and desired, which shall be decided on merits in accordance with law or may repeat application under section 12 of the Act, 1890 because such practice is not contrary to law as well as principle of res judicata as interim orders relating to the custody of the minors are tentative and with the material change in the circumstances, the Guardian Court can always be moved for modification of orders to promote the minors welfare. No order as to the costs.

MQ/T-12/L **Petition dismissed.**

2018 Y L R 1313

[Lahore]

Before Shahid Bilal Hassan, J

FARZAND ALI---Petitioner

Versus

MUHAMMAD ISHAQ---Respondent

C.R. No.888 of 2011, decided on 22nd December, 2017.

(a) Punjab Pre-emption Act (IX of 1991)---

----Ss. 13, 30 & 31---Limitation Act (IX of 1908), S. 4---Suit for possession through pre-emption---Limitation---Commencement of---Talbs, performance of---Requirements---Pre-emptor in his evidence had admitted that whole story of performing Talb-i-Muwathibat was fabricated---Possession after sale was changed and vendee was in possession on the suit land---Factum of sale through registered sale deed could not be under curtain for such a long period---Courts below had failed to appreciate evidence in true perspective---Mere sending of notice of Talb-i-Ishhad was not sufficient but service of its addressee was necessary to be proved which was lacking in the present case---Service of addressee in the present case was not affected---Talb-i-Ishhad was not proved in circumstances---Limitation for a suit to enforce a right of pre-emption was four months from the date of registration of sale deed---Presumption of truth was attached to the act of Registrar until and unless same was proved otherwise---Sale deed in the present case was registered on 03-04-2001---Limitation would start from the date of registration of sale deed instead of date of knowledge---Said limitation would end on 03-08-2001 on which date District Judiciary observed summer vacation---Pre-emptor instituted suit on 01-09-2001 on the first opening day of the Courts after summer vacation which was within time---Pre-emptor had not proved performance of Talbs---Impugned judgments and decrees passed by the Courts below suffered from mis-reading and non-reading of evidence which

were set aside---Suit filed by the plaintiff was dismissed---Revision was allowed in circumstances.

[Case law referred].

(b) Civil Procedure Code (V of 1908)---

----S. 115--- Revision--- Scope--- When concurrent findings were result of mis-reading and non-reading of evidence or material irregularity then same could be interfered with in exercise of supervisory revisional jurisdiction.

(c) Limitation---

----Matter of limitation could not be left to the pleadings of the parties but it was duty of the Court to consider the same---Question of limitation being mandatory could not be waived and even if waived could be taken up by the party waiving it and the Court---Exception to said principle was that defendant in exceptional cases would be barred from raising plea of limitation on account of estoppel arising from his conduct when said plea involved an inquiry of facts.

(d) Administration of justice---

----When law required a thing to be done in a particular manner then it would be nullity in the eyes of law if the same was not performed in the very prescribed manner.

Sheikh Usman Karim ud Din and Ch. Amir Rehman for Petitioner.

Rana Muhammad Anwar for Respondent.

ORDER

SHAHID BILAL HASSAN, J.---Tersely, the respondent instituted a suit for possession through pre-emption in respect of land measuring 5 kanals 17 marlas, situated in village Samo Bala, Tehsil and District Gujranwala, contending therein that the petitioner purchased the land from Zulfiqar Ali through sale deed registered on 03.04.2001 and the respondent/plaintiff got knowledge of the sale on 26.08.2001, at evening time when he was sitting at

his Dera along with his brother Ghulam Abbas and father through Haji Muhammad and pronounced talb-e-muwathibat in presence of witnesses. Thereafter, on the same day, he along with Ghulam Abbas and said Haji Muhammad went to the petitioner and repeated his said demand of pre-emption and requested him to receive the consideration amount but the petitioner declined. It was further maintained that on 28.08.2001, the respondent prepared notice of Talb-e-Ishhad at his office situated at District Court, Gujranwala in presence of Ghulam Abbas and Haji Muhammad. Haji Muhammad affixed his thumb impression and Ghulam Abbas signed the said notice of Talb-e-Ishhad which was dispatched to the petitioner through registered A.D. It was asserted that the sale in question was held secretly in consideration of Rs.30,000/- but just to avoid pre-emption the same was mentioned as Rs.160,000/-; hence, the suit.

The defendant No.2 (Zulfiqar Ali) was proceeded against ex parte, whereas the present petitioner/defendant contested the suit by filing written statement and controverted the averments of the plaint by raising preliminary as well as factual objections. The learned trial Court framed issues; both the parties adduced their evidence, oral as well as documentary, in pro and contra. The learned trial Court after hearing the arguments vide impugned judgment and decree dated 01.07.2009 decreed the suit of respondent/plaintiff; against the said judgment and decree the petitioner preferred an appeal, which was dismissed vide impugned judgment and decree dated 08.03.2011. Being aggrieved of the said judgments and decrees, the petitioner has filed the instant civil revision.

2. Opening arguments, the learned counsel for the petitioner has submitted that the suit was barred by limitation, but, this aspect of the case was not considered by the learned Courts below; mere contention that such plea was not taken in written statement does not liberate the learned trial Court from considering the question of law i.e. limitation, rather the learned trial Court is bound to consider such question at its own. Reliance in this regard has been placed on Haji Abdullah Khan and others v. Nisar

Muhammad Khan and others (PLD 1965 Supreme Court 690), Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 Supreme Court 153), Haji Muhammad Shah v. Sher Khan and others (PLD 194 Supreme Court 294), Maulana Nur-Ul-Haq v. Ibrahim Khalil (2000 SCMR 1305), Qasim Ali v. Rehmatullah (2005 SCMR 1926), Muhammad Khan v. Muhammad Amin (decd) through L.Rs. and others 2008 SCMR 913, Mst. Kausar Parveen v. Muhammad Iqbal (PLD 2012 Supreme Court 760), Muhammad Zahid v. Dr. Muhammad Ali (PLD 2014 Supreme Court 488) and Noor Din and another v. Additional District Judge, Lahore and others (2014 SCMR 513). He submits that material contradictions in the depositions of the P.Ws. have not been considered and undue weight has been given to the evidence produced by the respondent, thus, gross misreading and non-reading of evidence has been committed which has caused miscarriage of justice. Reliance has been placed on Ghafoor Khan (deceased) through LRs. v. Israr Ahmed (2011 SCMR 1545) and Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866). He contends that the respondent has not proved performance of talbs as per mandate of law because neither the postman nor the A.D. has been produced by the respondent; therefore, the suit ought to have been dismissed instead of decreed as has been done by the learned trial Court and confirmed by the learned appellate Court. Relies on Muhammad Ramzan v. Lal Khan (1995 SCMR 1510), Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs. and others (PLD 2007 Supreme Court 302), Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105), Muhammad Sharif through Mst. Irshad Bibi and others v. Walayat Khan (2008 SCMR 248), Khan Afsar v. Afsar Khan and others (2015 SCMR 311), Muhammad Iqbal and others v. Muhammad Hanif through L.Rs. (2016 CLC Note 89-Lahore), Muhammad Akbar v. Muhammad Yaqoob and others (2016 CLC 1402-Lahore), Saeeda Ghazala and 3 others v. Tahira Naz and 10 others (2016 CLC 1438-Lahore), Amir Khan v. Muhammad Taj (2017 CLC Note 94), Haji Makhan through Legal Representatives v. Mian Muhammad Zaman

(2017 CLC Note 117), Ali Muhammad v. Malka Hussain (2017 CLC 463-Lahore) and Basharat Ali Khan v. Muhammad Akbar (2017 SCMR 309). He, by placing further reliance on Hasil and another v. Karam Hussain Shah and others (1995 SCMR 1385), Nawab Din through L.Rs. v. Faqir Sain (2007 SCMR 401) and Muhammad Akram v. Mst. Zainab Bibi (2007 SCMR 1086), the learned counsel for the petitioner has prayed for setting aside of the impugned judgments and decrees as well as dismissal of the suit.

3. Contrarily, learned counsel for the respondent has supported the impugned judgments and decrees and has further argued that the respondent has fulfilled the required Talbs in accordance with law; that the suit has been filed well within time prescribed under law, even the point of limitation has not been raised by the petitioner while submitting written statement. He adds that concurrent findings on facts have been recorded and re-appraisal of evidence cannot be made while exercising powers under section 115 of the Code of Civil Procedure, 1908. He has prayed for dismissal of the civil revision in hand. Reliance has been placed on Sultan Ali and another v. Mirza Moazzam Baig (1987 MLD 2583(1)-Karachi), Muhammad Ramzan v. Ahmad Bux and another (1991 SCMR 716), National Bank of Pakistan v. Khushal Khan (PLD 1994 Peshawar 284), Messrs Tribal Friends Co. v. Province of Balochistan (2002 SCMR 1903) and Province of Punjab through Collector and others v. Muhammad Saleem and others (PLD 2014 Supreme Court 783).

4. Heard.

5. First of all, this Court deals with the submission made by the learned counsel for the respondent to the effect that concurrent findings on facts have been recorded and re-appraisal of evidence cannot be made while exercising powers under section 115 of the Code of Civil Procedure, 1908; in this regard, it is observed that the concurrent findings when are found result of misreading and non-reading of evidence or result of material irregularity, the same can be interfered with in exercise of supervisory revisional jurisdiction.

In this regard reliance is placed on Habib Khan and others v. Mst. Bakhtmina and others (2004 SCMR 1668), Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) and Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630), wherein it has invariably been held:--

> '17. Indeed, the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case, are not open to question at the revisional stage, but where on record the position is contrary to it, then the revisional Court in exercise of its jurisdiction under section 115, C.P.C. or this Court, in exercise of jurisdiction under Article 185(3) of the Constitution, are not denuded of their respective powers to interfere and upset such findings.'

In view of the above, it is settled principle that when the concurrent findings suffer from misreading and non-reading of evidence or material illegality and irregularity, the same can be rectified by exercising supervisory jurisdiction.

6. Now, this Court adverts to the second objection with regards to limitation. It has been argued by learned counsel for the respondent that the petitioner's side has not raised objection with regard to limitation while submitting written statement, so at this stage, no such plea can be raised. In this regard, it is observed that matter of limitation cannot be left to pleadings of the parties but it is duty of the Court to consider the same and the question of limitation being mandatory cannot be waived and even if waived can be taken up by party waiving it and by Court itself, too; however, there is an exception to this that defendant, in exceptional cases, is barred from raising plea of limitation on general principle of estoppel arising from his conduct particularly if plea belatedly taken involved an inquiry on facts; but in the present case, the position is otherwise. In this regard reliance is placed on Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 Supreme Court 153) wherein it has been held:

'The question of limitation may be one of fact or of law, if former the Court is not bound to go into it unless raised by the parties, and if latter the Court is as a general rule bound to raise an decide it, although not raised by the parties.'

In this regard guidance can also be sought from Haji Muhammad Shah v. Sher Khan and others (PLD 1994 Supreme Court 294) wherein it has been held:

'With regard to limitation it is not disputed that question of limitation is a mixed question of fact and law and even if the plea of limitation is not pressed it is the duty of the Court to determine such issue.'

Thus, the objection that as the petitioner has not raised objection with regard to limitation while submitting written statement, so the same cannot be agitated at this belated stage, has no force and is misconceived, the same is discarded.

It is an admitted fact that sale in question was carried out through registered sale deed. Section 30 of the Punjab Pre-emption Act, 1991 provides:

'**30. Limitation**.---The period of limitation for a suit to enforce a right of pre-emption under this Act shall be four months from the date'

(a) of the registration of the sale deed;

(b) of the attestation of the mutation, if the sale is made otherwise than through a registered sale deed;

(c) on which the vendee takes physical possession of the property if the sale is made otherwise than through a registered sale deed or a mutation; or

(d) of knowledge by the pre-emptor, if the sale is not covered under paragraph (a) or paragraph (b) or paragraph (c).

Plain reading of the above provision of law provides that the period of

limitation for a suit to enforce a right of pre-emption under this Act shall be four months from the date of the registration of the sale deed and section 31 of the Act will not come in the way, because presumption of truth is attached to the act of the Registrar until and unless the same is proved otherwise and where a case is covered by any specific earlier clauses i.e. (a), (b) & (c) of section 30 of the Act, clause (d) cannot be resorted to. In this regard reliance is placed on Qasim Ali v. Rehmatullah (2000 SCMR 1926), Maulana Nur-Ul-Haq v. Ibrahim Khalil (2000 SCMR 1305) and Mst. Kausar Parveen v. Muhammad Iqbal (PLD 2012 Supreme Court 760).

Pursuant to the above, in the present case, it is an admitted fact that date of sale through registered sale deed is 03.04.2001, thus, in this case the date of limitation would start from date of registration of the sale deed instead of date of knowledge and when we compute the period from the said date, it ends on 03.08.2001, on which date the District Judiciary observes Summer Vacation and no regular work except urgent nature is entertained; thus, the respondent instituted the suit on 01.09.2001, on the first opening day of the Courts, after summer vacation as per mandate of section 4 of the Limitation Act, 1908, which would be considered well within time. Reliance is placed on Muhammad Ramzan v. Ahmad Bux and another (1991 SCMR 716), Messrs Tribal Friends Co. v. Province of Balochistan (2002 SCMR 1903) and Province of Punjab through Collector and others v. Muhammad Saleem and others (PLD 2014 Supreme Court 783).

7. It has been asserted and pleaded by the respondent/plaintiff that he came to know about the disputed sale deed on 26.08.2001 at evening time when he along with his brother Ghulam Abbas and father was sitting at his Dera, Haji Muhammad informed him about the disputed sale and he, then and there, made jumping demand and on the same day went to the petitioner/defendant and offered him to receive the sale actual sale price and to mutate the suit land in his favour, but on petitioner's refusal, on 28.08.2001, he sent notice Talb-e-Ishhad under attestation of witnesses. The deposition of the petitioner (P.W.3) has been supported by the P.Ws. 4 and

P.W.5, in their examination; however, during cross-examination, the respondent categorically admitted that the whole story of making Talb-e-Muwathibat is fabricated as is evident from:

Such a mistake cannot be expected from an Advocate as he knows consequences of such like narration; even this aspect of the case finds support from the cross-examination conducted on P.W.5, brother of the present respondent, who during cross-examination admitted that:

So when soon after the sale, the possession was changed and the petitioner was in possession of the same, the factum of sale, especially through registered sale deed, could not be under curtain for such a long period and the story maneuvered by the respondent, as has been admitted during cross-examination, only to exercise right of pre-emption cannot be believed. The learned Courts below have failed to appreciate evidence in true perspective and the judgments and decrees suffer from misreading and non-reading of evidence; thus, the same are reversed on this point.

8. Now comes the second Talb i.e. Talb-e-Ishhad. Mere sending of notice was not sufficient but service of its addressee was necessary to be proved, which is lacking in this case, because P.W.1 (Muhammad Shahid, Clerk Post Office) during cross-examination deposed that on

Ex.P1 address of the defendant (petitioner) is available, but Ex.P1 does not find mentioned caste and post office of the defendant. Akin to him, P.W.2 (Asif Ali, Postman), during cross-examination, deposed that he could not tell who received the registry. Meaning thereby the service of addressee of the alleged notice was not effected. Even this aspect finds support from the fact the Acknowledgement Due, showing acceptance or refusal, was not brought on record; thus, this Talb was also not proved by the respondent as per mandate of law. In this regard reliance is placed on Muhammad Bashir and others v. Abbas Ali Shah (2007 SCMR 1105), Allah Ditta through L.Rs. and others v. Muhammad Anar (2013 SCMR 866), Khan Afsar v. Afsar Khan and others (2015 SCMR 311), Muhammad Iqbal and others v. Muhammad

Hanif through L.Rs. (2016 CLC Note 89-Lahore), Muhammad Akbar v. Muhammad Yaqoob and others (2016 CLC 1402-Lahore), Saeeda Ghazala and 3 others v. Tahira Naz and 10 others (2016 CLC 1438-Lahore), Amir Khan v. Muhammad Taj (2017 CLC Note 94), Haji Makhan through Legal Representatives v. Mian Muhammad Zaman (2017 CLC Note 117), Ali Muhammad v. Malka Hussain (2017 CLC 463-Lahore) and Basharat Ali Khan v. Muhammad Akbar (2017 SCMR 309).

9. It is a settled principle of law that when law requires a thing to be done in a particular manner then it would be a nullity in the eyes of law if not performed in that very prescribed manner. In the present case, as discussed above, the respondent has not substantiated his stance and has not proved performance of talbs as per dictates and provisions of section 13(3) of the Punjab Pre-emption Act, 1991, but even then the learned Courts below have passed the impugned judgments and decrees obliging him, which has resulted in miscarriage of justice; thus, the learned Courts below have failed to exercise vested jurisdiction in accordance with law. The impugned judgments and decrees are not upto the dexterity and are not entitled to hold field further.

10. For the foregoing reasons and discussions, by placing reliance on the judgments supra as well as Muhammad Akram v. Mst. Zainab Bibi (2007 SCMR 1086), the civil revision in hand is accepted, impugned judgments and decrees dated 01.07.2009 and 08.03.2011 passed by the learned trial Court and learned Appellate Court, respectively, are set aside, consequent whereof the suit instituted by the respondent stands dismissed. No order as to the costs.

ZC/F-3/L **Revision allowed.**

2018 Y L R 2138

[Lahore]

Before Shahid Bilal Hassan, J

Mst. KHURSHID BIBI and others---Petitioners

Versus

Syed FAZAL ABBAS and others---Respondents

Civil Revision No.1505 of 2009, decided on 29th June, 2018.

(a) Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Inheritance---Co-sharers---Daughters and widow being co-sharers in the property to the extent of their shares since the beginning, their suit was not barred by limitation---When the property was devolved upon said sharers it was of no importance that their ownership was not recorded in the mutation of inheritance.

(b) Civil Procedure Code (V of 1908)---

----S.115---Revisional jurisdiction of High Court---Scope---Concurrent findings---Misreading and non-reading of evidence---Interference by High Court---Scope---When there was no misreading and non-reading of evidence, the concurrent findings on facts, howsoever erroneous, could not be interfered with.

Muhammad Farid Khan v. Muhammad Ibrahim, and others 2017 SCMR 679; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469 and Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161 rel.

Syed Kalim Ahmad Khursheed and Zaka ur Rahman for Petitioners.

Dr. Abdul Basit and Inam Ullah Khan Aziz for Respondents.

Zafar Iqbal Kalanori for Applicant.

Wasim Mumtaz Malik, Additional Advocate General with Khuram Shahzad Naqvi ADLR, Rai Ali Hasnain ADLR and Ashar Hameed Sial, SG1.

Dates of hearing: 21st and 24th May, 2018.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the respondents Nos.1 to 4 instituted a suit for declaration against the present petitioners and respondents Nos.5 to 13 by maintaining that Syed Muhammad Shah son of Syed Alam Shah breathed his last in 1932 leaving behind Nazar Hussain Shah (son), Mst. Jind Waddi (widow), Mst. Ghulam Fatima, Mst. Satbharai and Mst. Ghulam Sakina (daughters). It was alleged that the parties were governed by Sharia. Muhammad Shah procured the mutations of inheritance in respect of lands situated in villages Anara, Kot Dharama and Gangra, whereby Mst. Jind Waddi, Mst. Ghulam Fatima, Mst. Satbharai and Mst. Ghulam Sakina were excluded from inheritance. It was alleged that the plaintiffs/respondents Nos.1 to 4 came to know about the above said entries two months ago while the cause of action arose for the first time on 19.12.1933, as such, the respondents Nos.1 to 4/plaintiffs being the alleged legal heirs of Ghulam Fatima daughter of Muhammad Shah instituted the suit on 26.08.2004. It was asserted that they were owners to the extent of 1/5th share and mutation No.101522 attested on 19.12.1933 was procured through fraud and misrepresentation. The possession was also claimed by the plaintiffs.

The suit was contested by the present petitioners. It was admitted that Mst. Ghulam Sakina daughter of Muhammad Shah was alive while their version was that they were governed by custom and mutation of inheritance was sanctioned under the customary law. Out of the divergent pleadings of the parties, the learned trial court framed issues. Both the parties adduced their respective oral as well as documentary evidence. On conclusion, the learned trial Court vide impugned judgment and decree dated 30.05.2008 decreed the suit. The present petitioners feeling aggrieved went in appeal.

The learned appellate Court vide impugned judgment and decree dated 12.06.2009 decided the appeal in the terms that the suit cannot be dismissed by setting aside the impugned decree; and that impugned decree is varied in the terms that the plaintiffs and defendants Nos.13 and 14 are entitled to inheritance and that they are entitled to the entries in the Revenue Record. Hence, the instant civil revision.

2. Syed Kalim Ahmad Khursheed, Advocate, learned counsel for the petitioners has argued that the impugned judgments and decrees are against law and facts of the case on record. The parties were governed by customary law especially when Mai Jindwaddi, predecessor of Mst. Ghulam Fatima, Mst. Ghulam Sakina and Mst. Satbharai appeared before the Revenue Officer on 13.06.1933 and it was decided by the Revenue Officer that the parties were governed by the custom, but this aspect of the matter has been omitted from the consideration of the learned Courts below. Further argued that the plaintiffs were estopped to bring the suit when their predecessor-in-interest did not challenge the validity of the inheritance mutations in their life time, as such the impugned judgments and decrees have been rendered on wrong assumption of facts and law and are result of non-reading of evidence on record. Section 2(A) of the Muslim Personal Law (Shariat) Application Act is not applicable in this case, but the learned Courts below have wrongly construed law on the subject and erred in law while passing the impugned judgments and decrees. Maintained that the respondents Nos.1 to 4/plaintiffs failed to prove on record that the parties were governed by Sharia instead of Custom, thus, the impugned judgments and decrees are based on surmises and conjectures. Submitted that the findings on issues especially issue No.7-a are not sustainable under law as both the learned Courts below have omitted to consider the rulings of the Apex Court of the country. Same is the situation with issues Nos.1 to 5 and 7, which have wrongly been decided by the learned Courts below. Added that the question of limitation has not been considered, because the mutation, challenged in suit was attested in the year

1933 and the suit was instituted on 26.08.2004, which was badly barred by limitation. Contended that the learned appellate Court while deciding issue No.6 has erred in law and has wrongly relied upon case law referred under the said issue. Material illegalities and irregularities have been committed by the learned Courts below while passing the impugned judgments and decrees, which has resulted in miscarriage of justice; therefore, by allowing the civil revision in hand, the impugned judgments and decrees may be set aside; consequent whereof suit of the respondents Nos.1 to 4 may be dismissed, with costs, throughout. Relies on Ahmad Din v. Muhammad Shafi and others (PLD 1971 Supreme Court 762), Secretary to Government (West Pakistan) Now N.-W.F.P. Department of Agriculture and Forests, Peshawar and 4 others v. Kazi Abdul Kafil (PLD 1978 Supreme Court 242), Muhammad Shafi and others v. Sultan (2007 SCMR 1602), Atta Muhammad v. Maula Bakhsh, and others (2007 SCMR 1446), Muhammad Hussain, and others v. Muhammad Shafi and others (2008 SCMR 230), Gul Rehman v. Gul Nawaz Khan (2009 SCMR 589), Bashir Ahmed v. Abdul Aziz and others (2009 SCMR 1014), Ch. Muhammad Ashraf and others v. Mst. Gulshan Ara and others (2008 YLR 650-Lahore), Abdul Rashid v. Muhammad Yaseen and another (2010 SCMR 1871), Ghulam Haider and others v. Murad through Legal Representatives and others (PLD 2012 Supreme Court 501), Muhammad Rustam and another v. Mst. Makhan Jan and others 2013 SCMR 299, Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others (PLD 2014 Supreme Court 167), Dr. Muhamad Javaid Shafi v. Syed Rashid Arshad and others (PLD 2015 Supreme Court 212), Nazim-Ud-Din and others v. Sheikh Zia-Ul-Qamar and others (2016 SCMR 24) and Muhammad Azam through L.Rs. v. Abdul Qayyum Khan and 2 others (2017 CLC Note 48-Lahore).

3. On the contrary, Dr. Abdul Basit, Advocate learned counsel for the respondents has supported the impugned judgments and decrees, which have been passed concurrently, and has prayed for dismissal of the civil

revision in hand.

4. Heard.

5. It is an admitted fact that at the time of death of deceased Muhammad Shah his all three daughters namely Ghulam Sakina, Satbharai and Ghulam Fatima along with her widow Mst. Jindwadi were alive besides Nazar Hussain Shah (son) and the same was the situation when the mutation of inheritance was attested but none of them was incorporated in the inheritance mutations in dispute bearing Nos.10, 15 and 22 attested on 09.12.1933 pertaining to Mauza Anarra, Mauza Kot Dharaman and Mauza Kanghrra, respectively. It was stance of the petitioners that their family was governed by customary law but astonishingly the D.Ws. including one of the defendant No.5 namely Aamir Shah (D.W.3) admitted that both the parties belonged to the most renowned and highly respectable spiritual family of Hazrat Shah Jewna who was a saint and a strict follower of the injunctions of Holy Quran and Sunnah. Moreover, neither Hazrat Shah Jewna nor his descendants either followed any un-Islamic ritual and even they did not persuade anybody else who was spiritually related to him to follow the same and for whole of his life Hazrat Shah Jewna and his descendants always persuaded their followers and disciples to follow Quran and Sunnah in respect of all the matters of life. When all these facts had been admitted by the petitioners, how could it be said that their family was governed by customary law, rather it was established on record that the family of the parties was governed by Islamic Law, which provides that on death of a Muslim, his property devolves upon his legal heirs as per their shares ordained by Holy Quran and Muhammadan Law. Thus, it was established on record that disputed inheritance mutation was got entered with mala fide while joining hands with the revenue officer as at the time of preparation of pedigree table the daughters and widow had not been shown; thus, the observation rendered by the learned Court below especially the learned trial Court that all the practice was done only to deprive the daughters and widow of deceased Muhammad Shah from their

valuable rights collusively and it had rightly been held by the learned trial Court that all the daughters and widow of deceased Muhammad Shah were entitled to inherit his property according to their shares. In Mst. Shahro and others v. Mst. Fatima and others (PLD 1998 Supreme Court 1512), it was invariably held:--

> 'Plaintiffs being female heirs of deceased landowner could not be deprived of their right in property left by deceased by illegal mutation sanctioned at the behest of male heirs.'

In the said judgment, it was further held that:--

> 'It has been held in several decisions by this court and is now well-settled that possession of one co-sharer or co-owner is for benefit of all other co-sharers and the mere fact that mutations had been attested in favour of some of the co-sharers should not extinguish the title of the other co-sharers. It has also been held, time and again, that entries in the revenue record of rights do not create or extinguish title but are a mere evidence thereof. In Ghulam Ali's case (Supra) it had been held that adverse entries in the revenue record and non-participation in the profits in the property would not amount to ouster of the co-sharers as wrong mutation confer no right in property, the revenue record being maintained only have the purpose of ensuring realization of land revenue.'

Apart from this, in Mst. Fazal Nishan and others v. Ghulam Qadir and others (1992 SCMR 1773), the Hon'ble Supreme Court held:--

> 'Last full owner (deceased) having acquired agricultural land under custom from a Muslim prior to 15 March 1948, would be deemed to have inherited under Muslim Personal Law; his heirs after his death would inherit in accordance with Muslim Law whether they were male or female heirs.'

Same is the situation with case law reported as Mst. Ghulam Janat and others

v. Ghulam Janat through legal heirs and others (2003 SCMR 362), rather in this judgment, the Hon'ble Apex Court of the country further held:--

> 'Under section 2-A, it was declared that a male heir of deceased Muslim will be deemed to be full owner thereof meaning thereby that he shall be deemed to have inherited the property not under custom with limitations on his powers to transfer but under the Mohammadan Law, as such, he was deemed to have inherited the property under Mohammadan Law as a consequence of which he could not be held to have acquired ownership rights in the entire estate but shall have to be deemed to be the full owner to the extent of his share.'

When the daughters and widow were co-sharers in the disputed land to the extent of their share since very beginning thus their suit was not barred by limitation, especially when after death of Muhammad Shah the property was devolved upon them and it was of no importance that their ownership was not recorded in mutation of inheritance; thus, the question with regard to limitation was also rightly adjudicated and considered by the learned Courts below.

So far as the copies of mutations exhibited on record as Ex.D1 to Ex.D7 are concerned, it is suffice to observe that none of these mutations discloses that the same were attested following the customary law, thus, the same have rightly been discarded by the learned trial Court.

6. Pursuant to the above discussion, both the learned Courts have rightly evaluated evidence on record and have reached to a just conclusion, concurrently, that the plaintiffs/ respondents are entitled to inherit the land owned by Muhammad Shah deceased and when there appears no misreading and non-reading of evidence, the concurrent findings on facts, howsoever erroneous, cannot be interfered with as has been held in judgments reported as Muhammad Farid Khan v. Muhammad Ibrahim, and others (2017 SCMR 679), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161).

7. The case law relied upon by the learned counsel for the petitioners, with utmost respect to the same, has no relevance to the peculiar facts and circumstances of the case in hand, thus, it is not helpful to the petitioners' case.

8. In view of the above, the findings of the learned appellate Court that only plaintiffs and defendants Nos.13 and 14 are entitled to inheritance and they are entitled to the entries in revenue record are modified as such that Nazar Hussain Shah (son), Mst. Jind Waddi (widow), Mst. Ghulam Fatima, Mst. Satbharai and Mst. Ghulam Sakina (daughters) or their legal heirs, as the case may be, are entitled to inherit the property left by Muhammad Shah deceased.

9. During pendency of the instant civil revision, Zulfiqar Ahmad and Asim Nisar filed C.M.No.6-C of 2016 seeking their impleadment under Order I, Rule 10 of the C.P.C., claiming themselves to be bona fide purchasers with value without notice of some portion of the disputed land. The said application has been resisted by the revision petitioners. It is evident from the record the applicants namely Zulfiqar Ahmad and Asim Nisar purchased the land in dispute during pendency of the proceedings in the suit, thus, the transaction is hit by doctrine of lis pendens and the applicants are not necessary party, because they will step into the shoes of their vendors. Thus, by placing reliance on 2008 SCMR 1024 and PLD 1993 SC 292, the application bearing No.C.M.6-C of 2016 stands dismissed.

10. For the foregoing reasons, the civil revision in hand, with above said modification, stands dismissed with no order as to the costs.

SA/K-15/L **Revision dismissed.**

PLJ 2018 Lahore 1078

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD RIAZ and another--Petitioners

versus

AHMED BAKHSH and others--Respondents

C.R. No. 2124 of 2015, decided on 7.5.2018.

Oath Act, 1873 (X of 1873)--

----S. 8 to 11--Qanun-e-Shahadat Order, (10 of 1984), Art. 163--Administration of Special oath--Proceedings for offer acceptance and administration of oath--Learned trial Court has observed all formalities provided under Sections 8 to 11 of Oaths Act, 1873 and has strictly followed said provisions as is evident from proceedings conducted by it, as proceedings for offer, acceptance and administration of oath were carried on 17.07.2013, whereas learned trial Court, decided matter on 24.07.2013; during intervening period from 17.07.2013 to 24.07.2013, petitioners did not agitate matter, contending same a result of fraud and misrepresentation or of coercion but kept mum and when proceedings were finalized through impugned order and decree, petitioners woke up from deep slumber and agitated matter by filing appeal; in this case principle of approbate and reprobate fully attracts and learned appellate Court has rightly dismissed appeal. [P. 1081] A

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 163--Oath Act, 1873, Ss. 8 to 11 Special oath--Stance to take an oath in support of claim--Mutual consent--Jurisdiction--Bare reading of this provision of Law makes it vivid that an initiative has to be taken by plaintiff, who in first stance has to take an oath in support of his claim where-after on his request Court has to call upon other side to refute said statement of plaintiff on oath and it is mandatory for Court to pass any

order in light of said statements of parties; but in present case, petitioners did not make an offer for administering special oath as provided in Article 163 of Qanun-e-Shahadat Order, 1984, rather, on offer of petitioners, one Muhammad Yar witness, administered oath in light of mutual agreement of parties and said mutual consent is basic theme of above referred provisions of Oaths Act, 1873--It is held that learned counsel for petitioners could not point out any illegality or irregularity as well as wrong exercise of vested jurisdiction, alleged committed by learned Courts below while passing impugned order, judgment and decrees, warranting interference by this Court--Civil revision was dismissed. [P. 1082] B & C

1981 SCMR 162 & 1984 CLC 2658, *ref*.

Rai Muhammad Hussain Kharal, Advocate for Petitioners.

Date of hearing: 7.5.2018.

ORDER

Through the instant civil revision, the petitioners have challenged the order and decree dated 24.07.2013 passed by the learned trial Court whereby the suit for declaration filed by them against the respondents/defendants has been dismissed on the basis of special oath administered by Muhammad Yar, witness of the respondents/defendants as per offer and acceptance as well as judgment and decree dated 14.04.2015 passed by the learned Addl. District Judge, Bhalwal Camp at Kot Momin whereby the appeal preferred by the petitioners has been dismissed.

2. Heard at length and available record has been gone through.

3. Perusal of record goes to make it diaphanous on 17.07.2013, the petitioner Muhammad Riaz alongwith learned counsel for the petitioners, when the suit was fixed for evidence of the respondents/defendants, appeared before the learned trial Court and made an offer for decision of the suit on

the basis of special oath of Muhammad Yar, one of the witness of the respondents/defendants on Holy Quran, which statement was reduced into writing by the learned trial Court and that statement was thumb marked/signed by Muhammad Riaz and also by the learned counsel for the petitioners. Thereafter, Muhammad Yar, witness of the respondents/ defendants while present in the Court alongwith learned counsel for the respondents accepted the said offer and got his statement recorded, where-after in response to the same he administered special oath on Holy Quran and his statement was also recorded by the learned trial Court, who deposed *that Ghulam Muhammad, predecessor of the plaintiffs, with his free will appeared before the Revenue Officer of the area and got his statement recorded that he had sold the disputed property to Defendants No. 1 and 2 and he had received Rs. 100,000/- out of the settled amount in his presence and for remaining sale consideration he, in my presence, stated that he had received the same and had sold the land; however, remaining amount was not paid in my presence*. On such statement, Muhammad Riaz and learned counsel for the petitioners/plaintiffs got their statements recorded that suit be decided in light of the statement of Muhammad Yar, witness. After recording statements of the parties, the learned trial Court adjourned the case for further proceedings for 24.07.2013 and on the said date proceeded to dismiss the suit instituted by the petitioners/ plaintiffs. There is nothing on record to suggest that the offer for decision of the suit on special oath administered by Muhammad Yar witness was made under some coercion or compulsion by the petitioners, rather it appears that same was out of free will and consent. I would like to reproduce Sections 8 to 11 of the Oath Act, 1873, here, which are relevant to the peculiar facts and circumstances of the case in hand, which run:--

> ***"8. Power of Court to tender certain oaths.--****If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by*

persons of the race or persuasion to which he belongs and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

9. Court may ask party or witness whether be will make oath proposed by opposite Party.– *If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:*

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. Administration of oath if accepted.–*If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.*

11. Evidence conclusive as against person offering to be bound.– *The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."*

Meaning thereby the learned trial Court has observed all the formalities provided under Sections 8 to 11 of the Oaths Act, 1873 and has strictly followed the said provisions as is evident from the proceedings conducted by it, as the proceedings for offer, acceptance and administration of oath were carried on 17.07.2013, whereas the learned trial Court, decided the matter on 24.07.2013; during the intervening period from 17.07.2013 to 24.07.2013,

the petitioners did not agitate the matter, contending the same a result of fraud and misrepresentation or of coercion but kept mum and when the proceedings were finalized through the impugned order and decree, the petitioners woke up from deep slumber and agitated the matter by filing appeal; in this case principle of approbate and reprobate fully attracts and the learned appellate Court has rightly dismissed the appeal, because Article 163 of the Qanun-e-Shahadat Order, 1984 is different from the provisions of Sections 8 to 11 of the Oaths Act, 1873, as Article 163 provides:-

> ***"163. Acceptance of denial of claim on oath:*** *(1) when the plaintiff takes oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on oath.*
>
> *(2) The Court may pass such orders as to costs and other matters as it may deem fit.*
>
> *(3). Nothing in this Article applies to laws relating to the enforcement of Hudood or other criminal cases."*

Bare reading of this provision of Law makes it vivid that an initiative has to be taken by the plaintiff, who in first stance has to take an oath in support of his claim where-after on his request the Court has to call upon the other side to refute the said statement of the plaintiff on oath and it is mandatory for the Court to pass any order in the light of the said statements of the parties; but in the present case, the petitioners did not make an offer for administering special oath as provided in Article 163 of the Qanun-e-Shahadat Order, 1984, rather, on the offer of the petitioners, one Muhammad Yar witness, administered oath in the light of the mutual agreement of the parties and said mutual consent is the basic theme of above referred provisions of the Oaths Act, 1873.

Here this question also loses its significance that the petitioner Muhammad Riaz could not understand the consequences of the offer so made by him, because, if the position was as such, the matter would have

been agitated during the intervening period i.e. from 17.07.2013 to 24.07.2013, but no such exertion was made by the petitioners. Thus, after accomplishment of the process in response to the offer, the petitioners could not step-back or resile, because once an offer made by one party has been accepted by the other party and the same is acted upon, they cannot squirm/back out from the output thereof as such offer and acceptance would be an agreement of binding nature.

4. Pursuant to the above discussion, it is held that the learned counsel for the petitioners could not point out any illegality or irregularity as well as wrong exercise of vested jurisdiction, alleged committed by the learned Courts below while passing the impugned order, judgment and decrees, warranting interference by this Court. Resultantly, while placing reliance on *Attiqullah v. Kafayatullah* (1981 SCMR 162), *Nazir Ahmad v. Mahmood Ahmad and others* (1984 CLC 2658-Lahore) and *Abdul Khaliq v. Gul Faraz* (PLD 2011 Peshawar 112), the civil revision in hand being without any force and substance stands dismissed ***in limine***.

(M.M.R.) **C.R. dismissed.**

2019 C L C 252

[Lahore]

Before Shahid Bilal Hassan, J

BASHARAT AMJAD HUSSAIN and others----Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No.36483 of 2017, decided on 16th July, 2018.

Civil Procedure Code (.V of 1908)---

----S. 12(2) & O. I, R. 10---Specific Relief Act (I of 1877), S. 12---Transfer of Property Act (IV of 1882), S. 52---Application under S.12(2), C.P.C.---Framing of issues before decision of such application---Necessity---Sale of suit property during pendency of suit---Lis pendens, principle of---Applicability---Fraud and misrepresentation---Proof---Decree, setting aside of---Decision of application under S. 12 (2), C.P.C. without framing of issues---Effect---Applicant during pendency of suit purchased suit property and moved application for impleadment of defendant but same was dismissed---Suit was decreed and sale deed was executed in favour of decree-holder/petitioner---Applicant applied for setting aside of said decree but same was dismissed by the Trial Court---Appellate Court remanded the matter to decide the same after framing of issues and recording evidence of the parties---Validity---Suit was filed on 20-04-1990 and applicant purchased suit property on 19-05-2003---Principle of lis pendens was applicable and applicant could not be impleaded as party in the main suit---Court was not bound to frame issues in each and every case before deciding an application under S.12(2), C.P.C. rather it could decide such application without framing of issues while considering material made available on the record---Mere allegation

of fraud and misrepresentation was not sufficient to undo the judgment of a court of competent jurisdiction---Party who had asserted fraud and misrepresentation had to bring on record cogent and plausible material in order to substantiate his such plea which was lacking in the present case---Revisional Court had erred in law while setting aside order passed by the Trial Court thus had committed illegality culminating into passing of an order which was perverse and perfunctory---Impugned order could not be allowed to hold the field further---High Court was competent to exercise its constitutional jurisdiction in circumstances---Impugned order passed by the Revisional Court was set aside and that of Trial Court was restored---Constitutional petition was allowed accordingly.

Muhammad Arshad Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Bagh Ali v. Mst. Ayesha and others 2013 SCMR 551 ref.

Town Committee, Sujawal v. Hakim Murtaza Khan and others 1989 MLD 1955; Abdul Sattar and 6 others v. Ibrahim and others PLD 1992 Kar. 323; Ghulam Muhammad v. M. Ahmad Khan and 6 others 1993 SCMR 662; Sunni View Cooperative Housing Society v. Irshad Hussain and others 1993 CLC 2336; Lah. Mst. Saadat-ur-Rehman through Legal Representative v. Muhammad Zaarat Khan and 3 others PLD 1998 Pesh. 1; Muhammad Hussain v. Mst. Razia Bibi and others 1999 MLD 3030; Lah. Fazal Karim through Legal Heirs and others v. Muhammad Afzal through Legal Heirs and others PLD 2003 SC 818; Allah Ditta v. Ahmed Ali Shah and others 2003 SCMR 1202; Akbar Ali and 4 others v. District Judge, Faisalabad and 4 others PLD 2006 Lah. 600; Pir Muhammad Azam v. Pir Azizullah and 2 others 2011 CLC 355; Sheikh Waseem v. Dr. Mrs. Tahira Hussain through Legal Heirs and others 2012

CLC 1019; Muhammad Ramzan v. Muhammad Akbar Bhatti and others 2013 CLC 1561 and Haji Farman Ullah v. Latif-ur-Rehman 2015 SCMR 1708 distinguished.

Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others 1999 SCMR 2874; Khadim Hussain v. Abid Hussain and others PLD 2009 SC 419; Muhammad Arshad Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905; Nazir Ahmed v. Muhammad Sharif and others 2001 SCMR 46; Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255; Muhammad Akbar v. Muhammad Malik and another PLD 2005 Lah. 1; Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others 2012 SCMR 983 and Bagh Ali v. Mst. Ayesha and others 2013 SCMR 551 rel.

Ahmad Waheed Khan for Petitioners.

Muhammad Ramzan Chaudhry and Sami-uz-Zameer Drrani for Respondents.

Dates of hearing: 5th and 6th July, 2018.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the petitioner No.1 entered into an agreement of sale dated 30.08.1989 with late S.M. Akbar with regard to the suit property but said S.M. Akbar failed to honour his commitments made in the agreement of sale, so the petitioner No.1 instituted a suit for specific performance on 20.04.1990, which was, after prolonged litigation, decreed vide judgment and decree dated 09.03.2006 with respect to undisputed 3 Kanals of plot. However, during pendency of the suit S.M. Akbar died and his legal heirs i.e. respondents Nos. 3 to 9 were impleaded. The judgment debtors when failed to execute the sale deed in favour of petitioner No.1, the execution proceedings were

initiated. The respondent No.2 filed an application under section 12(2) C.P.C. challenging the judgment and decree dated 09.03.2006 with the assertion that S.M. Akbar had sold his 3 Kanal plot boundaries whereof were described in document No.5259, Bahi No.1, volume No.3731 registered with Sub-Registrar on 25.04.1963 and which was mentioned in the agreement of sale dated 30.08.1989 executed in favour of the petitioner No.1, on the basis of sale deed bearing document No.2728, Bahi No.1, volume No.2155 dated 06.04.1995 to Mst. Shama Khalid/respondent No.11. Said Mst. Shama Khalid firstly entered into an agreement of sale of the said plot in favour of respondent No.2 on 07.11.2002 and thereafter executed sale deed bearing No.6352, Bahi No.1, volume No.201 on 19.05.2003. The said application under section 12(2) C.P.C. was duly contested by the present petitioner. The learned Trial Court vide order dated 06.05.2010 dismissed the said application after appreciating all facts and circumstances.

It is necessary to mention here that when disputed plot was sold to Mst. Shama Khalid/respondent No.11, the petitioner No.1 filed an application under Order I rule 10, C.P.C. for her impleadment as defendant but the learned Trial Court dismissed the said application on 05.09.1997 by holding that the sale during pendency of suit was hit by the principle of lis pendens. A civil revision bearing No.1510 of 1997 was filed before this Court and subsequently on 29.07.2003, the same was withdrawn as the learned Trial Court was restrained from passing final judgment till the disposal of the said civil revision.

2. Respondent No.2 being aggrieved of the order dated 06.05.2010 filed a civil revision bearing No.1758 of 2010 before this Court but due to increase in pecuniary jurisdiction, it was sent to the learned District Judge, concerned and same was entrusted to the learned Addl. District

Judge, who vide impugned order dated 15.03.2017 accepted the civil revision and set aside the order dated 06.05.2010 passed by the learned Civil Judge; case was remanded to the learned Trial Court for deciding the application under section 12(2) read with section 151, C.P.C. after framing of issues and recording evidence of the parties in accordance with law. Hence, the instant constitutional petition.

3. Main thrust of the learned counsel for the petitioners is that the principle of lis pendens is attracted with full force in the instant case because the purchase made initially by respondent No.11 and then by respondent No.2 took place during pendency of the suit, which was instituted on 24.04.1990 and was decided on 09.03.2006, therefore neither the respondent No.11 nor respondent No.2 were necessary or proper party. Reliance has been placed on Muhammad Arshad Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905). He further argues that in such an eventuality the application under section 12(2) read with section 151, C.P.C. was even not maintainable and same ought to have been dismissed at its inception by the learned Trial Court, which needful was done as there was no need to frame issues and record evidence but the learned Revisional Court by travelling beyond vested jurisdiction, without appreciating facts and circumstances of the case, mere on the basis of surmises and conjectures and wrong assumptions and presumptions, without appreciating law on the subject has illegally passed the impugned order, which is nothing but a mockery of law and can only be termed as an order passed to frustrate the ends of justice. He further argues that even the application under section 12(2), C.P.C. filed by respondent No.2 is lacking the ingredients necessary for filing such application, which was rightly dismissed by the learned Trial Court but the learned Revisional Court in allowing the revision petition and remanding the matter to the learned Trial Court for its regular trial has

committed serious illegality and misreading of record, which has resulted in miscarriage of justice. Lastly, he has prayed that by allowing the instant constitutional petition, the impugned order dated 15.03.2017 may be set aside and order passed by the learned Trial Court dated 06.05.2010, whereby application under section 12(2), C.P.C. may be restored with costs. Apart from above judgment, further reliance has been placed on Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others (2012 SCMR 983) and Bagh Ali v. Mst. Ayesha and others (2013 SCMR 551).

4. Contrarily, learned counsel appearing on behalf of respondent No.2 has argued that respondent No.2 is a bona fide purchaser with consideration without notice. He has been condemned unheard while defiling principle of audi alteram partem; he has vested interests as he has paid a huge amount for purchase of the disputed plot, therefore the learned Revisional Court after appreciating facts and circumstances of the case has rightly reached to the conclusion that the application under section 12(2), C.P.C. should be decided after framing of issues and recording evidence of the parties, because plea of fraud could only be ascertained and determined through evidence. He has prayed for dismissal of the constitutional petition in hand. Relies on Town Committee, Sujawal v. Hakim Murtaza Khan and others (1989 MLD 1955-Karachi), Abdul Sattar and 6 others v. Ibrahim and others (PLD 1992 Karachi 323), Ghulam Muhammad v. M. Ahmad Khan and 6 others (1993 SCMR 662), Sunni View Cooperative Housing Society v. Irshad Hussain and others (1993 CLC 2336-Lahore), Mst. Saadat-Ur-Rehman through Legal Representative v. Muhammad Zaarat Khan and 3 others (PLD 1998 Peshawar 1), Muhammad Hussain v. Mst. Razia Bibi and others (1999 MLD 3030-Lahore), Fazal Karim through Legal Heirs and others v. Muhammad Afzal through Legal Heirs and others (PLD 2003 Supreme Court 818), Allah Ditta v. Ahmed Ali Shah and others (2003 SCMR

1202), Akbar Ali and 4 others v. District Judge, Faisalabad and 4 others (PLD 2006 Lahore 600), Pir Muhammad Azam v. Pir Azizullah and 2 others (2011 CLC 355-Peshawar), Sheikh Waseem v. Dr. Mrs. Tahira Hussain through Legal Heirs and others (2012 CLC 1019-Sindh), Muhammad Ramzan v. Muhammad Akbar Bhatti and others (2013 CLC 1561-Sindh) and Haji Farman Ullah v. Latif-Ur-Rehman (2015 SCMR 1708).

5. Heard.

6. The main question, which requires determination by this Court, is the competency of application under section 12(2) of the Code of Civil Procedure, 1908 (the Code) before the learned Civil Judge. Section 12(2) of the Code provides three perspectives for challenging the validity of a judgment, decree or order which reads infra:-

"12 Bar to further suit. - (1)----------

---

(2). Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."

The respondent No.2, in the present case, was indebted to prove the existence of any of the supra narrated pre-requisites i.e. fraud, misrepresentation and want of jurisdiction. In the present case, the suit was instituted on 20.04.1990, so at the time of institution of the suit, the respondent No.2 was not in screen because he allegedly purchased the suit property on 19.05.2003, that too, from Mst. Shama Khalid who allegedly purchased the same on 06.04.1995 as has been stated above, so in this scenario, there appears no question of his impleadment in the suit,

because section 52 of the Transfer of Property Act, 1882 is much clear on the subject and in this case principle of lis pendens fully attracts. For ready reference section 52 of the Act ibid with explanation is reproduced infra:

> "During the pendency of in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> Explanation:---For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force." (Underline for emphasis)

Though respondent No.2 had pleaded ignorance of knowledge and asserted that being bona fide purchaser, his rights were protected but in such like case principle of caveat emptor was equally applicable and when litigation in respect of the suit property was pending, such transfer was to be governed by the provisions of section 52 of the Act ibid which lays down that a transaction made during pendency of litigation cannot affect

the rights of any other party to the litigation, which may be acquired by it under the decree passed by the Court; reliance can safely be placed on Industrial Development Bank of Pakistan through Deputy Chief Manager v. Saadi Asmatullah and others (1999 SCMR 2874) and Khadim Hussain v. Abid Hussain and others (PLD 2009 Supreme Court 419) as well as the celebrated judgment reported as Muhammad Arshad Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905).

7. So far as the contention of the learned counsel for the respondent No.2 that application under section 12(2) of the Code cannot be dismissed without framing of issue and recording of evidence is concerned, it is observed that the same is misconceived and ill-founded. It is not a universal principle that in each and every case, the Court is bound to frame issues before deciding the fate of an application under section 12(2) of the Code, rather the Court can decide such like application without framing of issues while considering the material made available on the record. In this regard reliance is placed on Nazir Ahmed v. Muhammad Sharif and others (2001 SCMR 46), wherein it has invariability been held:-

> '8. In Amiran Bibi and others v. Muhammad Ramzan and others (1999 SCMR 1334) this Court has laid down the rule which reads as follows:-
>
> "it is not the requirement of law that the Court while dealing with the allegation under section 12(2), C.P.C. must in all circumstances frame issues, record evidence and follow procedure prescribed for decision of the suit. The question whether or not the issues are to be formulated and evidence of the parties recorded in resolving the allegations of fraud and misrepresentation, depends upon the facts of each case in consonance with justice."

It was further observed that:-

"the impugned order was passed by the learned Judge in Chambers after hearing both the parties but the petitioners never sought permission to produce evidence in support of their application nor there was any prayer for formulation of issue at the time of hearing of the application."

The above principle has again been reaffirmed by this Court in Mrs. Amina Bibi through General Attorney v. Nasrullah and others 2000 SCMR 296 in the following terms:-

"While dealing with allegations under section 12(2), C.P.C., it was not incumbent upon Court that it must, in all circumstances, frame issues, record evidence and follow procedure prescribed for the suit."

8. In addition to the above, mere allegation of fraud and misrepresentation is not sufficient to overdo the judgment of a Court of competent jurisdiction, rather the person who asserts fraud and misrepresentation has to bring on record cogent and plausible material in order to substantiate his such plea, which is lacking in this case. Perusal of the impugned order dated 15.03.2017 passed by the learned Addl. District Judge, Lahore goes to evince that while setting aside the order dated 06.05.2010 the main stress of the learned Revisional Court was on the point that learned trial Court decided the fate of the application without framing of issues. In this regard, suffice to say that in view of the principles laid down in the judgments referred to above there is no need of framing of issues in each and every case for deciding an application under section 12(2) of the Code, so interference in the order of the learned Civil Judge by the learned Revisional Court was not warranted. As such, the learned Revisional Court has erred in law while setting aside the well-reasoned order passed by the learned Civil Judge dismissing the application under section 12(2) of the Code.

9. Apart from this, the order of the revisional Court is not sacrosanct which cannot be interfered with in any of the circumstances. Whenever, it is established that the revisional court has committed some illegality culminating into passing of an order which is perverse and perfunctory, this Court is competent to exercise its constitutional jurisdiction as ordained in Article 199 of the Islamic Republic of Pakistan, 1973; in this regard guideline can be sought from Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 Supreme Court 255) and Muhammad Akbar v. Muhammad Malik and another (PLD 2005 Lahore 1), wherein it was held:-

> "7. Anyhow, as regards the objections of the learned counsel for the respondent, suffice it to say that, it is not an absolute rule that an order passed in revision, cannot at all be interfered in the Constitutional jurisdiction. In my view, where the justice demands, an exception can be taken thereto and the High Court besides Article 199 of the Constitution, can invoke its supervisory jurisdiction under Article 203 of the Constitution, to correct the orders, when are perverse, fraudulent, erroneous and have been passed either by express violation or the ignorance of any provision of law. Because the order of the learned revisional Court is of the above nature, therefore, I deem it proper to correct it in my Constitutional jurisdiction .."

10. For the foregoing reasons, it has been established that the learned revisional Court has failed to exercise vested jurisdiction as per mandate of law and by travelling beyond the vested jurisdiction has passed the impugned order illegally, which cannot be allowed to hold field further.

11. As far as, the case law relied upon by the learned counsel for the respondent No.2 is concerned, with utmost respect to the same, it has no

relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the respondent No.2's case.

13(sic) In view of the above, while placing reliance on judgments supra as well as judgments reported as Muhammad Arshad Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 SC 905), Mst. Tabassum Shaheen v. Mst. Uzma Rahat and others (2012 SCMR 983) and Bagh Ali v. Mst. Ayesha and others (2013 SCMR 551), the constitutional petition in hand is allowed, consequent whereof the impugned order dated 15.03.2017 passed by the learned Revisional Court is set aside and the order dated 06.05.2010 passed by the learned Civil Judge dismissing application under section 12(2) of the Code filed by the respondent No.2 stands restored, with no order as to the costs.

ZC/B-8/L **Petition allowed.**

2019 C L C 1333

[Lahore]

Before Shahid Bilal Hassan, J

Mrs. AASIA RIZVI and others----Petitioners

Versus

Mian MUHAMMAD ASLAM and others----Respondents

Civil Revision No.192956 of 2018, heard on 24th January, 2019.

(a) Civil Procedure Code (V of 1908)---

----O. VII, R. 11 & O. VI, Rr. 16 & 17---Suit for partition---Partial rejection of plaint---Scope---Striking out pleadings---Scope---Impleading of necessary party---Principles---Purchase of land from joint Khata---Possession subject to partition of property in question---One of the defendants moved application for rejection of plaint to his extent which was accepted---Contention of plaintiff was that partial rejection of plaint could not be made---Validity---Plaint could not be rejected in piecemeal as concept of partial rejection of plaint was inapplicable to the provisions of O. VII, R. 11, C.P.C.---Pleadings could be partially struck out but plaint could not be rejected partially---Plaintiff in a suit was dominus litis who might choose persons against whom he did intend to litigate and he could not be compelled to sue a person against whom he did not seek any relief---If a necessary party was not impleaded then suit itself was liable to be dismissed---Defendant who had been deleted from the suit had purchased the suit land---If a person did purchase a land out of joint holding then he would become a co-owner in the holding along with other co-owners---If the purchaser had obtained any land from joint holding then such possession would be subject to the partition of Khata---Courts below while passing the impugned orders had erred in law and Committed material illegality---Impugned orders passed by the Courts below were set aside---Application filed under O. VII, R. 11, C.P.C. would be deemed to have been dismissed---Revision was allowed, in circumstances.

Aroma Travel Services (Pvt.) Ltd. through Director and 4 others v. Faisal Al Abdullah Al Faisal Al-Saud and 20 others 2017 YLR 1579; Mian Muhammad Akram and others v. Muhammad Rafi 1989 CLC 15; Mst. Shahnaz Begum v. Mst. Zulaikha Bibi and 5 others 1989 CLC 1526; Asgharali v. P.K. Shahani and 2 others 1992 CLC 2282; Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited PLD 2012 SC 247 and Haji Abdul Mateen Akhundzada and another v. District Coordination Officer/Deputy Commissioner, Quetta and 5 others PLD 2012 Bal. 154 distinguished.

E.F.U. General Insurance Company Ltd. through Branch Manager and 2 others v. Zahidjee Textile Mills Ltd. through Assistant Director and another 2005 CLC 848; Maxim Advertising Co. (Pvt.) Limited v. Messrs Z&J Hygenic Products and 2 others 2007 YLR 2252; Mst. Nishat Ishaq v. Amjad Khan and 2 others 2014 CLC 71; Mst. Jan Ara and others v. Muhammad Zubair and others 2012 CLC 1630; Muhammad Ali Shaikh v. Sui Southern Gas Company Ltd. through Managing Director and 3 others 2014 YLR 444; Nanik Ram and others v. Ghulam Akbar and 9 others 2016 MLD 52; Feroze Din and another v. Master Muhammad Sher Khan 1979 CLC 742; Moinuddin Paracha and 6 others v. Sirajuddin Paracha and 23 others 1993 CLC 1606; Valuegold Limited and 2 others v. United Bank Limited PLD 1999 Kar. 1; E.F.U. General Insurance Company Ltd. through Branch Manager and 2 others v. Zahidjee Textile Mills Ltd. through Assistant Director and another 2005 CLC 848; Maxim Advertising Co. (Pvt.) Limited v. Messrs Z&J Hygenic Products and 2 others 2007 YLR 2252; Mst. Nishat Ishaq v. Amjad Khan and 2 others 2014 CLC 71; Ata Ullah and 6 others v. Sana Ullah and 5 others PLD 2009 Kar. 38; Muhammad Afzal v. Muhammad Manzoor and 40 others 2013 YLR 85; Muhammad Khalid Pervez Ramay v. Talat Mehmood PLJ 2015 Lah. 425 and Mariam Bibi and 7 others v. Hakam Ali and others 2017 CLC Note 223, p. 250 rel.

(b) Civil Procedure Code (V of 1908)---

----O. VII, R. 11---Plaint, rejection of---Scope---Plaint could not be rejected in piecemeal.

(c) Civil Procedure Code (V of 1908)---

----O. I, R. 10 (2)---'Necessary party'---Meaning.

(d) Civil Procedure Code (V of 1908)---

----O. I, R. 10 (2)---'Proper party'---Meaning.

Messrs Abid Saqi and Sheikh Usman Karim-ud-Din for Petitioners.

Ahmad Waheed Khan and Ali Masood Hayat for Respondents.

Date of hearing: 24th January, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, the petitioners instituted a suit for partition originally against the respondents Nos.1 to 25 being co-owners of an undivided joint holding. During pendency of the suit, the petitioners filed an application for impleading respondent No.26 as defendant in the suit which application was allowed vide order dated 06.12.2012 and the petitioners submitted amended plaint after impleading the respondent No.26 in the array of defendants. On 08.01.2014, the respondent No.26 filed his written statement and joined the proceedings. On 20.01.2015, the respondent No.26 filed an application for rejection of plaint under Order VII, Rule 11 of the C.P.C. only to the extent of respondent No.26; the said application was duly resisted by the present petitioners. The learned trial Court vide impugned order dated 07.01.2016 accepted the said application and rejected the plaint of the petitioners' suit to the extent of respondent No.26, however, the suit to the extent of remaining defendants is still pending. The petitioners being aggrieved of the said order assailed the same by filing of an appeal but the same was dismissed vide impugned judgment dated 02.02.2018; hence, the instant

civil revision.

2. Voicing in favour of the grounds urged in the memorandum of appeal, the learned counsel for the petitioners has argued that it is settled principle of law that a plaint of the suit may only be rejected in totality and the concept of partial and piecemeal rejection of the plaint is alien to law on the subject; thus, the learned trial Court has committed material illegality by rejecting the plaint only to the extent of respondent No.26 and the learned appellate Court without applying independent judicious mind and without lawful justification dittoed the said order. Added that the findings recorded by the learned appellate Court that the respondent No.26 purchased specific land with specific boundaries and as such he is not co-owner in the joint holding with other co-owners is against the revenue record because the property purchased by the respondent No.26 falls in Khata No.127, which, according to revenue record has not been partitioned yet, thus, the impugned order and judgment are against the settled principle that if a person purchases a land out of joint holding, he becomes a co-owner in the holding along with other co-owners and if the purchaser gets the possession of any land from the joint holding, such possession is always subject to the partition of Khata. Submitted that the learned Courts below ignored the order of Hon'ble Supreme Court of Pakistan dated 07.05.2004 passed in C.P.No.234-L/2002 wherein the Hon'ble Supreme Court while upholding the orders passed by this Court in C.R.No.1205/D/1993 dated 15.10.2001 as well as the decree of learned Additional District Judge, Lahore dated 25.02.1993 held that the plaintiff in that suit (from whom the petitioners' predecessor has derived his title) has the right to file a suit for partition of joint holding against other co-owners including defendants Nos.18 to 25 (from whom the respondent No.26 allegedly purchased the land in the year 1993); that the learned Courts below have committed material illegalities and irregularities while passing the impugned order and judgment, because the petitioners and respondent No.26 are co-owners in Khata No.127 and hence, the respondent No.26 is a necessary party to the suit for partition. Moreover,

while deciding application under Order VII, Rule 11 of the C.P.C. only the contents of the plaint are considered and when the same do not disclose any cause of action or barred by any law, the plaint can be rejected, but here the case is otherwise, because partition has been prayed in respect of Khatas Nos.127 to 132 and the respondent No.26 purchased the land from Khata No.127. As such, the learned Courts below have travelled beyond the vested jurisdiction and have erred in law while passing the impugned order and judgment, which are not sustainable in the eye of law. It has been further argued that at the most, the learned trial Court ought to have given opportunity to the petitioner to amend the plaint, rather to knock him out on the basis of technicality; thus, by allowing the civil revision in hand, the same may be set aside, consequent whereof the application filed by the respondent No.26 may be dismissed. Relies on E.F.U. General Insurance Company Ltd. through Branch Manager and 2 others v. Zahidjee Textile Mills Ltd. through Assistant Director and another (2005 CLC 848-Lahore), Maxim Advertising Co. (Pvt.) Limited v. Messrs Z&J Hygenic Products and 2 others (2007 YLR 2252-Karachi), Mst. Nishat Ishaq v. Amjad Khan and 2 others (2014 CLC 71-Sindh), Mst. Jan Ara and others v. Muhammad Zubair and others (2012 CLC 1630-Peshawar), Muhammad Ali Shaikh v. Sui Southern Gas Company Ltd. through Managing Director and 3 others (2014 YLR 444 Sindh), Nanik Ram and others v. Ghulam Akbar and 9 others (2016 MLD 52 Sindh) and Aroma Travel Services (Pvt.) Ltd. through Director and 4 others v. Faisal Al Abdullah Al Faisal Al-Saud and 20 others (2017 YLR 1579-Sindh).

3. Naysaying the above submissions, learned counsel representing the respondents has supported the impugned order and judgment and has prayed for dismissal of the civil revision in hand. Relies on Mian Muhammad Akram and others v. Muhammad Rafi (1989 CLC 15-Lahore), Mst. Shahnaz Begum v. Mst. Zulaikha Bibi and 5 others (1989 CLC 1526-Lahore), Asgharali v. P.K. Shahani and 2 others (1992 CLC 2282-Karachi), Haji Abdul Karim and others v. Messrs Florida Builders

(Pvt.) Limited (PLD 2012 Supreme Court 247) and Haji Abdul Mateen Akhundzada and another v. District Coordination Officer/Deputy Commissioner, Quetta and 5 others (PLD 2012 Balochistan 154).

4. I have given due consideration to the arguments advanced by the learned counsel for the parties and have gone through the record with their able assistance minutely.

5. It is a settled principle, by now, that a plaint cannot be rejected in piecemeal as the concept of partial rejection of plaint is inapplicable to the provisions of Order VII, Rule 11 of the Code of Civil Procedure, 1908 and it would have its limited application with regards to the provisions of Order VI, Rules 16 and 17 of the C.P.C. There could be partial striking out of pleadings but not rejection of plaint, because partial acceptance or rejection of plaint is always considered as improper exercise of jurisdiction. In this regard reliance is placed on Feroze Din and another v. Master Muhammad Sher Khan (1979 CLC 742), Moinuddin Paracha and 6 others v. Sirajuddin Paracha and 23 others (1993 CLC 1606), Valuegold Limited and 2 others v. United Bank Limited (PLD 1999 Karachi 1), E.F.U. General Insurance Company Ltd. through Branch Manager and 2 others v. Zahidjee Textile Mills Ltd. through Assistant Director and another (2005 CLC 848-Lahore), Maxim Advertising Co. (Pvt.) Limited v. Messrs Z&J Hygenic Products and 2 others (2007 YLR 2252-Karachi), Mst. Nishat Ishaq v. Amjad Khan and 2 others (2014 CLC 71-Sindh), Ata Ullah and 6 others v. Sana Ullah and 5 others (PLD 2009 Karachi 38), Muhammad Afzal v. Muhammad Manzoor and 40 others (2013 YLR 85), Muhammad Khalid Pervez Ramay v. Talat Mehmood (PLJ 2015 Lahore 425), Mariam Bibi and 7 others v. Hakam Ali and others (2017 CLC Note 223, p. 250).

Moreover, in Mst. Jan Ara and others v. Muhammad Zubair and others (2012 CLC 1630-Peshawar), it was observed that:-

> '9. Since rule 11 of Order ibid being penal provision, to have construed strictly by considering the statement made in the plaint in

the light of law applicable thereto and not to be resorted to unless, conditions for exercise of such drastic powers are fully satisfied. Moreso, if the plaint is suffering from any legal infirmity entailing its rejection, in such eventuality, the plaintiff has the right to amend his plaint for the clarity of vagueness appearing in the plaint, so that it may conform with the relevant provisions of law, as the cherished goal of law is that the matter to be decided on its merits so that the litigants are not to be deprived of their valuable rights in the wake of their technical knockout. The Court is empowered that instead of rejecting the plaint may act under Order VI, Rule 17, C.P.C. to allow the amendment of pleadings, inasmuch as under this rule the Court is not precluded from allowing an opportunity to remove the defect. Thus, this ground cannot be availed by the petitioners defendants for rejection of the plaint.'

Similar view has been adopted and observed in Muhammad Ali Shaikh v. Sui Southern Gas Company Ltd. through Managing Director and 3 others (2014 YLR 444-Sindh), Nanik Ram and others v. Ghulam Akbar and 9 others (2016 MLD 52-Sindh).

6. In view of the above, if the petitioners could not mention the relief against the respondent No.26, despite the fact that he purchased the land from respondents-defendants Nos.18 to 25 and that property was not partitioned as yet, because nothing in support of any partition occurred, privately or through Court, was brought on record, the learned trial Court ought to have invoked jurisdiction under Order VI, Rule 16 and 17 of the Code of Civil Procedure, 1908 and would have granted opportunity to the petitioners to amend the plaint in this respect instead of rejecting the plaint in piecemeal to the extent of respondent No.26, which is not permissible as has been observed above.

7. In addition to supra, plaintiff in a suit is dominus litis who may choose persons against whom he wishes to litigate and he cannot be compelled to sue a person against whom he does not seek any relief and

necessary party is a person who must be joined as party and in whose absence no effective decree can be passed at all by the Court. If a necessary party is not impleaded the suit itself is liable to be dismissed. Proper party is a person whose presence enables court to completely, effectively and adequately adjudicate upon all matters in dispute in suit, though he is not a person in favour of or against whom decree is to be passed. In the present case, as has been referred above, the respondent No.26 purchased the land from respondents Nos.18 to 25 and there is nothing on record to suggest that the land was partitioned prior to his purchase and it is settled principle of law that if a person purchases a land out of joint holding, he becomes a co-owner in the holding along with other co-owners and if the purchaser gets the possession of any land from the joint holding, such possession is always subject to the partition of Khata.

8. So far as the case law relied upon by the learned counsel for the respondents is concerned, with utmost respect, the same has no relevance to the facts and circumstances of the case in hand; thus, it is not helpful to the respondents.

9. The crux of the above discussion is that the learned Courts below while passing the impugned order and judgment have erred in law and have deviated from the settled principles of law, thus, have committed material illegality and irregularity as well as have travelled beyond the vested jurisdiction; thus, the impugned order and judgment cannot be allowed to hold field further. Resultantly, the civil revision in hand is accepted, impugned order and judgment are set aside, consequent whereof application under Order VII, Rule 11 of C.P.C. filed by the respondent No.26 will be deemed to have been dismissed.

10. No order as to the costs.

ZC/A-14/L **Revision allowed.**

2019 C L C 1432

[Lahore]

Before Shahid Bilal Hassan, J

GULZAR AHMAD----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No. 257462 of 2018, decided on 20th February, 2018.

Civil Procedure Code (V of 1908) ---

----O. VI, R. 17---Suit for declaration---Amendment in pleadings---Scope---Defendant moved application for amendment in the written statement which was dismissed---Validity---Alternate and inconsistent pleas could be taken but contradictory and mutually destructive pleas could not be raised through amendment in the pleadings---Defendant through proposed amendment had sought elaboration of facts in detail which was not destructive or contradictory to the plea already raised and even same was not inconsistent or alternate plea---Courts below had failed to appreciate the facts in true perspective while passing the impugned orders---Mere delay in filing such application was not a good ground for refusal of the same---No amendment was to be allowed which might introduce a new and changed case/claim---Proposed amendment in the pleadings was not to change the nature, complexion and cause of action of the suit---Parties could not lead evidence beyond their pleadings and if provisions of O. VI, R. 17, C.P.C. were not construed and exercised liberally, it would jeopardize the case of the parties---Proposed amendment, in the present case, did not change the complexion and nature of written statement---Impugned orders passed by the Courts below were set aside and application for amendment filed by the defendant was accepted---Constitutional petition was allowed accordingly.

Hokum Dad and 4 others v. Mst. Roqiyya Begum and 5 others

1996 CLC 1920; Mubarik Ali Shah and another v. Nazir Ahmad Shah and 10 others 2000 CLC 892; C.A. Waheed v. Aftab Ahmad Mian and another PLD 2006 Lah. 68; Haji Sultan Abdul Majeed (decd) through Mehboob Sultan and Habib Sultan and others v. Mst. Shamim Akhtar (decd) through Mah Jabeen and others 2018 SCMR 82 and Lahore Development Authority and others v. Sultan Ahmed and another 2007 SCMR 1682 rel.

Misbah Ud Din Khan for Petitioner.

Seerat Hussain Naqvi for Respondents Nos.3 to 10.

Naseem Akhtar Respondent No.3 in Person.

ORDER

SHAHID BILAL HASSAN, J.----Through the instant constitutional petition, the petitioner has called into question the order dated 15.02.2018 passed by the learned trial Court and order dated 07.06.2018 passed by the learned Revisional Court, whereby application of the petitioner under Order VI, Rule 17 of the Code of Civil Procedure, 1908, seeking amendment in the written statement, filed in a suit for declaration with consequential relief, instituted by the respondent No.3 and appeal thereof were dismissed, respectively.

2. Learned counsel for the petitioner has argued that the impugned orders are against law and facts of the case; both the Courts have erred in law by holding that through proposed amendment the complexion and nature of the suit would change; that through the proposed amendment petitioner wants to elaborate the fact of sale and mode through which the petitioner purchased the disputed house and the petitioner already disclosed the factum of entering into agreement with the father of the respondents Nos.3 to 10 in his written statement and also relied upon the document while submitting list of reliance under Order VII, Rule 14 of the C.P.C.; that it is well settled law that in order to resolve the real controversy between the parties and to advance the ends of justice, even

alternative plea could be allowed or new ground could be allowed. The impugned orders have been passed without application of independent judicious mind; the same are based on sheer misreading and non-reading as well as mis-interpretation of facts and record. Adds that both the learned Courts below have failed to exercise vested jurisdiction as per mandate of law; hence, the impugned orders being not sustainable in the eye of law may be set aside by allowing the constitutional petition in hand and application under Order VI, Rule 17 of the C.P.C. seeking amendment in the written statement may be accepted. Relies on Hokum Dad and 4 others v. Mst. Roqiyya Begum and 5 others (1996 CLC 1920), Mubarik Ali Shah and another v. Nazir Ahmad Shah and 10 others (2000 CLC 892 Lahore) and C.A. Waheed v. Aftab Ahmad Mian and another (PLD 2006 Lahore 68).

3. Naysaying the above submissions, learned counsel for the respondents Nos.3 to 10 has supported the impugned orders and has prayed for dismissal of the constitutional petition in hand.

4. Heard.

5. It is settled principle of law, by now, that an alternative or inconsistent plea can be taken but contradictory and mutually destructive pleas cannot be raised. In this regard this Court is guided by the recent esteemed judgment of the Hon'ble Supreme Court of Pakistan reported as Haji Sultan Abdul Majeed (decd) through Mehboob Sultan and Habib Sultan and others v. Mst. Shamim Akhtar (decd) through Mah Jabeen and others (2018 SCMR 82) wherein it has invariably been held:-

> 'When a plea in the alternative can naturally arise and can co-exist with the main plea, which was not taken in the plaint at the time of filing of the suit then such a plea can be introduced by seeking amendment in the pleadings. To hold this view, we are fortified by the judgment of this Court passed in the case of Nazir Hussain Rizvi v. Zahoor Ahmad (PLD 2005 SC 787) wherein it was held as

under:-

"6. There is no cavil with the proposition that the proposed amendment can neither change the complexion of the suit nor introduce a new cause of action. "No amendment will be allowed where its effect would be to convert the character of the suit." Shahswar v. Najmaul Hassan 1981 SCMR 730, Khudeja v. Jahangir Khan 1971 SCMR 395, Atlantic Steamer's Supply Co. v. M.V. Titisee PLD 1993 SC 88 and more so the fundamental character of the suit including the subject-matter and cause of action cannot be allowed to be substituted. "(Ghulam Bibi v. Sarsa Khan PLD 1985 SC 345, Ghulab v. Fazal Illahi PLD 1955 Lah. 26). It is, however, to be kept in view that subject to certain exceptions "even alternative and inconsistent pleas may be allowed to be raised by way of amendment." (Ghulam Ali v. Pakistan PLD 1960 Kar. 581, Alauddin v. Central Exchange Bank Limited (PLD 1960 Lah. 446) "or a new ground of claim can be introduced because merely introduction of fresh matter cannot alter the nature of the suit and leave ought not be refused in such cases." (Muhammad Essa v. Hasseena Begum 1989 SCMR 476). A line of distinction is to be drawn between 'an alternative case' and 'an inconsistent case' which are neither synonymous nor interchangeable. A similar proposition was examined in case Budho v. Ghulam Shah (PLD 1963 SC 553) wherein it, was held that no two facts can be said to be inconsistent if both could have happened and the test of inconsistency is that a plain which contains both cannot be verified as true but a party can put forward more than one source of his right or defence in which case he is pleading in the alternative. The judicial consensus seems to be that an alternative or inconsistent plea can be raised but contradictory and mutually destructive pleas cannot be taken."

6. Now, when we consider and look on the proposed amendment, on

the said ratio, and read the same with the actual written statement, it appears that the petitioner has already taken the stance he purchased the disputed property from the father of the respondents Nos.3 to 10 on 13.04.2000 through a written agreement and the agreement dated 13.04.2000 has also been relied upon while submitting list of reliance under Order VII, Rule 14 of the C.P.C. Now through proposed amendment he only wants to elaborate the said fact in detail, which is not destructive or contradictory to the already taken plea and even the same is not inconsistent or alternative plea, rather the fact already mentioned in the written statement, as stated above, has been elaborated in the proposed amendment. As such, the learned Courts below have failed to appreciate the facts in true perspective while passing the impugned orders.

7. In addition to the above, mere delay in filing such like applications is not a good ground for refusal of the same, rather the essence of the ratio of above said celebrated judgment is that the proposed amendment may not introduce a new and changed case/claim and it would not likely change the nature, complexion and cause of action of the suit, but in the present case, as has been stated above, the position is otherwise. Allowing or refusing to allow amendment of pleadings is an act, which goes to the root of the case, because the parties cannot lead evidence beyond their pleadings and if the provisions of Order VI, Rule 17 of the Code of Civil Procedure, 1908 are not construed and exercised liberally, it would jeopardize case of the parties; in this regard reliance is placed on Lahore Development Authority and others v. Sultan Ahmed and another (2007 SCMR 1682), wherein it has been held:-

> '6. Allowing or refusing to allow amendment of pleadings is an act, which hits at the root of the attack or defence of a party, as the case may be. The parties cannot lead evidence beyond their pleadings and hence it affects the production of evidence as well. Ultimately, the case of a party, refused amendment in genuine cases, is most likely to be seriously jeopardized. Thus, the question

of amendment in hand was not of such an interlocutory nature, which could subsequently, be rectified at the time of final decision of case. While declining to interfere on such grounds, the learned High Court has fallen into material irregularity.'

8. So far as the arguments that the proposed amendments are based on mala fide intention, I am not in agreement with the learned counsel for the respondent on the same, rather as has been discussed above, the proposed amendment is nothing but an elaboration of the already pleaded facts; it does not change the complexion and nature. Providing open ground to both the parties to play on the same is the myth of law, which is based on principle of audi alteram partem.

9. For the foregoing reasons, while placing reliance on the judgment supra as well as Hokum Dad and 4 others v. Mst. Roqiyya Begum and 5 others (1996 CLC 1920), Mubarik Ali Shah and another v. Nazir Ahmad Shah and 10 others (2000 CLC 892-Lahore) and C.A. Waheed v. Aftab Ahmad Mian and another (PLD 2006 Lahore 68), the constitutional petition in hand is allowed, impugned orders are set aside, consequent whereof the application under Order VI, Rule 17 of the C.P.C., filed by the petitioner is accepted. No order as to the costs.

ZC/G-4/L **Petition allowed.**

2019 C L C 1693

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

Haji ABDUL MAJEED & CO. through Managing Partner----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE BUREWALA DISTRICT VEHARI and 10 others----Respondents

W.P. No. 16661 of 2018, decided on 12th November, 2018.

(a) Specific Relief Act (I of 1877)---

----S.12---Qanun-e-Shahadat (10 of 1984), Art. 84---Suit for specific performance---Comparison of signature---Scope---Application for sending signatures of defendant to fingerprint expert for comparison---Trial Court and Revisional Court concurrently dismissed the application---Validity---Revisional Court had redressed the grievance of the petitioner by directing the Trial Court to compare the signatures of defendant and then decide the contention of the petitioner after recording reasons---No illegality or irregularity was committed by the courts below---Writ petition was dismissed in limine.

Syed Sharif ul Hassan through L.Rs. v. Hafiz Muhammad Amin and others 2012 SCMR 1258 distinguished.

(b) Constitution of Pakistan---

----Art.199---Constitutional jurisdiction---Scope---High Court while exercising constitutional jurisdiction has to see whether the lower court has exercised jurisdiction vested in it, in a proper way or not---Order or judgment called into question need not be interfered with when the same is found to have been exercised in proper way, without committing any illegality or irregularity.

(c) Qanun-e-Shahadat (10 of 1984)---

----Art.61---Opinion of handwriting expert---Scope---Report of handwriting expert on its own cannot be made basis to discard the direct evidence---When direct evidence is available, there is no need of expert

opinion, which otherwise is nothing but confirmatory and explanatory to direct evidence.

Qazi Abdul Ali and others v. Khawaja Aftab Ahmad 2015 SCMR 284 ref.

(d) Qanun-e-Shahadat (10 of 1984)---

----Art.59---Opinion of handwriting expert---Scope---Expert opinion is not binding upon the Court.

Mrs. Perin J Dinshaw v. Mubarak Ali and another YLR 2016 Lah. 251 rel.

(e) Qanun-e-Shahadat (10 of 1984)---

----Art.84---Comparison of signature with admitted or proved signatures---Scope---Article 84 of Qanun-e-Shahadat, 1984 empowers the court to compare the signatures or thumb impression of any person by itself.

(f) Constitution of Pakistan---

----Art.199---Civil Procedure Code (V of 1908), S. 115---Constitutional jurisdiction---Scope---Revisional order, being passed in exercise of jurisdiction vested in court, cannot be challenged in writ petition.

Mian Muhammad Hafiz and others v. Aziz Ahmad and others 1980 SCMR 557; Muhammad Khan and 6 others v. Mst. Ghulam Fatima and 12 others 1991 SCMR 970 and Muhammad Yousaf v. Manzoor Ahmad and another PLD 2006 Lah. 738 ref.

Muhammad Masood Bilal for Petitioner.

Date of hearing: 12th November, 2018.

JUDGMENT

SHAHID BILAL HASSAN, J.----During proceedings of a suit for specific performance instituted by the petitioner/plaintiff, the present petitioner filed an application for sending signatures of the Respondent No. 4 to the finger print expert for comparison, which was duly contested by the respondents/defendants. The learned trial Court vide impugned order dated 2.3.2018 dismissed the said application. The petitioner being aggrieved of said order filed a civil revision before the learned Revisional

Court, but the same was also disposed of with certain directions to the learned trial Court vide impugned order dated 17.09.2018. Feeling aggrieved by the impugned orders, now the instant writ petition has been filed by the petitioner.

2. The grounds urged in the writ petition have been reiterated during the course of arguments by the learned counsel for the petitioner and prayer for setting aside of the impugned orders while allowing the writ petition in hand has been made; it has further been prayed that application for comparison of the signatures of Respondent No. 4 may be accepted. Relies on Syed Sharif Ul Hassan through L.Rs. v. Hafiz Muhammad Amin and others (2012 SCMR 1258).

3. Heard.

4. Exercising extraordinary constitutional jurisdiction, the Court has only to see whether the lower Court has exercised jurisdiction vested in it in a proper way or not and when same is found to have been exercised in a proper way, without committing any illegality or irregularity, the order or judgment called into question needs not to be interfered with. In the present case, it appears that both the learned Courts below have exercised vested jurisdiction in a judicious way keeping in view law on the subject because it is settled principle of law that report of handwriting expert on its own cannot be made basis to discard the direct evidence and when direct evidence is available, there is no need of expert opinion, which otherwise is nothing but confirmatory and explanatory to direct evidence, as has been held in Qazi Abdul Ali and others v. Khawaja Aftab Ahmad (2015 SCMR 284). Moreover, the expert report is not binding upon the Court as has been held in Mrs. Perin J Dinshaw v. Mubarak Ali and another 2016 YLR 251 Lahore; the relevant extract is:

> Even the report of Expert is an opinion under the law and it is not binding upon the Court. Undoubtedly, the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof, as the opinion of Handwriting Expert is a very weak type of evidence and the Expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence

cannot be given preference where confidence inspiring evidence is available. Light can be taken from the judgment of august Supreme Court of Pakistan reported as "2006 SCMR 193 (Mst. Saadat Sultan and others v. Muhammad Zahur Khan, and others)".

Apart from the above, it is evident from order of the learned Revisional Court that grievance of the petitioner has been redressed by observing that, .. . with the direction to the learned trial Court to consider the signatures of Defendant No. 2 who has denied the same over vouchers Mark-A and Cheque No. 8186289 bearing Account No. 1626 Exh.P5 and then decide the contention of the petitioner separately after recording its reasons on the basis of which the Court has considered the same as true or false as the case may be. Article 84 of the Qanun-e-Shahadat Order, 1984 empowers the Court to compare the signatures or thumb impression of any person and by giving specific direction to the learned trial Court, the learned Revisional Court has already protected the rights of the petitioner. Therefore, no Illegality and irregularity to have been committed by the learned Courts below, warranting interference by this Court in exercise of extraordinary writ jurisdiction, is evident on record. Even the revisional order, in civil litigation, passed in exercise of jurisdiction vested in a Court, cannot be challenged in writ petition. In this regard reliance is placed on Mian Muhammad Hafiz and others v. Aziz Ahmad and others 1980 SCMR 557, Muhammad Khan and 6 others v. Mst. Ghulam Fatima and 12 others 1991 SCMR 970 and Muhammad Yousaf v. Manzoor Ahmad and another PLD 2006 Lahore 738.

5. Case law relied upon by the learned counsel for the petitioner, with utmost respect, has no relevance to the peculiar facts and circumstances of the case in hand; therefore, it does not render any assistance or help to the petitioner's case or enhance the cause of the petitioner.

6. For the foregoing reasons, the instant writ petition being without any force and substance stands dismissed in limine.

SA/A-46/L **Petition dismissed.**

2019 C L C 1866

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

MUHAMMAD ZAFAR IQBAL----Petitioner

Versus

HAMEEDA NAZ alias HAMEEDA KHANUM and 4 others----Respondents

Civil Revision No.1472 of 2018, decided on 15th November, 2018.

Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance of contract---Non-payment of balance sale consideration---Effect---Trial Court while deciding the application for temporary injunction directed the plaintiff to deposit the balance sale consideration within thirty days otherwise suit would be dismissed---Contention of plaintiff was that condition for depositing the remaining sale consideration was illegal---Validity---Trial Court in a suit for specific performance was bound to consider the sale agreement at the very inception and if any amount was outstanding against the plaintiff, Court must order for its deposit in the Court within the time period so granted---Plaintiff, in the present suit, at the time of filing the same did not deposit the remaining sale consideration to show his bona fide and willingness to perform his part of agreement---Plaintiff instead of complying with the order of Trial Court for deposit of balance sale consideration assailed the same in appeal---Object for direction to deposit the balance sale consideration in the Court was to examine the bona fide of the purchaser for obtaining a decree for specific performance---Non-deposit of balance sale consideration would raise adverse presumption against the plaintiff that he was not serious in performing his part of agreement or in pursuing his remedy of specific performance

consequently disentitling him to decree for specific performance---Plaintiff before the cutoff date did not issue notice to the defendant with regard to fulfillment of her part of agreement and his willing to perform his part which showed that he was not serious in performing his part of agreement---Party seeking a remedy for specific performance was bound to apply the Court for depositing the balance sale consideration and any contumacious / omission in this regard would entail dismissal of the suit---No such steps had been taken by the plaintiff in the present suit rather plaintiff lingered on despite of balance sale consideration and kept on disobeying such order---Suit of plaintiff was liable to be dismissed---Revision was dismissed accordingly.

Messrs Bin Bak Industries (Pvt.) Ltd. and another v. Friends Associates (Regd.) and others 2003 SCMR 238 and Altaf Hussain Qamar and 2 others v. Imran Rasool and 5 others 2011 CLC 1891. distinguished.

Malik Imam Bukhsh v. Mohammad Boota (Deceased) through L.Rs. 2017 SCMR 516; Adil Tiwana and others v. Shaukat Ullah Khan Bangash 2015 SCMR 828; Messrs Bin Bak Industries (Pvt.) Ltd. and another v. Friends Associates (Regd.) and others 2003 SCMR 238 and Rabnawaz and 13 others v. Mustaqeem Khan and 14 others 1999 SCMR 1362 rel.

Chaudhry Abdul Razzaq for Petitioner.

ORDER

SHAHID BILAL HASSAN, J.----The petitioner/plaintiffs instituted a suit for specific performance of agreement to sell dated 02.10.2013 along with perpetual injunction with regard to the suit property fully mentioned in the paragraphs Nos.1 and 2 of the plaint, against the respondents. Initially, the respondents/defendants were proceeded against ex-parte vide order dated 09.09.2014, but the respondents/defendants Nos.2 to 5 filed application for setting aside of the ex-parte proceedings on 10.02.2015,

which was accepted on 27.05.2016. The suit was duly contested by the respondents Nos.2 to 5 while submitting written statement and written reply. Again on 08.03.2017, the respondents Nos.2 to 5 were proceeded against ex-parte, who submitted application for setting aside of the same on 21.03.2017, which was duly resisted by the present petitioner; however, the same was allowed on the statement of the learned counsel for the petitioner subject to cost of Rs.1000/- on 16.01.2018. Vide impugned order dated 06.06.2018, the learned trial Court while dismissing application for grant of temporary injunction directed the petitioner/plaintiff to deposit the remaining consideration of Rs.33,00,000/- within 30 days, otherwise suit would be dismissed. Feeling aggrieved of the said order, the present petitioner preferred an appeal, but remained unsuccessful vide impugned judgment dated 25.10.2018, which has culminated in filing of the civil revision in hand.

2. Avows that learned subordinate Courts while passing the impugned orders have failed to appraise the facts and circumstances of the case with independent judicious mind and the same are not speaking orders, against the mandate of section 24-A of the General Clauses Act, 1897; that the learned trial Court while deciding application for grant of temporary injunction has illegally imposed condition for depositing the remaining consideration of Rs.33,00,000/- within 30 days otherwise suit will be dismissed, such condition cannot be imposed because if the petitioner/plaintiff fails to deposit the amount, only the fate of application for grant of temporary injunction will be decided, hence, the impugned order has been passed in excess of jurisdiction. Adds that when the possession of the suit property is not with the petitioner, order for depositing the remaining sale consideration is uncalled for. Contends that the impugned order and judgment are result of wrong application of law on the subject. Maintains that learned appellate Court has also failed to play the role of custodian of the rights of the parties by stating in para

No.8 of the impugned judgment that petitioner/plaintiff should have complied with the order passed by the learned trial Court for payment of remaining sale consideration to discharge his obligation, by completely ignoring the non-fulfillment of the obligation by respondent/defendant No.1, who with mala fide intention, violating the terms of agreement, transferred the property in the name of defendants/respondents Nos.2 to 5. All the ingredients for grant of temporary injunction lean in favour of the petitioner; hence, the application ought to have been graced with acceptance instead of dismissing the same. As such, material illegalities and irregularities have been committed by the learned subordinate Courts, which has resulted in miscarriage of justice; thus, by allowing the civil revision in hand, the impugned order and judgment may be set aside, consequent whereof application for grant of temporary injunction may be accepted and direction for deposit of the remaining sale consideration may also be declared null and void. Relies on Messrs Bin Bak Industries (Pvt.) Ltd. and another v. Friends Associates (Regd.) and others (2003 SCMR 238) and Altaf Hussain Qamar and 2 others v. Imran Rasool and 5 others (2011 CLC 1891 Lahore).

3. Heard.

4. Considering the arguments and perusing the record made available, it is observed that in such like suits, under the enlightened principles of justice, it is bounden duty of the learned trial Court to consider the agreement to sell at the inception and if any amount is found outstanding against the plaintiff, it must order for its deposit in the Court within the time period so granted. In this regard reliance is placed on Malik Imam Bukhsh v. Mohammad Boota (Deceased) through L.Rs. (2017 SCMR 516). In the present case, the cutoff date was 05.12.2013 but the petitioner at the time of filing the suit on 18.12.2013 did not, in order to show his bona fide and willingness to perform his part of agreement,

deposit the alleged remaining sale consideration in the learned trial Court but he did not pose his such gesture and even when the learned trial Court ordered as such, he, on 09.07.2018, firstly filed written application for extension of time to submit the remaining consideration amount, and 15 days extension was granted to him, but instead of complying with the order of the learned trial Court, he assailed the order dated 06.06.2018 in appeal. When such a case was brought before the Hon'ble Supreme Court reported as Adil Tiwana and others v. Shaukat Ullah Khan Bangash (2015 SCMR 828), it was invariably held that:-

> 'The fact remains that the respondent, who was obliged to make payment of the balance sum of Rs.90,00,000/- by 31-12.1995, had failed to fulfil this material obligation until after the judgment of the High Court rendered on 4.4.2013. It would, in our opinion, be highly unfair and inequitable if the respondent is to be granted discretionary relief in the foregoing circumstances, which show failure on his part to make payment or comply with Court orders in spite of the extreme indulgence shown to him by the Court.'

Even in the said celebrated judgment it has been held that:-

> 'We may also add at this stage that the remedy by way of specific performance is equitable and it is not obligatory on the Court to grant such a relief merely because it is lawful to do so. Section 22 of the Specific Relief Act expressly stipulates so. It is axiomatic that one who seeks equity must do equity. In the present case all equities are squarely in favour of the appellants/defendants and stacked high against the respondent/ plaintiff. This evident from his conduct and is a significant additional reason why the suit filed by the respondent/plaintiff seeking discretionary equitable relief must be dismissed.'

In addition to the above, in the present case, the petitioner failed to satisfy

the learned trial Court regarding grant of temporary injunction in his favour, so the same was dismissed, because the possession of the suit property is not with the petitioner/plaintiff and he has allegedly paid a tweak of sale consideration and a huge amount of the same is yet to be paid, which has been ordered to be deposited in the learned trial Court but he did not comply with the same. Usually, in such like cases temporary injunction is granted so that the subject matter (disputed property) remain intact and ultimately could be transferred to a successful party in a litigation and one of the main objects for giving directions to deposit the balance sale consideration in the Court is to see the bona fide of the purchaser, who knocks the door of Court for obtaining a decree for Specific Performance of agreement against the vendor(s); the balance amount so deposited is usually invested in some profit bearing schemes, enabling the vendor/defendant to get an increased amount as sale consideration, having an element of compensation for the time consumed in litigation, inter alia, considering the inflationary trends and in case a purchaser or plaintiff remains unsuccessful, the deposited amount, keeping in view the facts/record of the case, can be returned back to him with accruals in order to safeguard his interest. Thus, non-deposit of balance sale consideration raises a legitimate adverse presumption against the petitioner/plaintiff that he is not serious in performing his part of the agreement or in pursuing his remedy of specific performance, consequently, disentitling him to a decree for specific performance of agreement.

Apart from the above, the petitioner/plaintiff, before the cutoff date, did not issue notice to the respondent/defendant No.1 regarding fulfillment of her part of agreement and his willingness to perform his part of agreement, which shows that he was and is not serious in performing his part of agreement. For a party seeking a remedy of specific performance, it is mandatory that he should apply to the Court for

depositing the balance amount and any contumacious/omission in this regard entails in dismissal of the suit or decretal of the suit, if it is filed by the other side. In the present case, no such exertion was made by the petitioner/plaintiff, rather when the Court ordered him to deposit the balance consideration, he firstly lingered on the matter and requested for extension of time, which was granted, but later on he agitated the order through appeal and when failed to get favourable decision, filed the instant civil revision and contumaciously kept on disobeying all such orders.

5. Another factor in this case is that in plaint the petitioner has pleaded that after entering into alleged agreement to sell and its attestation by the Notary Public on 02.10.2013, the possession of the disputed property was handed over to him, but while agitating the order dated 06.06.2018 passed by the learned trial Court in appeal, he averred that possession of the disputed property was with the respondents/defendants Nos.2 to 5 and same is the situation in the present civil revision; in such a scenario, there remains no justifiable reason with the present petitioner for defying the Court's orders by not depositing the balance sale consideration.

6. The case law relied upon by the learned counsel for the petitioner, with utmost respect to the same, has no relevance to the peculiar facts and circumstances of the case in hand, because in Altaf Hussain Qamar and 2 others' case the temporary injunction was granted with a condition to deposit balance consideration amount and failure to deposit the same would result into dismissal of the suit, which ought not have been ordered, but in the present case the application for grant of temporary injunction has been dismissed, issues were framed and thereafter the learned trial Court ordered, in second part of the impugned order, to deposit the sale consideration amount within 30 days otherwise suit will

be dismissed; thus, the said part would be considered as an independent order, which was mandatory in the light of supra mentioned judgment reported as Malik Imam Bukhsh v. Mohammad Boota (Deceased) through L.Rs. (2017 SCMR 516); same was the situation in Messrs Bin Bak Industries (Pvt.) Ltd. and another v. Friends Associates (Regd.) and others (2003 SCMR 238); thus, both being on distinguished premises are not helpful to the petitioner's case.

7. The above portrayal and discussion lead me to the conclusion that one who seeks equity must also do equity, which is not depicting on the part of the petitioner/plaintiff; thus, by placing reliance on the judgments supra and Rabnawaz and 13 others v. Mustaqeem Khan and 14 others (1999 SCMR 1362), the civil revision in hand as well as the suit instituted by the present petitioner/plaintiff along with all pending application(s), stands dismissed. Copy of the judgment be transmitted to the learned trial Court for further proceedings.

ZC/M-66/L **Revision dismissed.**

2019 C L D 1056

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan and Faisal Zaman Khan, JJ

FATIMA ENTERPRISES LIMITED through Chief Executive/Authorized Signatory and 4 others---Appellants

Versus

ALLIED BANK LIMITED through Branch Manager---Respondent

R.F.A. No. 146 of 2017, decided on 27th March, 2019.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 22---Limitation Act (IX of 1908), Ss. 3 & 5---Appeal under S. 22, Financial Institutions (Recovery of Finances) Ordinance, 2001---Limitation---Condonation of delay---Applicability of S. 5 of the Limitation Act, 1908 to appeal filed under S. 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Scope---Any appeal filed under a particular law would only be entertained beyond period of limitation and delay condoned, if S. 5 of the Limitation Act, 1908 was made applicable through an enactment otherwise, S. 3 of the Limitation Act, 1908 would become applicable and such an appeal would be dismissed---While Limitation Act, 1908 had been made applicable to proceedings before Banking Court, however the same had not been made applicable to appeals filed under S. 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and therefore, there existed no provision under the Limitation Act, 1908 whereby delay in such an appeal would be condoned---Period of Limitation prescribed under the Financial Institutions (Recovery of Finances) Ordinance, 2001 would prevail and any appeal preferred beyond limitation would not be entertained by court and delay in the same could not be condoned.

(b) Limitation---

----Principles---Condonation of delay---Scope---Delay of each and every day which was caused in availing a remedy was to be explained and even a

void order had to be assailed within the period of limitation prescribed under the law.

Asghar Leghari for Appellants.

Muhammad Saleem Iqbal for Respondent-Bank.

ORDER

C.M. No. 828-C of 2018

This is an application under section 5 of the Limitation Act, 1908 (ACT) for seeking condonation of delay in filing the Regular First Appeal.

2. At the outset of hearing, learned counsel for the applicants has been confronted with the fact that present application is not maintainable in view of the fact that section 5 of the Limitation Act, 1908 (Act) is not applicable to section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (Ordinance), therefore, any delay in filing an appeal under section 22 of the Ordinance beyond the prescribed period of limitation cannot be condoned.

3. Replying to the above, learned counsel for the applicants submits that on 21.03.2017 the case was heard by the learned Banking Judge and the judgment was reserved and in view of the fact that no intimation was sent to the applicants qua decision of the suit, therefore, as and when applicant came to know about the decision, they promptly applied for the certified copies and after obtaining the same filed the appeal therefore the appeal is within time and as abundant caution this application has been filed.

4. Arguments heard. Record perused.

5. For analyzing the afore-noted issue, it is imperative to reproduce section 5 of the Act, which reads as under:

"5. Extension of period in certain cases. Any appeal or application for a revision or a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section."

(emphasis supplied)

6. A perusal of the afore-noted provision reveals that any appeal filed under a particular law will only be entertained beyond the period of limitation and the delay can be condoned, provided this Section is made applicable (to the Act/Ordinance under which the appeal has been filed) through an enactment, otherwise Section 3 of the Act will come into motion and the appeal filed beyond the period of limitation has to be dismissed.

7. A bare reading of the Ordinance would show that although Act has been made applicable to the proceedings before the Banking Court, however, the same has not been made applicable to the appellate Court as defined in section 22 of the Ordinance, therefore there is no provision in the Act to empower the appellate Court to condone the delay of to entertain an appeal under Section 22 of the Ordinance, beyond the prescribed period of limitation.

8. Keeping in view the above circumstances, since a period of 30 days has been prescribed in section 22 of the Ordinance to file an appeal, therefore, in view of section 29 of the Act, the period of limitation prescribed under the Ordinance would prevail and any appeal preferred beyond that period of limitation will not be entertained by any court and delay if any caused in filing the same cannot be condoned.

9. Even otherwise, perusal of the record would show that impugned judgment and decree was passed on 21.03.2017 (the day it was heard as the judgment was never reserved), whereafter, on 08.04.2017 certified copy was applied, which was prepared on 25.04.2017 and was received by the applicants on 27.04.2017, whereafter, the appeal was filed on 23.05.2017 i.e. beyond the period of limitation.

10. It is rudimentary principle of law that delay of each and every day, which is caused in availing a remedy, is to be explained. For reference

reliance can be placed on Lal Khan through legal heirs v. Muhammad Yousaf through legal heirs (PLD 2011 SC 657), Qaisar Mushtaq Ahmad v. Controller of Examination and others (PLD 2011 SC 174), Muhammad Amjad v. Senior Superintendent of Police (Operations), Lahore and others (2010 PLC (C.S.) 838) and The Province of the Punjab through the Secretary, Services and General Administration, Lahore v. Syed Muhammad Ashraf [1973 SCMR 304].

11. It has also been settled by the superior courts that even a void order has to be assailed within the period of limitation prescribed under the law. Reliance in this regard can be placed on Ghulam Hussain Ramzan Ali v. Collector of Customs (Preventive), Karachi (2015 PTD 107), Ghulam Hussain Ramzan Ali v. Collector of Customs (Preventive), Karachi (2014 SCMR 1594), Gen. (R.) Parvez Musharraf v. Nadeem Ahmed, (Advocate) and another (PLD 2014 SC 585) and Messrs Blue Star Spinning Mills Ltd. v. Collector of Sales Tax and others (2013 SCMR 587).

12. So far as the contention of the learned counsel for the applicants that no intimation was given to the applicants about the decision of the suit, needless to say that the suit was heard by the learned Banking Judge on 21.03.2017 and on the same day the judgment was announced, which fact is also reflected from the judgment and decree, therefore, this contention of the applicants does not hold good.

13. In the above circumstances, even if there was a provision in the Ordinance for seeking condonation of delay in filing the appeal, the same could not have been condoned.

14. In view of the above, this application being not maintainable/meritless is dismissed.

MAIN CASE

15. Since the application under section 5 of the Act seeking condonation of delay in filing the appeal has been dismissed, therefore, this appeal being barred by time is also dismissed.

KMZ/F-12/L **Appeal dismissed.**

P L D 2019 Lahore 97

Before Shahid Bilal Hassan, J

MUHAMMAD RIAZ and others---Petitioners

Versus

QAIM ALI and others---Respondents

Civil Revision No.1744 of 2011, decided on 11th September, 2018.

Specific Relief Act (I of 1877)---

----S. 42---Suit filed by plaintiffs was for declaration only without seeking consequential relief of possession---Effect---Trial Court decreed the suit in favour of plaintiffs but lower Appellate Court dismissed the same---Validity---Plaintiffs failed to claim consequential relief of possession, so lower Appellate Court when found plaintiffs entitled to decree for declaration by concurring with findings of Trial Court should have allowed them to amend the plaint by adding a prayer for possession and would have ordered to affix appropriate court fee and then to grant them relief even though they had not specifically asked for the same instead of non-suiting them on the basis of technicalities---High Court directed that claim of consequential relief in the form of possession was to be read as part of plaint and suit was decreed in favour of plaintiffs for declaration along with consequential relief---Revision was allowed in circumstances.

Dilmir v. Ghulam Muhammad and 2 others PLD 2002 SC 403 and Ali Muhammad and another v. Muhammad Bashir and another 2012 SCMR 930 ref.

Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others 2003 SCMR 318; Altaf Hussain alias Mushtaq Ahmed v. Muhammad Din and others 2010 CLC 1646 and Muhammad Yar v. Muhammad Bukhsh 2017 CLC Note 11 fol.

Aftab Hussain Bhatti for Petitioners.

Tariq Bashir for Respondent No.3.

Ghulam Farid Sanotra and Imran Zaid Khan for Respondents Nos.1 to 3.

JUDGMENT

SHAHID BILAL HASSAN, J.--Precisely, the predecessor in interest of the petitioners namely Dad instituted a suit for declaration on 20.09.1999 in which he challenged the vires of mutation No.249 dated 16.04.1999 asserting therein that he was owner of the suit property falling in Khewat No.15, Khatooni No.148, measuring 56 kanals 10 marlas of square No.28, Killa Nos.4, 7, 14, 17 and 24 situated in Chak No.650/1-GB, Tehsil Jaranwala, District Faisalabad, which was owned by the Provincial Government and in the year 1956 the suit property was allotted to the predecessor of the petitioners namely Dad under "Bedakhal Muzaraen Scheme", whereas "Baie-Sletani" dated 14.11.1983 was processed and mutation No.132 was sanctioned in the name of the predecessor of the petitioners. He (Dad) neither sold that property to anyone else not he affixed his thumb impression on any document, therefore, possession over the suit property may not be disturbed. The respondents contested the suit by filing written statement on 13.03.2000. Out of the divergent pleadings of the parties, the learned trial Court framed issues on 27.07.2001. Both the parties adduced their respective evidence. The learned trial Court, after hearing arguments, vide judgment and decree dated 17.02.2010 decreed the suit in favour of the petitioners. The respondents, being aggrieved, preferred appeal on 24.02.2010, which was accepted vide impugned judgment and decree dated 13.04.2011 and suit of the petitioners was dismissed while setting aside the judgment and decree ibid passed by the learned trial Court. Therefore, the instant civil revision has been filed.

2. Learned counsel for the petitioners has argued that the impugned judgment and decree of the learned appellate Court is against law and facts of the case as the learned trial Court has rightly decided all the issues in favour of the petitioners. Even the learned appellate Court has decided issues Nos.1, 2 and 5 in favour of the petitioners but the learned appellate Court has failed to comprehend that when the petitioners

instituted suit for declaration on 20.09.1999, they were in possession, therefore, there was no need for seeking possession. The petitioners were dispossessed by the respondents, upon which FIR bearing No.478/1999 dated 24.09.1999 under sections 448/337-H(2)/148/ 149/395 P.P.C. was registered at Police Station Lundian Wala. Adds that prior to this, the respondents Qaim and Muhammad Ali also filed a suit on the basis of oral agreement on 28.04.1984, which was dismissed on 17.01.1979 and appeal against the same was also dismissed, copy of which were exhibited as Ex.P12 and Ex.P13, but all these documents were ignored by the learned appellate Court. The other documents exhibited on record as Ex.P14, Ex.P17 and Ex.P1 have totally been ignored by the learned appellate Court and basing his view totally on surmises and conjectures has passed by the impugned judgment and decree, thus, the same is not sustainable in the eye of law. In addition to this, it is settled principle of law that technicalities should not create hurdles in the way of substantial justice; if a party seeking declaration had failed to claim consequential relief, he should not have been non-suited on technical grounds. As such, by allowing the civil revision in hand, the impugned judgment and decree may be set aside and suit of the petitioners may be decreed by restoring the judgment and decree dated 17.02.2010 passed by the learned trial Court.

3. On the contrary, learned counsel for the respondents have argued that suit of the petitioners has rightly been dismissed by the learned appellate Court, because they had no right to claim declaration in absence of prayer for possession, as such the suit was incompetent. They have supported the impugned judgment and decree and have prayed for dismissal of the civil revision in hand. Reliance has been placed on Dilmir v. Ghulam Muhammad and 2 others (PLD 2002 Supreme Court 403) and Ali Muhammad and another v. Muhammad Bashir and another (2012 SCMR 930).

4. Heard.

5. The moot point involved in this case is whether without claiming or praying consequential relief, when otherwise the plaintiff succeeds in

proving his claim for declaration, his suit can be decreed or not? When such a point came up before the Hon'ble Supreme Court, it was settled through reported judgment Mst. Arshan Bi through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others (2003 SCMR 318), referred by learned appellate Court in its impugned judgment but could not conceive its ratio in its true perspective, and it was invariably held:--

> ' If a party seeking declaration has failed to claim consequential relief, he should not have been non-suited on technical grounds. It has been held time and again by this Court that technicalities shall not create hurdles in the way of substantial justice. Rules and regulations are made to foster the cause of justice and they are not to be interpreted to thwart the same. A heavy duty is cast upon the Courts to do substantial justice and not to deny the same on mere technicalities. Reference in this regard is made to the case of Ch. Akbar Ali v. Secretary, Ministry of Defence, Rawalpindi and another (1991 SCMR 2114) where it was held as under:-
>
> "In the exercise to do justice in accordance with law the Court and forums of law cannot sit as mere spectators as if at a high pedestal, only to watch who out of two quarreling parties wins. See the judgment of this Court in the case of Muhammad Azam v. Muhammad Iqbal and others (PLD 1984 SC 95 at page 132) and Civil Appeal No. 789 of 1990, decided on 26-6-1991 (Syed Phul Shah v. Muhammad Hussain PLD 1991 SC 1051). On the other hand deep understanding and keen observance of proceedings is a sine qua non for doing justice in the Constitutional set up of Pakistan. Those Rules of adversary system based merely on technicalities not reaching the depth of the matter, are now a luxury of the past. Neither of the parties can be permitted to trap an improperly defended or an undefended or an unsuspecting adversary by means of technicalities when the demand of justice is clearly seen even through a perfect trap. It will make no difference if the litigant parties are citizens high or low and/ or is Government or a State institution or functionary acting as such. "

Reference is also made to the case of Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar and another (PLD 1975 SC 678) wherein the learned Judge of this Court held that mere technicalities, unless offering insurmountable hurdles, should not be allowed to defeat the ends of justice. The learned Judge further quoted the following passage from an earlier illuminating judgment of this Court rendered by Kaikaus, J. in Imtiaz Ahmad v. Ghulam Ali (PLD 1963 SC 382):-

"I must confess that having dealt with technicalities for more than forty years, out of which thirty years are at the Bar, I do not feel much impressed with them. I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on ground of public policy. The English system of administration of justice on which our own is based may be to certain extent technical but we are not to take from that system its defect. Any system which by given effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his."

The denial of relief to a party simply on the ground that consequential relief was not claimed would, in no circumstances, advance the cause of justice.

It has been held time and again that the natural result of declaration would be that consequential relief has to be given by the Court even if it is not claimed. The trial Court in such like circumstances may call upon a party to amend the plaint to that extent and direct him to pay court-fee, if any. Reliance in this respect is placed upon the case of Ahmad Din v. Muhammad Shafi and others (PLD 1971 SC 762) where it was observed as under:-

"The contention of the learned counsel for the appellant that the suit could not fail merely by reason of the fact that the

consequential relief by way of possession had not been claimed is not altogether without substance. If his suit was otherwise maintainable and he was otherwise entitled to the relief it was open to the Courts to allow him to amend the plaint by adding a prayer for possession and paying the appropriate ad valorem court-fees and then to grant him relief even though he had not specifically asked for it."

Same view was adopted by this Court in Altaf Hussain alias Mushtaq Ahmed v. Muhammad Din and others (2010 CLC 1646- Lahore) and Muhammad Yar v. Muhammad Bukhsh (2017 CLC Note 11).

6. Facts and circumstances of the present case are at par with the above referred judgment, as in the present case the petitioners failed to claim consequential relief of possession, so the learned appellate Court, when found the petitioners entitled to decree for declaration by concurring with the findings of learned trial Court, ought to have allowed them to amend the plaint by adding a prayer for possession and would have ordered to affix appropriate court-fee and then to grant them relief even though they had not specifically asked for the same, instead of non-suiting them on the basis of technicalities. As such, it is observed that the claim of consequential relief in the form of possession would be read as part of the plaint.

7. For the foregoing reasons, while placing reliance on the judgments supra, the civil revision in hand is allowed, impugned judgment and decree dated 13.0 4.2011 passed by the learned appellate Court is set aside and suit of the petitioners for declaration, along with consequential relief, is decreed in their favour. However, they are directed to pay court-fee of Rs.15,000/-, on plaint and memorandum of civil revision, total Rs.30,000/- within 45 days of the announcement of order, failing which their suit will be deemed to be dismissed. No order as to the costs.

MH/M-158/L **Order accordingly.**

2019 Y L R 1404

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD YOUSAF---Appellant

Versus

MEHMOOD AHMAD---Respondent

R.S.A. No. 77 of 2016, heard on 14th February, 2019.

Civil Procedure Code (V of 1908)---

----O. XVIII, R. 8---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of agreement to sell---Evidence, recording of---Procedure---Improvements had been made in the evidence by the parties---Evidence, as a whole should be considered and dilated upon---Trial Court had adopted pick and choose methodology which was not warranted under the law---Evidence in totality had to be accepted or rejected---Evidence had been relied upon by the Trial Court beyond the pleadings ---No issue with regard to readiness and willingness of the parties germane to fulfilment of their part of agreement was framed by the Trial Court---Trial Court in a sketchy manner without discussing the evidence had disbelieved the defendant---Evidence, in the present case, was recorded through local commission but same did not bear certificate of Presiding Officer which was illegality on the part of Trial Court---Evidence was to be recorded by the Presiding Officer or under his dictation and in case evidence was recorded by a local commission then same should be under supervision and in presence of Presiding Officer---Presiding Officer was to give a certificate that evidence had been recorded in his presence by the local commission with consent of the parties---Impugned judgments and decrees passed by the Courts below were set aside and case was remanded to the Trial Court with the direction to frame issue with regard to readiness of the parties to fulfill the terms and conditions of agreement of sale and record evidence and decide the matter afresh---Second appeal was allowed, in circumstances.

Malik Muhammad Azeem for Appellant.

Rana Jahanzeb Akhtar and Naeem Sadiq for Respondents.

Date of hearing: 14th February, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, the respondent/plaintiff Mehmood Ahmad instituted a suit for possession through specific performance of contract dated 13.12.2007 allegedly entered into for a consideration of Rs.13,00,000/- with regards to the suit property, out of which Rs.200,000/- were paid as earnest money and the time of execution of registered sale deed and delivery of possession was fixed till 13.02.2008. The said suit was contested by the present appellant while submitting written statement contending therein that time till 13.02.2008 was essence of the contract and that the respondent-plaintiff having failed to perform his part of contract, was not entitled to any discretionary relief of specific performance. Out of the divergent pleadings of the parties the learned trial Court framed following issues:-

1. Whether the defendant failed to transfer property in the name of plaintiff at the date fixed? OPP
2. Whether the plaintiff is entitled to decree of possession through specific performance of agreement to sell? OPP
3. Whether the plaintiff is estopped by his word and conduct to institute the suit? OPD
4. Whether the plaintiff has received earnest money, therefore, agreement stood cancelled, hence, suit is liable to be dismissed? OPD
5. Whether the plaintiff could not pay the remaining amount at the date fixed, therefore, agreement stood cancelled? OPD
6. Whether the plaintiff has come to the Court with unclean hands? OPD
7. Relief.

On the application of the respondent-plaintiff, following additional issue was framed on 29.11.2011:--

6-A. Whether the time (i.e. date of 13.02.2008) was the essence of the agreement between the parties? OPD

Evidence of the parties was recorded. During pendency of the suit an application under Order I, Rule 10 of the C.P.C. was filed by Mst. Naseem Akhtar, etc. on 14.03.2013, however, the same was dismissed on 25.11.2013. After hearing arguments, the learned trial Court vide impugned judgment and decree dated 30.04.2014 decreed the suit in favour of the respondent-plaintiff. The petitioner being aggrieved of the said judgment and decree preferred an appeal, but the same was dismissed vide impugned judgment and decree dated 15.02.2016; hence, the instant regular second appeal.

2. Heard.

3. After hearing arguments and going through the record, it has been noted that the learned trial Court without considering documents and discussing evidence, produced by the parties, in a minute manner has proceeded to pass decree in favour of the respondent-plaintiff, because it has come on record that improvements in the evidence have been made by the parties, but the learned trial Court has adopted pick and choose methodology, which is not warranted under law, because evidence as a whole is to be considered and dilated upon. Evidence in totality is to be accepted or rejected but here the position is otherwise and even the evidence led beyond the pleadings has been relied upon by the learned trial Court. Moreover, no issue with regards to readiness and willingness of the parties germane to fulfillment of their part of agreement was framed by the learned trial Court and even there is nothing on record to suggest that as to who got issued the Fard Milkiyat, because both the parties remained reluctant to bring on record this fact; thus, the learned trial Court ought to have summoned the record of Rapt No.288 so as to get itself acquainted that who got issued the said Fard Milkiyat. Moreover, factum of issuance of legal notice has totally been ignored by the learned trial Court, because it was stance of the petitioner that he issued the legal notice and remained present in the office of Sub-Registrar on the target date but it was the respondent who did not appear there. The

learned trial Court in a sketchy manner, without discussing the evidence on this point, has disbelieved the petitioner-defendant.

4. Over and above, perusal of the evidence of the parties goes to evince that the same was recorded via local commission but the same does not bear certification of the learned Presiding Officer. It is an illegality on the part of the learned trial Court because it is required by law that evidence should be recorded by the learned Presiding Officer or under his dictation and in case the evidence is recorded by a local commission that should be under supervision and in presence of the learned Presiding Officer, whereupon the learned Presiding Officer would give a certificate that the same has been recorded in his presence by the local commission with consent of the parties. In this regard Rule 8 of Order XVIII of the Code of Civil Procedure, 1908 is much clear, which reads:--

> "Rule 8.--Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, in his own hand or from his dictation in open Court and such memorandum shall be signed by the Judge and shall form part of the record."

However, this aspect of the case has altogether been overlooked and ignored by the learned appellate Court while deciding the appeal and in a flimsy manner by dittoing the judgment and decree passed by the learned trial Court, passed the impugned judgment and decree without considering the consistent view of the higher Courts with regards to matters pertaining to specific performance of agreement to sell.

5. Pursuant to the above, the appeal in hand is allowed, impugned judgments and decrees are set aside and case is remanded to the learned trial Court to frame fresh issues keeping in view the observations made hereinabove, record evidence of the parties, if they intend to produce and decide the matter afresh on merits in accordance with law. The parties are directed to appear before the learned trial Court on 06.03.2019, positively.

ZC/M-38/L **Case remanded.**

PLJ 2019 Lahore (Note) 86

[Multan Bench Multan]

Present: SHAHID BILAL HASSAN, J.

SHAH ALI, etc.--Petitioners

versus

MUHAMMAD SHABBIR--Respondent

Civil Revision No. 1057-P of 2010, decided on 17.5.2016.

Specific Relief Act, 1877 (I of 1877)--

----Ss. 8 & 42--Punjab Pre-emption Act, (IX of 1991), S. 13--Suit for declaration and possession--Dismissed--Suit for possession through pre-emption--Decreed--Appeal--Dismissed--Pendency of--Execution petition--Compromise of--Petition was dismissed--Respondent was in possession--Recovering of amount--Concurrent findings--Challenge to--Stance of respondent also gets strength from fact that possession of suit property continuously remained with him and same was never handed over either to predecessor-in-interest of petitioners or to petitioners because documentary evidence produced by petitioners did not support this stance; as such findings recorded by learned Courts below on facts do not suffer from any misreading and non-reading of evidence as alleged by petitioners rather each and every aspect of case has been considered and evaluated by learned Courts below in a minute way--Concurrent findings of facts when do not suffer from any material illegality or irregularity as well as misreading and non-reading and have been recorded with jurisdiction howsoever erroneous cannot be interfered with while exercising revisional jurisdiction--Civil revision was dismissed.[Para 5, 6 & 7] A & B

Ch. Abdul Ghani, Advocate for Petitioners.

Mr. Aftab Ahmad Khan, Advocate for Respondent.

Dated of hearing: 17.5.2016.

JUDGMENT

The petitioners instituted a suit for declaration and possession as a consequential relief regarding the suit property by maintaining that the predecessor-in-interest of petitioners instituted a suit for possession through pre-emption against the respondent Muhammad Shabbir regarding 9 *kanal* & 7 *marlas* land situated in Mauza Ali Sher Wahn, Tehsil Jahanian. District Khanewal, which was decreed in his favour on 20.10.1984 and the decree remained intact upto High Court and predecessor-in-interest of petitioners filed an execution petition for satisfaction of decree and respondent while appearing before the learned Executing Court on 4.4.1991 got recorded his statement that he had received whole price of the suit property but due to stay obtained by the respondent/defendant, the execution petition was consigned. It was further alleged that possession of the suit property was handed over to the predecessor-in-interest of the petitioners but same was snatched in December 1995 by the respondent/defendant. Hence, the suit. The suit was contested by the respondent/defendant, who asserted that during pendency of execution petition, a compromise was reached at between him and predecessor-in-interest of the petitioners, who by receiving Rs.50,000/- got dismissed the execution petition and in his life time, he did not agitate the matter. The possession of suit property was with the respondent/defendant and the same is the position at present. Learned Trial Court framed issues. Both the parties adduced their evidence, oral as well as documentary, in support of their respective contentions. The learned Trial Court after hearing arguments, *vide* impugned judgment & decree dated 18.04.2007, dismissed the suit of the petitioners; against which, they preferred an appeal before the learned Appellate Court but remained unsuccessful *vide* impugned judgment & decree dated 29.03.2010. Hence, this civil revision.

2. Learned counsel for the petitioners has argued that the impugned judgments & decrees are against law and facts and the same suffer from misreading and non-reading of evidence. It is a settled principle of law that a pre-emption decree is a substitution and as and when the decree is passed and

the settled amount is paid to the judgment debtor, the decree holder becomes owner of the land. This principle has been ignored by the learned Courts below. Reliance is placed on *Maulvi Abdul Qayyum vs. Syed Ali Asghar Shah and 5 others* 1992 SCMR 241. Further argues that the petitioners proved their case by producing confidence inspiring evidence, whereas, the respondent failed in this regard but even then, the leaned Courts below non-suited the petitioners illegally. Findings recorded on Issues No. 2, 3 & 6-A are not tenable in the eye of law. Both the learned Courts below have failed to exercise jurisdiction vested in them and while committing material illegalities and irregularities passed the impugned judgments and decrees, which resulted in miscarriage of justice; therefore, by allowing the civil revision in hand, the impugned judgments & decrees may be set aside and suit of the petitioners may be decreed as prayed for.

3. Contrarily, learned counsel appearing on behalf of the respondent by favouring the impugned judgments & decrees has prayed for dismissal of the civil revision in hand.

4. Heard.

5. Admittedly, a pre-emption decree was passed in favour of predecessor-in-interest of petitioners, who filed execution petition, wherein, the respondent appeared and recorded his statement to the effect that he had received whole price of the suit land but the said execution petition did not meet its ultimate end rather the same was dismissed due to non-deposit of warrant of possession. The respondent took a defence that during pendency of execution petition, a settlement was reached at between him and predecessor-in-interest of the petitioners, who by receiving Rs.50,000/- did not press the execution petition and got the same dismissed. In order to prove this stance, the respondent/defendant produced two witnesses, in whose presence, said compromise was struck, who fully supported the stance taken up by the respondent. This stance was not cross-examined by the petitioners' side, which means it was admitted by the petitioners' side. Reliance is placed on *Farzand Ali and another vs. Khuda Bakhsh and others* PLD 2015 Supreme Court 187, wherein, it has been held, *this witness has not been cross-examined on the*

above statement except a vague suggestion. It is settled law that if a crucial and vital fact deposed in the examination-in-chief, is not subjected to cross-examination it shall be deemed to have been admitted, and this is the lapse on part of the appellants. The version of respondent finds support from the fact mat the predecessor-in-interest of the petitioners died on 22.06.1996 but during his life time, he neither agitated the matter nor tried to get possession of the suit property before any forum and almost one and half year after his death the instant suit was filed. The stance of the respondent also gets strength from the fact that possession of the suit property continuously remained with him and same was never handed over either to the predecessor-in-interest of the petitioners or to the petitioners because the documentary evidence produced by the petitioners did not support this stance; as such the findings recorded by the learned Courts below on facts do not suffer from any misreading and non-reading of evidence as alleged by the petitioners rather each and every aspect of the case has been considered and evaluated by the learned Courts below in a minute way.

6. Even otherwise, concurrent findings of facts when do not suffer from any material illegality or irregularity as well as misreading and non-reading and have been recorded with jurisdiction howsoever erroneous cannot be interfered with while exercising revisional jurisdiction. Reliance is placed on *Zaitoon Begum vs. Nazar Hussain and another* (2014 SCMR 1469) & *Cantonment Board through Executive Officer Cantt. Board Rawalpindi vs. Ikhlaq Ahmad and another* (2014 SCMR 161).

7. The case-law relied upon by the learned counsel for the petitioners, with utmost respect has no relevance to the facts and circumstances of the case in hand, therefore, it does not render any help to the petitioners' case.

8. For the forgoing reasons, the civil revision in hand, being devoid of any force stands dismissed. No order as to costs.

(Y.A.) **Civil revision dismissed.**

PLJ 2019 Lahore (Note) 88

[Multan Bench Multan]

***Present*: SHAHID BILAL HASSAN, J.**

BEENISH NASIR, etc.--Petitioners

versus

ADDL. DISTRICT JUDGE, etc.--Respondents

W.P. No. 16826 of 2016, decided on 7.11.2018.

Constitution of Pakistan, 1973--

----Art. 199--Muslim Family Laws Ordinance, 1961, Ss. 9 & 10--Guardian and Ward Act, 1890, S. 25--Suits for recovery of dower, Maintenance allowance and dowery articles while defendant was filed application for custody of minor--Both suits were consolidated--Suits were partially decreed and guardian application was dismissed--Appeals--Dismissed--Writ petitions--Allowed--Cases were remanded--Appeals preferred by petitioner were allowed--Appeals filed by respondents were dismissed--Challenge to--Findings recorded by learned appellate Court on point of dower and dowry articles are up to dexterity and do not call for any interference, which are upheld, as this Court finds no jurisdictional defect or legal infirmity in impugned judgments and decrees--Keeping in view financial position of Respondent No. 3, who is father of Petitioner No. 2 and is legally bound to maintain his child, and prevailing hike up in prices of commodities of daily use, learned appellate Court has rightly fixed maintenance allowance as Rs. 3000/- per month from date of institution of suit till her marriage with 10% annual increase--Petitioner No. 2 is a female child and is of tender age, mother's lap is lap of God and she cannot be deprived of affection of mother, even she needs care and love at this age, which none can shower except her mother--Learned Courts below have adjudicated matter on this point, while keeping in view betterment and welfare of minor which application for custody of minor otherwise seems an attempt to get rid of payment of maintenance--In view

of above discussion, this Court finds no occasion in impugned judgments and decrees divulging jurisdictional defect or legal infirmity, rather same are upto dexterity--Petitions was dismissed.[Para 5, 6, 7 & 8] A, B, C & D

M/s. Khawaja Qaiser Butt and Ch. Muhammad Imran, Advocates for Petitioners.

Mr. Tahir Mahmood, Advocate for Respondent No. 3

Date of hearing: 7.11.2018

ORDER

This single order will decide the captioned writ petition as well as the connected W.P. No. 16112 of 2016 *(Zaigham Hussain v. Addl. District Judge, etc.),* as in both one and same judgment and decree dated 30.07.2016 has been called into question.

2. Precisely, *Mst.* Beenish, etc. (the petitioners) instituted suits for recovery of dower amounting to Rs. 100,000/-, maintenance allowance as Rs. 5000/- per head per month from March, 2010 to onward, dowry articles as per lis Ex.P2 amounting to Rs. 500,000/-, whereas the Respondent No. 3 filed a guardian application for custody of Fatima Bibi/Petitioner No. 2. Both the suits and the application were contested by the parties while submitting their respective written statement and written reply. The suits and application for guardian were consolidated and issues were framed. Both the parties adduced their respective evidence. The learned trial Court *vide* judgment and decree dated 18.12.2012 partially decreed the suit of the petitioners and dismissed the guardian application of the Respondent No. 3. Being aggrieved of the said judgment and decree, both the parties preferred separate appeals. The learned appellate Court *vide* consolidated judgment and decree dated 26.11.2013 dismissed all the appeals. Both the parties filed writ petitions before this Court, which came up for hearing on 26.04.2016 and were partly allowed by setting aside findings of appellate Court and cases were remanded to the learned appellate Court with a direction to decide the respective appeals of the parties afresh within period of three months. On remand, the learned appellate Court *vide* impugned judgment and decree

dated 30.07.2016 partly allowed appeal preferred by the petitioners and held the Petitioner No. 1 entitled to recover amount of Rs. 500,000/- as value of dowry articles and fixed the maintenance allowance of the minor/Petitioner No. 2 as Rs. 3000/- per month with 10% annual increase and remaining findings of the learned trial Court regarding maintenance allowance were upheld, whereas the appeals preferred by the Respondent No. 3 were dismissed.

3. The petitioners have filed the captioned writ petition calling into question the impugned judgment and decree only to the extent of award of maintenance allowance of the Petitioner No. 2 and have prayed for its enhancement. The Respondent No. 3 has filed the connected W.P.No. 16112 of 2016 impugning the judgment and decree as a whole as well as judgment and decree dated 18.12.2012 passed by the learned trial Court.

4. Heard.

5. When the impugned judgments and decrees are put in juxtaposition with the evidence brought by the parties, it appears that each and every aspect of the case has been considered, dilated upon and scrutinized by the learned Courts below, especially when it has been established on record that earlier suits for recovery of dowry articles and dower were not instituted by the Petitioner No. 1, rather same were managed by the Respondent No. 3, the admitted dower amount i.e. 100.000/- and dowry articles valuing Rs. 500,000/- given at the time of marriage by parents of the Petitioner No. 1, who have sound financial status as has been proved on record, have rightly been decreed by the learned appellate Court; thus, the findings recorded by the learned appellate Court on the point of dower and dowry articles are up to the dexterity and do not call for any interference, which are upheld, as this Court finds no jurisdictional defect or legal infirmity in the impugned judgments and decrees.

6. So far as question with regard to enhancement of maintenance allowance of the minor/Petitioner No. 2 is concerned, it is observed that monthly income of the Respondent No. 3 is not too much, rather he earns

10,000/15,000 per month and the petitioners could not bring on record other sources of income of the Respondent No. 3. Thus, keeping in view financial position of the Respondent No. 3, who is father of the Petitioner No. 2 and is legally bound to maintain his child, and prevailing hike up in the prices of commodities of daily use, the learned appellate Court has rightly fixed the maintenance allowance as Rs. 3000/- per month from the date of institution of the suit till her marriage with 10% annual increase. The learned trial Court, keeping in view the poor financial status of the Respondent No. 3, has also rightly fixed the maintenance allowance of the Petitioner No. 1 at the rate of Rs. 2000/- per month only for Iddat period.

7. As far as the question germane to custody of the minor/Petitioner No. 2 is concerned, it is observed that the Petitioner No. 2 is a female child and is of tender age, mother's lap is lap of God and she cannot be deprived of affection of mother, even she needs care and love at this age, which none can shower except her mother. The learned Courts below have adjudicated the matter on this point, while keeping in view the betterment and welfare of the minor, which application for custody of minor otherwise seems an attempt to get rid of payment of maintenance allowance, and have reached to a just conclusion that the Respondent No. 3 is not entitled to the custody of the minor/Petitioner No. 2.

8. In view of the above discussion, this Court finds no occasion in the impugned judgments and decrees divulging jurisdictional defect or legal infirmity, rather the same are upto the dexterity. Resultantly, the constitutional petition in hand as well as the connected W.P. No. 16112 of 2016 being without any force and substance are hereby dismissed with no order as to the costs.

(Y.A.) **Petition dismissed.**

PLJ 2019 Lahore (Note) 110

[Multan Bench Multan]

Present: **SHAHID BILAL HASSAN, J**

ABDUL HAMEED--Petitioner

Versus

MUHAMMAD AMIN KHAN--Respondent

C.R. No. 348 of 2008, decided on 9.9.2015

Civil Procedure Code, 1908 (V of 1908)--

----O. XVI, R. 1--Application for producing of private witnesses--Dismissed--Appeal--Dismissed--Challenge to--Petitioner may produce his private witnesses namely Muhammad Suleman, Khadim Hussain, Ghulam Mustafa and Muhammad Akhtar before the learned trial Court into the witness box at his own and in that eventuality respondent's side shall cross examine said witnesses--Civil revision was disposed of.[Para 3] A

2005 MLD 688, *ref*.

Malik Abdul Khaliq, Advocate for Petitioner.

Mr. Qaisar Amir Khan, Advocate for Respondent.

Date of hearing: 9.9.2015.

ORDER

The matter has partly been argued by both the learned counsel. On Court's query to the learned counsel for the respondent as to whether the private witnesses namely Muhammad Suleman, Khadim Hussain, Ghulam Mustafa and Muhammad Akhtar can appear before the learned trial Court in the witness box and get their respective statements recorded at the instance of the petitioner and not through the agency of the Court. Learned counsel

for the respondent has conceded to this while stating that he has no objection if the petitioner produces the said witnesses at his own responsibility and not through the agency of the Court and the respondent side shall cross-examine the said witnesses.

2. In response, learned counsel for the petitioner submits that he intends to produce the said witnesses at his own and not through the agency of the Court in terms of Order 16 Rule CPC.

3. Resultantly, while placing reliance in the case of *"Haji Muhammad Tufail vs. Muhammad Iqbal"* reported as (2005 MLD 688), this civil revision is disposed of with the observation that the petitioner may produce his private witnesses namely Muhammad Suleman, Khadim Hussain, Ghulam Mustafa and Muhammad Akhtar before the learned trial Court into the witness box at his own and in that eventuality respondent's side shall cross examine the said witnesses.

(Y.A.) **C.R. disposed of.**

PLJ 2019 Lahore 506

[Multan Bench Multan]

***Present* : SHAHID BILAL HASSAN, J**

KABIR MUHAMMAD (deceased) through L.Rs.--Petitioners

versus

ALLAH BAKHAH (deceased) through L.Rs and others--Respondents

Civil Revision No.1280-D of 2011, decided on 2.4.2019.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Suit for declaration--Dismissed--Appeal Dismissed--Concurrent findings--Challenge to--Petitioner predecessor Kabir Muhammad remained in litigation with respondent and continuously associated proceedings before revenue hierarchy and Furd Badr was declared null and void on and same fact was in knowledge of Kabir Muhammad from day one, but he kept mum and instituted suit in year 1995, after about 12 years of passing of said order, which otherwise had to be challenged within one year. [P. 507] A

PTD 2015 SC 107, PLD 2014 SC 585 & 2014 SCMR 1594, *ref*.

Limitation Act, 1908 (IX of 1908)--

----S. 3--Barred by limitation--It is observed that while deciding issue of limitation, learned Court below have construed law on subject in a judicious and apt manner and have no committed any illegality and irregularity, rather vested jurisdiction has been exercised legally--Civil Revision was dismissed. [P. 507] B

M/s. Ch. Muhammad Siddique and Abdul Sammad Ali, Advocates for Petitioners.

Malik Zafar Mahboob Langrial, Advocate for Respondents

Mr. Ahmad Nadeem Gehla, Assistant Advocate General

Date of hearing: 2.4.2019.

ORDER

Precisely, petitioners' predecessor-in-interest namely Kabir Muhammad instituted a suit for declaration with regards to the suit land wherein he challenged certain mutations as well as order of Deputy Commissioner, Muzafargarh dated 8.9.1983. The respondents/defendants while appearing before the learned trial Court contested the suit and prayed for dismissal of the same. Out of the divergent pleadings of the parties,

issues were framed and evidence of the parties was invited, which was adduced in *pro* and *contra.* The learned trial Court *vide* impugned judgment and decree dated 15.09.2009 dismissed suit of the petitioners/plaintiffs, which decree was agitated by preferring an appeal, but the same was also dismissed *vide* impugned judgment and decree dated 26.07.2011, which has given rise to the instant civil revision.

2. Heard.

3. Admittedly, the petitioners predecessor Kabir Muhammad remained in litigation with the respondents and continuously associated the proceedings before the revenue hierarchy and the Fard Badr was declared *null* and *void* on 28.09.1983 and the same fact was in the knowledge of the Kabir Muhammad from the day one, but he kept mum and instituted the suit in the year 1995, after about 12 years of passing of the said order, which otherwise had to be challenged within one year. If for the sake of arguments it is admitted that the order was illegal and void, even then the name would have been called into question within time prescribed under law; reliance is placed on *Ghulam Hussain Ramzan Ali v. Collector of Customs (Preventive), Karachi* (2015 PTD 107-Supreme Court of Pakistan & (2014 SCMR 1594) and *Gen, (R.) Pervez Musharraf v. Nadeem Ahmad (Advocate) and another* (PLD 2014 Supreme Court 585).

4. Pursuant to the above, when it is found that the suit was barred by limitation, there is no need to discuss further merits of the case and it is observed that while deciding issue of limitation, the learned Court below have construed law on the subject in a judicious and apt manner and have no committed any illegality and irregularity, rather vested jurisdiction has been exercised legally.

5. For the foregoing reasons, the civil revision in hand being devoid of any force and substance stands dismissed.

No order as to the costs

(MMR) **Civil Revision dismissed.**

PLJ 2019 Lahore 523
[Multan Bench, Multan]

Present: SHAHID BILAL HASSAN, J.

KHUBAIB KHAN--Petitioner

versus

ADDL. DISTRICT JUDGE, MIAN CHANNU DISTRICT KHANEWAL and 2 others--Respondents

W.P. No. 5556 of 2019, decided on 15.4.2019.

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----Ss. 8 & 10--Constitution of Pakistan, 1973, Art. 199--Constitutional Petition--Suit for dissolution of marriage, recovery of dowry articles--*Exparte* partially decreed--Appeal--Case was remanded to trial Court--Trial Court again decreed--Appeal--*Exparte* partially decreed--Application for setting aside *exparte* proceedings--Accepted--Appellate Court varied claim of Respondent No. 3--Mutual settlement--Consent decree--Challenge to--It is evident from order that petitioner alongwith his brother and learned counsel was present before learned Appellate Court when parties settled to resolve claims of dowry articles and dower on basis of statement of Muhammad Bin Faqeer Ullah on oath and in response to said mutual understanding learned Appellate Court issued notice to said person, who appeared and recorded his statement on oath on 21.03.2019, where-after learned Appellate Court on basis of his statement passed impugned order and decree dated 21.03.2019--Status of said impugned order and decree is that of consent decree, which is not appealable--Learned Appellate Court after mutual understanding of parties and statement of person agreed upon for settling issue with regard to dowry articles and dower has rightly passed impugned order and decree--Thus, there appears no illegality and jurisdictional error in impugned order and decree passed by learned Appellate Court warranting

interference by this Court in exercise of extraordinary constitutional jurisdiction—Petition was dismissed. [P. 525] A

Syed Jaffar Tayyar Bukhari, Advocate for Petitioner.

Date of hearing : 15.4.2019.

ORDER

Concisely, the Respondent No. 3 instituted a suit for dissolution of marriage, recovery of dowry articles valuing Rs. 14,45,000/-, Haq Mehr Rs.5000/- and plot measuring five *marlas* valuing Rs. 10,00,000/- against the present petitioner. The petitioner was summoned through all modes but neither the petitioner/defendant nor anyone appeared on his behalf, therefore *ex parte* proceedings were carried out against him. Learned Trial Court after recording *exparte* evidence of the Respondent No. 3/plaintiff and hearing arguments *vide* impugned *ex parte* judgment and decree dated 28.05.2018 partially decreed the suit. The Respondent No. 3/plaintiff preferred appeal against the said judgment and decree and the case was remanded to the learned Trial Court with the direction to re-writ the judgment after proper evaluation of the evidence *vide* order dated 17.09.2018. After remand, the learned Trial Court re-wrote the judgment and decreed the suit of Respondent No. 3 in the following terms on 29.09.2018:

> *"-----suit of the plaintiff for dissolution of marriage is hereby decreed on the basis of Khula subject to relinquishment of 25% of the prompt dower. The plaintiff is entitled to receive alternate price of Rs.3,00,000/- for her dowry articles. The plaintiff is entitled to receive Rs.3750/- as dower. Claim of the plaintiff for recovery of plot measuring 5-Marla valuing Rs. 10,00,000/- is hereby dismissed."*

Being aggrieved of the said judgment and decree, the Respondent No. 3 preferred an appeal, wherein the petitioner did not appear despite issuance of process and publication of the newspaper, for which he was proceeded against *ex parte*. The learned Appellate Court *vide ex parte* judgment and

decree dated 18.12.2018 partially accepted the appeal of Respondent No. 3 in the following term:

> *"----------the instant appeal is partially accepted. Findings of the learned Family Court are modified, accordingly. To remove any confusion for the purpose of execution process, it is made clear that the appellant is held entitled for recovery of 75% of Rs.5000/- (Rs.3750) as per Column No. 13 and 50% of Rs. 10,00,000/- (Rs. 5,00,000/-) as per Column No. 16 of the Nikah Nama, as dower and for recovery of dowry articles, (excluding the gold ornaments, clothes, shoes and cosmetics), as per list Ex.P-3 or its alternate price of Rs. 5,00,000/-*

The petitioner filed an application for setting aside *ex parte* proceedings dated 15.12.2018 and *ex parte* judgment & decree dated 18.12.2018 and on 11.03.2019 in presence of the petitioner, his brother and father of the Respondent No. 3 as well as learned counsel for the parties, it was settled that matter with regard to dowry articles and dower may be resolved on the basis of statement of Muhammad Bin Faqeer Ullah on oath, so the learned Appellate Court ordered to summon said Muhammad Bin Faqeer Ullah. On 21.03.2019, application of the petitioner for setting aside *ex parte* proceedings dated 15.12.2018 as well as *ex parte* judgment and decree dated 18.12.2018 was accepted and after recording statement of Muhammd Bin Faqeer Ullah (maternal uncle) of the petitioner and Respondent No. 3, the learned Appellate Court varied the claims of Respondent No. 3 for dower and dowry articles as under:--

(i) The appellant is held entitled to recover half of value of the plot i.e. Rs.5,00,000/-, as per Column No. 16 of Nikah Nama Ex.P4 as dower. The amount of dower as per Column No. 13 shall be deemed to be paid by the respondent.

(ii) As mutually agreed between the parties, the respondent Khubaib Khan would deliver the dowry articles, as lying in his

house, on oath and the appellant would receive the same. Both of the learned counsels shall send representatives of their respective parties for handing over/receiving the dowry articles, within 15-days of passing of the instant order.

Hence, the instant constitutional petition by impugning the, *ex parte* judgment and decree dated 29.09.2018 passed by the learned Trial Court and order & decree dated 21.03.2019 passed by the learned Addl. District Judge, Mian Channu.

2. Heard.

3. Presumption of truth is attached to the proceedings of the Court. It is evident from the order dated 11.03.2019 that the petitioner alongwith his brother and learned counsel was present before the learned Appellate Court when the parties settled to resolve the claims of dowry articles and dower on the basis of statement of Muhammad Bin Faqeer Ullah on oath and in response to the said mutual understanding the learned Appellate Court issued notice to said person, who appeared and recorded his statement on oath on 21.03.2019, where-after the learned Appellate Court on the basis of his statement passed the impugned order and decree dated 21.03.2019. The status of said impugned order and decree is that of consent decree, which is not appealable. The learned Appellate Court after mutual understanding of the parties and statement of the person agreed upon for settling the issue with regard to dowry articles and dower has rightly passed the impugned order and decree. Thus, there appears no illegality and jurisdictional error in the impugned order and decree passed by the learned Appellate Court warranting interference by this Court in exercise of extraordinary constitutional jurisdiction.

4. Resultantly, the writ petition in hand being devoid of any force and substance stands dismissed *in limine*.

(MMR) **Petition dismissed.**

2020 C L C 106

[Lahore]

Before Shahid Bilal Hassan, J

TBEA COMPANY (PRIVATE) LIMITED through Faisal Anwar----Petitioner

Versus

AL'WASAY CONSTRUCTION COMPANY (PRIVATE) LIMITED through Chief Executive----Respondent

Civil Revision No.38920 of 2019, heard on 1st October, 2019.

(a) Arbitration Act (X of 1940)---

----Ss. 20, 3, 8 & First Sched.----Application to file in Court arbitration agreement---Provisions implied in arbitration agreement--- Appointment of arbitrator----Consent of parties---Sections 20 and 8 of the Arbitration Act, 1940---Nature and scope---Petitioner company impugned order of Trial Court whereby, upon respondent company's application under S.20 of the Arbitration Act, 1940; an arbitrator nominated by respondent was appointed without the consent of the petitioner --- Validity---Under the provisions of Arbitration Act, 1940 it was apparent that consent of parties was sine qua non for appointment of arbitrator and upon any dissent shown by a party, the same would result in a particular arbitrator not being appointed --- Jurisdiction of Trial Court after an application under S. 20 of the Arbitration Act, 1940 was to move, did not allow it to unilaterally appoint a sole arbitrator proposed by one party that was not acceptable to the other party---Provisions of S.8 of the Arbitration Act, 1940 were not applicable to the present case and said provision was separate and distinct from S.20(4) of the Arbitration Act, 1940 and there was no embargo on appointment of more than one arbitrators---Impugned order was therefore made while exercising jurisdiction not vested in Trial Court, and was set aside---High Court remanded matter to Trial Court with direction to appoint arbitrator with consent of parties and expertise --- Revision was allowed, accordingly.

Karachi Dock Labour Board v. Messrs Quality Builders Ltd. PLD 2016 SC 121 rel.

(b) Administration of justice----

----When an act was prescribed to be done in a certain manner, the same must be done in such prescribed manner and not otherwise.

Ms. Asma Hamid and Wajahat Ali Mian for Petitioner.

Muhammad Saeed Sheikh for Respondent.

Dates of hearing: 26th, 30th September and 1st October, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.----Facts, in concision, are as such that the petitioner entered into a contract agreement dated 17.05.2010 with National Transmission and Dispatch Company Limited (NTDC) to design, supply, test and commission the plant and equipment for Contract No.3076 (Package-1) Design, supply, installation, testing and commissioning of Plant and Equipment for Rahim Yar Khan 500/220/132 kV. Subsequent to the execution of Main Contract between the petitioner and NTDC, the petitioner and the respondent separately entered into a Sub-Contract dated 22.12.2010 to undertake and fulfill the requirements of the Main Contract. The Sub-Contract was amended on 02.04.2011 to the extent of project scope and remuneration. A dispute arose between the petitioner and respondent as to the payment of rental charges and the question of ownership and possession of tools as well as machinery used in relation to the terms and conditions. As a result, the respondent filed an application invoking the provisions of section 20 of the Arbitration Act, 1940 for referral of the dispute to arbitration on 01.03.2013 in the Civil Court, Lahore, but the same was withdrawn on 08.10.2013 for determination of dispute as per the procedure laid down in clause 6 of the Main Contract. However, subsequently the respondent filed another application under section 20 of the Act, 1940 on 27.03.2015, which was dismissed by the learned Civil Judge for being filed prematurely. After dismissal of the second arbitration application, the parties appeared before

a mediator of the Lahore Chamber of Commerce and Industry on 14.03.2018, 09.05.2018 and 07.06.2018 but the parties could not reach to any final settlement, which culminated in filing of third application under section 20 of the Act, 1940 before the Civil Court on 23.11.2018.

2. Through the instant revision petition, the petitioner has called into question the order dated 07.05.2019 passed by learned Civil Judge Ist Class, Lahore whereby in response to the above said application under section 20 of the Act, 1940, appointed one Muhammad Mazhar Ul Islam as Arbitrator, without consent of the petitioner, who was nominated by the rival party.

3. Learned counsel for the petitioner avows that the impugned order is against law on the subject matter, because the learned Judge has failed to apply the express provisions of Act, 1940 applicable to the matter; adds that the learned Court below has erred in law i.e. with specific reference to section 20(4) of the Act ibid where it was incumbent upon the Court to appoint an arbitrator with consent of both the parties. Submits that the arbitrator proposed and appointed by the learned trial Court was without consent of the petitioner, therefore, the impugned order cannot hold field in presence of express provisions of law on the subject. Contends that consent is the essence of arbitration and arbitration is the mechanism chosen to resolve disputes quickly and without being delayed by technicalities by an arbitrator and it is illogical that parties should submit to the adjudication of an arbitrator in whom they do not repose any confidence. Maintains that in the entire scheme of the Arbitration Act, 1940 there is no provision provided for the appointment without the consent of the parties; that the provisions of section 8 of the Act have no bearing on the matter in hand as the application has been filed by the respondent itself under section 20 and not under section 8 of the Act and scheme and intent as well as spirit of section 8 is separate and distinct from section 20(4), albeit both pertain to the appointment of arbitrators; that it is established law that an invalid and defect appointment of an arbitrator cannot lead to a valid and binding award; thus, the impugned

order is not sustainable as the same has been passed with material illegality and irregularity. Prays for acceptance of civil revision in hand, setting aside of the impugned order and appointment of arbitrator with consent of the parties.

4. On the contrary, learned counsel for the respondent has supported the impugned order and has prayed for dismissal of the civil revision in hand.

5. Heard.

6. Disposal of the present petition needs reproduction of the provisions of relevant law i.e. Arbitration Act, 1940, which are reproduced infra:-

> 'Section 3: Provisions implied in arbitration agreement. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.'

First Schedule is headed as "implied condition of arbitration agreements" and it consists of eight paragraphs and the most relevant are reproduced as under:-

1. Unless otherwise expressly provided, the reference shall be a sole arbitrator.
2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.
3. ----------
4. ----------
5. ----------
6. ----------
7. ----------
8. ----------

Section 20(4) of the Act, 1940 is also relevant to the present case, which reads:-

> '20. Application to file in Court arbitration agreement. -
>
> (1) ----------
>
> (2) ----------
>
> (3) ----------
>
> (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.'

When the above provisions of law are read conjointly it can easily be gathered that consent of the parties is sine qua non and essential and any dissent shown by either of the party on the arbitrator proposed by the rival party, the said arbitrator would not be appointed, because, in the entire scheme of the Act, 1940, the jurisdiction is not conferred upon the Court, to whom application under section 20(4) of the Act ibid is moved, to unilaterally appoint a sole arbitrator proposed by one party that is not acceptable to the other party. It is settled principle of law that when an act is prescribed to be done in a certain manner, it must be done in the prescribed manner and not otherwise. In Karachi Dock Labour Board v. Messrs Quality Builders Ltd. (PLD 2016 Supreme Court 121) the Apex Court of the Country has elaborated the said principle in the following words:-

> '..... shall be stringently applicable when it comes to the question of appointment of arbitrators; as the conferment of jurisdiction upon the arbitrator should be strictly in line with the letter and spirit of the agreement between the parties and the express provisions of the law. Obviously, any award passed by such an arbitrator who is not appointed in the above manner shall also be invalid, having been passed by an arbitrator without jurisdiction.'

Apart from the above, I am in agreement with the arguments and assertions of the learned counsel for the petitioner on the point that provisions of section 8 of the Act, 1940 are not applicable to the matter in hand, because the same is separate and distinct from section 20(4) of the Act ibid. Moreover, there is no embargo, restraint and impediment on appointment of more than one arbitrator as the above provision of law is much clear on the subject and at the cost of repetition the subsection (4) of the Section 20 of the Act supra is referred here, 'If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.'

7. For the foregoing reasons, it is held that the learned Court below has exercised that jurisdiction which is not vested in it and while committing illegality and irregularity has passed the impugned order, which cannot be allowed to hold field further. Resultantly, the civil revision in hand is allowed, impugned order is set aside. The learned trial Court is directed to appoint new arbitrator(s), obviously, with consent of the parties and also keeping view his/their expertise in the relevant field. No order as to the costs.

KMZ/T-19/L **Order accordingly.**

2020 C L C 291

[Lahore]

Before Shahid Bilal Hassan, J

IJAZ AHMAD CHAUDHRY----Petitioner

Versus

Learned CIVIL JUDGE and others----Respondents

Writ Petition No.9756 of 2019, decided on 30th October, 2019.

(a) Constitution of Pakistan---

----Art. 199 --- Civil Procedure Code (V of 1908), S. 115 --- Constitutional jurisdiction of High Court ---Scope---Orders amenable to revision under S. 115 of the C.P.C. --- Conversion of Constitutional petition into civil revision --- Scope---- Where an impugned order was revisable under S. 115 of the C.P.C., then a Constitutional petition could be converted into a civil revision under S.115, C.P.C.

Mian Asghar Ali v. Government of Punjab through Secretary (Colonies) BOR, Lahore and others 2017 SCMR 118 rel.

(b) Specific Relief Act (I of 1877)---

----S. 12---Suit for specific performance of agreement to sell immoveable property --- Depositing of entire / remaining sale consideration by plaintiff in court --- Bilateral contracts --- Scope--- Question before High Court was whether plaintiff seeking to enforce agreement to sell in a bilateral contract, was required to deposit entire sale consideration in court --- Contention of plaintiff, inter alia, was that as per contract, defendants failed to perform certain obligatory acts after initial payment, therefore plaintiff could not be made to deposit entire sale consideration until the defendants performed said acts --- Validity---- In bilateral agreement/contract/settlement(s), participating parties promise each other that they will perform or refrain from performing an act and such type of

contract was also known as a "two-sides contract" ---- When plaintiff had already performed first part of agreement, it was the defendants who had to perform their part as agreed between them and on refusal of the same, plaintiff approached Court to force them to perform their part --- In such a case plaintiff could not be forced to deposit whole sale consideration, especially when the agreement was bilateral as well as under certain terms and conditions and both the parties had to perform their parts step by step.

Hamood Mehmood v. Mst. Shabana Ishaque and others 2017 SCMR 2022 distinguished.

(c) Contract---

----Business contract --- Nature and types of business contracts --- Formation and nature of consideration in business contracts---Contracts based on validity and execution ---Various types of "business contracts/agreements" used, enumerated and meaning thereof explained.

Abid Saqi, Mudasir Farooq and Sohail Afzal Khan for Petitioner.

Rana Intizar and Umer Munir for Respondents Nos.2 and 3.

ORDER

SHAHID BILAL HASSAN, J.----At the very outset, it is observed that the impugned order passed by the learned trial Court is revisable; thus, the instant writ petition is converted into civil revision by placing reliance on Mian Asghar Ali v. Government of Punjab through Secretary (Colonies) BOR, Lahore and others (2017 SCMR 118).

2. Through the instant revision petition, the petitioner calls into question the order dated 26.01.2019 passed by the learned Civil Judge Ist Class, Lahore whereby the petitioner, being plaintiff in a suit for specific performance of agreement settlement dated 30.03.2018, was directed to pay the remaining consideration amount in the Court within a period of 30 days while relying on the dictum laid down by Hon'ble Supreme Court in judgment reported as Hamood Mehmood v. Mst. Shabana Ishaque and

others (2017 SCMR 2022).

3. It has been contended by learned counsel for the petitioner that in peculiar facts and circumstances of the petitioner's case the impugned order could not have been passed as the agreement between the petitioner and respondents Nos.2 and 3 is altogether bilateral. Further submits that the petitioner has paid an amount of Rs.170,000,000/- in response to clause 2(a) of the agreement; after payment of the said amount there were certain acts to be done by the respondents Nos.2 and 3, in furtherance of which the petitioner was to pay the second part of the agreed consideration. On failure of the respondents Nos.2 and 3 to perform their part of the agreement, the petitioner was left with no option but to file the suit. Draws attention of this Court to the agreement where the petitioner was to pay the agreed consideration at five stages. Adds that the petitioner is ready to perform his part of agreement of other stages but the respondents have miserably failed in response to the very first part of payment made by the petitioner. Further submits that the ratio of case law relied upon by the learned trial Court i.e. Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022) does not attract in this case. Contends that section 22(iii) of the Specific Relief Act, 1877 obligates the learned trial Court to exercise its discretion in favour of the petitioner/plaintiff where the plaintiff has done substantial acts or suffered losses in consequence of contract capable of specific performance. The learned trial Court has acted in a manner contrary to applicable law, thus, has caused a grave injustice to the petitioner; hence, the impugned order being not sustainable in the eye of law may be set aside by allowing the revision petition in hand and impugned order may be declared without lawful authority and of no legal effect and the learned trial Court may be ordered to proceed with the case in accordance with law.

4. On the contrary, learned counsel representing the respondents Nos.2 and 3 has supported the impugned order and has prayed for dismissal of the revision petition in hand.

5. Heard.

6. Business contracts serve to obligate the parties involved to fulfill their contractual duties by exposing them to the risk of legal consequences in the event of a contract breach. Contracts may come in many different forms to suit different situations, needs, and purposes. They can be categorized based on how they are formed, what kind of consideration is being offered, how they will be executed and whether or not they are valid.

What is a Business Contract?

A contract refers to any agreement between two parties to create a legally-enforceable obligation to perform, or refrain from performing a certain task. It can relate to almost any kind of transaction, including a sale, service, transfer of property, ownership, or a combination of different kinds of transactions. Parties entering into a contract may be individuals, business organizations, or government agencies. A contract may involve more than two people. In most situations, only parties who enter into a contract have duties and rights under the contract.

The function of a contract is to create a legal relationship between two parties who wish to enter into an agreement and specify their obligations and rights in accordance with the agreement. Contracting parties are legally obligated to fulfill the terms stated in the contract, even if the contract seems to be a bad bargain or improvident, as long as it is not fraudulent or does not result from undue influence or duress.

Understanding the Different Kinds of Contracts.

A contract can be a simple oral or written agreement that does not have to be signed, witnessed, or sealed. It can also be a formal agreement that is written witnessed, signed and sealed by the parties involved. Traditionally, a contract was regarded as legally enforceable only if it was sealed. Now that courts are recognizing implied contacts and other kinds

of informal contracts, the use of formal contracts under seal has diminished. When it comes to contracts, there are four classifications, including:

- Contracts based on formation
- Contracts based on nature of consideration
- Contracts based on execution
- Contracts based on validity

Contracts Based on Formation

Contracts based on formation can be categorized into three groups; express contracts, implied contracts, and quasi contracts. An express contract refers to a contract resulting from an expression or conversation, while an implied contract occurs without an express. While an implied contract can be implied in fact or implied in law, a true implied contract arises from a mutation agreement that has not been expressed in words. An implied-in-law contract is also known as a quasi contract. It is not predicated on the consent of the parties involved and exists regardless of consent.

Contracts Based on the Nature of Consideration.

There are two types of contracts based on the nature of consideration; unilateral and bilateral contracts. In a unilateral contract, only one party makes a promise. Such a contract can be established with just an acceptance of an offer. In a bilateral contract, participating parties promise each other they will perform or refrain from performing an act. This type of contract is also known as a two-sides contract.

Contracts Based on Execution.

Contracts based on execution can either be executed contracts or executory contracts. An executed contract is a contract in which performance is already completed. To a certain extent, the term is a

misnomer since a contract no longer exists once the parties involved have fulfilled their obligations. An executory contract refers to a contract that obligates the participating parties to perform their obligations in the future.

Contracts Based on Validity.

Contracts based on validity can come in five different forms, including valid contracts, void contracts, voidable contracts, illegal contracts, and unenforceable contracts. A valid contract is one that is legally enforceable, while a void contract is unenforceable and imposes no obligations on the parties involved. If a contract is established under certain physical or mental pressure, it is called a voidable contract. Such a contract may become a valid or void contract in the future. An illegal contract refers to a contract with unlawful object, whereas an unenforceable contract is a contract that has not fulfilled certain legal formalities.

6. Here, in this case, the perusal of Property Sale Agreement/ Settlement Agreement goes to evince that it is bilateral agreement/contract/ settlement agreement and in a bilateral contract, participating parties promise each other that they will perform or refrain from performing an act. This type of contract is also known as a two-sides contract, as stated above; thus, when the petitioner has already performed his first part of agreement, it is the respondents who have to perform their part as agreed between them and the petitioner and when they refused to perform their part of agreement/settlement agreement, this thing prompted the petitioner to approach the Court so as to force them to perform their part. Thus, in this eventuality, the petitioner cannot be forced to deposit the whole sale consideration, especially when the agreement is bilateral as well as under certain terms and conditions and both the parties have to perform their parts step by step. As such, the case law relied upon by the learned trial Court reported as Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022) does not attract and is not applicable to the facts of the case in hand being on different premises.

The petitioner/plaintiff has shown and pleaded his willingness to perform his part of sale agreement/settlement agreement as is evident from paragraph No.9 of the plaint, which reads:-

> '9. That as already mentioned above the plaintiff was and is ready to perform his part of the Agreement dated 30-03-2018. He has already performed his part of contract in toto. The defendants have not performed their part of obligation which made the plaintiff to seek the indulgence of this Hon'able Court.'

It is clear from clause 2(a) of the settlement agreement that the petitioner/plaintiff has paid a huge amount of Rs.170,000,000/- and the respondents/defendants have to contact him after obtaining Fard for further proceedings i.e. execution of sale deeds etc. but when they did not perform their part, the petitioner/plaintiff knocked the door of Court of law so as to get the remedy available under law. The petitioner/plaintiff has done substantial act and there is no denial rather an admitted fact on record that he has paid Rs.170,000,000/- in performance of first part of settlement agreement in question, so discretion ought to have been used by the learned trial Court in his favour instead of directing him to deposit the balance amount by appreciating the ratio of above said judgment in a wrong way.

7. Having observed above, agreements are an integral part of the business. Every business will have several Types of agreements in place for the smooth functioning of the organization and processes. These Types of agreements also help in dealing with scenarios of difficulty. Agreements are also known as contracts in which there are two or more parties involved and they both are bound by agreement enforced by law. Different types of agreements/contracts are there, which are entered into as per circumstances and scenario. Almost twenty agreements are used by various parties or business to form a law bound contract between them, which are:-

1) Express agreement or Express contract

The agreement in which all the terms and conditions of all the

parties that are involved in winning clearly and explicitly specified is called Express agreement. Express agreement or contract is also termed as special agreement and all of the terms and conditions are clearly stated in it.

2) Partnership agreement

It is an agreement in which two or more partners spell out the relation and individual obligation along with their contributions to the business which is mutually agreed upon. Partnership agreements are very common in every organization.

3) Indemnity agreement.

Indemnity literally translates to hold harmless. Therefore, an agreement in which one partly explicitly agrees to indemnify another person or party or parties for damages that my result from an agreement is called indemnity contract of indemnity agreement. An example would be a pet store owner would ask the pet store workers to sign an indemnity agreement to prevent legal problems if a pet bites the worker in any case. The worker may still be covered with medical expenses from the employer but this is to avoid the lawsuit of hurting the employee on purpose.

4) Non-disclosure agreement.

A non-disclosure agreement empowers the business owners with legal status if any of the parties involved in the organization share any kind of proprietary or confidential trade information to anyone or any party outside the organization. A non-disclosure agreement is also signed by many employees working for various organizations.

5) Purchase order

It is a legal and forced agreement that ensures a business owner or a company to purchase the said item in the given quantity for a price which is mutually agreed upon with specific terms and conditions for the delivery and payment. Purchase orders are common in sales and many organizations issue a purchase order to avoid for the dispute. It is the job

of the sales team to get purchase orders from their customers. In some cases, even customer service may help to get the purchase order.

6) Property and/or equipment lease

This agreement will ensure monthly payment deposits and other terms and conditions for the disease of a building a piece of land or an equipment. It is generally agreed upon that equipment and properties covered the maintenance charges with the party who has leased the equipment.

7) Bill of sale.

It is perhaps the most commonly used agreement by people involved in businesses and non-businesses alike. It is a legal document that transfers title of property or a product and serves as an evidence for the terms of sale between the seller and the customer.

8) General employment contract

It is an agreement which jots down the relation between the employer and the employee, the remuneration, the benefits, terms and conditions, job description and any other issues that relate the employee to the workplace. All the organizations have a gentle employment contract to enroll any employee.

9) Security agreement

A security agreement is one which the borrower pledges to keep an assent of any kind as a collateral to get a loan from the lender. It comes with the condition that in case the borrower is not able to pay the principal amount, the lender may transfer the ownership of the asset mentioned in the agreement, to himself.

10) Independent contractor agreement

The supplements for people who are working individually as a contractor. This agreement is between two people one of which works as an individual and independent contractor who provides a particular

service to the other person. The agreement without terms and conditions which delete both the hiring person and the individual contractor.

11) Non-compete agreement

This agreement specifies that for a specific period of time, after leaving an organization the employee is prohibited in any way, to compare with the organization getting involved with any such organization that competes with the earlier organization. Usually, a General Employment contract will have with Non-Compete Agreement and Non-disclosure agreement together for employee.

12) Executory Agreement

An agreement drawn upon by two or more parties in which the terms and conditions are agreed upon mutually and a date is decided for the fulfillment is called executory contract. The contact shows that both the parties involved have obligations to complete the order for the contract to fulfill the terms and conditions.

13) Bilateral agreement

It is an agreement in which there is mutual understanding between the parties that are involved and each of them promises to implement an action in exchange for other parties' action.

14) Unilateral agreement

Unilateral contract or agreement is when only one party makes an un-asserted promise or ensures to fulfill the performance without obtaining other exchanged agreement from the other party, only one party is exclusively involved in the unilateral agreement. The promises are fulfilled without the involvement of the second party.

15) Unconscionable agreement

A contract that is entirely based on one side of the participating parties which in turn is unfair to the other party or parties and therefore is

unenforceable under the terms of law is called unconscionable contract are agreement. This type of agreement is entirely uneven and does not favour other parties in any way thus ensuring disagreement from the other parties.

16) Adhesion agreement

When one participating party in the contract has all the leverage along with additional bargaining power, and the agreement is legally binding to all of the parties involved in it for executing of a specific thing or process while it is used to create the contract to benefit all of them is called Adhesive agreement.

17) Promissory Note

It is a legal record of the loan wherein the parties involved agree that a certain amount is borrowed and is to be returned on an agreed date. In other words, the promissory note is a legally enforced document which says 'I owe you' a certain amount of money or services.

18) Stock Purchase agreement

It is an agreement to sell a certain stock, in pre-decided quantity by all the participating parties, to a specified individual. The individual would owe the organization payment on agreed terms and agreed price. Post completion of Stock Purchase Agreement, the parties may either extend or terminate contract thereby taking back all the unsold stock, if any.

19) Transfer agreement

They are also known as 'transfer from a sole proprietorship to a limited company transfer agreement'. These are usually executed in order to transfer a business from an individual owner to a company. Transfer agreements are extremely complicated owing to the ownership and segregation of assets and liabilities.

20) Joint Venture agreement

When two or more companies agree to pool and share all the

resources and profits at a pre-decided percentage, is called a Joint Venture Agreement. This agreement facilitates the mutual benefit of both the parties involved. Joint ventures pools resources and reduce risk while shares challenges. Joint ventures are great when an organization is expanding in a new country.

8. All such contracts and agreements are introduced and entered into as per wishes and whims of the parties with free consent and undue influence as well as coercion and unless and until the same are not void or voidable due to terms and conditions, the same are enforceable in accordance with law.

9. For the foregoing reasons and discussions, the direction for depositing the remaining sale consideration issued by the learned trial Court to the petitioner is not tenable and such a direction will be issued only after the trial of the suit and at the time when the rights of the parties are being determined and such a direction will be issued at the time when the final decree is passed and not at this stage, keeping in view peculiar facts and circumstances of the case in hand. Resultantly, it is observed that the learned Court below has wrongly exercised vested jurisdiction and as such the impugned order cannot be allowed to hold field further. Consequently, the revision petition in hand is allowed and impugned order is set aside. No order as to the costs.

KMZ/I-21/L **Revision allowed.**

2020 C L C 594

[Lahore]

Before Shahid Bilal Hassan, J

IRFAN ULLAH KHAN----Petitioner

Versus

PROVINCE OF THE PUNJAB and others----Respondents

Writ Petition No. 13277 of 2016, heard on 26th September, 2019.

(a) Punjab Land Revenue Act (XVII of 1967)---

----S.41(2)---Suit for declaration---Correction of revenue record by the revenue officer---Assistant Collector prepared Fard Badar whereby he divided one Khata into two and created ownership in favour of respondent and appeal against the said order was dismissed with the observation that Civil Court had jurisdiction in the matter---Validity---Petitioner had approached Civil Court by instituting suit for declaration challenging the vires of Fard Badar---When petitioner and rival party had already approached the Court of ultimate jurisdiction and had challenged the validity of Fard Badar then revenue forum had rightly observed that matter did fall within the jurisdiction of Civil Court---When petitioner had already elected to avail remedy before Civil Court then revenue Courts had rightly withheld themselves from deciding the lis on merits---Petitioner had already knocked the door of Civil Court and doctrine of election would apply in the matter---Constitutional petition was dismissed, in circumstances.

Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Karishna Prabhu (dead) by L.Rs. AIR 1977 SC 1268; Kothandarama Gramani v. Sellammal and others AIR 1959 Madra 524, V 46 C 167; Mst. Sudehaiya Kumar and another v. Ram Dass Pandey and others AIR 1957 All. 270, V 44 C 82 May; Land Acquisition Officer and Assistant

Commissioner, Hyderabad v. Gul Muhammad through Legal Heirs PLD 2005 SC 311; Mst. Shireen Khanum v. Member (Revenue), Board of Revenue, Punjab, Lahore and others 2001 YLR 2387; Rai Ashraf and others v. Muhammad Saleem Bhatti and others PLD 2010 SC 691; Dr. Muhammad Tahir-Ul-Qadri v. Federation of Pakistan through Secretary M/o Law, Islamabad and others PLD 2013 SC 413; Civil Aviation Authority through Director General and 3 others v. Mir Zulfiqar Ali and another 2016 SCMR 183; Muhammad Sarwar v. Additional District Judge, Faisalabad and 5 others 2017 CLC 1361 and Park View Enclave (Pvt.) Ltd. through Chief Financial Officer v. Capital Development Authority through Chairman and 2 others 2018 CLC 947 ref.

Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others PLD 2018 SC 828; Muhammad Boota v. Judge Family Court and others 2019 CLC 640 and Raees Ghulam Sarwar through Attorney v. Mansoor Sadiq Zaidi and others PLD 2008 Kar. 458 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Factual controversy could not be considered and dealt with while exercising constitutional jurisdiction.

(c) Civil Procedure Code (V of 1908)---

----O.II, R. 2---Splitting of claim---Effect---No one could be allowed to split his claim.

Mian Muhammad Iqbal v. Mir Mukhtar Hussain and others 1996 SCMR 1047; Zahoor Ahmad v. Master Mushtaq Ahmad 2016 CLC 937; D. Cawasji & Co., and others v. The State of Mysore and another 1975 AIR 813 and 1975 SCR (2) 511 rel.

(d) Words and Phrases---

----'Election'---Meaning.

Black's Law Dictionary 11th Edition rel.

Sheikh Usman Karim ud Din for Petitioner.

Shafqat Mahmood Chohan and Mian Muhammad Athar for Respondent.

Musharaf Ali Khan for Respondents Nos.6, 7, 9, 23 to 26.

Syed Shadab Jafri, Additional Advocate General.

Dates of hearing: 20th and 26th September, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.----Facts in nutshell as have been asserted in the instant constitutional petition are as such that predecessor of the parties namely Muhammad Yamin Khan was owner of land measuring 183 kanals 10 marlas falling in Khewat No.301 as per Record of Rights for the year 1965-66 in Haveli Lakha, Tehsil Depalpur, District Okara; he leased out an area measuring 01 kanal 15 marlas for a period of ten years from 1965 to 1975 to Muhammad Saleh, etc. for the construction of Petrol Pump vide mutation No.368 sanctioned on 30.07.1966; at that time, allegedly the land was temporarily divided in two khewats: one measuring 01 kanas 15 marlas and other for an area of 129 kanals 08 marlas. The predecessor of the private parties namely Muhammad Yamin died in the year 1976. Subsequently, all the legal heirs i.e. five sons and five daughters, partitioned their total property through family partition. Mst. Shagufta Begum, inherited land measuring 07 kanals 11 marlas, however, she sold out land measuring 09 kanals 12 marlas, which was in excess of her entitlement. Allegedly, the land of the Petrol Pump came under the ownership of father of the petitioner namely Aman Ullah Khan; the

petitioner allegedly extended lease in favour of Saleh Khan, etc. from time to time till 19.11.1996 and finally upon determination of lease vide mutation No.9275, the said land measuring 01 kanal 15 marlas was made part of Khata comprising of land measuring 129 kanals 08 marlas. The father of petitioner alienated the said land measuring 01 kanal 15 marlas through two gift deeds bearing Nos. 2448 & 2449 dated 12.12.1996 in favour of the petitioner and in consequence of these two gift deeds mutations Nos.9606 and 9607 were sanctioned in favour of the petitioner on 28.01.1998.

Musharaf Ali Khan, legal heir of Mst. Shagufta Begum instituted two civil suits in which he claimed himself to be the owner of land measuring 01 kanal and 15 marlas as legal heir of Mst. Shagufta Begum despite the fact that her mother had already sold out more land than her entitlement. He also filed an application for holding inquiry and correction of record. The said application was dismissed vide order dated 24.05.2008 by the District Collector, Okara. The said order was challenged by Musharaf Ali Khan before the Executive District Officer (Revenue), Okara, whereas the petitioner got lodged an FIR No.749/2008 against Musharaf Ali Khan on the said score. Allegedly, during pendency of the appeal, the parties entered into a compromise where-after Musharaf Ali Khan withdrew his appeal vide order dated 05.03.2009 as well as his suits.

One Nasrullah Khan, another co-owner in the Khata initiated process of correction of record and the Assistant Collector/Tehsildar, Depalpur prepared a Fard Badr No.34 dated 18.01.2010, whereby he divided one Khata into two and also created ownership of Mst. Shagufta Bibi who had already sold land in excess of her entitlement. Through this Fard Badar, the petitioner, who was, as per registered gift deeds, owner in

possession of land measuring 01 kanal 15 marlas became landless. The petitioner assailed the said order of preparing Fard Badr dated 18.01.2010 before the District Collector which was dismissed on 22.06.2010 by District Collector (Revenue), Okara. Both the above said orders were assailed by the petitioner before the Additional Commissioner (Revenue), Sahiwal Division, but the appeal was dismissed vide order dated 20.12.2012 and same remained the situation before Board of Revenue, as revision petition of the petitioner was dismissed on 30.09.2014 and review petition thereof was dismissed on 15.10.2015; hence, the instant constitutional petition calling into question the above said orders.

2. Learned counsel for the petitioner has argued that while deciding the revision petition on 30.09.2014, the learned Member (J-VII), Board of Revenue, Punjab did not pass any speaking order at all, as such, the same cannot be considered as judicial order; adds that it was duty of the learned Member to take into consideration all the points raised by the parties and decide the same after independent application of mind; decision of revision petition in such a cursory manner was an error apparent on the face of the record and it was the duty of the learned Member to look into all aspects of the case while deciding review petition but the needful was not done; hence, the impugned orders suffer from jurisdictional error, thus, the impugned orders are liable to be declared void and of no legal effect. Contends that while deciding review petition, the learned Member identified certain illegalities committed by the Revenue Officers, but despite all this dismissed the review application, which amounts to renunciation of jurisdiction vested in him. Maintains that after dismissal of the application for holding enquiry regarding alleged wrong entries in revenue record by the learned District Collector, there was no justification for preparation of Fard Badr by Tehsildar but all the forums below while passing the impugned orders have lost sight of the doctrine of res judicata

viz. not to open already settled issue. If the respondents had any grievance, the only course available to them was to approach the civil Courts, because revenue Courts being of summary jurisdiction could not decide intricate issues relating to entitlement of the parties settled and reflected in revenue record for a long time. Maintains that the learned Revenue Officers while passing the impugned orders on the premise that the matter should be resolved by the civil court, has failed to take into consideration the provisions of section 172 of the Punjab Land Revenue Act, 1967, which bars the jurisdiction of civil court regarding the matters relating to correction of the revenue record, because the revenue officers had the jurisdiction to correct the entries wrongly been altered by preparing Fard Badr. Therefore, the revenue officers by not exercising jurisdiction vested in them, have committed blatant illegalities which have resulted into miscarriage of justice. Hence, by allowing the constitutional petition in hand, the impugned orders may be set aside and declared void and of no legal effect. Relies on Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Karishna Prabhu (dead) by L.Rs. (AIR 1977 Supreme Court 1268), Kothandarama Gramani v. Sellammal and others (AIR 1959 Madra 524 (V 46 C 167), Mst. Sudehaiya Kumar and another v. Ram Dass Pandey and others (AIR 1957 Allahabad 270 (V 44 C 82 May), Land Acquisition Officer and Assistant Commissioner, Hyderabad v. Gul Muhammad through Legal Heirs (PLD 2005 Supreme Court 311) and Mst. Shireen Khanum v. Member (Revenue), Board of Revenue, Punjab, Lahore and others (2001 YLR 2387-Lahore).

3. On the contrary learned counsel representing the respondents has argued that factual controversy is involved, which cannot be resolved through this writ petition, because a suit for declaration was instituted on 02.02.2010, which is pending between the parties and in paragraph No.5 of the said civil suit, the order with regards to Fard Badr bearing No.34

dated 18.01.2010 has been challenged and the same was impugned through this writ petition as well. Moreover, a suit under section 5 of the Specific Relief Act, 1877 was also filed on 06.07.2010 on the same subject matter relating to the issuance of said Fard Badr, which is in issue before this Court. Moreover, two civil suits germane to the same property on the basis of said Fard Badr were also filed on 23.12.2010 and 02.10.2012, respectively. A suit was also filed on the same subject matter on 02.07.2013. Adds that the matter with regards to Fard Badr No.34 dated 18.01.2010 has been decided by the revenue hierarchy upto the Board of Revenue and it has been observed that matter in dispute is of civil nature and the Civil Court being the competent jurisdiction will decide the matter; hence, the impugned orders were based on proper exercise of jurisdiction. Prayer for dismissal of the constitutional petition in hand has been made. Relies on Rai Ashraf and others v. Muhammad Saleem Bhatti and others (PLD 2010 Supreme Court 691), Dr. Muhammad Tahir-Ul-Qadri v. Federation of Pakistan through Secretary M/o Law, Islamabad and others (PLD 2013 Supreme Court 413), Civil Aviation Authority through Director General and 3 others v. Mir Zulfiqar Ali and another (2016 SCMR 183), Muhammad Sarwar v. Additional District Judge, Faisalabad and 5 others (2017 CLC 1361-Lahore) and Park View Enclave (Pvt.) Ltd. through Chief Financial Officer v. Capital Development Authority through Chairman and 2 others (2018 CLC 947-Islamabad).

4. Heard.

5. There is no cavil to the proposition that factual controversy cannot be considered and dealt with while exercising constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and if the Court reaches to such conclusion, the relief sought for by

the petitioner in such petition cannot be granted.

6. In the present case, admittedly, the petitioner has opted to approach the Court of ultimate jurisdiction i.e. Civil Court by instituting suits for declaration, wherein he has challenged the vires of Fard Badr No.34 dated 18.01.2010, certified copies of which have been submitted by the rival party, which are titled "Irfan Ullah Khan v. Nasrullah Khan and others" and "Irfan Ullah Khan v. Tehseen Ullah Khan and others"; moreover, another suit on the same subject matter titled "Sardar Ahmad Afzal and others v. Irfan Ullah Khan and others" is also pending adjudication.

The Revenue Officers upto the Board of Revenue, after such development vide impugned orders, have standstill their hands from making any interference in the order passed with regards to Fard Badr dated 18.01.2010 and have observed that as the matter with regards to cancellation of registered sale deeds falls within jurisdiction of Civil Court, where litigation is pending inter se the parties. In this scenario, when the petitioner and the rival party has already approached the Court of ultimate jurisdiction and has challenged the validity of Fard Badr, the forums below giving observations as stated above have not committed any illegality and have exercised vested jurisdiction as per mandate of law, because the revenue hierarchy is bound to implement the decree passed by Civil Court and cannot say "no" to a decree determining rights of the parties.

7. Here comes the doctrine of election into play. In Black's Law Dictionary 11th Edition, "Election" is defined as: "the exercise of choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or other remedies. Needless to observe that the petitioner has already knocked the door of Civil Court by

instituting suits for declaration, obviously on the same set of facts, challenging the vires of Fard Badr, subject matter in the present constitutional petition, besides other documents; thus, when the position is as such, the doctrine of election comes into play in full force.

The August Supreme Court of Pakistan in Trading Corporation of Pakistan v. Devan Sugar Mills Limited and others (PLD 2018 Supreme Court 828), has invariably held that:-

> 'The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principle of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, Rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order, 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations.'

Apart from above vivid observations, the Apex Court of the country has further held in the same case:-

> 'Fair trial, does not envisage recourse to successive remedies one after another against one and the same impugned order on

substantially same set of facts and pleadings seeking substantially similar relief, as it would be against the doctrine of election, as expounded above.'

In addition to the above, this Court in Muhammad Boota v. Judge Family Court and others 2019 CLC 640-Lahore (Multan Bench) has already held:-

'It is by now settled that where more than one remedy is available to a person and he avails one of those remedies for redress of his grievance, he cannot later on abandon that remedy and turnaround to seek another remedy'

With further observation that:-

"Reliance in this regard is placed on Messrs Shell Pakistan Limited through Legal Affairs Advisor and Attorney v. Aurangzeb Khan (2005 PLC 424) wherein it is held as under:

'It is a settled principle of law that where two remedies are available to a person he has option to choose either of the two remedies however once he exercises such option, he could not resort to the other remedy.'

Earlier to this, the Hon'ble Sindh High Court was also of the same view in a judgment reported as Raees Ghulam Sarwar Through Attorney v. Mansoor Sadiq Zaidi and others (PLD 2008 Karachi 458).

8. Pursuant to the above, any decisive observation at this stage, especially when factual controversy is involved in the matter in hand and matter is sub judice before the Court of competent jurisdiction inter se the parties, would prejudice case of either of the party.

9. Another aspect in this case is germane to splitting of claim. It is settled principle, by now, that splitting of claim by a party is against the

spirit of law as provided under Order II, Rule 2 of the C.P.C. The rationale behind Rule 2(1)(2)(3) of Order II, Code of Civil Procedure, 1908 clearly indicates that the Legislature introduced the said provisions to control splitting up of claim and to restrict the multiplicity of suits- Mian Muhammad Iqbal v. Mir Mukhtar Hussain and others (1996 SCMR 1047).

On this subject, this Court in Zahoor Ahmad v. Master Mushtaq Ahmad (2016 CLC 937 Lahore), has observed:-

> 'Order II, Rule 2, C.P.C. stipulates that if the cause of action is the same, the plaintiff has to prefer all the claims arising thereunder before the court in on suit. It, therefore, prohibits splitting of claim and enjoins unity of all claims based on the same cause of action in one suit. The object appears to prevent further litigation between the same parties over the same cause of action and this object is very much apparent from the language of Rule 1 which states that "Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them." The term 'cause of action' in the context of Order II, Rule 2, C.P.C. has often explained as the facts which give occasion to and form the foundation of the suit. The Privy Council in a judgment reported as Muhammad Khalil Khan and others v. Mahbub Ali Mian and others PLD 1948 PC 131 has defined "cause of action" as every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. In Ranbir Singh v. Dalbir Singh and others Decided on 18th of July, 2012 by the Delhi High Court, the rationale of Order II, Rule 2, C.P.C. was explained in the following terms:

'A plain reading of Order II, Rule 2 shows that mandate of law is that when a cause accrues, all actions which are required to be taken based on the said cause have to be included in one proceeding unless leave of the court is sought, and obtained, under Order II, Rule 2 of the Code of Civil Procedure. The policy of law behind this rule is that it is in the interest of the State and the citizens that litigation is brought to an end at the earliest and that no person is vexed twice for the same cause."

Avoiding multiplicity of unnecessary legal proceedings, in different forums, should be an aim of all courts D. Cawasji & Co., and others v. The State of Mysore and another on 29 October, 1974 (AIR 1975 ??? 813, 1975 SCR (2) 511). Therefore, when the petitioner has, as referred to supra, elected to avail remedy before the Civil Court, which is Court of ultimate jurisdiction, the revenue Courts have rightly withheld themselves from deciding the lis on merits.

10. For the foregoing reasons and discussions while placing reliance on the judgments supra, the constitutional petition in hand having no force and substance stands dismissed. No order as to the costs.

ZC/I-22/L **Petition dismissed.**

2020 C L C 780

[Lahore]

Before Shahid Bilal Hassan, J

Mst. FATIMA and 2 others----Petitioners

Versus

NAJEEB ULLAH and another----Respondents

Civil Revision No.5379 of 2019, heard on 23rd December, 2019.

(a) Civil Procedure Code (V of 1908)---

----O. XIII, R. 4---Endorsements on documents admitted in evidence---Scope---Document not produced and proved in evidence but only 'marked' as an exhibit---Such document had no legal value and sanctity in the eyes of law---When a document was not brought on record through witness(s) and duly exhibited, the same could not be taken into consideration by the Court --- Mere marking of a document as an exhibit would not dispense with requirement of proving the same and the same could not be exhibited unless it was proved.

Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604; Abdullah v. Provincial Government through Secretary Board of Revenue and 3 others 2014 CLC 285; Inspector-General of Police, Balochistan, Quetta and 4 others v. Ghulam Rasool 2012 CLC 1645; State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal 2011 SCMR 1013; Anwar Ahmad v. Mst. Nafiz Bano through Legal Heirs 2005 SCMR 152 and Syed Abdul Manan and others v. Malik Asmatullah and others 2019 CLC 1096 ref.

(b) Qanun-e-Shahadat (10 of 1984)---

----Art.76---Documentary evidence---Photocopies---Admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Art. 76 of the Qanun-e-Shahadat, 1984 would be illegal.

Feroz Din and others v. Nawab Khan and others AIR 1928 Lah. 432 and Fazal Muhammad v. Mst. Chohara and others 1992 SCMR 2182. ref.

(c) Qanun-e-Shahadat (10 of 1984) ---

----Art.76---Documentary evidence---Photocopied document---Where neither author of such document nor the witnesses nor its original produced in Court for inspection purposes---Such document, without formal proof, could not be relied upon.

Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160 ref.

Zaffar Abbas Khan for Petitioners.

Asmat Ullah Khan Niazi for Respondents.

Date of hearing: 23rd December, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, petitioners instituted a suit for declaration against the respondents maintaining therein that predecessor in interest of the petitioners was Sher Khan son of Alam Khan, resident of Tarri Khel, Tehsil and District Mianwali, who had contracted marriage with Mst. Fatima daughter of Muhammad Khan (petitioner No.1) and out of this wedlock two daughters i.e. petitioners Nos.2 and 3 were born; said Sher Khan had migrated to Karachi, who

settled down over there, got issued his I.D. Card; alleged he was follower of Fiqah-e-Jafria, he was a religious person and obtained the membership of a proscribed organization, he left his native abode and resided in Karachi at various places with various names. It was further averred that Sher Khan got issued an I.D. Card in the name of Saif Ullah son of Noor Ullah Khan, who died on 02.10.2003 in a road accident and was buried in Karachi. After his death Mutation No.1638 dated 12.08.2005 had been sanctioned in favour of the petitioners being legal heirs of deceased Sher Khan alias Saif Ullah Khan son of Alam Khan. It was asserted that respondents (paternal nephews of deceased) started objecting to the legacy of deceased and claimed themselves as heirs of deceased and to obtain share in the property; hence, the suit.

The respondents contested the suit by submitting written statement and controverted the averments of plaint by maintaining that inheritance mutation No.1638 dated 12.08.2005 was fake and illegal document, it was attested against law and facts, it was result of fraud and connivance, as a matter of fact, Sher Khan son of Alam Khan original owner was issueless, plaintiffs are not legal heirs of deceased Sher Khan; they are successors of Saif Ullah Khan son of Noor Ullah Khan and had no concern whatsoever with the disputed property. Sher Khan was not follower of Shia Fiqah, he was a Sunni by faith, Mst. Fatima (petitioner No.1) was got married with Sher Khan son of Alam Khan, at the first instance, couple remained issueless. Then petitioner No.1 married to Saif Ullah Khan son of Noor Ullah Khan. However, they admitted that Sher Khan was a member of proscribed organization and prayed for dismissal of the suit.

Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned

trial Court vide impugned judgment and decree dated 19.04.2017 dismissed suit of the petitioners, against which they preferred an appeal, but the same was also dismissed vide impugned judgment and decree dated 02.05.2018; hence, the instant civil revision.

2. Learned counsel for the petitioners has argued that the impugned judgments and decrees are against law and facts of the case; that the same suffer from misreading and non-reading of evidence on record; that the petitioners have successfully proved their case by leading confidence inspiring evidence but the same has been ignored altogether by the learned Courts below. Moreover, the respondent No.1 while appearing before the learned appellate Court on 18.11.2017 recorded his statement with regards to no objection on acceptance of appeal of the petitioners and decreeing the suit, but the same fact has totally been ignored by the learned appellate Court as the same has not been discussed in the impugned judgment and decree dated 02.05.2018. Solitary statement of the respondent No.2 has been given undue weight by the learned Courts below. It is not proved on record that Mst. Fatima (petitioner No.1) firstly married to Sher Khan son of Alam Khan and then with Saif Ullah son of Noor Ullah Khan, rather factum of her marriage with Sher Khan son of Alam Khan is an admitted one, but the learned Courts below have non-suited the petitioners mere on the basis of surmises and conjectures by relying on photocopies Marked on record by the respondents, which otherwise cannot be relied upon as the same have not been proved by them as per law. As such, material illegalities and irregularities have been committed by the learned Courts below, which has resulted in miscarriage of justice. Thus, by allowing the civil revision in hand, the impugned judgments and decrees may be set aside and suit instituted by the

petitioners may be decreed as prayed for.

3. On the contrary, learned counsel for the respondents has supported the impugned judgments and decrees and has prayed for dismissal of the civil revision in hand.

4. Heard.

5. In the present case, no document has been exhibited rather the same have been "marked", meaning thereby the same have no legal value and sanctity in the eye of law, because Rule 4 of Order XIII of the Code of Civil Procedure, 1908 provides:-

> '4. Endorsements on document admitted in evidence.-(1) Subject to the provisions of next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-
>
> (a) the number and title of the suit,
>
> (b) the name of the person producing the document,
>
> (c) the date on which it was produced, and
>
> (d) a statement of its having been so admitted:
>
> and the endorsement shall be signed or initialed by the Judge.
>
> (2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge.'

The above provision of law makes it vivid that when a document is not

brought on record through witness(s) and duly exhibited, the same cannot be taken into consideration by the Court. When such a matter came up before the Apex Court of country, it was held in reported judgment Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 Supreme Court 604):-

> 'The document which has not been brought on record through witnesses and has not duly exhibited, cannot be taken into consideration by the Court.'

The same was followed in Abdullah v. Provincial Government through Secretary Board of Revenue and 3 others (2014 CLC 285-Balochistan) and similar view was adopted in Inspector-General of Police, Balochistan, Quetta and 4 others v. Ghulam Rasool (2012 CLC 1645-Balochistan). Even prior to it, the Hon'ble Supreme Court in a case reported as State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013) held:-

> 'We are not convicted that, such document, which has not been produced and proved in evidence but only "marked" can be taken into account by the Courts as a legal evidence of a fact.'

The ratio of said judgment was followed and relied upon along with Anwar Ahmad v. Mst. Nafiz Bano through Legal Heirs (2005 SCMR 152), in Syed Abdul Manan and others v. Malik Asmatullah and others (2019 CLC 1096-Balochistan).

6. Mere marking of a document as an exhibit would not dispense with requirement of proving the same and the same cannot be exhibited unless it is proved. In the present case the situation remained the same, but the learned Courts below have not considered and dilated upon the

requirement of law because admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of the Qanun-e-Shahadat Order, 1984 would be illegal. Reliance is placed on Feroz Din and others v. Nawab Khan and others (AIR 1928 Lahore 432) and Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182). Neither authors of the documents nor the witnesses nor such documents in original have been produced in Court forinspection purposes. Thus, such documents, without formal proof, cannot be relied upon; reliance is placed on Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160), but as against this, the learned Courts below placing reliance on such documents have proceeded to pass the impugned judgments and decrees, which cannot be allowed to hold field, because in case of inability of either of the party to produce the Assistant Commissioner, Mianwali who allegedly conducted inquiry (Mark-DG), the learned trial Court ought to have summoned him as Court witness so as to unearth the truth and reach to a just conclusion of the case by determining rights of the parties, because the basic purpose is to administer justice to the parties rather to knock them out on the basis of technicalities. Moreover, no official from the NADRA was associated with the proceedings, rather the documents, which otherwise could not be considered being made way on the record in an improper manner and without adopting due process of law as has been hinted above, have been given undue weight.

7. Apart from this, the respondent No.1, while appearing before the learned appellate Court on 18.11.2017 recorded his statement having no objection acceptance of appeal and passing of decree in favour of the petitioners, but the said factum was also not considered and discussed by

the learned appellate Court while passing the impugned judgment and decree dated 02.05.2018, which otherwise ought to have adjudged in accordance with and effect of the said statement should have been discussed and determined.

8. Pursuant to the above discussion, the learned Courts below while passing the impugned judgments and decrees have failed to exercise vested jurisdiction as per mandate of law and have committed material illegalities and irregularities. Thus, the civil revision in hand is allowed, impugned judgments and decrees are set aside and the matter is remanded to the learned trial Court with a direction to decide the same afresh after recording evidence of the Assistant Commissioner, Mianwali who conducted the inquiry Mark-DG as well as evidence of official from the NADRA, as Court witness, keeping in view the ratio of judgments referred hereinbefore. No order as to the costs.

MWA/F-1/L **Revision allowed.**

2020 C L C 817

[Lahore]

Before Shahid Bilal Hassan J

AHMAD DIN (deceased) through L.Rs. and others----Petitioners

Versus

KHUSHI MUHAMMAD and others----Respondents

Civil Revision No.60561 of 2019, heard on 4th December, 2019.

(a) Civil Procedure Code (V of 1908)---

----S. 11 & O. VII, R. 11 & O. II, R. 2---Suit for declaration and permanent injunction---Res judicata, principle of---Applicability---Trial Court rejected plaint under O. VII, R. 11, C.P.C.---Validity---Earlier suit with regard to impugned mutation had already been decided finally---Courts below had rightly concluded that fresh suit with regard to same subject matter which had already been decided was barred under S. 11, C.P.C.---Relief which had been omitted in the earlier suit could not be enforced through subsequent suit as second suit was not competent and barred under O. II, R. 2, C.P.C.---When plaint was barred by any law then same should be rejected---Principle of res judicata was attracted in the case---No illegality or irregularity had been committed by the Courts below while passing the impugned judgments and decrees---Revision was dismissed, in circumstances.

Muhammad Chuttal v. Atta Muhammad through L.Rs. 2007 SCMR 373; Owais Ahmed Idris v. Syed Muhammad Waqar Uddin PLD 2014 Sindh 465 and Mst. Zeba and others v. Sher Muhammad and others 2010 YLR 2011 distinguished.

(b) Civil Procedure Code (V of 1908)---

----O. II, R. 2---Relinquishment of any part of claim---Effect---When plaintiff had omitted or relinquished any part of claim then he could not sue with regard to said portion of claim so omitted or relinquished afterwards.

Hafiz Muhammad Yusuf for Petitioners.

Rai Khadim Hussain Kharal for Respondents.

Muhammad Arshad Manzoor, Assistant Advocate-General.

Date of hearing: 4th December, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, the petitioners instituted a suit for declaration with consequential relief of permanent injunction in respect of suit property measuring 81-kanals 17-marlas, detailed in the head note of the plaint, by maintaining that the property in dispute was allotted and confirmed through RL-II No. 473 dated 19.10.1963 to Khushi Muhammad son of Jan Muhammad, Rehmat Ali, Ahmed Din, sons of Dedar Bakhsh being Mukhbars and they became exclusive owners in possession of the subject property; Jan Muhammad died leaving behind the respondents Nos.1 to 9 as his legal heirs, Muhammad Bukhsh son of Gulab died before the creation of Pakistan and he was neither allotted nor confirmed any piece of land through RL-II No. 473 rather property was allotted to Rehmat Ali, Khushi Muhammad and Ahmed Din; Muhammad Bakhsh had no concern with the subject property. Khushi Muhammad, respondent No.1 pursued all the proceedings of acquisition of land and allotment thereof under complete trust of rest of the parties. Allegedly, the petitioners came to know after consulting the revenue record that respondent No.1 by way of fraud and misrepresentation without being competent and authorized, without orders of the competent authority, subsequent to the allotment order dated 19.10.1963 managed the entry of Muhammad Bakhsh deceased in the Record of Rights in order to get his land. Khushi Muhammad subsequently got the mutation of inheritance No.317 dated 31.05.1981 attested. Regarding this alleged fraudulent attestation of mutation of inheritance of Muhammad Bakhsh, litigation between the parties started and remained pending uptill this Court. It was contended that all the entries in the revenue record and the attestation of Mutation No.317 dated 31.05.1981 on the basis of fraudulent entries in RL-II are liable to be set aside being based on fraud, misrepresentation,

illegal and ineffective against the rights of the petitioners, merit to be corrected in the revenue record.

The suit was contested by the respondents Nos.1 to 9 while submitting written statement raising certain legal and factual objections. The learned trial Court after hearing arguments germane to maintainability of the suit, rejected the plaint under Order VII, Rule 11 of the Code of Civil Procedure, 1908 vide impugned order and decree dated 06.03.2018. The petitioners being aggrieved of the said order and decree preferred an appeal, but the same was also dismissed vide impugned judgment and decree dated 22.07.2019; hence, the instant civil revision.

2. Heard.

3. In the earlier suit titled "Khushi Muhammad and others v. Ahmad Din and others" matter relating to mutation No.317 dated 31.05.1981 as well as RL-II relating to Khata Nos. 472, 473, 474, 6, 7, 8, 9, 10, 486, 487 and 488 (subject matter in the present suit) was fully discussed and this Court while deciding C.R.No.1196 of 2006 observed:-

> '9. There is no denial that the real controversy between the parties is with regard to the estate left by Muhammad Bukhsh who survived only Jan Muhammad predecessor-in-interest of the respondents. The respondents in their plaint mentioned the pedigree table of the parties which is not disputed by the petitioners. As per pedigree table Muhammad Bukhsh died in the year 1947 being issueless and he was survived by only Jan Muhammad. The respondents produced Nazir Ahmed employee of Qanungo office Toba Tek Singh as PW-1. In his statement he produced RL-II relating to khata Nos.472, 473, 474, 6, 7, 8, 9, 10, 486, 487 and 488. He also tendered certified copies of said RL-II from Exhibit P-1 to Exhibit. P-11. RL-II produced as Exhibit.P-8 relates to the entitlement of Muhammad Bukhsh deceased whose claim was confirmed as 159 units. The dispute between the parties arose on sanction of inheritance Mutation No.317 which was sanctioned in favour of Ahmed Din, Rehmat Din and Khushi

Muhammad in equal shares. The said mutation was challenged by the respondents before the revenue hierarchy and vide order dated 31st of May, 1981 passed by the Collector, the correction of entries was made and the property was given to Jan Muhammad predecessor-in-interest of the respondents, who was the sole legal heir of deceased Muhammad Bukhsh.

10. In the light of the stance taken by the learned counsel for the petitioners that the estate admittedly belongs to Muhammad Bukhsh, which in all respect is very fair stance on his part, no cavil left that when there is no dispute with pedigree table then it was only Jan Muhammad predecessor-in-interest of the respondents who could inherit the estate left by Muhammad Bukhsh deceased. The petitioners have failed to bring on record any cogent evidence that the respondents or their predecessor-in-interest have ever surrendered their rights in their favour. Thus the question of estoppel, as agitated by the learned counsel for the petitioners is not attracted in the present case. The respondents were well within their right to claim the suit property.'

After such conclusive observations, the petitioners did not further agitate the matter before the Apex Court. It is vivid from the above said observations that allotment and confirmation of the property in favour of Muhammad Bukhsh deceased and mutation of inheritance after his death was the subject matter of the previous litigation and was discussed and decided by the Civil Court as well as appellate and upheld by this Court. Thus, the learned Courts below have rightly reached to the conclusion that the fresh suit in respect of subject property which had already been decided is barred under section 11 of the Code of Civil Procedure, 1908, which provides:-

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit of the suit in

which such issue has been substantially raised and has been heard and finally decided by such court.'

4. Apart from above, if for the sake of arguments, it is admitted that the petitioners did not challenge the subject matter in the present suit in earlier suit, even then the said cause of action was well available to them and omitting as well as relinquishing the said relief cannot be enforced through second suit because the second suit was not competent and barred under Order II, Rule 2 of the Code of Civil Procedure, 1908, which provides:-

> '2. Suit to include whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> Relinquishment of part of claim.-(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> Omission to sue for one of several reliefs.-(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.'

The above provision of law is much clear on the subject that when a plaintiff omits or relinquishes any part of claim he Shall not afterwards sue in respect of the portion so omitted or relinquished.

5. Rule 11 of Order VII, Code of Civil Procedure, 1908 provides that:-

> '11. The plaint shall be rejected in the following cases:-
>
> a) where it does not disclose a cause of action:
>
> b) where the relief claimed is under-valued, and the plaintiff, on

being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

d) where the suit appears from the statement in the plaint to be barred by any law.'

This provision of law asserts that when the plaint is barred by any law, the same will be rejected. In the present case, as has been discussed and stated above, the subject matter in present suit remained under discussion substantively and was finally decided upto this Court, reopening of the same under the garb of challenging the entries of RL-II, which were categorically discussed and decided, is not warranted and uncalled for.

6. In view of the above, the principle of res judicata fully attracts in this case and same has rightly been applied by the learned Courts below. There appears no illegality and irregularity in the impugned order, judgment and decrees warranting interference by this Court in exercise of revisional jurisdiction.

7. So far as the case law relied upon by the learned counsel for the petitioner i.e. Muhammad Chuttal v. Atta Muhammad through L.Rs. (2007 SCMR 373), Owais Ahmed Idris v. Syed Muhammad Waqar Uddin (PLD 2014 Sindh 465) and Mst. Zeba and others v. Sher Muhammad and others (2010 YLR 2011-Quetta), is concerned, the same has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the petitioners' case.

8. For the foregoing reasons, the civil revision in hand being without any force and substance stands dismissed with no order as to the costs.

ZC/A-106/L **Revision dismissed.**

2020 M L D 1502

[Lahore]

Before Shahid Bilal Hassan, J

PUNJAB COLLEGE through Principal---Petitioner

Versus

GOVERNMENT OF PUNJAB through Chief Secretary and others---Respondents

Writ Petition No.58931 of 2019, decided on 29th April,2020.

Punjab Private Educational Institutions (Promotion and Regulation) Ordinance (IV of 1984)---

----S. 6(4)---Registration, refusal of---Petitioner college was aggrieved of refusal of authorities to register it for B.S (I.T.), B.F.A. and B.Ed. classes for 4 years program---Plea raised by authorities was that registration was refused to petitioner as it had applied after cut-off date---Validity---Authorities could not refuse registration of any institution, without giving proper hearing to the applicant and without recording reasons---No such practice was adhered to and all process as envisaged under S.6(4) of Punjab Private Educational Institutions (Promotion and Regulation) Ordinance 1984, was adopted and at the end registration certificate was not issued on the excuse that the application was filed after cut-off date---If application was after cut-off date the same would have been returned without proceeding further but the same was processed by the concerned authority---High Court observed that after observance of entire proceedings, the registration certificate should have been issued to petitioner instead of declining the same on lame excuse---Future of students who had taken admission and were studying in the college, could not be allowed to be ruined merely on the basis of technicalities---High Court declared the order passed by authorities as coram non judice and in violation of provision of basic enactment---High Court directed the

authorities to issue registration certificate to petitioner---Constitutional petition was allowed, in circumstances.

Messrs Mehraj Flour Mills and others v. Provincial Government and others 2001 SCMR 1806 rel.

Iftikhar Ahmad Mian for Petitioner.

Syed Shadab Jafri, Addl. Advocate General, M. Umar Hayat, Law Officer for Higher Education Department and Qaiser Raza Malik, Deputy Director on behalf of DPI (Colleges) Punjab, Lahore.

ORDER

SHAHID BILAL HASSAN, J.---Allegedly, the Punjab College has been established as a state of the art and well equipped Campus at 1-C, New Muslim Town, Lahore and it is catering with needs of huge strata of population residing in the densely populated area of Lahore and its periphery; further a sizable bulk of students coming from the localities, villages and towns as well as from other far-flung places are also being benefitted; that the campus is adequately furnished with the required infrastructure and set of facilities including well versed and experienced faculty, teaching and administrative staff besides spacious campus building as required by the regulatory Higher Education Officer including respondents Nos.2 to 5. The Campus had been providing quality education up till M.A./M.Sc. and equivalent for the last about, three and half decades and had affiliation with the University of Sargodha. In this regard, the petitioner moved an application to the respondent No.4-Director Public Instructions (DPI) Colleges Punjab, Lahore for issuance of registration certificate to teach M.A. (English) and M.Sc.(Physics, Chemistry, Zoology and Math) classes. In response to the same, the District Committee notified under section 5 of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 visited the premises of the petitioner and recommended for the

registration of the petitioner's institution, consequently, on 15.07.2019 a Registration Certificate was issued while allowing the request of the petitioner as a whole.

During the month of July, 2019, the HEC and Higher Education Department, Government of the Punjab announced that the Master Degree Program was going to end after two years; therefore, the petitioner forwarded the request for cancellation of registration through a request letter dated 06.07.2019 as the petitioner is interested to start B.S. Program with the University of Education Lahore. After knowing that the Master Degree Program is going to replace the B.S. Program for 4 years, the petitioner applied for the registration regarding the BS(IT), B.F.A. and B.Ed. classes for 4 years Program. Allegedly, the petitioner also deposited the requisite inspection fee of Rs.14,000/- and Rs.200,000/- as security amount in the account of the respondents. After scrutiny of the petitioner's application, the respondents through a letter dated 24.07.2019 directed the District Committee for the necessary inspection of the petitioner's premises. The concerned committee thoroughly visited the premises of the petitioner's college on 05.08.2019 and they found everything up to the mark; there was no lacuna or deficiency in the required things in college premises to teach the BS 4-years Program; consequently, the District Committee submitted its recommendations along with all inspection notes to the Authority as defined in section 2(8) of the Ordinance, 1984, in which the committee recommended for issuance of Registration Certificate for 4-years Program i.e. 2019-2023; that as per mandate of section 3(2) of the Ordinance, 1984, the Authority is bound to decide the application of petitioner within 60 days but without lawful authority, the respondent No.4 i.e. DPI Colleges Punjab refused to issue registration Certificate with an excuse that the respondent No.2-Higher Education Department, Government of Punjab has issued a letter dated 21.09.2019 in which a clear-cut direction has been issued to the Registration

Authority/respondent No.4 that the cases of BS 4-years Program of Private Colleges be stopped forthwith and not to forward to the Higher Education Department; hence, the instant constitutional petition with the prayer that an appropriate writ in nature of mandamus may kindly be issued whereby the impugned letter of respondent No.2 dated 21.08.2019 and notification dated 13.07.2018 may be declared illegal, unlawful, void ab-initio having no legal effect qua the rights of the petitioner, the same may be set aside and respondent No.4-DPI Colleges, Punjab, Lahore may be directed to issue Registration Certificate as per already processed/recommended application of the petitioner for BS(IT), B.F.A. and B.Ed. classes for 4 years Program, without any further delay. It is further prayed that the respondents may be restrained from interfering into the smooth running, functioning, working and admission of the students of BS(IT), B.F.A. and B.Ed. classes for 4 years Program, as per the mandate of Section 3(3) of the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984.

2. Heard at length and report/comments submitted by the respondents have been gone through.

3. Considering the arguments and going through the record, it is observed that Higher Education Department fixed the cutoff date for submission of applications for starting BS 4 Years degree program in Public and Private Colleges as 30th January, 2019 but the same was extended till 30th June, 2019 by the Secretary Higher Education Department. The petitioner was corresponding with the respondents as is evident from the record that it moved an application to the respondent No.4: Director Public Instructions (DPI) Colleges Punjab, Lahore for issuance of registration certificate to teach M.A. English) and M.Sc. (Physics, Chemistry, Zoology and Math) classes and in response to the same, the District Committee notified under section 5 of the Punjab

Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 visited the premises of the petitioner and recommended for the registration of the petitioner's institution and on 15.07.2019 a Registration Certificate was issued while allowing the request of the petitioner. However, when during the month of July, 2019, the Higher Education Commission (HEC) and Higher Education Department (HED), Government of the Punjab announced that the Master Degree Program was going to end after two years, the petitioner forwarded the request for cancellation of registration through a request letter dated 06.07.2019 as the petitioner was interested to start B.S. Program. After knowing that the Master Degree Program is going to be replaced with B.S. Program for 4-years, the petitioner applied for the registration regarding the B.S.(IT), B.F.A. and B.Ed. classes for 4-years Program, which request was processed as the petitioner showing its bona fide also deposited the requisite inspection fee of Rs.14,000/- and Rs.200,000/- as security amount in the account of the respondents and after scrutiny of the petitioner's application, the respondents through a letter dated 24.07.2019 directed the District Committee for the necessary inspection of the petitioner's premises. The concerned committee thoroughly visited the premises of the petitioner's college on 05.08.2019 and they found everything up to the mark and the District Committee submitted its recommendations along with all inspection notes to the Authority as defined in section 2(8) of the Ordinance, 1984, in which the committee recommended for issuance of Registration Certificate for 4-years Program i.e. 2019-2023. All these facts are admitted on behalf of the respondents as the same have not been denied or rebutted while submitting the report and para-wise comments; meaning thereby when the petitioner applied for the registration certificate for the B.S. (IT), B.F.A. and B.Ed. classes for 4-years Program and the request of the petitioner was entertained as all the process mentioned above was carried out, it presumed and assumed

that its request would be granted; thus, it continued the function as educational institution without registration, because section 3(3) of the Ordinance, 1984 allows it. For ready reference the same is reproduced:-

> "3. All institutions to be registered.-
>
> (1) ----------
>
> (2) ----------
>
> (3) Until the application for registration is decided, the institution may continue to function without registration."

Section 6 of the Ordinance, 1984 docs not give any time frame for filing application for registration. For ready reference the same is reproduced:-

> '6. Application for registration. - (1) The incharge of an institution may make an application for registration of an institution to such officer and in such form as may be prescribed.
>
> (2) The Officer receiving an application shall forthwith forward the same to the District Committee which, after making such inquiry about such matters as may be prescribed, shall submit its report with its recommendations to the Registering Authority within sixty days of the receipt of the application under subsection (1).
>
> (3) The Registering Authority shall, after considering the report of the District Committee and after such further enquiry as may be necessary if satisfied that the conditions prescribed fbr granting registration are fulfilled, issue a Registration Certificate.
>
> (4) No order for refusing to grant a certificate of registration shall be made without giving the applicant an opportunity of being heard and without recording reasons therefor.
>
> (5) The Government shall, by notification, constitute one or more

> Registering Authorities in a district and if more than a Registering Authority is constituted in a district, the Government shall specify the jurisdiction of each Registering Authority.'

When no time frame was given in the basic statute governing the process of registration, the cut-off date fixed by the respondent No.2 is Coram non judice as the same is not consistent with the statute i.e. Ordinance, 1984. In Messrs Mehraj Flour Mills and others v. Provincial Government and others (2001 SCMR 1806), the apex Court of the country held:--

> '12. There is no cavil with the proposition that the rule shall always be consistent with the Act and no rule shall militate or render the provisions of the Act ineffective. The test of consistency is whether the provisions of the Act and that of rules can stand together. Main object of rules is to implement the provisions of the Act and in case of conflict between them the rule must give way to the provisions of the Act. In any case, the rule shall not be repugnant to the enactment under which they are made.'

When sections 6 and 3(3) of the Ordinance ibid are read together it divulges that the legislatures intended to streamline the private and public educational institutions and their intention was not to create any hurdle in their way or they did not intend to refuse the registration on technical basis that is why the Educational institutions have been allowed to continue to function without registration until their application for registration is decided and subsection (4) of section 6 of the Ordinance, 1984 bounds the Registering Authority, by using words 'No order for refusing to grant a certificate of registration shall be made without giving the applicant an opportunity of being heard and without recording reasons therefor', not to refuse registration of institution, without giving proper hearing to the applicant and without recording reasons. But in the present

case, no such practice has been adhered to, rather all the process as envisaged under section 6(2) of the Ordinance, 1984 has been adopted and at the end the registration certificate has not been issued on the excuse that application was filed after cut-off date. If the application was after cut-date, the same would have been returned without proceeding further but the same was processed by the concerned authority; thus, after observance of entire proceedings, the registration certificate ought to have been issued to the petitioner instead of declining the same on lame excuse.

4. Future of the students, who have taken admission and have been studying in the petitioner's college, cannot be allowed to be ruined mere on the basis of technicalities, which otherwise has been declared Coram non judice and in violation of provisions of basic enactment.

5. For the foregoing reasons and while placing reliance on the judgment supra, the constitutional petition in hand is allowed and the respondent No.4-Director Public Instructions (DPI), Colleges Punjab, Lahore is directed to issue Registration Certificate in favour of the petitioner as all the pre-requisites as required under section 6(2) of the Ordinance, 1984 have already been fulfilled.

MH/P-8/L **Petition allowed.**

2020 M L D 1732

[Lahore]

Before Shahid Bilal Hassan, J

Syed ALI IRFAN NAQVI and another---Appellants

Versus

Sheikh MUHAMMAD ASIF and 3 others---Respondents

R.S.A. No.201 of 2012, decided on 29th April, 2020.

Specific Relief Act (I of 1877)---

----S. 12---Contract Act (IX of 1872), S. 55---Suit for specific performance of agreement to sell---Time as an essence of contract---Contention of defendants was that plaintiffs had failed to pay balance sale consideration within specific period and agreement to sell had been cancelled---Suit was decreed concurrently---Validity---Agreement to sell was an admitted document and non-signing of the same by one of the vendees was not fatal for its execution---Relief of specific performance of agreement to sell pertaining to an immovable property was discretionary---Court might refuse the relief of specific performance even agreement to sell had been proved by the plaintiff---Plaintiff could not claim the relief of specific performance as a matter of right---Time was an essence of agreement to sell in the present case---Plaintiffs had failed to pay remaining consideration amount within specified time---Courts below had failed to appreciate and construe law on the subject in a proper way---Material illegalities and irregularities had been committed by the Court below while passing the impugned judgments and decrees which were set aside and suit was dismissed---Second appeal was allowed, in circumstances.

Muhammad Sattar and others v. Tariq Javaid and others 2017 SCMR 98; Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others 2019

SCMR 524 and Farzand Ali and another v. Khuda Bakhsh and others PLD 2015 SC 187 rel.

Baleegh Uz Zaman Chaudhry for Appellants.

Amjad Ali Sherazi and Waqar Aslam for Respondents Nos.1 and 2.

ORDER

SHAHID BILAL HASSAN, J.----Tersely, the present respondents Nos.1 and 2 instituted a suit for Specific Performance of contract by maintaining that present appellants/defendants were joint owners of the House No.699-H, Sabza Zar Housing Scheme, Lahore, who entered into an agreement to sell the same on 16.02.2004 with them (respondents Nos.1 and 2) for a consideration of Rs.18,40,000/-, out of which Rs.500,000/- was paid to them as earnest money. Allegedly, it was settled between the parties that the remaining amount of Rs.13,40,000/- would be paid at the time of transfer of house in the names of the respondents Nos.1 and 2/plaintiffs and handing over physical possession as well as completion certificate issued in favour of the present appellants/defendants Nos.1 and 2. The other dues of the defendants Nos.3 and 4 were also to be paid by the appellants. The time for transfer of the house was fixed as 18.05.2004 but appellants failed to furnish the requisite documents and supplicated to extend the time upto 15.08.2004. Allegedly, the respondents/plaintiffs were ready to perform their part of the agreement but the appellants failed to perform their part, which constrained the respondents Nos.1 and 2/plaintiffs to institute the suit.

The appellants/defendants Nos.1 and 2 submitted their written statement by raising objection of cause of action and maintainability of the suit. It was pleaded by them that the respondents Nos.1 and 2/ plaintiffs failed to make payment of balance amount so the agreement dated 16.02.2004 was deemed to be cancelled as per legal notice dated

15.07.2004. The appellants also entered into agreement to sell with one Abdul Razzaq for the purchase of land and paid Rs.400,000/- as earnest money but they could not pay the remaining amount as the respondents Nos.1 and 2/ plaintiffs did not fulfill their part of agreement and failed to pay the remaining amount. Prayer for dismissal of the suit was made.

Divergence in the pleadings of the parties was summed up into issues by the learned trial Court. Both the parties adduced their respective evidence.

The learned trial Court after hearing arguments vide impugned judgment and decree dated 11.01.2011 decreed the suit in favour of the respondents Nos.1 and 2, against the appellants; which decree was assailed before the learned lower appellate Court by filing an appeal, but subsequently the same was dismissed vide impugned judgment and decree dated 01.10.2012.

2. Feeling aggrieved of both the impugned judgments and decrees, the appellants agitated the same through this second appeal before this Court, which was decided on 04.12.2015. The respondents Nos.1 and 2 filed appeal bearing No.12-L of 2016 before the Hon'ble Supreme Court, which was allowed vide order dated 17.09.2018 and case was remanded to this Court for decision afresh after hearing both the parties with the following observation:-

> '3. The primary oasis for dismissing the Suit for Specific Performance by the learned High Court was that the document in question was not signed by both the sides. Now this Court vide its judgment reported as Muhammad Sattar and others v. Tariq Javaid and others (2017 SCMR 98) has held that where an Agreement to Sell is not signed by vendor it was not necessary that the Suit filed for Specific Performance must automatically be dismissed in every eventuality.

4. In this view of the matter, both the learned counsel states that the impugned order dated 04.12.2015 be set aside and the case is remanded to the learned High Court for decision afresh after hearing both the parties.

5. Consequently, the impugned order dated 04.12.2015 is set aside and RSA filed by the Respondent shall be deemed to be pending and shall be decided after hearing both the parties.'

3. Heard.

4. It is settled proposition of law that to bestow the relief of specific enforcement of an agreement to sell pertaining to an immovable property is a discretionary relief; even in cases where the agreement to sell is validly proved by the plaintiff, the Courts may refuse to allow the relief of specific performance. Court is neither obliged to grant the relief of specific enforcement nor can the plaintiff claim it as a matter of right. Reliance is placed on Sheikh Akhtar Aziz v. Mst. Shabnam Begum and others (2019 SCMR 524), wherein it was held:-

16. Finally, there is no cavil with the proposition that relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or inequitable.'

5. In this case, a minute perusal of the alleged agreement to sell Ex.P1 goes to divulge that the time was essence of the agreement and it was not agreed that the remaining amount would be paid at the time, fixed by the parties to get the agreement enforced, rather the contents of the agreement go to evince that production of certain documents regarding clearance of encumbrances was upon the vendors at the time of the transfer and not before the transfer or execution of the agreement deed. Meaning thereby time was the essence of the agreement and the

respondents Nos.1 and 2 failed to cope with the agreed terms and conditions in time. There is nothing on record to suggest that the respondents Nos.1 and 2 ever tried to make payment of the remaining amount. Moreover, it is noticeable fact that on the backside of the first page of alleged agreement to sell Ex.P1, a receipt with regards to receiving of Rs.300,000/- has been recorded but the same does not bear the signatures or thumb impressions of the applicants, which fact speaks volume about authenticity of the same.

5(sic) The other aspect of the case that the agreement to sell is an admitted document, so non-signing of the same by one of the vendees is not barring the same; in order to cater this issue, in Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 Supreme Court 187) it has been observed by the Apex Court of the Country that, The argument that the agreement to sell in favour of the appellants has been admitted by the vendors and, therefore, is valid and the non-signing has lost its efficacy, suffice it to say that despite the above, the respondent has joined issue with the appellants vis- -vis the validity and valid execution of the agreement, therefore, the appellants cannot rely upon and take advantage of any admission made by the vendors, because of the law, that an admission made by a co-defendant is not binding on the other even if made in the written statement. Reliance in this regard can be placed on the judgments reported as Shah Muhammad and 2 others v. Dulla and 2 others (2000 SCMR 1588), Allah Rakha through L.Rs. v. Nasir Khan and 4 others (2007 CLC 154) and Zeeshan Bhatti v. Maqbool Bhatti and another (PLD 2001 SC 79). "

6. Pursuant to the above, the learned Courts below have failed to appreciate and construe law on the subject in a proper way as well as failed to consider the subject in question judiciously. Material illegalities and irregularities as well as misreading and non-reading of evidence have

been committed by learned Court below while passing the impugned judgments and decrees.

7. For the foregoing reasons, while placing reliance on the judgment supra, the instant appeal is accepted, impugned judgments and decrees passed by the learned Courts below are set aside, consequent whereof the suit of the respondents Nos.1 and 2/plaintiffs stands dismissed. No order as to costs.

ZC/A-36/L **Appeal allowed.**

P L D 2020 Lahore 160

Before Shahid Bilal Hassan, J

PERVAIZ AFZAL---Petitioner

Versus

MEHWISH and 2 others---Respondents

Writ Petition No.175072 of 2018, decided on 31st October, 2019.

Divorce Act (IV of 1869)---

----Ss. 10, 7 & 22---Christian divorce---Grounds for dissolution of marriage by wife---Nature of proceedings under Divorce Act, 1869---Ground of adultery---Scope---Husband/petitioner impugned order of Appellate Court whereby suit for dissolution of marriage filed by wife was decreed---Contention of husband/petitioner was, inter alia, that impuged order was based on non-reading of evidence on record with regard to alleged adultery---Scope---Section 10 of the Divorce Act, 1869, had made clear that unless and until the grounds(s) mentioned therein were not provided, no divorce/dissolution of marriage could be granted since concept of Khula was alien to Chirstian marriage---Procedings under the Divorce Act, 1869 were regulated under C.P.C. and like a civil suit, any fact pleaded in plaint or written statement was to be proved by leading trustworthy evidence---While wife/respondent, in the present case, had stated that her husband had committed adultery, however nothing pivotal to her stance was brought on record, thus dissolution of marriage decree could not have been granted---Even when examined under the restored S.7 of the Divorce Act, 1869, wife, in the present case, had failed to discharge burden with regard to the alleged ground of adultery---Impugned order was, therefore, not based on proper appreciation of evidence and was set aside---Constitutional petition was allowed, accordingly.

M. Jaffar v. Additional District Judge and others 2005 MLD 1069;

Muhammad Habib v. Mst. Safia Bibi and others 2008 SCMR 1584; Hamid Ali v. Mst. Nabila Riaz and 2 others 2012 YLR 2693; Robin David John v. Mst. Huma Samuel and others 2015 MLD 1683; Wahid Bakhsh and others v. Ameer Bakhsh and others 2015 CLC 1387; Chairman, BISE, Peshawar and others v. Muhammad Jaar Ullah 2016 YLR 302; Zahid Janan v. Mst. Kausar Begum and 2 others 2016 YLR Note 43; Basharat Ahmed v. Mst. Shamim and 2 others PLD 2016 Lah. 271 and Ameen Masih v. Federation of Pakistan and others PLD 2017 Lah. 610 ref.

Mst. Parveen Amanual v. Additional District Judge-III, Rahim Yar Khan and 2 others PLD 2009 Lah. 213 and Ameen Masih v. Federation of Pakistan PLD 2017 Lah. 610 rel.

Chaudhry Javed Bashir Cheema for Petitioner.

Zahid Imran for Respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.---Precisely, the respondent No.1 was married on 13.09.2015 with the petitioner, however, the parties remained issueless. The respondent No.1 instituted a suit for dissolution of marriage and for recovery of dowry articles against the petitioner. It is pertinent to mention here that the parties are Christian by religion. The petitioner filed written statement on 13.04.2016 and controverted the averments of plaint. Out of the divergent pleadings of the parties, the learned trial Court framed issues and recorded evidence of the parties, adduced by them in their respective versions.

The learned trial Court vide impugned judgment and decree dated 19.04.2017 decreed the suit of the respondent No.1 for recovery of dowry articles to the tune of Rs. 100,000/- instead of Rs.533,000/-, whereas suit to the extent of dissolution of marriage was dismissed. Both the parties aggrieved of the said judgment and decree preferred separate appeals. The

learned appellate Court vide impugned consolidated judgment and decree dated 20.11.2017 upheld the judgment and decree of learned trial Court to the extent of dowry articles amounting to Rs.100,000/- and additionally decreed the suit for dissolution of marriage on 20.11.2017 and dismissed appeal preferred by the petitioner; hence the instant constitutional petition.

2. Learned counsel for the petitioner has argued that the impugned judgments and decrees are against law and facts of the case; that the same are based on surmises and conjectures; that the learned Courts below did not advert to the real facts and circumstances of the case, which was sufficient to rebut the claim of the respondent No.1; that the Courts below have taken erroneous grounds to pass the impugned judgments and decrees without considering the facts brought on the record by the petitioner; that the impugned judgments and decrees are result of misreading and non-reading of evidence on record; that material illegalities and irregularities have been committed by the learned Courts below, which has resulted in miscarriage of justice. Thus, the impugned judgments and decrees being not sustainable in the eye of law may be set aside and suit of the respondent No.1 may be dismissed.

3. On the contrary, learned counsel for the respondent No.1 has supported the impugned judgments and decrees and has prayed for dismissal of the constitutional petition in hand. Reliance has been placed on M. Jaffar v. Additional District Judge and others (2005 MLD 1069-Lahore), Muhammad Habib v. Mst. Safia Bibi and others (2008 SCMR 1584), Hamid Ali v. Mst. Nabila Riaz and 2 others (2012 YLR 2693-Lahore), Robin David John v. Mst. Huma Samuel and others (2015 MLD 1683-Lahore), Wahid Bakhsh and others v. Ameer Bakhsh and others (2015 CLC 1387-Lahore), Chairman, BISE, Peshawar and others v. Muhammad Jaar Ullah (2016 YLR 302- Peshawar), Zahid Janan v. Mst. Kausar Begum and 2 others (2016 YLR Note 43), Basharat Ahmed v.

Mst. Shamim and 2 others (PLD 2016 Lahore 271) and Ameen Masih v. Federation of Pakistan and others (PLD 2017 Lahore 610),

5. Section 10 of the Divorce Act, 1869 (an Act relating to the divorce of persons professing the Christian religion) contemplates:-

> '10. When husband may petition for dissolution.-Any husband may present a petition to the Court of Civil Judge, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.
>
> When wife may petition for dissolution.-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman;
>
> Or has been guilty of incestuous adultery,
>
> Or of bigamy with adultery,
>
> Or of marriage with another woman with adultery,
>
> Or of rape, sodomy or bestiality.
>
> Or of adultery coupled with such cruelty as without adultery would have entitled her to divorce a mensa et toro.
>
> Or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.
>
> Contents of petition. Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

The above section is clear on the subject that unless and until any one of the grounds mentioned above is not proved, divorce cannot be granted,

because concept of Khula is alien to the Christian marriages.

Section 18 of the Act ibid provides that any husband or wife may apply to court for annulment of marriage or for declaration of its being void and section 19 of the Act, further provides that such decree may be passed on any of the following grounds:-

1. That the respondent was impotent at the time of the marriage and at the time of the institution of the suit;
2. That the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;
3. That either party was a lunatic or idiot at the time of marriage;
4. That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

No such ground neither pleaded nor available to the respondent. Even section 22 of the Act, 1869, which is Judicial Separation, provides:-

> '22. Bar to decree for divorce a mensa et toro, but judicial separation obtainable by husband or wife. No decree shall hereafter be made for a divorce a mensa et toro, but the husband or wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of as divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned.'

Section 45 of the Divorce Act, 1869 provides that:-

> 'Code of Civil Procedure to apply. Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.'

Meaning thereby all the proceedings under the Act, 1869 are governed and regulated by the Code of Civil Procedure, 1908 and instead of a suit instituted under Family Courts Act, 1964, for which a timeframe is given under section 12 of the Act that the same be decided within six months and the Family Court can adopt any procedure as Code of Civil Procedure, 1908 and Qanun-e-Shahadat Order, 1984 is not applicable in stricto sensu; a suit like civil suit is filed before Civil Court and declaration is sought and if a person pleads any fact in plaint or written statement that is to be proved by leading confidence inspiring and trustworthy evidence.

6. In the present case, the respondent No.1 asserted that the petitioner developed illicit relations with one Nusrat daughter of Parvez, and committing adultery, due to which his demeanor towards her turned cruel, but in order to substantiate that stance, she could not lead any solid, confidence inspiring and reliable evidence. The learned appellate Court has only considered that part of statement, which has been incorporated by the respondent No.1 in her affidavit submitted as P.W.1, wherein she asserted that when she intended to be with the petitioner in order to serve him, he reprimanded and openly confessed commission of adultery by saying that he has no shortage of women in Taxila. This part of statement loses its worth when a suggestion was put in this regard by the learned counsel for the respondent No.1 to the petitioner and the same was negated and after categorical denial and negation, the onus was upon the respondent No.1 to prove what was pleaded by her through independent evidence, but as stated above, nothing pivotal in support of her stance could have been brought on record by her; thus, she was not entitled to a decree for dissolution of marriage and the learned appellate Court has on wrong perception and using pick and choose method has passed decree for dissolution marriage because evidence as a whole has not been considered and appreciated by it. In a case reported as Mst. Parveen Amanual v. Additional District Judge-III, Rahim Yar Khan and 2 others

(PLD 2009 Lahore 213), this Court held:-

> "There is no provision in the nature of 'Khula' in the Divorce Act, 1869 and as such the mere statement of the petitioner that she was not willing to live as a wife with respondent No.3, is not sufficient for the purpose of dissolution of Christian marriage. In this regard reference is made to section 10 of the Divorce Act, 1869, which relates to the grounds when wife may ask for the dissolution of marriage and further reference is also made to section 22 of the same Act, which lays down the grounds where judicial separation is obtainable by wife."

In the said judgment it was further held:-

> '6. The bond of marriage between Christian husband and wife is of a permanent nature and as such the wife has to prove her case on the concrete facts after leading reliable and cogent evidence to the facts on which the claim of dissolution of marriage is based. Only then the Court can grant a decree for a judicial separation within the meaning of section 22 of the Divorce Act, 1869 or to dissolve the marriage under section 10 of the same Act.'

This Court, in Ameen Masih v. Federation of Pakistan (PLD 2017 Lahore 610) has restored the omitted provision of Section 7 of the Divorce Act, 1869 declaring its omission as repugnant to fundamental rights and it was held:-

> 'Restored section 7 is to be read harmoniously with Section 10 of the Act. This means that ground of divorce on the basis of adultery are available and anyone who wishes to invoke them is free to do so, but for those who wish to seek divorce on the ground of irretrievable breakdown of marriage, they can rely on Section 7 of the Act and avail of the additional grounds of divorce available under the Matrimonial Causes Act, 1973 (UK), which will be available to the Christians in Pakistan and will be enforceable in Pakistan.

It was also held by this Court in the very case:-

> 'The UK law referred to in (repealed) section 7 is the UK Matrimonial Causes Act, 1973. Section 1 of Part 1 of Chapter 18 of UK law provides as follows:
>
> 1. (1) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (hereafter in this Act referred to as "two years' separation") and the respondent consents to a decree being granted;
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereafter in this Act referred as "five years' separation").
>
> (3) On a petition for divorce it shall be the duty of the court to

inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.

(4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then, unless it satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to sections 3(3) and 5 below, grant a decree of divorce.

(5) Every decree of divorce shall in the first instance be a decree nisi and shall not be made absolute before the expiration of six months from its grant unless the High Court by general order from time to time fixes a shorter period, or unless in any particular case the court in which the proceedings are for the time being pending from time to time by special order fixes a shorter period than the period otherwise applicable for the time being by virtue of this subsection."

If for the sake of above repealed section 7 of the Act is considered and the grounds as mentioned above are taken into account, even then, as stated above, the respondent No.1 has failed to discharge the burden shifted on her with regards to alleged ground of adultery. As such, the learned appellate Court, as elaborated above, has misread and non-read evidence of the parties and has wrongly passed the impugned judgment and decree dated 20.11.2017 with regards to dissolution of marriage, which cannot be allowed hold field further, to this extent.

7. So far as the decree for dowry articles is concerned, the findings recorded by the learned Courts below, concurrently, are based on proper appreciation of evidence on record; thus, the same are upheld.

8. For the foregoing reasons and discussions, the constitutional petition in hand is partially allowed, impugned judgment and decree dated 20.11.2017 passed by the learned Add. District Judge, Sargodha is set

aside to the extent of grant of decree for dissolution of marriage, whereas to the extent of grant of dowry articles or alternate price the impugned judgments and decrees are upheld. No order as to the costs.

KMZ/P-13/L **Order accordingly.**

P L D 2020 Lahore 679

Before Shahid Bilal Hassan, J

Mst. ASMA BIBI---Petitioner

Versus

CHAIRMAN RECONCILIATION COMMITTEE and others---Respondents

Writ Petition No.6782 of 2019/BWP, heard on 28th January, 2020.

(a) Muslim Family Laws Ordinance (VIII of 1961)--

----Ss. 7 & 2(b)---West Pakistan Rules under Muslim Family Laws Ordinance, 1961, R. 3---SRO No. 1086(K)61, dated: 09-11-1961---Talaq---Territorial jurisdiction of Chairman---Scope---Petitioner/wife assailed validity of order passed by Chairman, Reconciliation Committee, whereby divorce to the petitioner was confirmed through an ex-parte order---Validity---Respondent/husband was permanently residing abroad and the petitioner was also there at the time of alleged talaq---Petitioner had categorically asserted in the petition, which was supported by an affidavit, that at the time of alleged pronouncement of talaq she was residing abroad, so as per SRO No.1086(K)61, dated: 09-11-1961, officers of Pakistan Mission abroad were authorized to discharge the functions of Chairman under the Muslim Family Laws Ordinance, 1961---Chairman, Reconciliation Committee, had no authority to exercise that authority which he had exercised---Divorce registration certificate and impugned order of confirmation were declared to be of no legal effect and value---Constitutional petition was allowed, in circumstances.

Mt. Sharifan v. Abdul Khaliq and another 1983 CLC 1296 and Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others PLD 2019 Lah. 285 ref.

(b) Muslim Family Laws Ordinance (VIII of 1961)---

----S. 7---Talaq---Talaq by husband residing abroad---Procedure.

Where husband is not a Pakistani National or even if both husband and wife are not Pakistani National they can get divorce in Pakistan provided that the marriage is registered in Pakistan by adopting following procedure, in case of husband:-

(i) Husband will send a power of attorney to his lawyer;

(ii) Power of attorney should be attested from the Pakistani Embassy or Consulate of the Country where he is residing;

(iii) Where a lawyer receives the power of attorney, he will proceed according to law;

(iv) Proceedings of overseas divorce in Pakistan are conducted in Arbitration Council;

(v) Minimum 90 days proceedings will be conducted by lawyer in arbitration council;

(vi) After the proceedings of overseas divorce in Pakistan, a divorce certificate will be issued by NADRA through arbitration council and this certificate is considered as sole and only proof of divorce.

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Averments of facts---Affidavit---Scope---Averments of the facts made in a petition, which is supported by an affidavit, have to be accepted as correct, in absence of a counter affidavit or other material in rebuttal.

Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others PLD 2019 Lah. 285 and Islamic Republic of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and another v. Amjad Ali Mirza PLD 1977 SC 182 ref.

Muhammad Ayaz Kalyar for Petitioner.

Zohaib Abdullah Akhtar for Respondent No.4.

Mazhar Hussain Anjum, Secretary, Union Council Chak 94/NP

No.83 Tehsil Khanpur District Rahim Yar Khan for Respondents.

Date of hearing: 28th January, 2020.

JUDGMENT

SHAHID BILAL HASSAN, J.--Precisely, the petitioner contracted marriage with lmdad Ullah/respondent No.3, who is residing in USA. The respondent No.3 sent a visa to the petitioner and her real daughter aged 5 years, so they could settled there (USA). Allegedly, the respondent No.3 on the instigation of respondent No.4, his brother, prepared a fake, forged and bogus divorce deed in the name of the petitioner and then sent her back to Pakistan; that the divorce deed was not in the knowledge of the petitioner and her daughter, which fact was intimated to them after four months of returning back to Pakistan, hence, the petitioner enquired about the said fact from the Union Council concerned, then on query it was informed that the divorce had been confirmed ex parte, allegedly, in connivance of respondents Nos.1 and 4 without issuing any notice to the petitioner or her family members including her father, because the respondents Nos.1 and 2 did not serve any notice to the petitioner or her family members. The respondent No.3 issued a Salsee Nama in favour of respondent No.4 regarding performance of his role as Arbitrator (Salis) in this matter on 20.11.2013. Allegedly, the respondent No.3 through his brother respondent No.4 had written a divorce deed on a blank paper on 01.08.2018, while the respondent No.3 had not affixed his thumb impressions or his signatures upon the said divorce deed, however, the respondent No.4 affixed his thumb impressions and signatures upon the same. Upon said divorce deed, the respondent No.1 issued notice of divorce through respondent No.4 and then through respondent No.1 himself on 01.08.2018 on the same date; that on 01.10.2018, the respondent No.1 again issued a notice for 01.11.2018 in the name of the petitioner. On 14.11.2018, the respondent No.1/The Chairman, Reconciliation Committee, Union Council Chak No.94/NP, Khanpur,

District Rahim Yar Khan passed an ex parte order for confirmation of divorce to the petitioner on behalf of respondent No.3 through respondent No.4, wherein presence of respondent No.3 was never shown; that the Secretary, Union Council ibid issued impugned divorce registration certificate bearing No.Z10224574 on 21.01.2019. Through the instant constitutional petition, the impugned divorce registration certificate dated 21.01.2019 and impugned order of confirmation dated 14.11.2018, have been challenged contending the same to be illegal, void ab initio, against the facts, ex parte, without any notice to the petitioner or her father and hence, liable to be set aside.

2. Heard.

3. The only point in issue is the assumption of jurisdiction by the respondent No.1/Chairman, Union Council Chak No.94/NP, Khanpur, District Rahim Yar Khan in order to pass the impugned order dated 14.11.2018 and to issue the impugned divorce registration certificate dated 21.01.2019. Sections 2(b) and 7 of the Muslim Family Laws Ordinance, 1961 and Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 are necessary to be reproduced, which read:-

> 'Section 2(b):- "Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by any officer authorized in that behalf by any such Government to discharge the functions of Chairman under this Ordinance. '
>
> '7. "Talaq". (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever, contravenes the provisions of subsection (1) shall be

punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save a provided in subsection (5) a Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Subsection (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

In order to resolve the matter in hand, as the respondent No.3 is permanently residing in USA and petitioner was also there at the time of alleged Talaq, Notification/S.R.O.No.1086(K)61 dated 09.11.1961 is also relevant, which reads:-

'In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration) Ministry of External Affairs to appoint officers of Pakistan Mission abroad to discharge the functions of Chairman under the aforesaid Ordinance. '

Rule 3(b) of the Rules provides:-

Rule 3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of section 2 shall be as follows, namely:-

(a) .

(b) in the case of notice of talaq under subsection (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom talaq has been pronounced was residing, at the time of the pronouncement of talaq:

Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be -

(i) in case such wife was at any time residing with the person pronouncing the Talaq in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the talaq is permanently residing in West Pakistan; '

In view of the above said provisions of law, the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce. Reliance is placed on Mt. Sharifan v. Abdul Khaliq and another (1983 CLC 1296) and Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others (PLD 2019 Lahore 285). The petitioner has categorically asserted in the instant constitutional petition which is supported by an affidavit that at the time of alleged pronouncement of talaq she was residing in USA, so as per Notification/S.R.O.No. 1086(K)61 dated 09.11.1961, officers of Pakistan Mission abroad are authorized to discharge, the functions of Chairman under the aforesaid Ordinance. Meaning thereby the Chairman, Union Council Chak No.94/NP, Khanpur, District Rahim Yar Khan had no authority to exercise that authority which he has exercised, because in absence of a counter affidavit or other material in

rebuttal, the averments of facts made in a petition, which is supported by an affidavit, the same is to be accepted as correct as has been held in Islamic Republic of Pakistan through Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and another v. Amjad Ali Mirza (PLD 1977 Supreme Court 182) and followed by this Court in the judgment of Ms. Sadat Munir Khan ibid.

In addition to the above, it is an admitted fact on record that Imdad Ullah-respondent No.3, husband of the petitioner, is permanently residing in USA, so any affidavit or divorce deed, allegedly executed by him or any authority letter or Salsee Nama, rendered and executed by him in favour of respondent No.4 must have been attested by the Consulate of Pakistan at USA, but the record shows that such procedure has not been adopted and affidavit allegedly executed by him (Imdad Ullah) on 01.04.2019 is on a simple paper and seems to be a fax copy, without being attested by the Consulate of United States of USA and same is the position in case of Talaq Narna, which is on simple paper and that too without any date that on what date the pronouncement of talaq was made; thus, the said documents could not be considered and relied upon. Moreover, all the proceedings were conducted and joined by Hammad Ullah, brother of Imdad Ullah, who was not authorized person as has been observed above, because if a husband is a Pakistani national, he can divorce in Pakistan. Even if a husband is not a Pakistani National or even if both husband and wife are not Pakistani national they can get divorce in Pakistan provided that the marriage is registered in Pakistan by adopting following procedure, in case of husband:-

1. Husband will send a power of attorney to his lawyer;
2. Power of attorney should be attested from the Pakistani embassy or consulate of the country where he is residing;
3. Where a lawyer receives the power of attorney, he will proceed according to law;

4. Proceedings of overseas divorce in Pakistan are conducted in Arbitration council;
5. Minimum 90 days proceedings will be conducted by lawyer in arbitration council;
6. After the proceedings of overseas divorce in Pakistan, a divorce certificate will be issued by NADRA through arbitration council and this certificate is considered as sole and only proof of divorce.

In the present case as stated above, the process provided under law has been bypassed; thus, the impugned divorce registration certificate dated 21.01.2019 and impugned order of confirmation dated 14.11.2018 are declared to be of no legal effect and value, set aside, accordingly, by allowing the constitutional petition in hand.

SA/A-18/L **Petition allowed.**

P L D 2020 Lahore 931

Before Shahid Bilal Hassan, J

IFTIKHAR AHMED---Petitioner

Versus

The STATE and others---Respondents

Writ Petition No. 28536 of 2020, decided on 17th July, 2020.

(a) Criminal Procedure Code (V of 1898)---

----Ss. 63, 169 & 497---Discharge of accused---Procedure---Magistrate may discharge an accused person during investigation but the same has to be done on report of police and not at his own---If Magistrate considers that there is no case whatsoever against accused person in custody then accused cannot be kept in custody by restricting his right of liberty---Provision of S.497, Cr.P.C. takes care and to order straight away under S.63, Cr.P.C. is contrary to the provisions of S.497, Cr.P.C.

(b) Criminal Procedure Code (V of 1898)---

----Ss. 63 & 161---Penal Code (XLV of 1860), S.406---Criminal breach of trust---Discharge of accused on first day of arrest---Complainant was aggrieved of discharge of accused by Magistrate on first day of his arrest on the ground that offence under S.406, P.P.C. was not made out---Validity---Submission of report by police was necessary for such discretion to pass order under S.63, Cr.P.C. to discharge accused justly and fairly---Accused was discharged by Magistrate on the first day of arrest despite the fact that statements of complainant and witnesses recorded under section 161 Cr.P.C. were available on record---Magistrate had not already granted physical remand of accused and police could not collect incriminating evidence against them---High Court set aside such mechanical order of discharge and remanded the matter to Magistrate for decision afresh on remand application filed by police---Constitutional

petition was allowed in circumstances.

Muhammad Shafi and others v. S.H.O. and others 1999 PCr.LJ 1345; The State through Advocate-General N.-W.F.P. v. Ubaidullah and another 2005 MLD 1883; Shahid Raza Bhatti v. Magistrate S. 30 and others 1999 MLD 1847; Imran Sattar v. Judicial Magistrate and others PLJ 2001 Lah. 728 and Hidayatullah and others v. State through Advocate General NWFP, Peshawar 2006 SCMR 1920 rel.

Muhammad Maqsood Buttar for Petitioner.

Ch. Muhammad Rafique Jathol for Respondents Nos.5 and 6.

Zafar Rahim Sukhaira, A.A.G. for the State.

ORDER

SHAHID BILAL HASSAN, J.---Precisely, the petitioner lodged FIR No. 422 of 2020 dated 11.06.2020, for offence under section 406, P.P.C., at Police Station Moutra, District Sialkot against the respondents No. 5 and 6, who were arrested on 13.06.2020 in the above said FIR and on the same day, the Investigating Officer produced them before the learned Judicial Magistrate Ist Class, Daska seeking their physical remand. The learned Magistrate/respondent No.2 vide impugned order dated 13.06.2020 not only turned down request of physical remand of the respondents Nos.5 and 6 but also discharged them by observing that offence under section 406, P.P.C. is not attracted; hence, the instant constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 561-A of Cr.P.C.

2. Learned counsel for the petitioner has argued that the impugned order is void and without lawful authority; that evidence in the shape of statements of the petitioner and that of witnesses recorded under section 161, Cr.P.C. have not been considered while passing the impugned order; that the stamp paper executed by the respondents Nos. 5 and 6 germane to

receipt of amount as entrustment, which was submitted during arguments, was also not taken into account; that order of discharge of accused persons at early stage of investigation without any cogent reason and justification means interference in process of investigation and it also restrained the Investigating Officer from collecting the evidence; that the Investigating Officer arrested the accused persons, investigation could not be completed within 24 hours so he produced the accused persons before the learned Magistrate for physical remand but the learned Magistrate without any proper and cogent reason as well as without affording opportunity to collect and produce evidence to the prosecution and the petitioner/complainant; that the impugned order has been passed without applying judicial mind, in a hasty manner; that bare reading of the FIR shows that offence under section 406, P.P.C. is made out against the accused persons and essential ingredients of entrustment, dishonest misappropriation, dishonest use are attracted against the accused; that the impugned order is based on surmises and conjectures as well as the same is result of misreading and non-reading of evidence and has been passed in an arbitrary manner; therefore, the same is not sustainable in the eye of law; hence, by allowing the constitutional petition in hand, the impugned order may be set aside and physical remand of the respondents Nos.5 and 6 may be allowed for the purpose written in the application in this respect.

3. On the contrary, learned counsel for the respondents Nos.5 and 6 has supported the impugned order and has prayed for dismissal of the constitutional petition in hand. Learned Law Officer has informed that the cancellation report has been submitted in compliance with the impugned order.

4. Heard.

5. On lodging FIR by the petitioner, the Investigating Officer arrested the respondents Nos.5 and 6 on 13.06.2020 and when he could not

conclude the investigation within 24 hours as fixed under section 61 of the Cr.P.C. he produced the accused with a request of eight days physical remand on the same date, obviously after recording statements of the witnesses under section 161, Cr.P.C., apparently considering that accusation is well founded, but the learned Magistrate without considering the statements of the witnesses and other material on record proceeded to pass the impugned order without mentioning the provisions under which such order was passed. During course of arguments, section 63 of the Cr.P.C. was referred, which reads as under:-

> "No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate."

In order to properly understand the actual meaning and purpose of this provision, it is to be read with other provisions of Chapter V of the Criminal Procedure Code, 1898 and is not to be read in isolation. This Chapter relates to arrest, escape and retaking; it is in section 46, Cr.P.C. as to how the arrest is made and then continues to specify as to how in certain conditions the arrest has to be affected under sections 49 to 53, Cr.P.C. Sections 59 and 60, Cr.P.C. lay down that after a person is arrested, he has to be taken to a Magistrate or Officer in Charge of the police station. Section 61 provides that no person can be detained for more than 24 hours and by virtue of section, 62 Cr.P.C. every arrest has to be reported to the concerned District Magistrate or Sub-Divisional Magistrate within whose limits the arrest has been made; then section 63, Cr.P.C., in the same run, prescribes that once a persons is arrested then he cannot be discharged unless three conditions are fulfilled as have been mentioned above under the said section. It means, once a persons is arrested by the police, he cannot be discharged by the police itself. Perceptibly for the reason that the powers of arrest and discharge were not

intended to be conferred on the police officials and intervention by the Magistrate was considered essential by the legislatures. As to how this power of section 63, Cr.P.C. has to be exercised, section 169, Cr.P.C. is relevant, which is reproduced for ready reference: -

> "169. If, upon an investigation under this Chapter, it appears to the officer incharge of the police station (or to the police officer making the investigation) that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, by a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or (send) him for trial."

If section 63, Cr.P.C. is given the meaning that a Magistrate can discharge an accused of his own without any police report then this exercise of power seems to be contrary to the whole scheme described in this regard. If such was the intention of the legislature with regards to section 63, Cr.P.C., there was no need to include section 169 in the Code of Criminal Procedure, 1898.

6. The epitome of the above discussion is that if sections 63 and 169, Cr.P.C. are read and considered together, one can easily infer that a Magistrate may discharge an accused person during investigation but the same would be done on the report of the police and not in the manner as has been done by the learned Magistrate in the present case.

At this point, a question arises that if a Magistrate, in a case, considers that there is no case whatsoever against the accused person in custody then whether the accused must be kept in custody by restricting his right of liberty? In this situation, section 497, Cr.P.C. takes care; thus,

to order straight-away under section 63, Cr.P.C. is contrary to the provisions of section 497, Cr.P.C. and in the present case, when the impugned order is gone through it appears that the learned Magistrate has gone deeply into facts of the case, put-forth by the defence side and entered into domain of investigation at the initial stage, because on the first day of arrest, the accused persons were discharged, especially when they were produced by I.O. seeking physical remand under section 167, Cr.P.C. and under the said provision, the learned Magistrate was not empowered to discharge the accused persons. It was held in Muhammad Shafi and others v. S.H.O. and others (1999 PCr.LJ 1345) that criminal investigation should not be stifled or killed during its infancy as the same will be against the principles governing administration of justice and the same ratio was observed by a Division Bench of the Peshawar High Court in a judgment reported as The State through Advocate-General N.-W.F.P. v. Ubaidullah and another (2005 MLD 1883), wherein it was further held:-

> "If Magistrates are given the powers to discharge and release an accused person at the very initial stage, there will be no room for success in blind heinous criminal case which always investigated at different theories of probabilities based on spy information. Once an accused is apprehended and found innocent, he can only be set free during investigation by obtaining discharge order from Court. Discharge of accused is also governed by section 169, Cr.P.C. which is at the conclusion of investigation and on submission of report under section 173 Cr.P.C."

Similar view was rendered in judgments reported as Shahid Raza Bhatti v. Magistrate Section 30 and others (1999 MLD 1847) and Imran Sattar v. Judicial Magistrate and others (PLJ 2001 Lahore 728).

The above said view finds support from the judgment of Apex

Court reported as Hidayatullah and others v. State through Advocate General NWFP, Peshawar (2006 SCMR 1920) wherein it was invariably held:-

> '8. It is a settled principle of law that it is the discretion of the magistrate concerned to pass order under Section 63 of the Code of Criminal Procedure to discharge the accused persons. However, the discretion must be exercised by the concerned magistrate justly, fairly and in case discharge order was passed by magistrate mechanically without application of his independent mind to the facts of the case, blindfolded acceptance of a recommendation of the police in that regard, perversity of reasoning and adoption of a procedure which offends against the letter and spirit of the law relating to discharge, then High Court has ample jurisdiction to interfere and set aside such an order Section 561-A Cr.P.C. See Arif Ali Khan and others v. The State and others (1993 SCMR 187) and Muhammad Sharif and others v. The State and another (1997 SCMR 304)." (underline for emphasis)

Submission of report by the police is necessary as has been underlined in the excerpt of the reported judgment and such discretion to pass order under section 63 Cr.P.C. to discharge the accused has to be exercised justly and fairly, but in the present case, as has been observed above, on the first day of arrest, the accused respondents No.5 and 6 have been discharged by the learned Magistrate despite the fact that statements of complainant and witnesses recorded under section 161, Cr.P.C. were available on record. It is not the case that the learned Magistrate already granted physical remand of the accused and the police could not collect incriminating evidence against them; thus, such mechanical order cannot be allowed to hold field.

7. In view of the above discussion and while placing reliance on the

judgments supra, the constitutional petition in hand is allowed, impugned order is set aside and the request of the Investigating Officer for physical remand of the accused persons i.e. respondents No.5 and 6 will be deemed to be pending before the learned Magistrate, who shall pass appropriate order keeping in view the observations made above. Office is directed to transmit copy of this order to the learned Magistrate concerned immediately.

MH/I-14/L **Case remanded.**

2020 Y L R 401

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

Mst. AYESHA ABDUL MALEEK---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, SAHIWAL and 2 others---Respondents

Writ Petition No. 8873 of 2017, heard on 1st April, 2019.

Guardians and Wards Act (VIII of 1890)---

----Ss. 25 & 17---Custody of minor---Welfare of minor---"Intelligence preference" of minor---Scope---Petitioner/mother filed petition for custody of minor daughter whereas father moved application for appointment as guardian---Petition for custody of minor daughter filed by the mother was dismissed whereas father's application for appointment of guardian was allowed--- Validity--- Paramount consideration while deciding application for custody of minor was welfare of minor and nothing else---Character and capacity of proposed guardian as well as age and sex were important factors to be considered while determining the welfare of minor---Courts below summoned the minor for the purpose of "intelligence preference" and she denied to have company with the petitioner mother and showed her willingness to reside with her father---Courts below had rightly concluded that petitioner mother was not entitled to the custody of minor daughter and respondent father was entitled to retain her custody as he had sound financial status---Respondent father was looking after the minor properly---Petitioner mother of minor daughter was entitled for visitation rights---No illegality or jurisdictional error had been pointed out in the impugned

orders passed by the Courts below---Constitutional petition was dismissed, in circumstances.

Mehmood Akhtar v. District Judge, Attock and 2 others 2004 SCMR 1839 rel.

Muhammad Ashraf Qureshi for Petitioner.

Abdul Rehman Khan Laskani, Saghir Ahmad Bhatti and Kabir Ahmad Gill for Respondents.

Date of Hearing: 1s April, 2019.

JUDGMENT

SHAHID BILAL HASSAN-J.---This single judgment will dispose of the captioned constitutional petition as well as connected W.P.No.7657 of 2017, as in both one and same judgment has been impugned.

2. Precisely, Mst. Ayesha Abdul Maleek (hereinafter called as "petitioner") filed an application under section 25 of the Guardians and Wards Act, 1890 with the assertion that the marriage between the petitioner and Naeem Hassan Gill (hereinafter called as "respondent") took place on 27.01.2006 and out of the wedlock a female minor namely Waniya Naeem Gill was born, who was aged 10 years at the time of filing of the application and was in custody of the respondent; she contended that welfare of the minor lies with the petitioner as she got her admitted in Bloomfield Hall School, Sahiwal and the respondent had contracted second marriage, so it would not be convenient for the minor to live with step mother. The said application was resisted by the respondent and he also filed an independent application under section 7 of the Guardians and Wards Act, 1890 for his appointment as guardian of the minor.

Both the applications were consolidated by the learned trial Court

on 01.07.2016 and consolidated issues were framed. Evidence of the parties was invited, which was adduced in pro and contra, oral as well as documentary, whereafter, the learned Guardian Judge vide consolidated order dated 10.04.2017 dismissed application of the petitioner and accepted the application under section 7 of the Act, 1890 filed by the respondent.

The petitioner being aggrieved of the said order preferred an appeal. The learned appellate Court vide impugned judgment dated 15.05.2017 dismissed the appeal, however, chalked out visitation schedule.

Being aggrieved of the above said order and judgment, the petitioner has filed the instant constitutional petition, whereas the respondent has filed the connected W.P.No.7657 of 2017 calling into question the visitation schedule, chalked out by the learned appellate Court.

2(sic). Heard.

3. Prime and paramount consideration while deciding application for custody of the minor is the welfare of the minor and nothing else. Section 25 of the Guardians and Wards Act, 1890 provides:-

> '25. Title of guardian to custody of ward.---(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

Similarly, the other relevant provision to decide the question of custody of a minor is section 17 of the Act ibid, which reads:--

> '17. Matters to be considered by the Court in appointing guardian.---(1) In appointing or declaring the guardian of the minor, the Court shall, subject to the provisions of this section, be guarded by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.
>
> (2) In considering what will be for the welfare of the minor the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.
>
> (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference."

From the above provisions of law it is vivid that prime and foremost consideration to decide the question of custody of a minor is his or her welfare and betterment. Welfare of the minor would overweight against all other considerations. It is also apparent from the bare reading of section 17(2) of the Act that character and capacity of the proposed guardian as well as age and sex, is also an important factor to be considered while determining the welfare of the minor. In a reported judgment Mehmood Akhtar v. District Judge, Attock and 2 others (2004 SCMR 1839), the Apex Court of the country held:--

> 'The right of custody of minor is not an absolute right rather it is always subject to the welfare of the minor. The Court in the light of law, on the subject and facts and circumstances of each case

considers the question of custody on the basis of welfare of minors and there can be no deviation to the settled principle of law that in the matter of custody of minor the paramount consideration is always the welfare of minor. No doubt general principle of Muhammadan Law is that a Muslim father being the natural guardian of the minor, has the preferential right of custody of minor but this rule is always subject to the welfare of the minor which is the prime consideration in determination of the question of custody.'

In the present case, both the learned Courts have summoned the minor for the purpose of "intelligence preference" as the minor was old enough to form an "intelligence preference" and she categorically denied to have company with the petitioner and even the minor has deposed about the character of the petitioner and she has showed her willingness to reside with her father i.e. the respondent; even she deposed that her father contracted second marriage with one Nasreen Kanwal on her asking and she feels happy to be with her as she takes care of her more than her mother i.e. the petitioner. Thus, it can safely be said that the learned Courts below while evaluating evidence of the parties especially "intelligence preference" of the minor have rightly reached to the conclusion that the petitioner is not entitled to the custody of the minor and the respondent is entitled to retain her custody because he enjoys sound financial status and his family is also well educated, they are providing education to the minor and up-bringing her in a better way. The respondent is looking after the minor properly and minor Wania Naeem Gill is enjoying natural sense of safety and protection with her father/ respondent.

4. There is no denial that the petitioner is mother of the minor, so the learned appellate Court while considering this fact has rightly held her entitled to have visitation rights, despite the fact that the minor has shown her aversion towards the petitioner but the petitioner cannot be denied to have company of her minor daughter, because the same cannot be denied to a mother/father vice versa.

5. Pursuant to the above, there appears no illegality, jurisdictional error or legal infirmity in the impugned order and judgment passed by the learned Courts below warranting interference by this Court in exercise of extraordinary constitutional jurisdiction. Resultantly, the constitutional petition in hand as well as connected W.P.No.7657 of 2017, being without any force and substance stands dismissed. No order as to the costs.

ZC/A-88/L **Petition dismissed.**

2020 Y L R 461

[Lahore]

Before Shahid Bilal Hassan, J

PERVAIZ AHMED and others---Petitioners

Versus

SULTAN TIPU SARWAR and others---Respondents

Civil Revision No. 204044 of 2018, decided on 14th October, 2019.

Transfer of Property Act (IV of 1882)---

----S. 52---Civil Procedure Code (V of 1908), O. I, R. 10---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of contract---Appeal---Subsequent sale of suit land---Impleadment of a party---Lis pendens, principle of---Applicability---Suit was dismissed against which an appeal was filed wherein an application was moved for impleadment as a party on the ground that petitioner had purchased the suit property---Appellate Court accepted the said application and case was remanded for de novo trial---Validity---Rule of lis pendens was based upon the principle that it would be impossible that any action or suit could be brought to a successful termination if the alienation pendente lite was permitted to prevail and subsequent transferee was allowed to set out his own independent case even of being the bona fide transferee against the succeeding party of the matter and asked for the commencement of de novo proceedings so as to defeat the claim which had been settled by a final judicial verdict---Petitioner was not necessary party to the appeal or suit and appeal could have been decided without impleading him---Impugned judgment was set aside and application for impleadment as a party was dismissed---Matter was remanded to the Appellate Court for decision of appeal afresh in accordance with law---Revision was allowed, in circumstances.

Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others PLD 2011 SC 905 and Mehmood Anwer and another v. Additional District Judge and 14 others 2017 YLR Note 51 rel.

Malik Nazim Ali Awan for Petitioners.

Chaudhry Majid Hussain for Respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.---Precisely, the respondent No.1/plaintiff instituted a suit for specific performance with permanent injunction regarding the inherited share of petitioner No.1 and respondent No.2 from deceased father as legal heirs along with other co-sharers of the property/house measuring 4 marlas 4 sarsahi out of total measuring 10 marlas situated in Mohallah/Mauza Mianapura Tehsil and District Sialkot which has been inherited from deceased father as legal heirs along with other co-sharers alleging that the petitioner No.1 and his real brother namely Muhammad Tufail, respondent No.2, have entered into agreement to sell of their shares vide agreements Nos.216 and 218, respectively. It has further been alleged that vide above mentioned agreements to sell, the petitioner No.1 and respondent No.2 have received an amount of Rs. 11,00,000/- out of total consideration amount of Rs.13,33,000/- and agreed that the remaining consideration amount of Rs.233,000/- will have to be paid at the time of attestation of sale deeds; hence, the suit on refusal of the rival party to cope with the demand of the respondent No.1/plaintiff.

The petitioner No.1 and respondent No.2 were proceeded against ex parte on 25.03.2017.

After recording ex parte evidence, the learned trial Court vide ex parte judgment and decree dated 03.07.2017 dismissed suit of the respondent No.1/plaintiff, who being aggrieved of the same preferred an appeal. During pendency of the appeal, the petitioner No.2 filed an application under Order I, Rule 10 of the Code of Civil Procedure, 1908 on the ground that he has purchased the disputed property vide document No. 2129 dated 15.06.2017, thus, being bona fide purchaser without notice may be impleaded as party to the appeal and suit. The said application was resisted by the respondent No.1/plaintiff. The learned appellate Court

vide impugned judgment dated 13.03.2018 accepted the said application and remanded the case to the learned trial Court for de novo trial; hence, the instant civil revision.

2. Heard.

3. Admittedly, the petitioner No.2 purchased the suit land during pendency of the suit because the suit was instituted on 01.09.2016 and petitioner No.1 purchased the suit property on 15.06.2017; in this regard explanation given under section 52 of the Transfer of Property Act, 1882 is relevant; therefore, principle of lis pendens fully attracts in this case. For ready reference section 52 of the Act ibid with explanation is reproduced infra:

> "During the pendency of in any Court having authority in Pakistan or established beyond the limits of Pakistan by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> Explanation:---For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force." (Underline for emphasis)

The rule of lis pendens is founded upon the principle that it would be impossible that any action or suit could be brought to a successful

termination if the alienation pendente lite are permitted to prevail and the subsequent transferee is allowed to set out his own independent case, even of being the bona fide transferee against the succeeding party of the matter and ask for the commencement of de novo proceedings so as to defeat the claim which has been settled by a final judicial verdict; as has been held in Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (PLD 2011 Supreme Court 905).

4. Pursuant to the above, the learned appellate Court has travelled beyond the vested jurisdiction and has wrongly appreciated the ratio of judgment reported as Mehmood Anwer and another v. Additional District Judge and 14 others (2017 YLR Note 51-Lahore), because facts of the present case are distinguished from that case, as in the present case, as stated above, the petitioner No.2 purchased the suit property during pendency of the suit.

5. In view of the above, the petitioner No.2 was not necessary party to the appeal or suit and the appeal could have been decided without impleading him. As such, the civil revision in hand is allowed, impugned judgment is set aside, consequent whereof application under Order I, Rule 10 of C.P.C. is dismissed and case is remanded to the learned appellate Court, where the appeal will be deemed to be pending for decision afresh along with application moved by the respondent No.1 for additional evidence, in accordance with law. The adversaries are directed to appear before the learned appellate Court on 31.10.2019.

ZC/P-10/L **Case remanded.**

2020 Y L R 611

[Lahore]

Before Shahid Bilal Hassan, J

Malik MUHAMMAD NADEEM---Petitioner

Versus

LESCO and others---Respondents

Writ Petition No. 73192 of 2019, heard on 6th December, 2019.

(a) Electricity Act (IX of 1910)---

----S. 26-A---Civil Procedure Code (V of 1908), O. XXXIX, Rr. 1 & 2---Electricity bill---Resolution of dispute---Civil court, jurisdiction of---Petitioner was consumer of electricity company and filed civil suit for correction of his bill on plea that it was illegal and unlawful---Trial Court allowed interim injunction application and directed electricity company to restore connection of petitioner---Lower Appellate Court modified order passed by Trial Court on stay application---Validity---Matter before civil court did not relate to detection bill or theft of electricity or illegal abstraction of energy, rather matter was with regard to dishonest consumption of energy through manipulation of or tampering with metering equipment or other similar apparatus as well as matter related to meter or maximum demand indicator and other measuring apparatus supplied for ascertaining energy consumed at premises---High Court directed Trial Court to decide issue of jurisdiction and remanded matter for decision afresh---Constitutional petition was dismissed accordingly.

Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd. Okara and others PLD 2012 SC 371; Colony Textile Mills Ltd., Multan through Factory Manager v. Chief Executive, Multan Electricity Power Company Ltd. (MEPCO), Multan and 2 others 2004 SCMR 1679; Multan Electric Power Company Ltd. through Chief

Executive and another v. Muhammad Ashiq and others PLD 2006 SC 328; MEPCO and others v. Advisory Board, Punjab, Lahore and others PLD 2017 Lah. 769; WAPDA through Chairman and 3 others v. Advisory Board, Punjab, through Chairman and 2 others 2015 MLD 299; WAPDA v. Muhammad Azeem 2009 MLD 1434 and Water and Power Development Authority through Chairman, WAPDA and 4 others v. Abdul Shakoor through Legal Heirs PLD 2008 Lah. 175 ref.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---High Court exercises its Constitutional jurisdiction when it finds an order without lawful justification, jurisdiction and authority.

Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914 rel.

Muhammad Hafeez Rafique for Petitioner.

Rana Muhammad Siddique for Respondents.

Date of hearing: 6th December, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Tersely, the petitioner is consumer of LESCO, a company incorporated and duly registered with the Sub-Registrar of Companies with its Head Office at Lahore through its Chief Executive and is dealing in Electricity Line and Connection as well as providing services thereto to its consumers at Lahore. The petitioner used a meter under reference No.2411129003001U vide Meter No.13704, which is in the name of Malik Nadeem Iqbal son of Muhammad Shafi and has been paying the requisite bills regularly and allegedly nothing is outstanding against him till May, 2019. The respondents served the bill for the month of June, 2019 amounting to Rs.26,79,788/-, which was allegedly illegal, unlawful and excessive one, after receiving the said bill

the petitioner approached the respondents for correction of bill, but they refused, hence, the petitioner instituted suit for declaration with permanent injunction and mandatory injunction as a consequential relief, in which injunctive order was passed on 30.07.2019 with a direction to the petitioner to deposit an amount of Rs. 18,00,000/- and the respondents were directed not to disconnect the electricity connection as well as not to remove the meter in question from the site of the premises of the petitioner. Allegedly, the petitioner deposited an amount of Rs.18,00,000/- with the respondents in compliance of direction of the Civil Court. Again the respondents issued a bill for the month of July, 2019 amounting to Rs.38,40,469/-, the petitioner again approached the concerned quarters and on refusal, he instituted a fresh suit for declaration, etc. wherein injunctive order was issued on 26.08.2019 with a direction to the petitioner to deposit 1/3rd amount of the disputed bill and respondents were directed not to disconnect the electricity connection as well as not remove the meter in question. The petitioner deposited Rs.15,00,000/- with the respondents in compliance of the said order. The said suits were withdrawn with permission to file afresh. Again the respondents issued a bill for the month of August, 2019 to the tune of Rs.48,20,108/-, which was also challenged by filing a suit for declaration challenging all the aforementioned bills wherein injunctive order was passed on 19.09.2019 with a direction to the petitioner to deposit 1/5th of the disputed amount and the respondents were directed to restore the electricity supply of the premises of petitioner and to re-install the meter in question at site. Allegedly, the petitioner approached the respondents with a request to issue the bill as per order dated 19.09.2019 and restore the electricity supply as well as re-install the meter, but they statedly asked the petitioner that the matter is relating to jurisdiction. The petitioner filed a contempt petition for non-compliance of order dated 19.09.2019. The respondents contested the suit by filing written statement

and written reply as well as resisted the contempt petition by filing written reply. They also agitated the order dated 19.09.2019 in appeal. The learned appellate Court vide judgment dated 27.09.2019 disposed of the appeal with observation that as the respondents have filed application for withdrawal of the order dated 19.09.2019 before the learned trial Court it would be appropriate that the same would be decided first with a direction to the learned trial Court to decide the said application within one week positively. The said application was withdrawn by the learned counsel for the respondents on 19.10.2019. The learned trial Court vide order dated 01.11.2019 accepted the application for grant of temporary injunction with observation that the petitioner/plaintiff would be bound to pay the current bill of every succeeding month; the respondents were directed to restore the electricity connection of the petitioner subject to payment of RCO and other ancillary charges within ten days from the order. The respondents being aggrieved of the said order preferred an appeal. The learned appellate Court vide impugned judgment dated 26.11.2019 accepted the appeal and modified the order passed by the learned trial Court as follows:--

> "Anyhow he is liable to pay the current bill of Rs.21,25,710/- of consumed units in the month of August, 2019. Hence, respondent/ plaintiff is directed to pay the amount of current bill for the month of August 2019 and also pay the current bill of every succeeding month regularly and pay the reconnection charges and other ancillary charges there-after, the appellant/defendant are bound to restore the electricity connection to the respondent/ plaintiff.'

Being aggrieved of the said judgment, the petitioner has filed the instant constitutional petition.

2. Heard.

3. First of all this Court has to expound on the point of jurisdiction of

civil Court in the matter in hand, because it does not relate to detection bill or theft of electricity or illegal abstraction of energy, rather the matter in hand is with regards to dishonest consumption of energy through manipulation of, or tampering with, the metering equipment or other similar apparatus as well as relates to the meter or maximum demand indicator and other measuring apparatus supplied for ascertaining the energy consumed at the premises. In Water and Power Development Authority and others v. Messrs Kamal Food (Pvt.) Ltd. Okara and others (PLD 2012 Supreme Court 371) by following the dicta settled in Colony Textile Mills Ltd., Multan through Factory Manager v. Chief Executive, Multan Electricity Power Company Ltd. (MEPCO), Multan and 2 others (2004 SCMR 1679), wherein it has invariably been held:--

> "It follows from the above case-law that where the allegation against the consumer of electrical power is of dishonest consumption of energy through manipulation of, or tampering with, the metering equipment or other similar apparatus, the Electric Inspector would still have the authority to entertain reference under section 26(6). In case the theft alleged is by means other than the tampering or manipulation of the metering equipment etc, the matter would fall exclusively under section 26-A of the Act, outside the scope of powers of the Electric Inspector. Since the Electric Inspector possesses special expertise in examining the working of the metering equipment and other related apparatus, it makes sense that any issue regarding their working, functioning or correctness, whether or not deliberately caused, be examined by him. It may be added that section 26-A is an enabling provision empowering the licensee to charge the consumer for dishonest extraction or consumption of electricity. It does not provide any procedure for resolving any dispute between consumer and the licensee on a charge of theft. It should,

therefore, be read in conjunction with the other relevant provisions, including section 26(6) of the Act.'

Prior to the above said dicta, the Apex Court in Multan Electric Power Company Ltd. through Chief Executive and another v. Muhammad Ashiq and others (PLD 2006 Supreme Court 328), held that:--

> "Thus, as the law declared stands today, in cases of theft of electricity or illegal abstraction of energy, the Electric Inspector has no jurisdiction to adjudicate a dispute and it is only the Court of plenary jurisdiction who could resolve such a controversy."

Similar view was adopted by this Court in MEPCO and others v. Advisory Board, Punjab, Lahore and others (PLD 2017 Lahore 769), WAPDA through Chairman and 3 others v. Advisory Board, Punjab, through Chairman and 2 others (2015 MLD 299 Lahore) and WAPDA v. Muhammad Azeem (2009 MLD 1434 Lahore), in the latter judgment it was held:-

> "Both the Courts below have failed to take notice of the legal position as to the jurisdiction of the Court and the maintainability of the suit as stated in Water and Power Development Authority and another v. Mian Muhammad Riaz and another (PLD 1995 Lahore 56). In the precedent case, the learned Full Bench of this Court had taken the view that the controversies and disputes concerning the slowness of meter or other faults with the equipment fall within the jurisdiction of the Electric Inspector under section 26 of the Electricity Act, 1910. The matter thus falls within the exclusive jurisdiction of Electric Inspector."

4. Apart from above, the Higher Courts are consistent on this point that jurisdiction is conferred by law and not by consent of the parties as has been held by this Court in Water and Power Development Authority through Chairman, WAPDA and 4 others v. Abdul Shakoor through Legal

Heirs (PLD 2008 Lahore 175) wherein it was held:-

> "7. Non-raising of objection to the jurisdiction before the Court of first instance will not confer jurisdiction upon the court. Relying on various decisions, the Hon'ble Supreme Court in afore-noted case observed that jurisdiction is conferred by law and not by consent of the parties. It reiterated its observation recorded in Haji Abdullah Khan and others v. Nasir Muhammad Khan and others (PLD 1965 SC 690), I reproduced below:-
>
> "It may be noted that it is duty of the Court itself to apply the law. A party is not bound to engage a counsel. Whatever law becomes applicable on the admitted or proved fact law has to be given effect to whether or not it has been relied upon by a party."

5. Now, when the facts of present case are considered and assessed on the ratio of the above said judgments, it can safely be held that both the learned Courts below have failed to appreciate the ratio of the said judgments and have wrongly construed as well as appreciated law on the subject germane to question of jurisdiction. As such, it is a fit case to exercise extraordinary constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and this Court in exercise of constitutional jurisdiction has, when finds an order without lawful justification, jurisdiction and authority, ample jurisdiction to make interference in the same as has been held in Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914). In this judgment, it was also held that, "Even otherwise, the Courts of law are not supposed to perpetuate what is unjust and unfair by exploring explanation therefor. They should rather explore ways and means for undoing what is unjust and unfair." In the backdrop of above said eventuality, there is no need to further ponder upon the matter in hand on facts.

6. For the foregoing reasons, without commenting on merits of the case, the constitutional petition in hand is dismissed. However, the learned trial Court is directed to decide the issue of jurisdiction again keeping in view the ratio of the above said judgments. Office is directed to send the copy of this judgment to the learned trial Court. No order as to the costs.

MH/M-203/L **Case remanded.**

2020 Y L R 666

[Lahore]

Before Shahid Bilal Hassan, J

UMAR HAYAT---Petitioner

Versus

MUHAMMAD IQBAL ARSHAD GORAYA and others---Respondents

Writ Petition No. 50319 of 2019, decided on 13th September, 2019.

(a) Civil Procedure Code (V of 1908)---

----O. VII, R. 11---Suit for declaration---Rejection of plaint---Limitation---Time-barred suit---Petitioner had assailed order of revisional court whereby his plaint was rejected under O. VII, R. 11, C.P.C.---Validity---Father of petitioner and other plaintiffs remained alive for about 43 years after the demise of auction purchaser, but during his lifetime he had never agitated the matter before any forum---Had the father of petitioner paid the amount of his share, he would have assailed the matter of allotment in favour of auction purchaser, but he took no steps---Petitioner, even after the death of his father took no action for 16 years---Suit of the petitioner was barred by limitation---No jurisdictional defect or legal infirmity was available in the impugned order warranting interference by the High Court in the exercise of extraordinary constitutional jurisdiction---Constitutional petition, being devoid of force and substance, was dismissed.

(b) Limitation---

----Question of law---Question of limitation if not taken or raised by the

party, could be considered by the court even at appellate and revisional stage.

Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705 and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others 1992 SCMR 2435 ref.

Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212 and United Bank Limited and others v. Noor-un-Nisa and others 2015 SCMR 380 rel.

Malik Muhammad Ali Asif for Petitioner.

ORDER

SHAHID BILAL HASSAN, J.---Precisely, the petitioner and respondents Nos.13 to 17 instituted a suit for declaration with regard to the suit property, against the respondents-defendants Nos.1 to 12 contending therein that they are owners in possession of 1/4th share from 1/2 share of disputed property; the suit was duly contested by the respondents Nos. 1 to 3 and 10 as well as by respondents Nos.11 and 12. During pendency of suit, the respondents Nos.1 to 4 and defendant No.10 filed an application under Order VII, Rule 11 of the Code of Civil Procedure, 1908 for rejection of plaint; the said application was resisted by the present petitioner and other plaintiffs. The learned trial Court vide order dated 21.05.2018 dismissed the said application. The respondents Nos.1 and 2 being aggrieved of the said order filed a revision petition and the learned Revisional Court vide impugned order dated 18.05.2019 accepted the revision petition and set aside the order dated 21.05.2018 passed by the learned trial Court, consequent whereof while accepting the application under Order VII, Rule 11 of the C.P.C., rejected the plaint of

suit instituted by the petitioner and respondents Nos.13 to 17; hence, the instant constitutional petition.

2. Heard.

3. It is a settled principle of law that question of law even if not taken or raised by the party, could be considered by the Courts even at appellate and revisional stage. In Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others (PLD 2015 SC 212), it was invariably held by the august Court of the country that:-

> ".....From the various dicta/ pronouncements of the superior court, it can be deduced without any fear of contradiction that such law is founded upon public policy and State interest. This law is vital for an orderly and organized society and the people at large, who believe in being governed by systemized law. The obvious object of the law is that if no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating to such cause of action, and a person is allowed to sue for the redressal of his grievance within an infinite and unlimited time period, it shall adversely affect the disciplined and structured judicial process and mechanism of the State, which is sine qua non for any State to perform its functions within the parameters of the Constitution and the rule of law. The object of the law of limitation and the law itself, prescribing time constraints for each cause or case or for seeking any relief or remedy has been examined by the courts in many a cases, and it has been held to be a valid piece of legislation, and law of the land. It is "THE LAW" which should be strictly construed and

applied in its letter and spirit; and by no stretch of legal interpretation it can be held that such law (i.e. limitation law) is merely a technicality and that too of procedural in nature. Rather from the mandate of section 3 of the Limitation Act, it is obligatory upon the court to dismiss the cause/lis which is barred by time even though limitation has not been set out as a defence. And this shows the imperative adherence to and the mandatory application of such law by nature and is held to mean and serve as a major deterrent against the factors and the elements which would affect peace, tranquility and due order of the State and society. The law of limitation requires that a person must approach the Court and take recourse to legal remedies with due diligence, without dilatoriness and negligence and within the time provided by the law; as against choosing his own time for the purpose of bringing forth a legal action at his own whim and desire. Because if that is permitted to happen, it shall not only result in the misuse of the judicial process of the State, but shall also cause exploitation of the legal system and the society as a whole. This is not permissible in a State which is governed by law and Constitution. And it may be relevant to mention here that the law providing for limitation for various causes/reliefs is not a matter of mere technicality but foundationally of the "LAW" itself. .....'

In regard of above said view, this Court is further fortified by a judgment reported as United Bank Limited and others v. Noor-un-Nisa and others (2015 SCMR 380), wherein it was held:-

"Under section 3 of the Limitation Act, 1908, it is the bounden duty of every Court of law to take notice of the question of

limitation even if not raised in defence by the other contesting party(s)."

Earlier to the above said celebrated judgments, the Hon'ble Supreme Court of Pakistan dealt with the same proposition in Lahore Development Authority v. Mst. Sharifan Bibi and another (PLD 2010 SC 705) and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others (1992 SCMR 2435).

4. When on the touchstone of the above ratio, the present case is weighed, it appears that auction was accepted in favour of Barkat Ali deceased who was literate and ex-army person, who died in the year 1976 and father of the present petitioner and other plaintiffs namely Ghulam Rasool remained alive for about 43 years after demise of Barkat Ali, but during his life time he never ever agitated the matter before any forum. Had he paid the amount of his share, he would have assailed the matter of allotment in favour of Barkat Ali, during his life time or after demise of Barkat Ali, but he kept mum and after his (Ghulam Rasool's) death, the plaintiffs kept quiet for a considerable period and after 16 years of death of their father/predecessor instituted the suit in hand, which has rightly been adjudicated to be barred by law of limitation while appreciating the ratio of judgments referred in the impugned order dated 18.05.2019 passed by the learned appellate Court; as such, the learned appellate Court while considering law on the subject and facts of the case has rightly concluded that the suit of the petitioner(s)/plaintiffs was badly barred by limitation. There appears no jurisdictional defect or legal infirmity in the impugned order warranting interference by this Court in exercise of extraordinary constitutional jurisdiction. The findings recorded by the learned appellate Court are upheld and maintained.

5. Pursuant to above the learned appellate Court has evaluated record in true perspective and has reached to a just conclusion. Resultantly, while placing reliance on the judgments supra, the constitutional petition in hand being devoid of any force and substance stands dismissed in limine.

SA/U-8/L **Petition dismissed.**

PLJ 2020 Lahore 48

[Multan Bench Multan]

Present: SHAHID BILAL HASSAN, J.

RASHEED KHAN (deceased) through L.Rs. and others--Petitioners

versus

Mst. AALAM (deceased) through L.Rs. and others--Respondents

C.R. No. 115-D of 1999, decided on 8.4.2019.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Suit for possession--Dismissed--Appeal--Accepted--Case was remanded--Civil revision--Accepted--Case was remanded to trial Court--Appeal was partly accepted--Entitlement of possession--Consistency between findings--Challenge to--Petitioners-defendants could not bring on record any cogent evidence with regards to fact that Syed Qutub Ali Shah sold out his share of property to lessees, as no sale deed with regards to above said fact was brought on record and only contents of Ex.D2 were referred by learned counsel for petitioners, which were not sufficient to prove factum of selling out of property owned by Sycd Qutub Ali Shah--Apart from this, petitioners, though produced a letter written by a person from India that Syed Qutub Ali Shah had also sold his share, but said letter could not be relied upon as it was not a sufficient proof that share of Syed Qutub Ali Shah was purchased by Hindus before partition and same was later on declared as evacuee property--Appellate Court and by evaluating evidence on record in a minute manner learned appellate Court has rightly adjudged lis in hand and has rightly held respondents entitled to have possession of one kanal and 15 marlas of disputed land--It is settled proposition of law that in case of inconsistency between findings learned trial Court and learned Appellate Court, findings of latter must be given preference in absence of any cogent reason to contrary--There appears no illegality and irregularity as well as wrong exercise of vested jurisdiction allegedly to have been committed by learned appellate Court while passing impugned judgment and decree warranting interference by

this Court in exercise of revisional jurisdiction--Civil revision was dismissed. [Pp. 50 & 51] A, B, C & D

PLJ 1975 Lahore 298, 1993 SCMR 21, 2015 SCMR 1, 2013 SCMR 1300 and 1969 SC 617 *ref.*

Mr. Habib-ur-Rehman Thaheem, Advocate for Petitioners.

Barrister Rehan Khalid Joiya, Advocate for Respondents.

Date of hearing: 8.4.2019.

JUDGMENT

Succinctly, the respondents-plaintiffs instituted a suit for possession against the present petitioners wherein it was maintained that they were owners of the property as mentioned in the head note of the plaint and they were entitled to get its possession. As per averment of the plaint, the property in dispute was leased out in the year 1932 by Syed Hazoor Bakhsh Shah and Syed Qutub Ali Shah, the predecessor-in-interest of the respondents-plaintiffs, for the construction of a factory and the said lease for a fixed period of 20 years. The possession was delivered to the lessees and they made construction on it. The possession was to be restored uptill 14.06.1952 and the debris on the disputed property was deemed to be property of the lessees. The lease ended after 14.07.1952 and the same was incorporated in the revenue record, but the Defendants No. 1 to 4 got illegal possession of the disputed property in the year 1969 and started construction which resulted into the institution of the suit, which was, withdrawn with permission to file a fresh suit subject to payment of costs. It was averred that the property in dispute could not be declared as evacuee property because the same belonged to the Muslim owners and its status quo could not be changed due to lease. The construction made on the disputed property, only belonged to evacuee and the ownership of the disputed property still vested with the persons who leased out the property.

The suit was resisted by the rival parties while submitting written statement. Out of the divergent pleadings of the parties, issues were framed by the learned trial Court and evidence of the parties, oral as well as documentary, was recorded. The learned trial Court vide judgment and

decree dated 01.03.1995 dismissed suit of the respondents-plaintiffs. They preferred an appeal against the said judgment and decree and the learned appellate Court vide judgment and decree dated 27.10.1996 accepted the appeal and remanded the ease to the learned trial Court for decision afresh, but the rival party called into question the said remand order in C.R,No. 15-D-97 before this Court and vide order dated 13.04.1998, the remand order was set aside and case was remanded to the learned appellate Court for decision of appeal afresh. The learned appellate Court, after remand, vide impugned judgment and decree dated 20.02.1999 partly accepted the appeal and decreed suit of the respondents-plaintiffs to the extent of one kanal and 15 marlas, owned by Syed Qutub Ali Shah; hence, the instant civil revision.

2. Heard.

3. The petitioners-defendants could not bring on record any cogent evidence with regards to the fact that Syed Qutub Ali Shah sold out his share of property to the lessees, as no sale deed with regards to the above said fact was brought on. record and only contents of Ex.D2 were referred by learned counsel for the petitioners, which were not sufficient to prove the factum of selling out of property owned by Sycd Qutub Ali Shah. Apart from the this, the petitioners, though produced a letter written by a person from India that Syed Qutub Ali Shah had also sold his share, but said letter could not be relied upon as it was not a sufficient proof that the share of Syed Qutub Ali Shah was purchased by Hindus before partition and the same was later on declared as evacuee property. Moreover, the Additional Commissioner (Consolidation), Multan/D.G.Khan Division passed an order (Ex.Pl), which goes to evince that the land one kanal and 15 marlas was not mortgaged property and it was held to be the property Mst, Alam Bibi daughter of Syed Qutub Ali Shah and others and that order hold field; thus, the learned appellate Court was right in observing that, ... *In fact Jind Wadda Shah was the person who sold his share after 13/14 years of the execution of lease deed in favour of Hindues, as is evident by Ex.D.2. Since Mst. Alam Bibi daughter of Syed Qutub Ali Shah is also a widow of Jind Wadda Shah, it was misconceived by the respondents that she could not claim the ownership of the property which was sold, by her husband, i.e. Syed Jind Wadda Shah.*

She has not claimed, the share of her husband, but she has claimed her share as a daughter of Syed Qutub Ali Shah, who admittedly never sold his property and due to wrong entries in the revenue record that property was shown as evacuee property and onwards transferred to the respondents treating it as an evacuee property.'

The ratio of case law reported as PLJ 1975 Lahore 298 and 1993 SCMR 21 have also rightly been followed by the learned appellate Court and by evaluating evidence on record in a minute manner the learned appellate Court has rightly adjudged the lis in hand and has rightly held the respondents entitled to have possession of one kanal and 15 marlas of disputed land.

4. In addition to the above, it is settled proposition of law that in case of inconsistency between the findings the learned trial Court and the learned Appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary. Reliance is placed on *Amjad Ikram v. Mst. Asiya Kansar and 2 others* (2015 SCMR 1), *Madan Gopal and 4 others v. Maran Bepari and 3 others* (PLD 1969 SC 617) and *Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others* (2013 SCMR 1300).

5. For the foregoing reasons, there appears no illegality and irregularity as well as wrong exercise of vested jurisdiction allegedly to have been committed by the learned appellate Court while passing the impugned judgment and decree warranting interference by this Court in exercise of revisional jurisdiction. Resultantly, the civil revision in hand having no force and substance stands dismissed. No order as to the costs.

(Y.A.) **Civil Revision dismissed.**

PLJ 2020 Lahore 603

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD ALI, etc.--Petitioners

versus

ZUHRA BIBI, etc.--Respondents

C.R. No. 521 of 2016, decided on 13.2.2019.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Specific Relief Act, (I of 1877), S. 12--Suit for declaration--Decreed--Appeal--Dismissed--Concurrent findings--Challenge to--Non-availability of trust worthy evidence--No consideration amount was either paid or received--Main controversy between parties is reflected in issues No. 8 & 9 framed by learned Trial Court *i.e*. to effect whether mutations are against law and facts, are ineffective and inoperative upon rights of plaintiff and are liable to be cancelled and whether plaintiff is-entitled for decree of declaration as prayed for--Admittedly, Petitioner No. 1 and Respondent No. 1 are real brother and sister being off springs of Hayat s/o Salam, original owner--After death of Hayat, his property was to be devolved upon his legal heirs, which needful was done but not to extent of Respondent No. 1 despite fact that she became owner of 7/48 in legacy of her deceased father--It was stance of petitioners that Respondent No. 1 alienated her share to petitioners through sale mutation but for proving said fact, petitioners were bound to lead strong, cogent and trust-worthy evidence keeping in view fact that Respondent No. 1 was an illiterate lady and any transaction with regards to sale exchange etc. by an illiterate person especially a lady, strong evidence is required from beneficiary *i.e*. petitioners--Though, Halqa Patwari was produced as D.W-2 but Tehsildar was not produced to verify impugned mutation--Only one witness of impugned mutation was produced as D.W-4, who in his cross-

examination submitted that he did not recognize Respondent No. 1 personally--Admittedly, in such like cases proving of Consideration is very vital--D.W-2 *i.e*. Halqa Patwari in his cross-examination submitted that no consideration was either paid or received before him by Respondent No. 1--Other witnesses except D.W-3 were silent with regards to said consideration--It is observed that, in response to each and every issue of case with regards to evidence produced by parties has been scanned by Courts below--There appears no misreading and non-reading of evidence--Both Courts below have passed impugned judgments and decrees strictly in accordance with law--Civil revision was dismissed. [P. 606] A & B

Civil Procedure Code, 1908 (V of 1908)--

----O.XLI R. 27--Closing of evidence--Application for production of witness--Dismissal of--Importantly, dismissal of application under section XLI Rule 27 C.P.C. by Appellate Court is strictly in accordance with law--Petitioners closed their evidence and at relevant time they did not either request Court for production of any witness before said Court after having recorded six witnesses; therefore observations given in order whereby application of petitioners under Order XLI Rule 27 C.P.C. was dismissed were upheld being in accordance with law. [P. 606] C

1996 CLC 650 Lahore.

Rana Zia Abdul Rehman and *Mr. Muhammad Amir Javed Bhatti*, Advocate for Petitioners.

Mr. Abdul Khaliq Safrani, Advocate for Respondents.

Date of hearing: 13.2.2019.

ORDER

Briefly, Respondent No. 1/*Mst.* Zuhra Bibi filed a suit for declaration with consequential relief against the present petitioners and Respondents No. 2 to 5 with the assertions that mutations No. 431 dated 21.01.1991, 1080 and 1081 dated 31.12.2002 be declared as nullity with regards to her entitlement. Further maintained that originally the dispute between the parties arose on the death of Hayat s/o Salam, who was owner of land measuring 159-kanals and 09-marlas bearing Khewat No. 73 and 20-kanals and 5-marlas bearing Khewat No. 130 situated at Mauza Udooki, Tehsil & District Hafizabad as per register Haq Daran-e-Zamin for the year 1987-88. After the death of said Hayat, it was the stance of Respondent No. 1 that she herself and petitioners, Ameen Bibi and Sardaran Bibi became sole owners of the said property being the surviving legal heirs and resultantly, she was entitled 7/48 share in the suit property. When she came to attend Chehlum ceremony of her deceased father at Mauza Udooki in the year 1991, she was asked by the petitioners *i.e*. her real brothers so as to accompany them to get entered mutation of inheritance of the deceased Hayat in the revenue record and for the said purpose, she appeared before Halqa Patwari, where her photograph was taken and her thumb impressions were also obtained on certain papers. She did the said with the view to be incorporated as legal heir of deceased Hayat but the petitioners in connivance with the revenue officials got the said mutation in their favour, which is nothing else but an outcome of fraud and misrepresentation. In furtherance, the petitioners have also alienated the disputed land in favour of two respondents through mutations No. 1080, 1081 dated 31.12.2002, resultantly the suit was filed for getting the said mutations declared as null and void being ineffective qua the rights of Respondent No. 1 being actual owner of the property to the extent of her share mentioned hereinbefore.

In response to the said suit, the petitioners and respondents appeared and contested the suit. Out of the divergent pleadings of the parties, learned

Trial Court framed as many as ten issues including "Relief and asked the parties to get their evidence recorded, which needful was done and resultantly, the suit of Respondent No. 1 was decreed by the learned Trial Court *vide* impugned judgment and decree dated 02.02.2013 by declaring mutations No. 1080 and 1081 dated 31.12.2002 as void subject to the condition that share of Respondent No. 1 is delivered to her from the property of deceased namely Hayat in terms of mutation No. 431 dated 21.01.1991. Aggrieved of the said judgment and decree, the petitioners opted to prefer an appeal, which needful was done and the learned Court of Appeal after hearing both the sides at length dismissed the appeal of the petitioners *vide* impugned judgment and decree dated 20.01.2016, Hence, the instant civil revision.

2. Heard.

3. The main controversy between the parties is reflected in issues No. 8 & 9 framed by the learned Trial Court *i.e.* to the effect whether the mutation No. 431, dated 21-1-1991 and mutation No. 1080 and 1081 dated 31-12-2002 are against the law and facts, are ineffective and inoperative upon the rights of plaintiff and are liable to be cancelled and whether the plaintiff is-entitled for the decree of declaration as prayed for. In response to these issues and the other issues framed by the learned Trial Court, both the parties led their evidence, oral as well as documentary in support of their respective stance. Admittedly, the Petitioner No. 1 and Respondent No. 1 are real brother and sister being off springs of Hayat s/o Salam, the original owner. After the death of Hayat, his property was to be devolved upon his legal heirs, which needful was done but not to the extent of Respondent No. 1 despite the fact that she became owner of 7/48 in the legacy of her deceased father. It was the stance of the petitioners that the Respondent No. 1 alienated her share to the petitioners through sale mutation dated 21.01.91

but for proving the said fact, the petitioners were bound to lead strong, cogent and trust-worthy evidence keeping in view the fact that Respondent No. 1 was an illiterate lady and any transaction with regards to sale exchange etc. by an illiterate person especially a lady, strong evidence is required from the beneficiary *i.e*. the petitioners. Though, the Halqa Patwari was produced as D.W-2 but Tehsildar was not produced to verify the impugned mutation. Only one witness of the impugned mutation was produced as D.W-4, who in his cross-examination submitted that he did not recognize the Respondent No. 1 personally. Admittedly, in such like cases proving of Consideration is very vital. D.W-2 *i.e*. Halqa Patwari in his cross-examination submitted that no consideration was either paid or received before him by the Respondent No. 1. The other witnesses except D.W-3 were silent with regards to the said consideration. It is observed that, in response to each and every issue of the case with regards to evidence produced by the parties has been scanned by the learned Courts below. There appears no misreading and non-reading of evidence. Both the learned Courts below have passed the impugned judgments and decrees strictly in accordance with law.

4. Importantly, dismissal of the application under section XLI Rule 27 C.P.C. by the learned Appellate Court is strictly in accordance with law. The petitioners closed their evidence on 20.11.2012 and at the relevant time they did not either request the Court for production of any witness before the said Court after having recorded six witnesses; therefore the observations given in the order dated 20.01.2016, whereby application of the petitioners under Order XLI Rule 27 C.P.C. was dismissed are upheld being in accordance with law.

5. Case law reported as *Hassan and another v. Hussain* (1996 CLC 650-Lahore) relied upon by the learned counsel for the petitioners, with utmost respect to the same, has no relevance to the peculiar facts and

circumstances of the case in hand and is distinguishable, thus it does not render any assistance or help to the petitioners' case.

6. For the foregoing reasons, there appears no illegality and irregularity as well as wrong exercise of jurisdiction in the impugned judgments and decrees passed by the learned Courts below warranting interference by this Court in exercise of supervisory revisional jurisdiction. Resultantly, the civil revision in hand, being without any force and substance stands **dismissed.** No order as to costs.

(M.M.R.) **Civil revision was dismissed.**

PLJ 2020 Lahore (Note) 80

Present: SHAHID BILAL HASSAN AND ABID AZIZ SHEIKH, JJ.

ALI AHMAD--Appellant

versus

ALLIED BANK OF PAKISTAN etc.--Respondents

F.A.O. No. 689 of 2015, decided on 6.12.2017.

Financial Institutions (Recovery of Finance) Ordinance, 2001--

----Ss. 19 & 23--Banking Companies (Recovery of Loans Advanced & Credit Finance) Act, 1997, S. 21--Suit for recovery--Decreed--Execution--Auction proceedings--Objection petition--Dismissed--Mortgage of property--Execution of general power of attorney in favour of bank--Agreement to sell after mortgage--*Bona fide* purchase--Recording of evidence--Limitation--Challenge to--Argument of counsel for appellant is that being a *bona fide* purchaser appellant is entitled to retain property--This argument is also mis-conceived--Once original title document were with respondent bank and property was also/mortgage through registered deed, which was incorporated in revenue record, appellant cannot be claimed to be a *bona fide* purchaser, without making reasonable inquiries to get valid title of property--Even if appellant is considered to be a *bona fide* purchaser, mortgage charge will remain in field and unless redeem will travel with property--Executing Court was not bound to record evidence in each and every case and evidence could only be recorded if same was required in circumstances of a particular case--It cannot be said that non-disposal of two pending applications (First to record evidence and second to place on record documents) has caused prejudice to appellant in final decision of objection petition--So, far as objection regarding limitation is concerned, we have noted that no such objection was raised in objection petition filed under Section 19 of Ordinance read with Section 47, 151 and Order 21, Rule 58, CPC and further no finding

has been recorded by Court below on this issue--Therefore, this plea cannot be raised for first time in this appeal--Appeal was dismissed.

[Para 7, 8 & 10] A, B, C & D

2002 CLD 1090; 2008 SCMR 1259; 2002 CLD 1244.

Mr. Tassawar Hussain Qureshi, Advocate for Appellant.

Mr. Moiz Tariq, Advocate for Respondent Bank.

Date of hearing: 6.12.2017.

ORDER

This appeal has been filed against order .dated 12.11.2015 (**impugned order**) passed by Judge Banking Court No. IV, Lahore whereby objection petition of the appellant was dismissed.

2. Brief facts are that suit for recovery was decreed in favour of respondent bank on 02.9.1999. In execution, number of properties were put to auction. The appellant filed objection petition in respect of agricultural property measuring 44 kanals and 2 marlas mentioned at Serial No. 6 of the fard taleeqa (herein after referred to as property), being *bona fide* third party purchaser. The said objection petition was dismissed through impugned order dated 12.5.2015, hence this appeal.

3. Learned counsel for the appellant submits that judgment debtors executed agreement to sell in his favour on 01.10.2000 and consequently verbal Mutation No. 5045 was also entered on 30.12.2000. Submits that said mutation could not be sanctioned by Revenue Officer, however, subsequently in 2009, appellant deposited requisite fee and mutation was attested in his favour by the Revenue Officer. Submits that appellant being *bona fide* purchaser of the property has right to retain possession of the property. He further submits that appellant also filed two applications (application for recording of evidence and bringing on record the documents) but without deciding said applications, objection petition was dismissed.

Submits that sale of property in appellant favour being before promulgation of Financial Institutions (Recovery of Finances) Ordinance, 2001 (Ordinance), same was not hit by Section 23 of the Ordinance. He concluded that execution was also barred by time. He placed reliance on *Chief Land Commissioner etc. vs. Maula Dad etc.* (1978 SCMR 264), *Mahboob Alam etc. vs. Citibank etc.* (2002 CLD 1244), *Raja Amir Khan vs. Bank of Punjab etc.* (2004 CLD 1600). *SME Bank Ltd vs. Messrs Continent Leather (Pvt.) Ltd etc.* (2005 CLP 1508), *Ali Muhammad Shah vs. Iiaz Hussain* (2007 CLP 1084) and *Mst. Imtiaz Begum vs. Mst. Sultan Jan and others* (2008 SCMR 1259).

4. Learned counsel for the respondent bank on the other hand submits that property was mortgaged in favour of respondent bank through memorandum deposit of title deed (MOP) on 27.12.1995 and thereafter, through registered mortgage on 20.7,1999. He submits that the agreement to sell dated 02.10.1999 in favour of appellant being after mortgage and decree dated 02.9.1999 has no legal effect.

5. We have heard the arguments of learned counsel for the parties and perused the record.

6. The document shows that property was mortgaged through Equitable Mortgage on 27.12.1995 with respondent bank by deposit of original title deed dated 11.12.1995. The judgment debtors also executed registered general power of attorney in favour of respondent bank on 27.12.1995. Beside equitable mortgage, registered mortgage was also executed on 20.7.1999 which was also incorporated in the revenue record through Mutation No. 4668. Thereafter, suit of the respondent bank was also decreed on 02.9.1999. It is admitted position on record that appellant entered into agreement to sell on 02.10,1999, after the aforesaid mortgage deeds and also decree in favour of respondent bank. In the given circumstances, the appellant has no better claim on property, firstly because it is settled law that

agreement to sell does not confer any title (Reliance is placed on *Zafar Ahmad vs. Mst. Hajaran Bibi* (PLD 1986 Lahore 399) and secondly, even otherwise, being equitable mortgage on 27.12.1995 and registered, mortgage on 20.7.1999, the subsequent agreement to sell dated 02.10.1999 was subject to mortgage charge of the respondent bank. Law is also well settled that mortgage unless redeemed, will travel with the sale of property. In this regard, reliance is placed on *Mrs. Tahrina Bashir vs. Abdul Rauf* (1995 CLC 973) and *Muslim Commercial Bank Ltd vs. Sayed Sultan Shah etc.* (2003 CLD 888).

7. One of the argument of learned counsel for the appellant is that being a *bona fide* purchaser appellant is entitled to retain property. This argument is also mis-conceived. Once the original title document were with the respondent bank and property was also mortgage through registered deed, which was incorporated in the revenue record, the appellant cannot be claimed to be a *bona fide* purchaser, without making reasonable inquiries to get valid title of the property. Even if the appellant is considered to be a *bona fide* purchaser, mortgage charge will remain in field and unless redeem will travel with the property. In this regard, reliance is placed on *Major Muhammad Tariq vs. Citibank Housing Finance Company* (2002 CLD 1090), *Muhammad Farrukh etc. vs. Allied Bank of Pakistan etc.* (2003 CLD 37). *Mst. Rukhsana Butt vs. Judge Banking Court etc.* (2005 CLD 312), *Ahmed Zaki Khokhar etc. vs. Bank of Oman Ltd. etc.* (2005 CLD 1047), *M. Jameel etc. vs. Citibank etc.* (2005 CLD 610), *Citibank N.A through Manager vs. Muhammad Akbar and 3 others* (2005 CLD 384), *Muhammad Anwar Khan vs. Habib Bank Ltd etc.* (2005 CLD 165), *Habib Bank Limited vs. Daizy Knitwear (Pvt.) Ltd etc.* (2006 CLD 206) *Dost Muhammad vs. Bouse Building Finance Corporation* (2007 CLD 1369), *Habib Bank Ltd vs. Syed Muhammad Haroon etc.* (2009 CLD 140).

8. The next argument of learned counsel for the appellant that his pending applications being not decide, the impugned order is not sustainable, has also no substance. The appellant specifically asserted before learned Executing Court that evidence may be recorded but learned Court has declined this request. The executing Court was not bound to record evidence in each and every case and evidence could only be recorded if same was required in the circumstances of a particular case. This case indeed was not the one in which evidence was required to be recorded in the circumstances) discussed above. Further, on face of it, during arguments before Executing Court, the appellant referred to all documents which he relied upon. Therefore, it cannot be said that non-disposal of two pending applications (First to record evidence and second to place on record the documents) has caused prejudice to appellant in final decision of objection petition. For these reasons, the' judgment of *Mst. Imtiaz Begum vs. Mst. Sultan Jan etc.* (2008 SCMR 1259) relied upon by the appellant in this context is not applicable.

9. We have also gone through the other case law relied upon by learned counsel for the appellant and found it also not applicable as discussed below. In *Al-Haj Chaudhry Muhammad Bashir vs. Citibank N.A. and 2 others* (2002 CLD 962), it was held that person having agreement to sell has right to file objection petition. There is no cavil with this law but same is not question in dispute. Case of *SME Bank Lit vs. Messrs Continent Leather (Pvt.) Ltd etc.* (2005 CLD 1508) relates to framing of issues, which has already been distinguished in proceeding paras. In case *Mahboob Alam etc. vs. Citibank etc.* (2002 CLD 1244), the original sale deed was in possession of objector and property in question was also not mortgage, hence same is not applicable to facts of this case. In case of *Raja Amir Khan vs. Bank of Punjab through Manager etc.* (2004 CLD 1600), it is held that Ordinance will not operate retrospectively. This proposition is also not applicable, because here appellant was not non-suited on the basis of Section 23 of the Ordinance only. The case of *M/s. Chief Land Commissioner etc. vs.*

Maula Dad etc. (1978 SCMR 264) relied upon actually advances the case of the respondent bank, where it is held that charge or mortgage to run with land, hence transfree of encumbered land step into shoes of debtor.

10. So, far as objection regarding limitation is concerned, we have noted that no such objection was raised in the objection petition filed under Section 19 of the Ordinance read with Section 47, 151 and Order 21, Rule 58, CPC and further no finding has been recorded by Court below on this issue. Therefore, this plea cannot be raised for the first time in this appeal.

11. In view of above discussion, we found no illegality or infirmity in the impugned order, therefore, this appeal being meritless is accordingly **dismissed.**

(Y.A.) **Appeal dismissed.**

PLJ 2020 Lahore (Note) 85

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD ALI--Petitioner

versus

NAWAB DIN, etc.--Respondents

Civil Revision No. 172 of 2008, decided on 28.01.2016.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Specific Relief Act, (I of 1877), S. 42--Suit for declaration--Dismissed--Appeal--Dismissed--Consolidated proceedings--Jurisdic-tion of Civil Courts can take cognizance of matters involving consolidation or not, specially when no *mala fide* a excessiveness of authority is evident--Challenge to--Petitioner has failed to point out any illegality or irregularity allegedly committed by Consolidation Officer at time of conducting consolidation proceedings; therefore, jurisdiction of civil Court is barred under law to entertain such like suit or matter--Both Courts have rightly exercised jurisdiction while passing impugned judgments and decrees--No illegality and irregularity has been committed by learned Courts below--Revision petition was dismissed.[Para 6] B

West Pakistan Consolidation of Holding Ordinance, 1960 (VI of 1960)--

----S. 26--Powers to determination--Any such matter in which government, Board of Revenue or any officer is empowered to determine, decide or dispose of in hierarchy of Ordinance, cannot be called into question by way of civil suit [Para 6] A

Ms. Farzana Bilqees, Advocate for Petitioner.

Mr. Qaiser Mahmood Sra, Advocate for Respondents.

Date of hearing: 28.01.2016.

ORDER

The petitioner Muhammad Ali instituted a suit for declaration germane to the suit land against the respondents. *(Detailed facts', which need not to be reproduced here, can easily be gathered from the impugned judgment dated 27.01.2004 passed by the learned appellate Court.)*

2. The respondents/Defendants No. 1 to 4 contested the suit by filing written statement; while the other Defendants No. 5 to 8 filed their consenting written statement. The learned trial Court, out of the divergent pleadings of the parties, framed issues and after recording evidence, adduced by the parties and hearing the arguments *vide* impugned judgment and decree dated 08.12.2000 dismissed suit of the petitioner/plaintiff; against which he preferred an appeal, but same was dismissed *vide* impugned judgment and decree dated 27.01.2004 passed by the learned Addl. District Judge, Kasur; hence, this civil revision.

3. Recapping and reechoing the grounds commended in the memorandum of civil revision, the learned counsel for the petitioner has prayed for acceptance of the instant civil revision, setting aside of the impugned judgments and decrees; consequent whereof decretal of the suit of the petitioner/plaintiff. Relies on *Muhammad Shafi v. Ahmad Din* PLD 1961 (W.P.) Lahore 183 and *Raja Shah and 38 others v. Nazar Hussain Shah and16 others* PLD 1976 Lahore 658.

4. Perversely, learned counsel appearing on behalf of respondents by favouring the impugned judgments and decrees has prayed for dismissal of the civil revision in hand. Relies on *Muhammad Feroze Khan and others v. Muhammad Jamaat Ali* 2006 SCMR 1304, *Abdul Mateen and others v. Mst. Mustakhia* 2006 SCMR 50, *Ahmad and others v. Karam Hussain and another* 1986 SCMR 1384, *Mst. Farrukh Begum v. Shaukat Jeelani Khan*

and 22 others 1998 CLC 517-Lahore, *Bashir Ahmad and 13 others v. Maula Bakhsh and 24 others* 1990 CLC 1241-Lahore, *Sardara and 4 others v. Province of the Punjab through Collector, District Jhang and 17 others* 2000 CLC 1752-Lahore, *Sanjha and another v. Elahi Bakhsh and 3 others* 2006 YLR 1931-*Lahore, Farman Ali and 7 others v. Khani Aman and 400 others* PLD 2005 Peshawar 186 and *Mst. Begum Jan and others v. Attique Ahmad and others* 1979 CLC 426-Lahore.

5. Heard.

6. The core point involved in this case is whether civil Court can take cognizance of the matters involving consolidation or not, especially when no *mala fide* or excessiveness of authority is evident. In this regard, suffice is to say that Section 26 of the West Pakistan Consolidation of Holdings Ordinance, 1960 has clearly provided that any such matter in which government, Board of Revenue or any officer is empowered to determine, decide or dispose of in hierarchy of the Ordinance, cannot be called into question by way of civil suit. In the present case, the petitioner has failed to point out any illegality or irregularity allegedly committed by the Consolidation Officer at the time of conducting consolidation proceedings; therefore, the jurisdiction of the civil Court is barred under the law to entertain such like suit or matter. Both the learned Courts have rightly exercised jurisdiction while passing the impugned judgments and decrees. No illegality and irregularity has been committed by the learned Courts below. As such, while placing reliance on *Ahmad and others v. Karam Hussain and another* 1986 SCMR 1384, *Sardara and 4 others v. Province of the Punjab through Collector, District Jhang and 17 others* 2000 CLC 1752-Lahore, *Sanjha and another v. Elahi Bakhsh and 3 others* 2006 YLR 1931-Lahore, *Farman Ali and 7 others v. Khani Aman and 400 others* PLD 2005 Peshawar 186 and *Mst. Begum Jan and others v. Attique Ahmad and others*

1979 CLC 426-Lahore, *Mst. Farrukh Begum v. Shaukat Jeelani Khan and 22 others* 1998 CLC 517-Lahore, *Bashir Ahmad and 13 others v. Maula Bakhsh and 24 others* 1990 CLC 1241-Lahore, the instant civil revision being devoid of any force and substance stands dismissed. No order as to the costs.

(Y.A.) **Revision petition dismissed.**

PLJ 2020 Lahore (Note) 198

Present: SHAHID BILAL HASSAN, J.

FARHAT ABBAS--Petitioner

versus

SAGHEER AHMAD--Respondent

C.R. No. 153 of 2012, decided on 20.2.2018.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115, O.XLI R. 27--Specific Relief Act, 1877, S. 12 & 54--Suit for specific performance with permanent injunction--Dismissed--Appeal dismissed--Application for producing of additional evidence--Dismissed--Non-producing of reliable evidence--Concurrent finding--Challenge to--It is evident from head note of plaint that suit has been instituted for possession through specific performance of agreement, meaning thereby possession is not with petitioner; however, in contents of plaint he has taken a stance that possession was delivered to him, but this plea is contrary to head note of plaint--Moreover, if petitioner was in possession of suit land pursuant to agreement to sell he would have tendered in evidence document sought to be produced as additional , evidence before trial Court in his affirmative evidence; at this stage, application is nothing but an attempt to fill up lacunae, which cannot be allowed--Thus, application bearing being without any force stands dismissed--In addition to above, deposition of scribe does not equate statement of a marginal witness, who (scriber) otherwise, in present case, cannot be considered as scriber, because his name is not mentioned on Ex.P1, as has been observed by appellate Court in above paragraph--Moreover, concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction--Case-law relied upon by the learned counsel for petitioner, with utmost respect, has no relevance to peculiar

facts and circumstances of case in hand; thus, it does not render any assistance or help to petitioner's case.

[Para 5, 6, 7 & 8] A, B, C & D

2014 SCMR 1469, 2014 SCMR 161 and 2017 SCMR 679 *ref.*

Mr. Muhammad Hanif Niaz and *Mr. Azhar Ali Bhindar,* Advocates for Petitioners.

Ch. Sadaqat Ali, Advocate for Respondent.

Date of hearing: 20.2.2018.

JUDGMENT

Impugns the judgment and decree dated 21.5.2010 delivered by the learned trial Court, whereby suit for possession through specific performance with permanent injunction alongwith consequential relief, instituted by the petitioner, was dismissed as well as judgment and decree dated 22.10.2011 passed by the learned Appellate Court, through which appeal was dismissed.

Succinctly, the petitioner/plaintiff instituted a suit for possession through specific performance with permanent injunction alongwith consequential relief against the respondent/defendant contending therein that the respondent was owner of land measuring 03 *kanals* 15 *marlas,* fully detailed in Paragraphs No. 1 and 2 of the plaint, situated in village Adamke Nagra, Tehsil Pasrur, District Sialkot who entered into an agreement to sell dated 21.06.2.002 with regard to land measuring 01 *kanal* 15 *marlas* from the above said land for a consideration of Rs. 52,000/- with the petitioner and the petitioner paid Rs. 20,000/- as earnest money in presence of the witnesses to the respondent. The balance amount was to be paid on or before 31.12.2002; however, allegedly the possession as delivered to the petitioner. It was further averred that respondent, contacted the petitioner on 28.12.2002 and demanded the balance amount of Rs. 32,500/- for some personal need and same was also paid by the petitioner to the respondent in presence of the

witnesses namely Muhammad Abbas and Muhammad Arif and agreed that he would appear before the Sub-Registrar on 31.12.2002 and get the registered sale deed attested in favour of the petitioner. The respondent failed to execute sale-deed in favour of the petitioner as he remained present in the office of Sub-Registrar but he (respondent) did not appear. On 14.07.2003, the petitioner sent a legal notice to the respondent asking him to get execute the sale-deed in his favour but he refused; therefore, the suit was instituted.

The respondent/defendant contested the suit by filing written statement and controverted the averments of the plaint on legal as well as factual grounds. The learned trial Court framed issues, recorded evidence of the parties. The suit and appeal resulted as has been mentioned above; hence, this civil revision.

2. It has been argued by learned counsel for the petitioner/plaintiff that the impugned judgments and decrees are against law and facts of the case as well as are based on surmises and conjectures. The impugned judgments and decrees suffer from misreading and non-reading of evidence on record. Material illegalities and irregularities have been committed by the learned Courts below. Both the learned Courts have exercised that jurisdiction which was not vested in them, as the petitioner proved his case as per mandate of Articles 17 & 79 of the Qanun-e-Shahadat Order, 1984, but even then the petitioner was non-suited; hence, the impugned judgments and decrees are not sustainable in the eye of law; the same may be Set aside by allowing the civil revision in hand, consequent thereof the suit instituted by the petitioner may be decreed as prayed for. Relies on *Muhammad Sattar and others v. Tariq Javaid and others* (2017 SCMR 98), *Farzand Ali and another v. Khuda Bakhsh and others* (PLD 2015 Supreme Court 187), *Mst. Gulshan Hamid v. Kh. Abdul Rehman and others* (2010 SCMR 334), *Messrs Jamal Jute Baling & Co., Dacca v, Messrs M. Sarkies & Sons, Dacca* (PLD

1971 Supreme Court 784) and *Syed Sardar Shah and 2 others v. Qazi Masood Alam and 5 others* (2003 CLC 857-Peshawar).

3. Contrarily, learned counsel for the respondent has supported the impugned judgments and decrees, which have been rendered concurrently, and has prayed for dismissal of the civil revision in hand. Reliance has been placed on *Bootay Khan through Legal Heirs v. Muhammad Rafiq and others* (PLD 2003 Supreme Court 518), *Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241) and *Adil Tiwana and others v. Shaukat Ullah Khan Bangash* (2015 SCMR 828).

4. Heard.

5. During pendency of the instant civil revision, the petitioner filed an application bearing CM. No. 1-C of 2018 under Order XLI, Rule 27 of the Code of Civil Procedure, 1908 for additional evidence which is copy of Khasra Girdawri and Fard pertaining to the disputed land; the said application has been contested by the other side. It is evident from the head note of the plaint that the suit has been instituted for possession through specific performance of agreement, meaning thereby the possession is not with the petitioner; however, in contents of plaint he has taken a stance that possession was delivered to him, but this plea is contrary to the head note of the plaint. Moreover, if the petitioner was in possession of the suit land pursuant to the agreement to sell he would have tendered in evidence the document sought to be produced as additional evidence before the learned trial Court in his affirmative evidence; at this stage, the application is nothing but an attempt to fill up the lacunae, which cannot be allowed. Thus, the application bearing C.M. No. 1-C of 2018 being without any force stands dismissed.

6. I have given due consideration to the record made available and when impugned judgments and decrees are put in juxtaposition with the evidence brought on record by the parties, it appears that the learned Courts

below have minutely gone through and appreciated the same and have reached a just conclusion that the petitioner has failed to prove his case by producing cogent, trustworthy and reliable evidence; in this regard reproduction of observation recorded by the learned appellate court under Paragraph No. 12 will be sufficient for disposal of the instant civil revision, which runs:

> *"12. I have considered the oral as well as documentary evidence of the parties and come to the conclusion that the agreement to sell Exh.P.1 was written on stamp paper of value Rs. 50/- and no endorsement on the reverse of Exh.P.1 reflects that the said stamp paper was purchased by the respondent for execution of agreement to sell in favour of the appellant. The appellant has to prove through the trustworthy and reliable evidence about the execution of agreement to sell Exh.P.1 from the side of the respondent but from the gathered evidence, the appellant has totally failed to prove, the execution of agreement to sell as well as the payment of the agreement to sell dated 21.06.2002 to the respondent. Moreover. Exh.P1 was not signed by Nasar Ullah Khan PW who allegedly written the agreement as such how it is prove that the agreement to sell was written by Nasar Ullah PW. The appellant filed suit for possession with regard to the suit land against the respondent and pendency of previous litigation is also admitted, by the appellant as such there left no chance for the respondent to sell out his land measuring 1-kanal 15-marlas from the total land measuring 3-kanals 15-marlas owned to the appellant in village Adamke Nagra. The contention of the appellant that he paid. Rs. 32,500/- to the respondent, on 28.12.2002 but he has failed to prove the said contention through documentary evidence as if he has actually paid the remaining consideration then there left no chance for him to get execute registered sale deed with regard to suit plot from the respondent."*

Apart from the above, relief and remedy by way of specific performance was equitable and it was not obligatory on the Court to grant such a relief merely because it was lawful to do so; even in the present case, the petitioner miserably failed to substantiate his stance. In this regard reliance is placed on *Adil Tiwana and others v. Shaukat Ullah Khan Bangash* (2015 SCMR 828).

In addition to the above, the deposition of scribe does not equate the statement of a marginal witness, who (scriber) otherwise, in the present case, cannot be considered as scriber, because his name is not mentioned on Ex.P1, as has been observed by the learned appellate Court in the above paragraph. In this regard reliance is placed on *Hafiz Tassaduq Hussain v. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241).

7. Moreover, concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction. Reliance is placed on *Mst. Zaitoon Begum v, Nazar Hussain and another* (2014 SCMR 1469), *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161) and *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (2017 SCMR 679).

8. The case-law relied upon by the learned counsel for the petitioner, with utmost respect, has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance or help to the petitioner's case.

9. For the foregoing reasons and while placing reliance on the judgments *supra*, the civil revision in hand being devoid of any force and substance stands dismissed. No order as to the costs.

(M.M.R.) **Revision petition dismissed.**

2021 C L C 270

[Lahore]

Before Shahid Bilal Hassan, J

FOZIA MAZHAR---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and 2 others---Respondents

Writ Petition No. 13063 of 2020, decided on 29th October, 2020.

(a) Jurisdiction---

----Assumption of---Wrong provision of law---Effect---Merely citing or relying on wrong provision of law to assume jurisdiction over a lis is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, statue or any other provision of law to pass order. A

Mst. Safia Bibi v. Mst. Aisha Bibi 1982 SCMR 494; Jane Margrete William v. Abdul Hamid Mian 1994 SCMR 1555; Rauf B Kadir v. State Bank of Pakistan and another PLD 2002 SC 1111 and Olas Khan and others v. Chairman Nab through Chairman and others PLD 2018 SC 40 rel.

(b) Family Courts Act (XXXV of 1964)---

----Ss. 5 & 17---Civil Procedure Code (V of 1908), S. 12(2)---Judgment and decree, setting aside of---Jurisdiction of Family Court---Wrong provision of law---Parties were husband and wife inter se and suit for dissolution of marriage filed by wife/respondent was dismissed as withdrawn by Family Court---On application under S.12(2), C.P.C. filed by wife/respondent Family Court and Lower Appellate Court set aside the order on the plea of fraud and misrepresentation and marriage was dissolved---Plea raised by husband/petitioner was that Family Court did not have jurisdiction to set aside order under S.12(2), C.P.C.---Validity---If power of Court was there and Court had got jurisdiction to undo a fraudulent order obtained, then all such irrational technicalities and formalities should not deprive a real and genuine litigant---Contents of

application and prayer of litigant were to determine fate of a suit, an appeal or a petition---Substantial justice must be done, granted and showered upon genuine litigant, leaving aside all formal and minor technicalities hindering path of justice---No jurisdiction error, legal infirmity and illegality existed in order passed by Courts below, rather vested jurisdiction was judiciously and aptly exercised---High Court declined to interfere in concurrent orders passed by two Courts below---Constitutional petition was dismissed in circumstances.

Haji Muhammad Nawaz v. Samina Kanwal 2017 SCMR 321; Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool and others PLD SCMR 1840; Iftikhar Khan and another v. Mst. Amina Bibi and 2 others PLD 2012 Pesh. 159 and Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others 2014 SCMR 1365 ref.

(c) Review---

----Exercise of power---Principle---Power of review does not exist unless it is expressly conferred by law---Such power has two well-established exceptions i.e. (i) a Court has inherent jurisdiction to set aside judgment or order which it delivered without jurisdiction; (ii) a Court or authority has power to review an order or judgment obtained by fraud.

The Chief Settlment Commissioner, Lahore v. Raja Muhammad Fazil Khan and others PLD 1975 SC 331 rel.

Muhammad Shahzad Shaukat, Barrister Taha Shaukat, Muhammad Uzair and Muhammad Ali Raza for Petitioner.

Najam-us-Saqib, Muslim Abbas, Muhammad Muzaffar Semor and Malik Muhammad Salik Awan for Respondent No.3

Date of hearing: 11th September, 2020.

JUDGMENT

SHAHID BILAL HASSAN, J.---Facts, in precision, are as such that petitioner and respondent No.3 entered into nuptial tie on 03.04.2010 and

respondent No.3 went back to Canada after a few weeks of marriage and there-after neither contacted the petitioner nor provided her maintenance allowance. The petitioner instituted a suit for dissolution of marriage, which was contested by the respondent No.3; however, the said suit was decreed on 04.04.2015. Before the said decree dated 04.04.2015 could take effect in accordance with law, the matter was resolved inter se the parties and petitioner as well as respondent No.3 filed a joint application seeking annulment of the said decree. As it was a Watta Satta marriage, so the brother of the petitioner and his wife (sister of the respondent No.3) also submitted a compromise in the suit between them. Pursuant to the said application, on the basis of statement of the petitioner, the decree dated 04.04.2015 was set aside and suit was dismissed as withdrawn on 27.04.2015. Similar compromise order was also obtained in suit between Faiza Hanif (sister of respondent No.3) and Tassavar Hayat (brother of the petitioner), which too was withdrawn on the basis of compromise on the same date i.e. 27.04.2015.

There-after the petitioner proceeded to Canada after her visa was arranged by the respondent No.3 as his lawfully wedded wife. However, the spouses could not lead an amicable life and as a result of physical assault on her, the petitioner lodged a criminal complaint against the respondent No.3, who was charged and convicted but later on was released on peace bond as per Canadian laws. The respondent No.3 proceeded to divorce the petitioner on 27.11.2015 but the said divorce deed was declared ineffective by the Administrator/Chairman Arbitration Council (UC-89) vide order dated 04.01.2016; revision against the said order filed by the respondent No.3 was allowed by the Additional District Collector, Jhang vide order dated 29.06.2016. The petitioner, being aggrieved, filed W.P. No.24174 of 2016 against the said order, which was allowed by this Court on 09.05.2017.

Faced with this situation, the respondent No.3 filed an application under section 12(2) of the Code of Civil Procedure, 1908 seeking setting aside of order dated 27.04.2015 on the ground that order sheet did not

bear signatures of his special attorney; the said application was contested by the present petitioner. Issues were framed and evidence of the parties was recorded. The learned trial Court vide impugned order dated 23.01.2018 allowed the said application. The petitioner being aggrieved of the same filed revision petition, which was allowed vide judgment dated 11.02.2019. The respondent No.3 filed W.P.No.12624 of 2019 against the said judgment, which was disposed of through a consent order by virtue of which the order passed by revisional Court was set aside and case was remanded for decision of the revision petition afresh. After remand, the learned Revisional Court vide impugned judgment dated 04.02.2020 dismissed the revision petition filed by the present petitioner, which has culminated in filing of the instant constitutional petition.

2. Learned counsel representing the petitioner has argued that the impugned judgments are against law and facts of the case and are illegal, unjust as the same are bad on account of sheer ignorance of section 17 of the Family Courts Act, 1964, which ordains that the provision of Code of Civil Procedure, 1908 except sections 10 and 11 had no application to proceedings before the Family Court; that while deciding application under section 12(2) of the C.P.C., the learned trial Court assumed jurisdiction as Civil Judge instead of Judge Family Court and Civil Judge would have no jurisdiction to entertain and decide upon a challenge made to a judgment/order of a Family Court of competent jurisdiction as has been contemplated in section 5 of the Family Courts Act, 1964; that the provisions of sections 21 and 21-A (as amended by Punjab Family Courts (Amendment Act, 2015) (Act XI of 2015) have totally been escaped the notice of the learned Courts below; that admittedly no proceedings before the Chairman, Arbitration Council were carried out after passing of the decree for dissolution of marriage, thus, the impugned order and judgment are illegal and incompetent; that application under section 12(2) of the C.P.C. did not contain any description of fraud allegedly committed by the petitioner; that the learned Courts below have failed to appreciate that the application under section 12(2),C.P.C. was clearly an afterthought and the respondent No.3 on realizing that the parties would be governed by

Canadian Law most surreptitiously filed the said application; that the petitioner had already filed a claim for divorce and matrimonial property in the Court of Queen's Bench of Edmonton, in which order was granted by the said Court on 06.03.2017; that an issue as to the maintainability of the application under section 12(2), C.P.C. was, though, framed but the same as brushed aside in a slipshod manner; that the impugned order and judgment suffer from gross misreading and non-reading of material evidence; that the impugned order and judgment are not, thus, sustainable in the eye of law as the learned Courts below have failed to exercise vested jurisdiction as per mandate of law. Thus, by allowing the constitutional petition in hand, the impugned order and judgment may be set aside, consequent whereof application under section 12(2) of C.P.C., filed by the respondent No.3, may be dismissed.

3. Naysaying the above said submissions, learned counsel on behalf of the respondent No.3, has supported the impugned order and judgment and has further argued that the misapplication of section in an application is no ground to dismiss the same out-rightly when otherwise the Court has jurisdiction under the law to pass order; thus, the instant constitutional petition may be dismissed.

4. Heard.

5. Considering the arguments advanced at bar and perusing the record, made available and appended with the instant petition, it is observed that it is now settled position in law that merely citing or relying on wrong provision of law to assume jurisdiction over a lis is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, statute or any other provision of law to pass order, as has been held in Mst. Safia Bibi v. Mst. Aisha Bibi (1982 SCMR 494), Jane Margrete William v. Abdul Hamid Mian (1994 SCMR 1555), Rauf B Kadir v. State Bank of Pakistan and another (PLD 2002 Supreme Court 1111) and Olas Khan and others v. Chairman Nab through Chairman and others (PLD 2018 Supreme Court 40). In the present case, though the respondent No.3 has mentioned wrong section i.e. 12(2) of C.P.C. while filing application

seeking setting aside of order dated 27.04.2015, but when the learned Judge Family Court has jurisdiction to adjudicate upon the same, mere mentioning of wrong section, does not oust its jurisdiction, because proceedings of the Family Court, whether as a Trial Court or an executing Court are governed by the general principle of equity, justice and fair-play, as has been held in Haji Muhammad Nawaz v. Samina Kanwal (2017 SCMR 321). Moreover, Family Court has to regulate its own proceedings in accordance with the provisions of Family Court Act and in doing so it has to proceed on the premises that every procedure is permissible unless clear prohibition is found in law, meaning thereby that Family Court can exercise its own powers to prevent the course of justice being deflected from the path. Though Code of Civil Procedure, 1908 except sections 10 and 11 is not applicable but the Judge Family Court is not debarred to follow the principle of the Code, 1908 coupled with the fact, as has been held in Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool and others (2010 SCMR 1840); the same principle was followed by a Division Bench of Peshawar High Court in judgment reported as Iftikhar Khan and another v. Mst. Amina Bibi and 2 others (PLD 2012 Peshawar 159). Moreover, in Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others (2014 SCMR 1365), it was held that, 'Family Court was a quasi-judicial forum, which could draw and follow its own procedure, provided such procedure was not against the principles of fair hearing and trial.'

Now, when this case is considered on the touchstone of the above ratio, it can safely be observed that mere wrong citing of section is no ground to dismiss the application when otherwise the contents of the same divulge that something fishy has been done and fraud has been played and the learned Court, before whom such application has been filed, has jurisdiction to adjudicate upon the matter, because the litigant cannot be ousted from the arena of litigation mere on the basis of technicalities, as it is a settled law that to keep the flag of justice high, substantial justice has to be done. Formal defects, technical defaults, clerical or arithmetical mistakes, wrong drafting of suit, appeal, review or revision or any

petition, incorrect quoting, omission of section, Article of law or misquoting of a Rule or Regulation cannot deprive a genuine claimant or litigant and real contestant. If the power of the Court is there and the Court has got the jurisdiction to undo a fraudulent order obtained, then all these irrational technicalities and formalities should not deprive a real and genuine litigant. The contents of application and the prayer of a litigant are to determine the fate of a suit, an appeal or a petition. Substantial and real justice must be done, granted and showered upon the genuine litigant, leaving aside all formal and minor technicalities hindering the path of justice.

6. In view of the above, If for the sake of arguments this Court considers that application section 12(2) of the Code of Civil Procedure, 1908 was not maintainable due to non-applicability of C.P.C., even then the learned Judge Family Court in a case where as decree or order has been obtained through fraud, deceits, misrepresentation or on any of such grounds, the learned Judge Family Court can competently entertain such an application under the inherent jurisdiction, which is presumed and considered to be vesting in all Courts, Tribunals or authority of even limited jurisdiction, because it is a settled principle of law that fraud vitiates the most solemn proceedings even and the decrees, orders or the judgments obtained in pursuit of these intentions or actions are to be reviewed, reversed, recalled or upset. This rule is based on the principle that an authority if can do act or pass an order, judgment or decree, it can undo it also but with some exceptions also, if the authority has been defrauded in the passing of that act, order or judgment.

In addition to the above, the general rule that power of review does not exist unless it is expressly conferred by law, has got two well-established exceptions i.e. (i) a court has inherent jurisdiction to set aside judgment or order which it had delivered without jurisdiction; (ii) a court or authority has the power to review an order or judgment obtained by fraud. Reliance is placed on The Chief Settlment Commissioner, Lahore v. Raja Muhammad Fazil Khan and others (PLD 1975 SC 331). In this view of

the matter, when facts of this case are considered and read, it appears that the order dated 27.04.2015 has been obtained by the petitioner through misrepresentation, because in the entire file of the suit proceedings, Wakalatnama of Mr. Muhammad Asif Mughal Advocate, allegedly representing the respondent No.3 through his special attorney, is not available, which shows that he neither represented the respondent during the proceedings of suit nor he appeared as counsel till the decision of the suit on 04.04.2015; thus, there is nothing on record to suggest that the respondent No.3 was duly represented and even the first order which is in the handwriting of the learned Judge Family Court shows the presence of only Fozia Mazhar, the petitioner and margin of order sheet bears her signatures and thumb impression and only her statement is available on file and no statement of special power of attorney of the respondent No.3. When the position remained as such, the learned trial Court was vested with jurisdiction to undo the order dated 27.04.2015 obtained by the petitioner through misrepresentation.

7. Pursuant to the above discussion, it can safely be held that there appears no jurisdictional error, legal infirmity and illegality in the impugned order and judgment passed by the learned Courts below, rather vested jurisdiction has judiciously and aptly been exercised. The impugned order and judgment are upto the dexterity and do not call for any interference by this Court in exercise of extraordinary constitutional jurisdiction. Resultantly, while placing reliance on the judgments supra, the constitutional petition in hand being without any force and substance stands dismissed. No order as to the costs.

MH/F-17/L **Petition dismissed.**

2021 C L C 863

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD MANSHA----Petitioner

Versus

MUHAMMAD USMAN and others---Respondents

Civil Revision No.66831 of 2020, decided on18th December, 2020.

Civil Procedure Code (V of 1908)---

----O.VI, R.15 & O. X, R. 2---High Courts (Lahore) Rules and Orders, Vol. 1, Chap. 1, Pt. C, Clauses 4 & 9---Specific Relief Act (I of 1877), Ss. 42 & 54---Suit for declaration and permanent injunction---Signing and verification of pleadings---Scope---Suit was not instituted by the plaintiff himself , instead by his relative, after obtaining his signatures on the plaint---Maintainability---Oral examination of the party or companion of party---Scope and effect---Held, that person (litigant) himself was to verify the pleadings on oath or on solemn affirmation under R.15, O.VI of the Civil Procedure Code, 1908, as well as under the High Court Rules and Orders---Petitioner/ plaintiff had admitted in his statement recorded under R.2, O.X of C.P.C, while appearing before the Trial Court, that his relative had instituted the suit after obtaining his signatures---Petitioner neither dictated the plaint nor imparted facts of the case to his counsel---Petitioner's counsel had not obtained his signatures on the plaint as well as under verification statement after reading out contents of the plaint---Alleged verification, if any, made by the petitioner on the plaint, admittedly, was without knowing the contents of the plaint --- Appellate Court had rightly observed that when plaintiff had admitted before the Court of law that his relative got instituted the suit by obtaining his signature and that he had no knowledge about contents of the case then he could not adduce/record his evidence properly as he was not acquainted with the facts of the case ---Verification made by the plaintiff was also not as per requirement of law----Both the Courts below had rightly exercised their vested jurisdiction by holding that the suit of the plaintiff

was not maintainable---No illegality or infirmity was found in the impugned judgments and decrees passed by both Courts below---Revision petition was dismissed, in circumstances.

Ch. Muhammad Rafique Gujjar for Petitioner.

ORDER

SHAHID BILAL HASSAN, J.----Succinctly, a suit for declaration with permanent and mandatory injunction was instituted on behalf of the petitioner. The respondents Nos.2, 7, predecessor of the respondents Nos.8 to 16 and respondent No.18 appeared in the Court and submitted their consenting written statement. The respondents Nos.19 and 20 submitted their contesting written statements whereas respondents Nos.1, 3 to 6 and 17 were proceeded against ex parte. However, during pendency of the suit, the respondent No.10, who had already submitted consenting written statement, moved an application for summoning the petitioner/plaintiff. The petitioner voluntarily appeared in the learned trial Court and recorded his statement on 10.10.2019 and above-said application was dismissed being infructuous, suit was fixed for arguments on maintainability of the suit in light of the statement of the petitioner, which was subsequently dismissed vide impugned order and decree dated 18.11.2019 by the learned trial Court and appeal there-against was also dismissed vide impugned judgment and decree dated 24.09.2020; hence, the instant civil revision.

2. Heard.

3. Rule 15 of Order VI, Code of Civil Procedure, 1908 reads:-

'15. Verification of pleadings.---(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own

knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.'

Clause 4 of Chapter I, Part-C of Volume 1 of the High Court Rules and Orders provides that:-

'4. Singing and verification.----The plaint must be signed by the plaintiff, or, if by reason of absence or other good cause the plaintiff is unable to sing it, by his duly authorized agent. It must also be signed by the plaintiff's pleader (if any) and be verified by the plaintiff, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

The personal attendance of the plaintiff in Court for the purpose of verification is unnecessary. The verification must, however, be signed by the person making it.'

Clause 9 of Chapter I, Part-C of Volume 1 of the High Court Rules and Orders is with regard to suits germane to Land, which reads:-

'9. Land suits. - If the plaint relates to agricultural land and the plaintiff is illiterate, it should be scrutinized with special care, according to the following directions:-

(i) The Presiding Officer shall ascertain by careful examination of the plaintiff or his agent, whether the prayer in the plaint corresponds in all particulars with the exact relief which the plaintiff orally describes himself as seeking. If the oral statements of the plaintiff or his agent are at variance with the written description of his claim, the plaintiff shall, in his or his agent's presence, be returned for amendment, and no amended plaint should be accepted until the Court is satisfied that it correctly expresses the claim which the plaintiff desires to establish.

(ii) ----------.'

Apart from the above provisions of law, Rule 2 of Order X, Code of Civil Procedure, 1908 is also relevant, for the purpose of the instant case, which reads:-

> '2. Oral examination of the party or companion of party. - At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, shall be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.'

A bare reading of the above provision of law makes it vivid that a person verifies the pleadings on oath or on solemn affirmation. In this case, when the petitioner being plaintiff appears before the learned trial Court, he recorded his statement to the effect that his relatives instituted the suit after obtaining his signatures, meaning thereby he neither dictated the plaint nor imparted facts of the case to his alleged counsel nor the learned counsel obtained his signatures on the plaint and under verification statement after reading out contents of the plaint, therefore, the alleged verification, if any, made by him of the plaint, was nothing but without knowing the contents of the plaint, rather it was not known to him as per his stance. In this scenario, the learned appellate Court has rightly observed that when a person says before a Court of law that his relatives got instituted suit by obtaining his signatures and he has no knowledge about contents of the case, then what would be fate of the case if evidence of plaintiff is recorded especially when he is not acquainted with the facts of the case and his verification is not as per requirement of law. As such, no illegality and irregularity has been committed by the learned Courts below while passing the impugned order, judgment and decrees rather vested jurisdiction has rightly been exercised.

4. The crux of the discussion above is that the civil revision in hand comes to naught, hence same stands dismissed in limine.

MQ/M-20/L **Revision dismissed.**

2021 C L C 1351

[Lahore]

Before Shahid Bilal Hassan, J

AZHAR ABBAS and others----Petitioners

Versus

Haji TAHIR ABBAS and another----Respondents

Regular Second Appeal No.84 of 2011, decided on 30th November, 2020.

(a) Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance of agreement to sell---Agreement on plain paper---Unregistered document---Scope---Plaintiff instituted a suit for specific performance of agreement to sell regarding suit land, which had been obtained by him on lease from the father of defendants---Trial Court and Appellate Court concurrently decreed the suit---Validity---Suit land was obtained on lease for a period of four and a half years but within a period of three months of said lease the alleged agreement to sell was reached at between the parties---Nothing was available on record to suggest as to when, where and in whose presence the alleged bargain of agreement to sell was struck---Agreement to sell was written down by plaintiff himself on a white paper and it was an unregistered document---Plaintiff, after specific denial of the defendants about execution of the agreement to sell and affixation of thumb impression and making of signatures over it, had not exerted to get the same compared with admitted signatures and thumb impression by moving an application in that regard, which fact went against the plaintiff---Plaintiff could not prove payment of earnest money as well as the remaining amount---Appeal was allowed and the impugned judgments and decrees passed by the courts below were set aside, in circumstances.

Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others PLD 1973 SC 160 ref.

Abdul Majid Mia v. Moulvi Nabiruddin Pramanik and 3 others PLD 1970 SC 465 rel.

(b) Civil Procedure Code (V of 1908)---

----O.XIII, R. 4---Endorsements on document admitted in evidence---Scope---Marked documents have no value legal value and sanctity in the eyes of law.

(c) Civil Procedure Code (V of 1908)---

----O.XIII, R.4---Endorsements on document admitted in evidence---Scope---When a document is not brought on record through witness(s) and in not duly exhibited, the same cannot be taken into consideration by the court.

Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604 and State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal 2011 SCMR 1013 rel.

Abdullah v. Provincial Government through Secretary Board of Revenue and 3 others 2014 CLC 285; Inspector-General of Police, Balochistan, Quetta and 4 others v. Ghulam Rasool 2012 CLC 1645; Anwar Ahmad v. Mst. Nafiz Bano through Legal Heirs 2005 SCMR 152 and Syed Abdul Manan and others v. Malik Asmatullah and others 2019 CLC 1096 ref.

(d) Civil Procedure Code (V of 1908)---

----O.XIII, R.4---Endorsements on document admitted in evidence---Scope---Mere marking of a document as an exhibit would not dispense with the requirement of proving the same and the same cannot be accepted unless it is proved.

(e) Qanun-e-Shahadat (10 of 1984)---

----Art. 76---Cases in which secondary evidence relating to documents

may be given---Scope---Admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Art.76 of the Qanun-e-Shahadat, 1984 would be illegal.

Feroz Din and others v. Nawab Khan and others AIR 1928 Lah. 432; Fazal Muhammad v. Mst. Chohara and others 1992 SCMR 2182 and Abdul Rehman and another v. Zia-Ul-Haque Makhdoom and others 2012 SCMR 954 ref.

Syed Kalim Ahmad Khursheed for Appellants.

Khurram Iqbal for Respondent No.1.

ORDER

SHAHID BILAL HASSAN, J.----Learned counsel for the appellants does not press this appeal to the extent of respondent No.2 and seeks its withdrawal. In this view of the matter, the instant appeal stands dismissed as withdrawn to the extent of respondent No.2.

2. Facts, in brevity, are as such that respondent No.1/plaintiff instituted a suit for specific performance of agreement to sell dated 13.04.2003 in respect of land measuring 19 acres situated at Dab Kalan, Tehsil Shorkot, District Jhang. It was asserted that originally the respondent No. 1/plaintiff obtained the land in dispute on lease from Muzaffar Abbas, father of the appellants and an amount of Rs.232,750/- was paid as lease money from 01.01.2003 to 30.06.2006. Further maintained that appellant were defaulters of Zarai Taraqiati Bank Shorkot, District Jhang, so they showed their willingness to sell the disputed land, so the bargain was struck for Rs.19,00,000/- and alleged agreement to sell was executed on 13.04.2003; that Rs.300,000/- was paid as earnest money; that the respondent No.1/plaintiff paid the agricultural loan in Zarai Taraqiati Bank Shorkot, District Jhang to the tune Rs.10,41,230/-, paid agricultural tax amounting to Rs.87,853/- and one

car was purchased from Ghulam Muhammad by the appellants for a consideration of Rs.300,000/- which was allegedly paid by the respondent No.1/plaintiff and remaining amount Rs.171,617/- had also been received by the appellants in cash, so entire consideration had been paid but the appellants refused to transfer the disputed land in favour of the respondent No.1/plaintiff; hence, he was forced to institute the suit.

The suit was contested by the present appellants by submitting written statement. Muhammad Rafique, respondent No.2 submitted separate written statement. Out of divergent pleadings of the parties, issues were framed and evidence of the parties, oral as well as documentary, was recorded. The learned trial Court vide impugned judgment and decree dated 26.09.2009 decreed the suit in favour of the respondent No.1/plaintiff subject to payment of Rs.471,617/- within 30 days. The appellants, being aggrieved of the said judgment and decree preferred an appeal, but the same was dismissed vide impugned judgment and decree dated 16.04.2011 passed by the learned Addl. District Judge, bang. Hence, the instant regular second appeal.

3. Heard.

4. Considering the arguments advanced at bar by learned counsel for the parties and going through the record, it is observed that allegedly the disputed land is in possession of the respondent No.1, which was obtained by him as lease holder from the father and husband of the present appellants, on 01.01.2003 for a period of four and half years, but within a period of three months of said lease, the alleged agreement to sell Ex.P1 was reached at between the parties as has been pleaded by the respondent No.1, though the same has been differed by P.W.2, who, during cross examination stated that the respondent No.1/plaintiff had been cultivating the disputed land on lease for the last one year from the date of arriving at the disputed agreement to sell. There is nothing on record to suggest as to when, where and in whose presence the alleged bargain of agreement to

sell was struck which resulted into Ex.P1 (which was admittedly written down by the respondent No.1 himself on a white paper) and it was an unregistered document. This very fact casts doubt about the veracity and authenticity of the alleged agreement to sell (Ex.P1) especially when the respondent No.1/plaintiff did not produce the alleged lease agreement in evidence. In Abdul Majid Mia v. Moulvi Nabiruddin Pramanik and 3 others (PLD 1970 Supreme Court 465) it was held:-

> 'waving seen the original ourselves, we are inclined to think that it is a spurious document. It was not written by a regular deed writer, and the plain paper on which it was written, with revenue stamps affix on it, adds to its suspicious character.'

Here, in this case, on the alleged agreement to sell Ex.P1 even no stamp was affixed at the time of its execution. In addition to this, after specific denial about execution of the said agreement to sell by the appellants and affixation of thumb impression and making of signatures over it, the respondent No.1 did not make any exertion to get the same compared with admitted signatures and thumb impression by moving an application in this regard, which fact also goes against the respondent No.1/plaintiff, but this aspect has also been ignored by the learned Courts below while passing the impugned judgments and decrees.

Moreover, P.W.2 is real brother of the respondent No.1/plaintiff, so his evidence cannot be relied upon especially when he contradicted the stance of the respondent No.1 about the period of his possession over the disputed land on lease and reaching at of the disputed agreement to sell. So, the possession of the respondent No.1 over the disputed land is also not proved to be in pursuance of the alleged agreement to sell Ex.P1.

5. Apart from the above, payment of alleged earnest money amounting to Rs.300,000/- was also not proved by the respondent No.1, because besides his solitary statement the other witnesses produced by him i.e. P.W.2 and P.W.3 have not uttered a single word in this regard.

P.W.4 is Patwari Halqa, who served notices for agricultural tax and he categorically deposed that Azhar Abbas handed him over three challans valuing Rs.87,153/- after depositing. Though in his examination in chief he deposed that plaintiff told him that he had bargained with the appellants about the sale of the disputed land, so he handed over the challans to him, but in his cross-examination he stated that it was incorrect that Azhar Abbas told him about bargain, meaning thereby his earlier deposition that Azhar Abbas told him about said alleged fact at his Dera was not correct. Moreover, this witness did not produce the original receipts germane to payment of agricultural tax rather submitted photocopies of the same as Mark-A to Mark-D, which cannot be relied upon because "marked" documents have no legal value and sanctity in the eye of law; in this regard Rule 4 of Order XIII, Code of the Civil Procedure, 1908 is relevant, which reads:-

> '4. Endorsements on document admitted in evidence.-(1) Subject to the provisions of next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-
>
> (a) the number and title of the suit,
>
> (b) the name of the person producing the document,
>
> (c) the date on which it was produced, and
>
> (d) a statement of its having been so admitted:
>
> and the endorsement shall be signed or initialed by the Judge.
>
> (2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge. '

The above provision of law makes it vivid that when a document is not

brought on record through witness(s) and duly exhibited, the same cannot be taken into consideration by the Court. When such a matter came up before the apex Court of country, it was held in reported judgment Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 Supreme Court 604):-

> 'The document which has not been brought on record through witnesses and has not duly exhibited, cannot be taken into consideration by the Court.'

The same was followed in Abdullah v. Provincial Government through Secretary Board of Revenue and 3 others (2014 CLC 285 Balochistan) and similar view was adopted in Inspector-General of Police, Balochistan, Quetta and 4 others v. Ghulam Rasool (2012 CLC 1645-Balochistan). Even prior to it, the Hon'ble Supreme Court in a case reported as State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013) held:-

> 'We are not convinced that, such document, which has not been produced and proved in evidence but only "marked" can be taken into account by the Courts as a legal evidence of a fact.'

The ratio of said judgment was followed and relied upon along with Anwar Ahmad v. Mst Nafiz Bano through Legal Heirs (2005 SCMR 152), in Syed Abdul Manan and others v. Malik Asmatullah and others (2019 CLC 1096-Balochistan).

6. Mere marking of a document as an exhibit would not dispense with requirement of proving the same and the same cannot be exhibited unless it is proved. In the present case the situation remained the same, but the learned Courts below have not considered and dilated upon the requirement of law because admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of the Qanun-e-Shahadat Order, 1984 would be illegal. Reliance is placed on Feroz Din and others v. Nawab Khan and

others (AIR 1928 Lahore 432) Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182) and Abdul Rehman and another v. Zia-Ul-Haque Makhdoom and others (2012 SCMR 954). Neither authors of the documents nor the witnesses nor such documents in original have been produced in Court for inspection purposes. Thus, such documents, without formal proof, cannot be relied upon; reliance is placed on Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160), but as against this, the learned Courts below placing reliance on such documents have proceeded to pass the impugned judgments and decrees, which cannot be allowed to hold field.

7. Even, the respondent No. 1/plaintiff could not prove making of payment of Rs.300,000/- towards purchase of car by the appellants, because the witnesses produced by him are silent in this regard. However, this fact has totally been ignored and non-read by the learned Courts below.

8. For the foregoing reasons, when glare misreading and non-reading of evidence is on record, the impugned judgments and decrees cannot be allowed to hold field further and concurrent findings can be interfered with in exercise of jurisdiction under section 100 of the Code of Civil Procedure, 1908 because such findings are not sacrosanct that they cannot be disturbed. Resultantly, the appeal in hand is allowed, impugned judgments and decrees passed by the learned Courts below are set aside, consequent whereof suit instituted by the respondent No.1/plaintiff stands dismissed with no order as to the costs.

SA/A-3/L **Appeal allowed.**

2021 C L C 1491

[Lahore]

Before Shahid Bilal Hassan, J

PARVEEN AKHTAR and 2 others----Petitioners

Versus

AKHLAQ AHMED and 2 others----Respondents

Civil Revision No.1843 of 2013, decided on 15th June, 2021.

(a) Civil Procedure Code (V of 1908)---

----O.XIV, Rr.1 & 2---Framing of issues---Issues of law and fact---Scope---Duty of the Court to frame issues from material propositions---To frame issues, Court is to find out questions of fact, question of law and mixed questions of fact and law from pleadings of the parties and other materials, which are produced with pleading and parties are to produce their evidence to prove or disprove the framed issues. [p. 1495] A

(b) Civil Procedure Code (V of 1908)---

----O.XIV, R.1---Framing of issues---Object---Scope---Issue is a single material point of fact or law in litigation that is affirmed by one side and denied by the other, that subject of the final determination of the proceedings is called 'issue'---Object of framing issues is to ascertain the real dispute between the parties by narrowing down the area of conflict and determining where the parties differ---Judge himself is to frame proper issues---Where parties are not satisfied, it is their duty to get proper issues framed.

(c) Civil Procedure Code (V of 1908)---

----O.XIV, R.1---Framing of issues---Scope---Framing of an issue does not mean that a Court is taking a position on the contentions of the parties on a material question of fact or law---Court is merely engraving the contours of the trial so that the progress of the trial is not accosted by slugfest on immaterial issues that have no bearing on the adjudication of the rights and liabilities of the parties.

(d) Civil Procedure Code (V of 1908)---

----O.XIV, R. 1---Framing of issues---Scope---Matters to be considered before framing issues, detailed.

Matters to be considered before framing issues are:-

i. The Court shall read the plaint and written statement before framing an issue to see what the parties allege in it.

ii. Order X, Rule 1, CPC permits the Court to examine the parties for the purpose of clarifying the pleadings, and the Court can record admissions and denials of parties in respect of an allegation of fact as are made in the plaint and written statement.

iii. If any party admits any fact or document, then no issues are to be framed with regard to those matters and the Court will pronounce judgment respecting matters which are admitted.

iv. The Court may ascertain, upon what material proposition of law or fact the parties are at variance.

v. The Court may examine the witnesses for the purpose of framing of issues.

vi. The Court may also in the framing of issues take into consideration the evidence led in the suit. Where a material point is not raised in the pleadings, comes to the notice of the Court during course of evidence the Court can frame an issue regarding it and try it.

vii. Under Order XIV, Rule 4, CPC any person may be examined and any document summoned, for purposes of correctly framing issues by Court, no produced before the Court.

(e) Civil Procedure Code (V of 1908)---

----O.XIV, R.3---Material from which issues may be framed, enumerated.

The court may frame the issue from all or any of the following materials.

i. Allegations made on oath

Issues can be framed on the allegations made on oath by the parties or by any persons present on their behalf or made by the pleader of such parties.

ii. Allegations made in Pleadings

Issues can be framed on the basis of allegations made in the pleadings.

iii. Allegations made in interrogatories

Where the plaint or written statement does not sufficiently explain the nature of the party's case, interrogatories may be administered to the party, and allegations made in answer to interrogatories, delivered in the suit, may be the basis of framing of issues.

iv. Contents of documents.

The court may frame issue on the contents of documents produce by either party.

v. Oral examination of Parties.

Issues can be framed on the oral examination of the parties.

vi. Oral objections of Parties.

Issues may be framed on the basis of oral objection.

(f) Civil Procedure Code (V of 1908)---

----O.XIV, R.5---Amendment of issues---Scope---Court before passing of decree, can amend framed issues on those terms, which it thinks fit, however, such amendment of framed issues is necessary for determination of matters in controversy between the parties.

(g) Civil Procedure Code (V of 1908)---

----O.XIV, R.5---Amendment of issues---Discretionary jurisdiction---Scope---Court possesses discretionary power regarding amendment of framed issues---Court can exercise such power when no injustice results from amendment of framed issue on that point, which is not present in pleadings, however, it cannot be exercised when it alters nature of suit, permits making of new case or alters stand of parties through rising of inconsistent pleas.

(h) Civil Procedure Code (V of 1908)---

----O.XIV, R.5---Amendment of issues---Mandatory power---Scope---Court has mandatory power regarding amendment of framed issues---In fact, Court is bound to amend framed issues especially when such amendment is necessary for determination of matters in controversy, when framed issues do not bring out point in controversy or when framed issues do not cover entire controversy.

(i) Civil Procedure Code (V of 1908)---

----O.XIV, R. 5---Striking out of issues---Scope---Before passing of decree, Court can strike out framed issues especially when it appears to Court that such issues have been wrongly framed or introduced.

Ali Usman for Petitioner.

Hafeez ur Rehman Chaudhry, Ejaz ul Hassan Mughal and Noor Dad Chaudhry for Respondents.

ORDER

SHAHID BILAL HASSAN, J.---Briefly, the present petitioner instituted a suit for declaration with permanent injunction and recovery of possession against the respondents and three others. The respondents contested the suit by filing written statement, whereas, the names of other defendants were deleted. Out of the divergent pleadings of the parties, the learned Trial Court framed as many as six issues including "Relief". Both the parties adduced their evidence, oral as well as documentary, in support of their respective version. The learned Trial Court after hearing arguments from both sides, vide judgment and decree dated 19.12.2012 decreed the suit of the present petitioner. Feeling aggrieved of the said judgment and decree, the respondent No.1 preferred an appeal, which was accepted vide impugned judgment and decree dated 28.06.2013 passed by the learned Addl. District Judge while setting aside the judgment and decree dated 19.12.2012 passed by the learned Trial Court, consequent whereof, suit of the present petitioner was dismissed. Hence, the instant civil revision.

2. Heard.

3. After hearing arguments and going through the record, this Court reaches to the conclusion that the learned trial Court has not framed issues while considering the pleadings of parties and framed generalized issues, wherein, too, the documents challenged and sought to be declared as illegal, based on fraud and forgery were not included. Parties lead evidence on issues and when the proper and necessary issues were not framed, the parties could not lead evidence. This aspect of the case has totally been ignored by the learned first appellate Court.

4. It is duty of the Court to frame issues from material propositions. To frame issues, Court is to find out questions of fact, question of law and mixed questions of fact and law from pleading of the parties and other materials, which are produced with pleading and parties are to produce their evidence to prove or disprove framed issues. Following are the relevant provisions of law regarding the concerned topic:-

i. Order XIV Rule 1 to 6 of CPC 1908

ii. Order XVIII Rule 2 of CPC 1908

iii. Order XX Rule 5 of CPC 1908

iv. Order XLI Rule 31 of CPC 1908

v. Order XV Rule 1 of CPC 1908

5. So far as the definition of "issue" is concerned, it can be summarized as such that, 'A single material point of fact or law in litigation that is affirmed by one side and denied by the other, that subject of the final determination of the proceedings is called "issue". The object of framing issues is to ascertain the real dispute between the parties by narrowing down the area of conflict and determining where the parties differ. It is the duty of the Judge himself to frame proper issues. Where parties are not satisfied, it is their duty to get proper issues framed. Matters to be considered before framing issues are:-

i. The Court shall read the plaint and written statement before framing an issue to see what the parties allege in it.

ii. Order X, Rule 1, CPC permits the Court to examine the parties for the purpose of clarifying the pleadings, and the Court can record admissions and denials of parties in respect of an allegation of fact as are made in the plaint and written statement.

iii. If any party admits any fact or document, then no issues are to be framed with regard to those matters and the Court will pronounce judgment respecting matters which are admitted.

iv. The Court may ascertain, upon what material proposition of law or fact the parties are at variance.

v. The Court may examine the witnesses for the purpose of framing of issues.

vi. The Court may also in the framing of issues take into consideration the evidence led in the suit. Where a material point is not raised in the pleadings, comes to the notice of the Court during course of evidence the Court can frame an issue regarding it and try it.

vii. Under Order XIV, Rule 4 CPC any person may be examined and any document summoned, for purposes of correctly framing issues by Court, no produced before the Court.

6. The court may frame the issue from all or any of the following materials.

i. Allegations made on oath

Issues can be framed on the allegations made on oath by the parties or by any persons present on their behalf or made by the pleader of such parties.

ii. Allegations made in Pleadings

Issues can be framed on the basis of allegations made in the pleadings.

iii. Allegations made in interrogatories

Where the plaint or written statement does not sufficiently explain the nature of the party‟s case, interrogatories may be administered to the party, and allegations made in answer to interrogatories, delivered in

the suit, may be the basis of framing of issues.

iv. Contents of documents.

The court may frame issue on the contents of documents produce by either party.

v. Oral examination of Parties.

Issues can be framed on the oral examination of the parties.

vi. Oral objections of Parties.

Issues may be framed on the basis of oral objection.

7. Apart from the above, the following points are important in respect of framing, amending, altering or striking out the issues:-

i. Amendment of issues.

At any time before passing of decree, court can amend framed issues on those terms, which it thinks fit. However, such amendment of framed issues should be necessary for determination of matters in controversy between the parties.

ii. Striking out of issues

At any time before passing of decree, court can strike out framed issues especially when it appears to court that such issues have been wrongly framed or introduced.

iii. Discretionary Power

Regarding amendment of frame issues, court possesses discretionary power. Court can exercise this power when no injustice results from amendment of framed issue on that point, which is not present in pleading. However, it cannot be exercised when it alters nature of suit, permits making of new case or alters stand of parties through rising of inconsistent pleas.

iv. Mandatory Power.

Regarding amendment of framed issues, court also has mandatory power. In fact, court is bound to amend framed issues especially when such amendment is necessary for determination of matters in controversy, when

framed issues do not bring out point in controversy or when framed issues do not cover entire controversy.

v. At any stage.

Court can amend or strike out framed issues at any time before final disposal of suit.

8. In addition to the above, the framing of an issue does not mean that a court is taking a position on the contentions of the parties on a material question of fact or law. The court is merely engraving the contours of the trial so that the progress of the trial is not accosted by slugfest on immaterial issues that have no bearing on the adjudication ofthe rights and liabilities of the parties. In the present case, material issues, which go to the roots of the case, have not been framed by the learned trial Court, as observed above; thus, when the position is as such, the judgments and decrees passed by the learned Courts below, though at variance, cannot be allowed to hold field.

9. Pursuant to the above, the civil revision in hand is allowed, impugned judgment and decree dated 28.06.2013 passed by the learned appellate Court as well as judgment and decree dated 19.12.2012 rendered by the learned trial Court are set aside and case is remanded to the learned trial Court with a direction to reframe issues, keeping in view the above observations as well as pleadings of the parties, record evidence of the parties, if they desire to adduce and decide the case afresh in accordance with law. As the matter is an old one, it is expected that the learned trial Court will decide the same at the earliest preferably within a period of six months from the date of receipt of certified copy of the order passed by this Court, even if it has to fix the case on day to day basis. No order as to the costs.

SA/P-8/L **Case remanded.**

2021 C L D 679

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan and Masud Abid Naqvi, JJ

MCB BANK LIMITED through Manager---Appellant

Versus

AZHAR HUSSAIN and another---Respondents

F.A.O. No. 41 of 2015, decided on 23rd June, 2016.*

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)----Ss. 10, 9(5) & 7---Suit for recovery---Procedure of Banking Court---Application for leave to defend---Filing of application for leave to defend within period of statutory limitation---Effective service in terms of S. 9(5) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Scope---Application for leave to defend was dismissed on account of being barred by time---Contention of defendant, inter alia, was that impugned order did not take into account fact that said application was filed within 30 days from date of knowledge of defendant with regard to proceedings before Banking Court----Validity---Defendant had not mentioned such date of knowledge of proceedings in application for leave to defend and therefore same could only be regarded as an afterthought to remove legal lucana and even otherwise, defendant did not mention mode/source of such knowledge about pending proceedings, and did not make any allegation with regard to postal address on which effective service was made--- No illegality therefore existed in impugned order---Appeal was dismissed, in circumstances.

Mian Khurram Hashmi for Appellant.

Ch. Muhammad Saleem Khral for Respondents.

ORDER

Concise facts of this appeal are that the respondent No. 1 filed suit for recovery of Rs.471982/- on 10.10.2009. The appellant filed an application for Leave to appear and defend the suit which was duly contested by the plaintiff/respondent. After hearing the arguments, appellant's application was dismissed by the learned Banking Judge vide order dated 19.02.2015. Feeling aggrieved of order dated 19.02.2016 of learned Banking Court, the appellant has preferred instant appeal and challenged the validity of the impugned order.

2. Learned counsel for the appellant/defendant submits that the application for leave to appear and defend the suit was filed within time because the appellant/defendant got the knowledge of the pendency of suit on 03.02.2010 while the learned Banking Court has misread and misconstrued the record

while passing the impugned order. Therefore the same is not sustainable at law and liable to be set aside. Learned counsel for the respondent/plaintiff fully supports the impugned order. We have heard the arguments of the learned counsel for the parties and have minutely gone through the record as well as the impugned order.

3. Perusal of the record reveals that after the filing of suit by the respondent/plaintiff on 10.10.2009, summons in Form 4, Appendix (B) of the First Schedule to the Code of Civil Procedure 1908 in terms of section 9(5) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 were issued to the appellant/defendant on 25.11.2009 for 22.12.2009. The appellant/ defendant was served through courier service on 05.12.2009, through registered post AD on 05.12.2009 and through Bailiff on 09.12.2009. Hence, the appellant/defendant was duly served through at least three modes prescribed under the law and Wakalatnama on behalf of the appellant/defendant was also filed on 22.12.2009. Thereafter, the appellant/defendant filed an application for leave to appear and defend the suit on 02.03.2010 which was hopelessly barred by time because the same was not filed within the statutory period of 30 days from the date of knowledge, enumerated in section 10(2) of Financial Institutions (Recovery of Finances) Ordinance, 2001. As regard the submission of learned counsel for the appellant/defendant regarding the date of knowledge of the pendency of suit on 03.02.2010, it is relevant to reproduce the para 1 of application for leave to appear and defend the suit as under;

> "1. That the plaintiff has not complied with the modes of service prescribed under the law. The respondent came to the notice of titled suit on ---------, therefore the application has been filed within time."
>
> Hence, the date of knowledge is not mentioned in the application for leave to appear and defend the suit which is written in this appeal and same can be taken as an afterthought, just to remove legal lacuna. Even otherwise, the appellant/defendant has neither mentioned the mode/ source of his knowledge about the pending suit nor has made any allegation regarding address in the application for leave to appear and defend the suit.

4. For the foregoing reasons, we are of the view that the learned Banking Court has exhaustively dealt with each and every point alleged before it and we see no ground to interfere with well-reasoned order. Consequently, finding no merit in this appeal, the same is dismissed.

KMZ/M-153/L **Appeal dismissed.**

2021 M L D 766

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

MUHAMMAD RAFIQUE AWAN---Appellant

Versus

The LAND ACQUISITION COLLECTOR, NATIONAL HIGHWAY AUTHORITY and 4 others---Respondents

Regular First Appeal No.146 of 2004, decided on 31st December, 2020.

(a) Land Acquisition Act (I of 1894)---

----Ss.4 & 18---Acquisition of land---Reference to Court---Compensation of acquired land---Assessment---Factors to be taken into consideration by the Court enumerated.

Factors to be taken into consideration by the Court in assessing the compensation of acquired land are:-

i. Its market value at the prevalent time and its potential;

ii. One year average of sale (price) of similar land before publication of notification under section 4 of the Land Acquisition Act, 1894;

iii. Likelihood of development and improvement of the land;

iv. What a willing purchaser would pay to a willing buyer in an open market arm's length transaction entered into without any compensation;

v. Loss or injury by change of residence or place of business and loss of profit;

vi. Delay in the consummation of acquisition proceedings; and

vii. Peculiar facts and circumstances of each case.

(b) Land Acquisition Act (I of 1894)---

----Ss.4 & 18---Acquisition of land---Reference to Court---Compensation

of acquired land---Enhancement of compensation---Discharge of burden---Scope---Appellant/ land-owner sought enhancement to the extent of the price of the land-in-question assessed by the District Price Assessment Committee---Held, that when a party was interested in enhancement of the compensation, he owed a duty to discharge the burden by procuring convincing , trustworthy and solid evidence for the said purpose --- Potential value of the property could not be determined on the basis of mere oral assertion on behalf of the land owner---Record revealed that documents exhibited/produced by the appellant in his evidence, included the report of District Price Assessment Committee and the Valuation Table prepared by the concerned District Collector 4/5 years before the award, however, the same was prepared for the purposes of computation of ad-valorem stamp duty only---Oral assertion made by the appellant, therefore, was not sufficient to outwit the documentary evidence produced by authorities which were documents/mutations/sale deeds related to urban as well as rural lands surrounding the acquired land of the appellant sold at the relevant time or preceding year---Khasra Girdawries of the previous 4/5 years showed that the land-in-question was still agricultural and even the remaining land of the appellant was being cultivated and the appellant admitted the said fact in cross-examination during his evidence---Appellant had not produced any evidence that the status of land was changed from agricultural to commercial or urban, whereas the respondents had established, by leading documentary evidence, that the land-in-question was agricultural in nature---Evidence also showed that Board of Revenue, through special Committee, inspected the spot and assessed the compensation keeping in view the average sale price of the area---Price of the land-in-question, as assessed by the District Price Assessment Committee, was not based on independent inspection of the spot and the same was founded on the valuation table prepared by the concerned District Collector 4/5 years ago, which was prepared only for the purpose of calculation of ad-valorem Stamp Duty, whereas Board of

Revenue had fixed the compensation in accordance with law---Appellant could not point out any mala fide on the part of Board of Revenue in determining the compensation as declared in award-in-question---No bar existed on Board of Revenue to assess the reasonability of the compensation assessed by the District Price Assessment Committee---Appellant had failed to rebut the documentary evidence produced by the authorities showing that the adjacent land was higher in price than awarded to him by the authorities through issuance of award---Man could tell a lie a document could not and to outdo a documentary proof, better and cogent evidence in shape of document had to be produced, which was lacking in the present case on the behalf of appellant---Record further revealed that the appellant had received the compensation more than his entitlement---Referee Court had rightly decided the issue by taking into the consideration facts and circumstances in assessing the compensation of acquired land---Board of Revenue after spot inspection had rightly assessed the compensation of the acquired land---No illegality had been committed by the Trial Court which had judiciously exercised its jurisdiction vested to it after examining record and appreciating law on the subject --- Appeal was dismissed, in circumstances.

Hyderabad Development Authority through MD., Civic Centre, Hyderabad v. Abdul Majeed and others PLD 2002 SC 84; Air Weapon Complex through DG v. Muhammad Aslam and others 2018 SCMR 779; Civil Aviation Authority through Project Director and others v. Rab Nawaz and others 2013 SCMR 1124; Abdul Sattar v. Land Acquisition Collector Highways Department and others 2010 SCMR 1523 and National Highway Authority through Chairman and 2 others v. Bashir Ahmad and 2 others 2018 CLC Note 63 ref.

Ghulam Sarwar Gishkori for Appellant.

Malik Muhammad Tariq Rajwana and Kashif Rafique Rajwana for Respondents Nos.1 and 2.

Date of hearing: 15th December, 2020.

JUDGMENT

SHAHID BILAL HASSAN, J.----Facts, in concision, are as such that a patch of land owned by the appellant, measuring 13 kanals 13 marlas, comprising Khasra No.92-93, Khata No.444- 447, situated in Mauza Gaddai Sharqi, Tehsil and District D.G.Khan was acquired for construction of D.G. Khan bypass in Mauza Gaddai Sharqi, Tehsil and District D.G. Khan by the respondent No.1-Land Acquisition Collector, National Highway Authority, Indas Highway Project, through Award No.6 dated 01.11.2001. Being aggrieved of the said Award, the appellant requested the competent authority to refer the matter to the Referee Court for determination of the compensation, as required under section 18 of the Land Acquisition Act, 1894 by contending that the impugned Award has been announced without observing the mandatory provisions of law and without giving of necessary notices under the provisions of Sections 9 and 10 of the Land Acquisition Act, 1894 and that he should have been awarded compensation at the rate of Rs.35,000/ per marla for "commercial front road" and Rs.15,000/- per marla for "commercial off road" but instead the price was assessed as Rs.20,000/- per marla in case of "commercial front road", Rs.15,000/- to Rs.10,000/- per marla in case of "commercial off road" and for agricultural land at the rate of Rs.400,000/- per acre.

The Reference was contested by the respondents. Out of the divergence in pleadings, the learned referee Court framed as many as seven issues including "Relief" and invited evidence of the parties. The parties adduced their evidence, oral as well as documentary, in support of their respective contentions. The learned Referee Court vide impugned judgment dated 19.04.2004 dismissed the reference; hence, the instant appeal.

2. It is noteworthy that earlier this Court vide judgment dated

11.03.2010 dismissed the appeal. The appellant challenged the said judgment in the Hon'ble Supreme Court of Pakistan by filing Civil Appeal No.208 of 2011, which was accepted vide order dated 20.02.2018 and matter was sent back to this Court with the following observation:-

> 'The learned High Court though has upheld the finding of the learned Referee Court whereby the amount of compensation determined in the award has not been interfered with, but the petitioners' counsel has drawn our attention to the notification issued by the Deputy Commissioner whereby the price of the land in the area was settled and this document at all has not been considered by the learned Appellate Court as well as the learned High Court, which is a clear case of misreading of evidence. Resultantly, while accepting these appeals we remand the matter back to the learned High Court to consider the entire documentary as also the oral evidence on the record in the light of the issue and pass judgment afresh.'

3. Heard.

4. Factors to be taken into consideration by the Court in assessing the compensation of acquired land are:-

(i) Its market value at the prevalent time and its potential;

(ii) One year average of sale (price) of similar land before publication of notification under section 4 of the Land Acquisition Act, 1894;

(iii) Likelihood of development and improvement of the land;

(iv) What a willing purchaser would pay to a willing buyer in an open market arm's length transaction entered into without any compensation;

(v) Loss or injury by change of residence or place of business and loss of profit;

(vi) Delay in the consummation of acquisition proceedings; and

(vii) Peculiar facts and circumstances of each case.

Moreover, when a party is interested in enhancement of the compensation, he owes a duty to discharge the burden by producing convincing, trustworthy and solid evidence for such purpose. Potential value of the property cannot be determined on the basis of mere oral assertion on behalf of the land owner. Reliance is placed on Hyderabad Development Authority through MD., Civic Centre, Hyderabad v. Abdul Majeed and others (PLD 2002 Supreme Court 84).

When we go through the record, it emerges that the appellant, in support of his contention, has appeared as his own witness as (A.W.1) and produced two officials of the office of D.O.(R) and E.D.O.(R), D.G. Khan and got exhibited seven documents, which include the report of District Price Assessment Committee (Ex.A4) and the valuation table prepared by the District Collector, D.G. Khan in the year 1998 (Ex.A7), which finds mentioned in clear cut manner that the same is being prepared for the purposes of computation of ad-valorem Stamp Duty and not for any other purpose; meaning thereby the oral assertion made by the appellant is not sufficient to outwit the documentary evidence produced by the respondents in the shape of documents Ex.R1 to Ex.R89, which are mutations and registered sale deed and documents Ex.R7 to Ex.R17 relate to urban land whereas Ex.R18 to Ex.R89 relate to rural land and the said documents/mutations/sale deeds are of surrounding lands, sold at the relevant time or preceding year, of the acquired land of appellant. Apart from this, it is evident from the copies of Khasra Girdawries from Kharif 1998 to Rabi 2002 (Ex.R87) that the land is still agricultural and even remaining land of the appellant i.e. 1 kanal 4 marlas is included in the same and this fact finds support from his admission during cross examination that the land in question is situated 4/5 miles away from D.G. Khan city and even he was sure about the exact nature of the Mauza as he stated that he did not know whether the land was agricultural or urban and nothing was brought on record to show that the status of land was

changed from agricultural to commercial or urban; as against this, the respondents by leading documentary evidence had established that the land in question was agricultural in nature and the Board of Revenue through special Committee, correspondence of which was exhibited on record, inspected the spot and assessed the compensation keeping in view the average sale price of the area.

5. The mainstay of the appellant that the District Price Assessment Committee assessed the price of the land in dispute as Rs.35,000/- per marla, so the same should have been awarded to him, but in this regard it is observed that the assessment of the District Price Assessment Committee was not based on independent inspection of the spot and the same was founded on the valuation table prepared by the District Collector, D.G. Khan in the year 1998 (Ex.A7), which was prepared only for the purposes of calculation of ad valorem Stamp Duty and not for any other purpose, whereas the Board of Revenue, inspected the spot, through Committee and fixed the compensation in accordance with law. Even otherwise, the appellant could not point out any mala fide on the part of the Board of Revenue in determining the compensation as declared in the Award No.6 as there is no bar upon the Board of Record to assess the reasonability of the compensation assessed by the District Price Assessment Committee.

6. In addition to the above, the appellant has taken reasonable compensation of the RCC Factory as per record produced by the respondents. The appellant has failed to rebut the documentary evidence produced by the respondents showing that the adjacent land was higher in price than awarded to him by the respondents through issuance of award, because a man can tell a lie but a document not and to outdo a documentary proof, better and cogent evidence in shape of document has to be produced, which is lacking in this case on behalf of the appellant.

Moreover, when we examine the record, it appears that the

appellant was owner of 11 kanals 01 marla land and the same was acquired, whereas the appellant received compensation for 13 kanals and 11 marlas of land, which was beyond his entitlement. As such, the learned Referee Court keeping in view facts and circumstances of the case as well as all the factors, to be taken into consideration by the Court in assessing the compensation of acquired land, has rightly decided the issue, because the Board of Revenue after spot inspection through Committee, constituted by it for the said purpose, has rightly assessed the compensation for the acquired land. The appellant, as stated above, has failed to make out a case for enhancement of compensation as claimed by him in the reference.

7. In view of the above, this Court holds that no illegality has been committed by the learned Trial Court while passing the impugned judgment, rather vested jurisdiction has judiciously been exercised after examining record and appreciating law on the subject. Resultantly, while placing reliance on the judgment supra as well as the judgments reported as Air Weapon Complex through DG v. Muhammad Aslam and others (2018 SCMR 779), Civil Aviation Authority through Project Director and others v. Rab Nawaz and others (2013 SCMR 1124), Abdul Sattar v. Land Acquisition Collector Highways Department and others (2010 SCMR 1523) and National Highway Authority through Chairman and 2 others v. Bashir Ahmad and 2 others (2018 CLC Note 63), the appeal in hand having no force and substance stands dismissed with no order as to the costs.

MQ/M-26/L **Appeal dismissed.**

2021 M L D 1173

[Lahore]

Before Shahid Bilal Hassan, J

Ch. ABDUL RASHID ASEEM (DECEASED) through L.R.---Petitioner

Versus

The STATE and others---Respondents

Writ Petition No.23650 of 2020, decided on 16th June, 2020.

Constitution of Pakistan---

----Art.199---Constitutional petition---Cancellation/resumption of lease of land---Petitioner sought direction to the authorities to allot government land to him through private treaty---Validity---Land in question was leased out to the petitioner for a period of twenty years for a specific purpose i.e. construction of library and the lease had already expired in the year 2016---Petitioner had failed to fulfil the commitment made for creating a Trust in respect of the library in question---Land in question had to be resumed by the State irrespective of the fact that proprietary rights had been given to the petitioner and construction had been made by him---Occupation of the petitioner over the property in question had rightly been declared as illegal as petitioner had not deposited lease amount to the treasury of Government---Status of petitioner after cancellation of lease in his favour was nothing but as an encroacher---Constitutional petition was dismissed.

Javed Naseem for Petitioner.

Zafar Raheem Sukhera, Assistant Advocate General for the State.

Mian Sultan Tanvir Ahmed for Respondent No.4.

ORDER

SHAHID BILAL HASSAN, J.----The petitioner has filed the instant constitutional petition with the following prayer:-

> "In view of the above, it is respectfully prayed that the impugned order dated 18.05.2020 passed by respondent No.2 and those passed by respondents Nos.3 and 4 dated 5.5.2020 and 14.11.2019 may graciously be set aside and the respondents may be directed to allot five kanals of land to the petitioner through private treaty, in compliance with the orders of the High Court dated 27.11.1991 and 10.10.2006 and of the Member (IV), Board of Revenue dated 10.3.2008 which went unchallenged and attained finality".

2. Heard and comments perused.

3. Admittedly, land in dispute was leased out for al period of twenty years to the father of the petitioner for a specific purpose i.e. construction of library and the lease period has expired in the year 2016. The District Collector who visited the spot for site inspection submitted his report dated 04.05.2019, which depicts violations of terms and conditions of lease as he reported as under:-

(i) The issue of fraud, foul play has already been observed in instant issue which may kindly be perused through from the brief history of the orders passed by then Deputy Commissioner Mian Mohsin Rasheed on 14.11.2013.

(ii) The visit of the site further divulged that applicants have encroached far more area against their impugned lease of the state land measuring 03-kanals.

(iii) In furtherance of above, a private school is running on commercial basis and the said land is also being used for residential purpose

which is a blatantly violation of statement of conditions on which land was leased out

(iv) The lease of said land has already been expired in the year 2016 and as a matter of fact there is no such policy in vogue through that said may be allowed to be continued to present occupants so at present they are illegal encroachers and trespassers on the said land.

The District Collector further reported that a small library and school was established on the site. However, both were closed due to Corona epidemic. The Incharge of library Mr. Zafar has occupied the place and having residence on the first storey. The land occupied by the library and school is 05-Kanal that is above leased area of 03-Kanals. When we put the above mentioned facts in juxtapositions then it seems to leave no doubt that impugned land is under the illegal occupation and the order passed by the then Deputy Commissioner Mian Mohsin Rasheed dated 14.11.2019 is retinal and same is endorsed.

4. It is vivid from the order dated 10.03.2008 passed by learned Member (Judicial IV) Board of Revenue Punjab that a clear observation was made to the effect that after obtaining the proprietary rights of the land in question the present petitioner Mian Mohsin Rasheed shall make a trust as per his commitment with regard to the management of the said library-cum-school. In case the petitioner fails to fulfill the commitment made, for making a trust in respect of the Library in question, before the honourable Lahore High Court, Lahore as well as this Court, the land in question shall be resumed by the State irrespective of the fact that proprietary rights have been given to the petitioner and construction has been made by him.

5. Now when the petitioner violated the terms and conditions as well as undertaking given by him before this Court and learned Member

(Judicial-IV), Board of Revenue Punjab coupled with non-deposit of single penny of lease amount to the treasury of Government, the occupation of the petitioner over the disputed property has rightly been declared as illegal and the status of the present petitioner after cancellation of lease in his favour is nothing but as an encroacher. During course of arguments, learned counsel for the petitioner has failed to point any legal infirmity in the impugned orders warranting interference by this Court in exercise of extraordinary constitutional jurisdiction.

6. For the foregoing reasons, the constitutional petition in hand being without any force and substance stands dismissed.

SA/A-29/L **Petition dismissed.**

2021 Y L R 977

[Lahore]

Before Shahid Bilal Hassan, J

FAISAL AFZAL through Attorney---Petitioner

Versus

CHIEF SETTLEMENT COMMISSIONER, (MEMBER JUDICIAL-VIII), LAHORE

and 3 others---Respondents

Writ Petition No. 43553 of 2019, decided on 19th December, 2019*.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability--- Interim order---Verification proceedings---Proceedings for verification of claim were pending before Chief Settlement Commissioner---Petitioner contended that Chief Settlement Commissioner had no jurisdiction to entertain and adjudicate upon the matter---Validity---In earlier proceedings initiated by petitioner High Court directed revenue authorities to associate him in proceedings and then to proceed accordingly---Chief Settlement Commissioner decided the matter in pursuance of earlier order passed by High Court---Nature of order in question was that of interim and Constitutional petition was not maintainable---High Court declined to entertain and discuss merits of case as matter was sub judice in view of earlier interlocutory order passed by High Court---Constitutional petition was dismissed, in circumstances.

Dr. Ahmad Iqbal and 9 others v. Member Board of Revenue Chief Settlement Commissioner and others PLD 2010 Lah. 249; Ch. Sir Muhammad Zafrullah Khan and others v. The Custodian of Evacuee Property, West Pakistan and Karachi and others PLD 1964 SC 865; Sher Afzal Khan and others v. Haji Razi Abdullah and others 1984 SCMR 228; Shamshad and others v. Mukammil Shah and others 1984 SCMR 912;

Mst. lqbal Siddiqui v. Assistant Settlement Commissioner (Urban) and others PLD 1984 Lah. 291; Bilqis Begum and others v. Fazal Muhammad and others 1987 SCMR 1441; Khawaja Bashir Ahmad v. The Additional Settlement Commissioner, Rawalpindi and others 1991 SCMR 1604; Hafiz Noor Muhammad and others v. Ghulam Rasul and others 1999 SCMR 705; Syed Istijab Hassan and 4 others v. Member (Settlement and Rehabilitation Wing), Board of Revenue/Chief Settlement Commissioner, Punjab, Lahore and 2 others 1999 YLR 1627; Jamal-Ud-Din v. Member, Board of Revenue and 4 others 2001 CLC 81; Government of Punjab, Colonies Department, Lahore and others v. Muhammad Yaqoob PLD 2002 SC 5; Pakistan Transport Company Ltd. v. Walayat Khan through Legal Heirs 2002 SCMR 1470; Sagheer Muhammad Khan and 5 others v. Member (Judicial) Board of Revenue, Punjab and 4 others 2009 YLR 1255; Rubina Habib and others v. Province of Punjab and others 2019 CLC Note 36; Shamir, through Legal heirs v. Faiz Elahi, through Legal Heirs 1993 SCMR 145; Wali Muhammad v. Ellahi Bakhsh through L.Rs. and others 2005 SCMR 1526; Muhammad Sadiq (decd.) through L.Rs. and others v. Mushtaq and others 2011 SCMR 239; Bashir Ahmad Khan v. Pakistan PLD 1997 Lah. 423 and Abdur Rahman Bhatti and another v. Member (Colonies), Board of Revenue, Punjab, Lahore and another 2006 CLC 543 ref.

Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab, Lahore 2003 SCMR 708; Mst. Fatima Zohra and another v. Salimuddin and others 1988 MLD 605 and Amir Saleem v. Presiding Officer and others PLD 2013 Lah. 607 rel.

Mian Muhammad Hussain Chotiya for Petitioner.

Ch. Iqbal Ahmad Khan and Ahmad Waheed Khan for Respondents Nos.2 to 4.

Muhammad Yaqoob Kanjoo for Respondent No.1.

Syed Shadab Jafri, Additional Advocate General.

Date of hearing: 17th October, 2019.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, the facts as emerged from the memorandum of petition are as such that property No. F-2572 situated Inside Kashmiri Gate, Lahore being Evacuee Property was allotted/transferred through Transfer Order No.17481 dated 05.11.1974 by the Deputy Commissioner (Settlement), Lahore on 06.01.1974 to one Rana Muhammad Ashfaq son of Muhammad Ishaque. Its first sale was made through sale deed dated 20.03.1979 and finally it is now in the ownership and possession of the present petitioner through registered sale (Annexure-B/1). The said Transfer Order No.17481 dated 05.11.1974 was verified on the application of one Muhammad Bashir through minutes of meeting dated 30.08.2016 under letter No.372/2015/1787/OIR by the Board of Revenue (Settlement and Rehabilitation Wing/Provincial Verification Committee (PVC) Farid Kot House, Lahore) and through letter No.1965/18/1274/OIR dated 19.10.2018 was submitted to ADCR, Lahore. The petitioner being owner in possession of the said property applied for approval of constructions of building plan to Walled City Authority, Lahore which was approved through letter No.101403 dated 30.07.2018 and the petitioner was making his construction as per approved building plan when firstly respondent No.2 and others tried to interfere into constructions of the petitioner, therefore, he instituted a suit and construction making order dated 01.12.2018 was issued by the learned Civil Judge seized of the matter, the position remained the same in appeal and Writ Petition bearing No.87/2019 filed by the respondents Nos.2 to 4 was dismissed on 02.04.2019 by this Court, too.

On Human Rights Application of one Mst. Humaira daughter of respondent No.2/Safia Qayyum before the Hon'ble apex Court, the properties were scaled by order dated 12.01.2019 subject to decision of Civil Court and verification of he ownership/entitlement documents. Finally, the property of the petitioner was de-sealed after due verification by the Civil Court vide order dated 17.05.2019 and the petitioner, was making construction thereon. Inspite of having knowledge of the above

said order, the respondent No.1/Chief Settlement Commissioner has initiated proceedings on application of respondents Nos.2 to 4, allegedly in violation of law as well as dictum laid down in Dr. Ahmad Iqbal and 9 others v. Member Board of Revenue Chief Settlement Commissioner etc. PLD 2010 Lahore 249). Hence, the instant constitutional petition.

2. It has been argued on behalf of the learned counsel for the petitioner that Khan Muhammad got land measuring 1-kanal, 19 marlas, 176 sq. ft. through agreement for sale dated 20.03.1952 of damaged scheme but no property number was mentioned therein; even the terms of agreement were not fulfilled. Adds that above said land was not transferred in favour of Khan Muhammad through any lawful document. Maintains that husband of Mst. Safia Qayyum fraudulently created sale deed in her favour on the basis of agreement for sale dated 20.03.1952. First Information Report No.188/2018 was lodged at Police Station Lower Mall by Sub-Registrar against Safia Qayyum, etc. and they were found guilty by police, who are facing trial. Moreover, show-cause notice dated 02.10.2018 by ADC(R), Lahore for fraudulent sale deed was issued to them. Alleges that respondents Nos.2 to 4 admitted property and allotment F-2572 correct in partnership deed dated 10.07.2017 and same remained the situation in their bogus sale deed. As such, the respondents Nos.2 to 4 have no locus standi and no concern with the property owned by the petitioner. The property of the petitioner is Evacuee Property whereas the claim property of respondents Nos.2 to 4 is of Damaged Scheme of LTI now LDA/Punjab Govt. meaning thereby these are two different properties with different locations, situations and status. Contends that Chief Settlement Commissioner has no jurisdiction to entertain and adjudicate upon the matter in hand after cut-off date i.e. 01.07.1974 and cancel the Transfer Order, because the matter of property of the petitioner was not pending at that time and after the time of promulgation of Evacuee and Displaced Persons Laws (Repeal) Act, 1975 the respondent No.1 has become functus officio. Further contends that neither Settlement Department has litigated nor claimed nor challenged

the allotment in favour of original allottee, through whom the petitioner derived his right. After observing all legal formalities the Settlement Department declared Transfer Order as correct with allotment; hence, the proceedings before the respondents No.1 are without lawful authority, without jurisdiction, coram non judice, without backing of law and with mala fide intention. Therefore, by allowing the Writ Petition hand bearing No.43553 of 2019, it may be declared that after verification report of Transfer Order in question by the Provincial Verification Committee dated 30.08.2016, the respondent No.1 has no powers to hear against this report of PVC being higher in rank and competent Committee; it may also be declared that after cut-off date i.e. 01.07.1974 coming repeal of Evacuee Laws and Evacuee and Displaced Persons Law (Repeal) Act, 1975, the proceedings regarding T.Os. PTOs and PVC report before the respondent No.1 are ultra vires to laws and case law; moreover, all the orders and proceedings before the respondent No.1, even restraining orders dated 03.07.2019 of respondent No.1 or any other restraining order may please be set aside. Relies on Ch. Sir Muhammad Zafrullah Khan, etc. v. The Custodian of Evacuee Property, West Pakistan and Karachi, etc. (PLD 1964 Supreme Court 865), Sher Afzal Khan and others v. Haji Razi Abdullah and others (1984 SCMR 228), Shamshad and others v. Mukammil Shah and others (1984 SCMR 912), Mst. Iqbal Siddiqui v. Assistant Settlement Commissioner (Urban) and others (PLD 1984 Lahore 291), Bilqis Begum and others v. Fazal Muhammad and others. (1987 SCMR 1441), Khawaja Bashir Ahmad v. The Additional Settlement Commissioner, Rawalpindi and others (1991 SCMR 1604), Hafiz Noor Muhammad and others v. Ghulam Rasul and others (1999 SCMR 705), Syed Istijab Hassan and 4 others v. Member (Settlement and Rehabilitation Wing), Board of Revenue/Chief Settlement Commissioner, Punjab, Lahore and 2 others (1999 YLR 1627 Lahore), Jamal-Ud-Din v. Member, Board of Revenue and 4 others (2001 CLC 81 Lahore), Government of Punjab, Colonies Department, Lahore and others v. Muhammad Yaqoob (PLD 2002 Supreme Court 5), Pakistan Transport

Company Ltd. v. Walayat Khan through Legal Heirs (2002 SCMR 1470), Sagheer Muhammad Khan and 5 others v. Member (Judicial) Board of Revenue, Punjab and 4 others 2009 YLR 1255), Dr. Muhammad Iqbal and 9 others v. Member, Board of Revenue/ Chief Settlement Commissioner, Lahore and another (PLD 2010 Lahore 249) and Rubina Habib and others v. Province of Punjab and others (2019 CLC Note 36 Lahore).

3. As against above, by placing reliance on Shamir, through Legal Heirs v. Faiz Elahi, through Legal Heirs (1993 SCMR 145), Wali Muhammad v. Ellahi Bakhsh through L.Rs. and others (2005 SCMR 1526), Muhammad Sadiq (decd.) through L.Rs. and others v. Mushtaq and others (2011 SCMR 239), Bashir Ahmad Khan v. Pakistan (PLD 1997 Lahore 423), Abdur Rahman Bhatti and another v. Member (Colonies), Board of Revenue, Punjab, Lahore and another (2006 CLC 543 Lahore), the learned counsel for the respondents Nos.2 to 4 has argued that the writ petition in hand is not maintainable because the same is against an interim order passed by the respondent No.1 . Adds that the matter pending before the Chief Settlement Commissioner is being heard in compliance with the directions of this Court passed vide order dated 26.11.2018 whereby W.P. No.251525/2018 was disposed of with the directions to the MBR/SCS for deciding the pending matter within 30 days, hence, the MBR/CSC is under obligation to hear and decide the matter; that the petitioner challenged the above said order dated 26.11.2018 by filing petition under section 12(2) of the Code of Civil Procedure, 1908, which was dismissed vide order dated 12.12.2018 again directing the present petitioner to participate in the proceedings pending before the MBR/CSC; that the petitioner being dissatisfied with the said order filed Intra Court Appeal No.256558 of 2018, which was dismissed on 17.12.2018; that all the above said orders and proceedings have been concealed by the petitioner, thus, the writ petition is liable to be cancelled on this score only; that the verification committee verified the genuineness of Transfer Order when the ADC Lahore was not present in meeting, but someone else singed for ADC Lahore in attendance sheet, thus, the committee was incomplete,

therefore, the forged and fabricated document cannot be verified and termed as genuine document; that the MBR/CSC is fully competent to check the record of alleged TO/PTO and to hold whether the documents are genuine or not as has been provided under the Evacuee Property and Displaced Persons (Repeal Laws) Act, 1975, therefore, no restraining order could be passed to strangulate the judicial proceedings of MBR/CSC; that under section 2(3) of the Act, 1975 ibid the MBR/CSC is competent to proceed further according to the provisions or repeal laws related to the proceedings. Adds that under section 23 of the Displaced Persons (Compensation and Rehabilitation) Act XXVIII of 1958, the Chief Settlement Commissioner (CSC) is fully competent to proceed as Civil Court and the MBR/ CSC is also competent to proceed as a public servant and also as a criminal Court under sections 21, 196, 199, 200 and is empowered to proceed under sections 193 and 228 of the Code of Criminal Procedure, 1898. Contends that jurisdiction of Civil Court is specifically barred under section 25 of the Displaced Persons (Compensation and Rehabilitation) Act XXVIII of 1958, therefore, the matter pending before the CSC neither could be withdrawn nor could be entrusted to any other officer, the writ petition is liable to be rejected on this score; that all the settlement laws have been repealed due to promulgation of the Evacuee Properties and Displaced Persons (Repealed Laws) Ordinance, 1974, after the target date i.e. 01.07.1974 only the notified officer was competent to issue TO/PTO, but the alleged Transfer Order has been issued by Deputy Settlement Commissioner dated 06.11.1974, meaning thereby it is a forged and fabricated document; that under the provisions of the Act, 1958, no T.O. can be issued without verification of possession by the Settlement Department. The alleged document was issued on 06.11.1974 but the petitioner was put in possession on the basis of decree (through bailiff) dated 03.05.2017, thus, it proves that the said T.O. is a forged and fabricated document; that in compliance of order of the Hon'ble Supreme Court, the Superintendent Police inquired at the spot and submitted report stating therein that the

present petitioner or his vendor never remained in possession upon the property in question; that the respondents filed application under section 12(2) of the C.P.C. before the Civil Court, but the same was dismissed and appeal there-against is pending before the learned Addl. District Judge; that the respondent No.2 purchased the land of Scheme No.2 from LIT/Lahore Improvement Trust through auction and his offer was accepted dated 16.01.1952 regarding purchase of land Plot Nos. 1 to 6 and portion-A and he paid the total price of the plots, the complete possession was handed over to him on 04.11.1963 through Land Acquisition Collector, so after payment of price, the respondent No.2 became full-fledged owner. As such, the writ petition in hand is not maintainable and same may be dismissed.

4. Heard.

5. Considering the arguments and going through the record, it is observed that a Writ Petition bearing No.251525 of 2018 titled "Safia Qayyum, etc. v. Member Board of Revenue, etc." was filed with the prayer that order of Secretary S&R dated 30.08.2016 be set aside by declaring that Settlement Department has no concern with the property of Lahore Improvement Trust; the said writ petition was disposed of on 12.12.2018 with the following observation:--

> 3. Be that as it may, let a copy of this petition along with its annexures be transmitted to respondent No. 1, who shall treat the same as representation on behalf of the petitioners. ,Needless to observe that he shall afford proper opportunity of hearing to the petitioners- as well as to all concerned and then decide the same, by way of speaking order, strictly in accordance with law, within thirty days from the date of receipt of instant order. The learned law officer shall convey the order of this Court to respondent No.1 for its compliance. Dispose of '

The respondent No.1 in the said writ petition was Member Board of Revenue/Chief Settlement Commissioner, Punjab, Lahore. The record

further reveals that the present petitioner filed a C.M.No.03 of 2018 under section 12(2) of the C.P.C. against the said order, which was disposed of on 12.12.2018 with a direction to the respondent No.4/Additional Deputy Commissioner (Revenue), Lahore to associate the applicant in the said proceedings and then proceed accordingly in terms of order dated 26th November, 2018. The petitioner being aggrieved of the said order filed an Intra Court Appeal bearing No.256558/2018 but the same was dismissed.

The above picture shows that the matter has been taken up and order dated 03rd of July, 2019 has been passed by the Chief Settlement Commissioner/Member (Judicial-VIII), Board of Revenue, Punjab, in pursuance of the order dated 12.12.2018 passed by this Court. In Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab, Lahore (2003 SCMR 708), the Hon'ble Supreme Court of Pakistan invariably held:-

> 'It is to be noted that interlocutory order is an order in which no final verdict is pronounced but an ancillary order is passed with the intention to keep it operative till final decision.'

The nature of impugned order in the present case is also that of interim and writ petition against the same is not maintainable as has been held in Mst. Fatima Zohra and another v. Salimuddin and others (1988 MLD 605 Lahore), relevant part of which reads:-

> '4. After hearing the learned counsel for the parties, we are quite clear that against the interim order of the learned Settlement Commissioner dated 3-1-1978, whereby the appellants had been issued a notice on the application of the respondent No.1 for setting aside the ex parte order, no writ petition could be maintained. Whatever pleas the appellants may have in opposition to the application of the respondent, they can take the same before the Authority who is dealing with that application. The appeal is without merits and is accordingly dismissed with costs.'

Apart from above, in Amir Saleem v. Presiding Officer and others (PLD

2013 Lahore 607), this Court observed:-

> 'In any case, the order is of interim in nature and as to the propriety of the impugned interim order or its correctness or otherwise in my humble view a ought not to be entertained in Constitutional jurisdiction. Reliance is placed on Bolan Bank Limited v. Capricorn Enterprise (Pvt.) Ltd. 1998 SCMR 1961, Muhammad Zubair and 4 others v. Muhammad Zameer and 11 others (1999 CLC 2045) and Mst. Aysha Bibi v. District Judge 2005 CLC 894. '

Merits of the case cannot be entertained and discussed in the instant petition, because the matter is sub judice, as has been stated above, pursuant to orders of this Court and in view of the ratio of above said judgments, the writ petition in hand is not maintainable; thus, no relief as prayed for can be granted to the petitioner, as the impugned order has been passed with jurisdiction.

6. In addition to the above, the petitioner has also taken recourse to the Civil Court by filing a suit titled "Faisal Afzal v. Chief Settlement Commissioner (Residual Properties/Notified Officer, Punjab, (Member Judicial-VIII), Board of Revenue Lahore, etc." for declaration with consequential relief, so any findings at this stage, may prejudice case of either of the party, pending before the competent Court of jurisdiction and it would amount to hamper the said proceedings.

7. So far as the case law submitted by both the sides, with due respect, the same has no relevance to the peculiar matter under discussion, because it relates to merits of the case, which is not subject matter of the present petition.

8. For the foregoing reasons, the petition in hand being not maintainable stands dismissed.

MH/F-1/L **Petition dismissed.**

2021 Y L R 1691

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD ANAR TARAR---Petitioner

Versus

PROVINCE OF PUNJAB through District Officer (Revenue) and others---Respondents

Civil Revision No. 2745 of 2010, decided on 10th August, 2020.

(a) Colonization of Government Lands (Punjab) Act (V of 1912)---

----Ss. 30(2) & 36---Specific Relief Act (I of 1877), S.42---Suit for declaration---Resumption of land after conferment of proprietary rights---Jurisdiction of Member (Colonies), Board of Revenue ('the Member')---Scope--- Plaintiff instituted civil suit to challenge order passed by the Member under S.30(2) of the Colonization of Government Lands Act, 1912 ('the Act 1912') to resume the land-in-question---Both the Courts below dismissed the suit of plaintiff---Contention of petitioner/plaintiff was that the Member passed the order without jurisdiction as the matter-in-question actually related to tenancy rights/fair price assessment---Validity---Plea of the petitioner had itself been negated/ denuded by the exhibited registered sale deed, which showed that the agricultural land in the canal colony was sold out, so the Member (Colonies) was well within jurisdiction to deal with the matter and passed appropriate order under S.30(2) of the Act, 1912---Both the Courts below, while considering the facts arising out from the record, had rightly decided the issues of jurisdiction of the Member and objection/plea of the petitioner had no force---Record revealed that during proceedings before the Trial Court, the brother of the petitioner was Member of Provincial Assembly (MPA) of the ruling political party when the land-in-question was allegedly sold

to him through private treaty---Said transaction had rightly been concluded as having been obtained through influence of the ruling political party---When the position was such that the disputed land was obtained through fraud and pressure, the Member (Colonies) was well within jurisdiction to cancel the same and that sale through private treaty under the influence of the politicians was to be discouraged---No illegality or infirmity having been found in the impugned decrees and judgments passed by both the Courts below---Revision petition was dismissed, in circumstances.

Mian Asghar Ali v. Province of Punjab through District Collector and others 2006 SCMR 936 and Mian Asghar Ali v. Government of Punjab through Secretary (Colonies) BOR, Lahore and others 2017 SCMR 118 ref.

Muhammad Tamil Asghar v. The Improvement Trust, Rawalpindi PLD 1965 SC 698; Hamid Husain v. Government of West Pakistan and others 1974 SCMR 356; Haji Muhammad Khan and 2 others v. Islamic Republic of Pakistan through Pakistan Railway and 2 others 1992 SCMR 2439; Mst. Kamina and another v. Al-Amin Goods Transport Agency through L.Rs. and 2 others 1992 SCMR 1715; Province of Punjab through Chief Secretary and 5 others v. Malik Ibrahim and Sons and another 2000 SCMR 1172; Qasim Ali v. Rehmatullah 2005 SCMR 1926; Gul Kanjeer Khan and others v. Subedar Umer Khatab and others 2007 SCMR 800; Muhammad Nazir Khan v. Ahmad and 2 others 2008 SCMR 521; Muhammad Sadiq and others v. Barkat Ali and 4 others 1990 CLC 533; Muhammad Liaquat and 5 others v. Member, Board of Revenue (Colonies), Punjab, Lahore and 3 others 2000 CLC 953; Province of the Punjab through Collector and 2 others v. Nazir Ahmad and 9 others 2004 YLR 1650 and Province of Punjab through Collector and 4 others v. Haji Wali Muhammad and 4 others 2004 MLD 441 distinguished.

(b) Colonization of Government Lands (Punjab) Act (V of 1912)---

----Ss. 36 & 30(2)---Specific Relief Act (I of 1877), S.42---Suit for declaration---Resumption of land after conferment of proprietary rights---Jurisdiction of Civil Court---Scope---Plaintiff instituted civil suit to challenge order passed by the Member (Colonies), Board of Revenue ('the Member') under S.30(2) of the Colonization of Government Lands Act, 1912 ('the Act 1912') to resume the land-in-question---Both the Courts below dismissed suit of the plaintiff---Contention of petitioner/plaintiff was that the Member (Colonies) passed the order without jurisdiction as the matter-in-question actually related to tenancy rights/fair price assessment---Validity---No malice, mala fide or ill-will on the part of the Member (Colonies) while passing the order against the petitioner, had been pleaded or brought on record---Section 36 of the Colonization of Government Lands Act, 1912, barred jurisdiction of Civil Court to make any interference in such like orders, which had been passed with jurisdiction---Revision petition was dismissed, in circumstances.

(c) Specific Relief Act (I of 1877)--

----S. 42---Colonization of Government Lands (Punjab) Act (V of 1912), Ss.30(2) & 36---Resumption of land after conferment of proprietary rights---Suit for declaration without seeking possession---Maintainability--- Plaintiff instituted suit to challenge order passed by the Member (Colonies), Board of Revenue, under S.30(2) of the Colonization of Government Lands (Punjab) Act, 1912 ('the Act 1912') to resume the land-in-question---Held, that the petitioner/plaintiff did not seek possession of the land-in-question and only sought declaratory decree as it was established on record (through the document exhibited by the defendants) that the possession of the land-in-question was of provincial government, so the suit was bad and was not maintainable as per mandate of S.42 of the Specific Relief Act, 1877---Revision petition dismissed, in

circumstances.

(d) Civil Procedure Code (V of 1908)---

----S. 115---Revisional jurisdiction of High Court--- Scope--- Scope of interference with concurrent findings of facts by High Court in exercise of revisional jurisdiction was very narrow---While examining the legality of judgment and decree in exercise of powers under S.115, Civil Procedure Code, 1908, High Court, on reappraisal of evidence, could not upset findings of facts, howsoever erroneous such findings were---High Court could not take a different view of evidence, especially when there was no misreading and non-reading of evidence on record.

Muhammad Feroze and others v. Muhammad Jamaat Ali 2006 SCMR 1304; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161 and Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679 ref.

Allah Bakhsh Gondal for Petitioner.

Zafar Rahim Sukhaira, A.A.G. for Respondents.

ORDER

SHAHID BILAL HASSAN, J.---Tersely, the petitioner/plaintiff instituted a suit for declaration against the respondents/defendants challenging the order dated 26.02.1998 passed by the respondent/defendant No.2 under section 30(2) of the Colonization of Government Lands Act,1912. The suit was contested by the respondents/ defendants while submitting written statement. The controversies in the pleadings were summed up into issues and evidence of the parties, pro and contra, was recorded. The learned trial Court vide impugned judgment and decree dated 25.06.2009 dismissed suit of the petitioner/plaintiff, who being aggrieved of the same preferred an appeal

but it was dismissed vide impugned judgment and decree dated 12.05.2010; hence, the instant civil revision.

2. Learned counsel for the petitioner has argued that the impugned judgments and decrees are against law and facts of the case; that the Member Board of Revenue has passed the impugned order dated 26.02.1998 under section 30(2) of the Colonization of Government Lands Act, 1912, without jurisdiction as the same relates to tenancy rights, but this fact has not been considered judiciously by the learned Courts below; that the price assessment dated 19.05.1997 by the respondents/defendant is not fair assessment as the same is politically motivated to inflict injury to the petitioner; that material illegalities and irregularities have been committed while passing the impugned judgments and decrees, which are based on surmises and conjectures as well as assumptions and presumptions; thus, the same are not sustainable in the eye of law. By allowing the revision petition in hand, the impugned judgments and decrees may be set aside and the suit instituted by the petitioner may be decreed as prayed for. Reliance has been placed on Mr. Muhammad Tamil Asghar v. The Improvement Trust, Rawalpindi (PLD 1965 Supreme Court 698), Hamid Husain v. Government of West Pakistan and others (1974 SCMR 356), Haji Muhammad Khan and 2 others v. Islamic Republic of Pakistan through Pakistan Railway and 2 others (1992 SCMR 2439) Mst. Kamina and another v. Al-Amin Goods Transport Agency through L.Rs. and 2 others (1992 SCMR 1715), Province of Punjab through Chief Secretary and 5 others v. Malik Ibrahim and Sons and another (2000 SCMR 1172), Qasim Ali v. Rehmatullah (2005 SCMR 1926), Gul Kanjeer Khan and others v. Subedar Umer Khatab and others (2007 SCMR 800), Muhammad Nazir Khan v. Ahmad and 2 others (2008 SCMR 521), Muhammad Sadiq and others v. Barkat Ali and 4 others (1990 CLC 533 Lahore), Muhammad Liaquat and 5 others v. Member, Board of Revenue (Colonies), Punjab, Lahore and 3 others (2000 CLC 953 Lahore),

Province of the Punjab through Collector and 2 others v. Nazir Ahmad and 9 others (2004 YLR 1650 Lahore) and Province of Punjab through Collector and 4 others v. Haji Wali Muhammad and 4 others (2004 MLD 441 Lahore).

3. On the contrary, learned law officer has supported the impugned judgments and decrees and has prayed for dismissal of the civil revision in hand.

4. Heard.

5. Suffice it to observe, after considering the arguments and perusing the record, that the plea taken up by the petitioner has itself been denuded by the alleged registered sale deed Ex.P3, which shows that the agricultural land in the canal colony was sold out, so the Member (Colonies) Board of Revenue was well within jurisdiction to deal with the matter and pass appropriate order in this regard under section 30(2) of the Colonization of Government Lands Act, 1912. As such, the learned Courts below, while considering the facts arose out from the record, have rightly decided the issues of jurisdiction of the Member (Colonies), Board of Revenue. Therefore, the objection and argument in this regard has no force and the same is discarded.

Moreover, when no malice, mala fide or ill will on the part of the Member (Colonies) while passing the order dated 26.02.1998 has been pleaded or brought on record, section 36 of the Act, 1912 ibid bars jurisdiction of the Civil Court to make any interference in such like orders, which have been passed with jurisdiction.

6. During proceedings before the learned trial Court it has emerged that the brother of the petitioner was Member of Provincial Assembly (MPA) of the Ruling Party at that time when the land in disputed was allegedly sold out to him through private treaty, which has rightly been concluded to have been obtained through influence of the ruling party and

when the position was as such that the land in dispute was obtained through fraud and pressure, the Member (Colonies) was well within jurisdiction to cancel the same, when the same proved affirmative. In Mian Asghar Ali v. Province of Punjab through District Collector and others (2006 SCMR 936), the Apex Court of the country, invariably, held:--

> Independent thereof any intervention with the impugned order would tantamount to encouraging perpetuation of patent illegal devices to protect the illegitimate gains reaped by the political vultures for unjust enrichment at the cost of public exchequer which has eroded the very moral fabric of the society."

The said esteemed judgment was further affirmed in Mian Asghar Ali v. Government of Punjab through Secretary (Colonies) BOR, Lahore and others (2017 SCMR 118) and sale through private treaty under the influence of the politicians has been discouraged. In this view of the matter, the learned Courts below have rightly assumed jurisdiction vested in them, thus, the findings are maintained.

7. Apart from the above, the petitioner did not seek possession of the disputed land and only sought declaratory decree, as it is established on record that the possession of the disputed land was of provincial government as per Ex.D3, so the suit was bad and was not as per mandate of section 42 of the Specific Relief Act, 1877 and was not maintainable, which was rightly declared as such by the learned appellate Court while passing the impugned judgment and decree dated 12.05.2010.

8. In addition to the above, scope of interference with concurrence findings of facts by High Court in exercise of revisional jurisdiction is very narrow, as while examining the legality of judgment and decree in exercise of powers under section 115 of the Code of Civil Procedure, 1908, this Court cannot upset findings of facts, howsoever erroneous such

findings are, on reappraisal of evidence, and take a difference view of evidence, especially when there is no misreading and non-reading of evidence on record. Reliance is placed on Muhammad Feroze and others v. Muhammad Jamaat Ali (2006 SCMR 1304), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161) and Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679).

9. So far as, case law relied upon by the learned counsel for the petitioner are concerned, with utmost respect to the same, it is observed that the facts and circumstances of the case in hand are entirely different from that cases/ judgments, so the same are not helpful to the petitioner's cause. Even otherwise, each and every case has its own peculiar facts and circumstances and the Courts have to act like a sieve so as to reach to a just conclusion and administer safer justice to the parties.

10. For the foregoing reasons and while placing reliance on the judgments supra, the civil revision in hand comes to naught, hence, the same stands dismissed with no order as to the costs.

MQ/M-62/L **Revision dismissed.**

PLJ 2021 Lahore (Note) 35

Present: SHAHID BILAL HASSAN AND ABID AZIZ SHEIKH, JJ.

ABDUL SATTAR--Appellant

versus

M.C.B. BANK LIMITED--Respondent

E.F.A. No. 107804 of 2017, decided on 13.12.2017.

Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of 2001)--

----Ss. 22 & 23--Suit for recovery--Decreed was converted into execution--Approval of auction--Objection petition was dismissed--Evaluation report--Direction to--Non-considering of evaluation report--While passing impugned order has observed that evaluation submitted by petitioner (appellant) is submitted by evaluator who was not evaluator of the bank association and is not available on panel of bank, which observation was against factual position; thus, such observations were not, sustainable, rather lower Court ought to have considered evaluation report submitted by appellant instead of repelling the same--Appeal was allowed. [Para 2] A & B

Khawaja Mujahid Hussain, Advocate for Appellant.

Mr. Tariq Iqbal, Advocate for respondent-Bank.

Date of hearing: 13.12.2017.

ORDER

Tersely, facts for disposal of the instant appeal are as such that Suit No. 152 of 2015 for recovery was filed by the respondent Bank which *vide* order &. decree dated 13.2.2017, was decreed by the learned Banking Court, Sargodha; for recovery of a sum of Rs. 29,06,373/- and the decree was converted into execution *vide* order dated 18.10.2017 by the learned Banking Court as well as approved the auction schedule on a very low price, which is allegedly below than the prevailing market, rate. The reserve price of the property was approved at Rs. 74-lac, whereas at site this being a three storey commercial and residential building is with a value of more than Rs. 20-Million as is apparent from the valuation which was before the .learned Banking Court but has been totally ignored. Moreover, a caution letter dated 28.07.2017 addressed to the ADLR, Sargodha under the provision of Section 23 of the FIO, 2001 related to a property measuring 02 kanals 13 marlas even not mortgaged with the bank, the other mortgaged property measuring 04

marlas 207 sq.ft. situated at Block No. 24, Chak No. 44/NB, Tehsil & District Sargodha was issued by the Bank, due to which the Fard/Record of rights has been -stopped, but the application alongwith the objection petition has been dismissed through the impugned order, which otherwise needed acceptance as the learned lower Court was competent to grant permission for making agreement of the other property; hence, the instant appeal with prayer that the impugned order dated 15.11.2017 may be declared as illegal, without lawful authority, void *ab initio*, of no legal effect and the same may be set aside and permission in terms of Section 23 of the FIO, 2001 for entering into appropriate agreement for the non-mortgaged property be also given.

2. We have heard the learned counsel for the parties and have gone through the record as well as the impugned order; the learned counsel for the appellant has drawn our attention to page 77 of this appeal which on the face of it shows that Khan Engineers & Evaluators, Sargodha are approved Evaluators of Pakistan Banks' Association, but the, learned lower Court while passing the impugned order has observed that the evaluation submitted by the learned counsel for the petitioner (appellant) is submitted by the evaluator who is not ' the evaluator of the bank association and is not available on the panel of the bank, which observation is against factual position; thus, such observations are not, sustainable, rather the learned lower Court ought to have considered the evaluation report submitted by the learned counsel for the appellant instead of repelling the same.

So far as the observation with regard to the second application regarding permission for making agreement of the other property which is not subject matter of the dispute in hand and is not mortgaged with the bank, the observation recorded by the learned Court below are well within the four-corners of law and does not call for any interference.

3. For the foregoing reasons, the appeal in hand is allowed to the extent of not considering the evaluation report submitted by the learned counsel for the appellant and the impugned order is set aside to that extent with a direction to the learned- Banking Court to consider the evaluation report submitted by the appellant's side and fix the reserve price afresh and issue fresh auction schedule, in accordance with law.

(Y.A.) **Appeal allowed.**

PLJ 2021 Lahore (Note) 39

Present: SHAHID BILAL HASSAN AND ABID AZIZ SHEIKH, JJ.

IMRAN MURTAZA--Appellant

versus

ROYAL BANK OF SCOTLAND LTD. etc.--Respondents

R.F.A. No. 1000 of 2011, decided on 13.12.2017.

Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of 2001)--

----S. 22—Limitation Act, 1908, S. 12--Suit for recovery--Barred by time--Bailiff report--Non-adoptation of process of substituted service--Direction to--Bailiff report shows that bank refused to accept notices, however, process for substituted service was adopted by bailiff for affixation of notices at residence of defendants--There is also no report regarding service of defendants through registered A.D. or courier service--Only service which was validly effected on defendants including appellant was through proclamation in newspaper Banking Court erred in law while dismissing PLA on ground of limitation--In PLA appellant raised number of legal and factual objections--However, none of these grounds were discussed or adjudicated by Banking Court before decreeing suit filed by Bank--It is settled law that notwithstanding fact that PLA was time barred or was not even filed, Banking Court is required to consider all available documents and satisfy itself regarding claim of plaintiff before decreeing suit--Appeal was allowed. [Para] A, B & C

Mr. Muhammad Khalid Sajjad, Advocate for Appellant.

Mr. Tariq Iqbal, Advocate for Respondent.

Date of hearing: 13.12.2017.

ORDER

This appeal u/S. 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (Ordinance) has been filed against the judgment and decree dated 05.09.2011 (impugned judgment) passed by Banking Court No. 1, Faisalabad.

2. Brief facts are that respondent bank filed a suit for recovery on 10.06.2010 for an amount of Rs. 93,48,325.87/-. The appellant and Respondent No. 2 filed petition for leave to appear and defend the suit (PLA). The said PLA was dismissed being barred by limitation and the suit of the respondent bank was decreed for an amount of Rs. 91,15,612/-. The appellant being aggrieved has filed this appeal.

3. Learned counsel for the appellant submits that the PLA was within time, therefore, same could not be dismissed summarily on the ground of limitation. Further submits that notwithstanding the fact that PLA was dismissed, the learned Banking Court was required to decide the legal questions raised by the appellant in PLA and suit could only be decreed after consulting the relevant record and supportive documents filed by the respondent bank.

4. Learned counsel for the respondent bank on the other hand submits that the PLA being barred by time was rightly dismissed by the learned Banking Court. He further submits that entire record was perused before passing the impugned judgment and decree against the appellant which is well reasoned.

5. We have heard learned counsel for the parties and perused the record. The documents shows that the suit was filed on 10.06.2010 in which

notices were issued to the defendants on 10.11.2010 through Bailiff, registered post and through publication in newspaper. The Bailiff report shows that the defendants refused to accept notices, however, thereafter no process for substituted service was adopted by the Bailiff for affixation of notices at the residence of the defendants. There is also no report regarding service of the defendants through registered A.D. or courier service. The only service which was validly effected on the defendants including appellant was through proclamation in the newspaper on 09.12.2010. The appellant admittedly filed PLA on 08.01.2010. After excluding the date of publication for reckoning of the limitation period (as per provision of Section 12 of the Limitation Act, 1908), the PLA filed on 8.1.2011 from the date of knowledge through publication was within thirty days. Therefore, on face of it, the learned Banking Court erred in law while dismissing the PLA on the ground of limitation. In any case in impugned judgment and decree no discussion has been made by the learned Banking Court before concluding that PLA was barred by time. Hence, on this ground alone the impugned judgment and decree is not sustainable.

6. We have also noted that in PLA the appellant raised number of legal and factual objections. However, none of these grounds were discussed or adjudicated by the learned Banking Court before decreeing the suit filed by the respondent Bank. It is settled law that notwithstanding the fact that PLA was time barred or was not even filed, the learned Banking Court is required to consider all the available documents and satisfy itself regarding the claim of the plaintiff before decreeing the suit. This exercise was also not undertaken by the learned Banking Court, in the impugned judgment and decree.

7. In view of the above discussion, the. impugned judgment &decree dated 05.09.2011 is set aside and the matter is remitted back to the learned Banking Court with direction to decide the PLA afresh after considering the grounds raised therein through speaking and well-reasoned order. This appeal is **allowed** in the above terms.

(Y.A.) **Appeal allowed.**

PLJ 2021 Lahore (Note) 73

Present: **SHAHID BILAL HASSAN, J.**

MEHNGA--Appellant

versus

ILAM DIN (deceased) through L.Rs.--Respondents

C.R. No. 531 of 2008, decided on 22.11.2017.

Civil Procedure Code, 1908 (V of 1908)--

----S. 115--Specific Relief Act, (I of 1877), S. 9--Suit for possession--Decreed--Appeal--Dismissed--Illegal possession of petitioner--Report of local commission--Concurrent findings--Encroachment of land by petitioner--Challenge to--Case of respondents is based on report of local commission who appeared as P.W.1 in support of his report and proved contents of report; thus, Courts below have rightly evaluated evidence on record, especially when petitioner has neither relied upon orders of ADC (Consolidation), Narowal as required under Order XIII, Rules 1 & 2 of Code of Civil Procedure, 1908 nor annexed same with written statement for judicial notice of trial Court; thus, it is a settled principle of law that a party cannot go beyond its pleadings, so, any evidence led beyond proceedings cannot be read and considered--When respondents proved their contention, by producing trustworthy and unimpeachable evidence in support of their contention, they were entitled to decree for possession and Courts below have exercised vested jurisdiction in accordance with law--Concurrent findings recorded by Courts below on facts, howsoever erroneous, cannot be interfered with while exercising revisional jurisdiction--Revision petition dismissed.

[Para 5 & 6] A, B & C

2014 SCMR 1469 and 2014 SCMR 161 *ref.*

Mr. Aurangzeb Mirza, Advocate for Petitioner.

Mr. Shahnawaz Khan Niazi, Advocate for Respondents.

Date of hearing: 22.11.2017.

ORDER

Briefly, Ilam Din, the deceased respondent/ plaintiff instituted a suit for possession in respect of land measuring 4 marlas falling in Khasra No. 405, Khata/Khatuni No. 139/161, Village Kohlian Tehsil Shakargarh, District Narowal and for the demolition of the construction over the above said property allegedly illegally constructed by the petitioner; the said suit was contested by the present petitioner being defendant while submitting written statement. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded; whereafter *vide* impugned judgment and decree dated 27.02.2007, the learned trial Court decreed the suit and the petitioner was directed to vacate the encroached land and handover the same to the respondents/plaintiffs, which resulted in filing of the appeal but the same was dismissed *vide* impugned judgment and decree dated 10.01.2008 passed by the learned appellate Court; hence, the instant civil revision.

2. Learned counsel for the petitioner has argued that impugned judgments and decrees are based on misreading and non-reading of evidence; that the jurisdiction of the Civil Court is barred under Section 26 of the West Pakistan Consolidation of Holdings Ordinance, 1960 but even then the same has been exercised; that both the learned Courts below have-failed to exercise the jurisdiction vested in them in a proper way; that impugned judgments & decrees are based on surmises and conjectures; that without application of judicious mind, impugned judgments and decrees have been passed; that material illegalities and irregularities have been committed by learned Courts below. By allowing the civil revision in hand, the impugned judgments & decrees may be set aside, consequent whereof the suit of the

respondents/plaintiffs may be dismissed. Relies on *Mst. Farrukh Begum v. Shaukat Jeelani Khan etc.* (PLJ 1998 Lahore 344), *Sardara and 4'others v. Province of the Punjab through Collector, District Jhang and 17 others* (2000 CLC 1752-Lahore) and *Nawab v. Ghulab and 4 others* (2004 SCMR 1833).

3. Contrarily, learned counsel for the respondents/ defendants has supported the impugned judgments and decrees and has prayed for dismissal of the civil revision in hand.

4. Heard.

5. The objection and the argument that the Civil Court has no jurisdiction to adjudicate upon the matter in hand as per Section 26 of the West Pakistan Consolidation of Holdings Ordinance, 1960 ends in fiasco when it is admitted by the petitioner that during consolidation proceedings his land measuring 4 marlas was excluded coupled with report of Girdawr (P.W.1) finding the petitioner in illegal possession of the disputed; thus, to determine the lis, the Civil Court got jurisdiction. The case law relied upon by the petitioner's counsel on this point has no relevance to the facts and circumstances of the case in hand; thus, it is not helpful to the cause of the petitioner being distinguished one.

Adverting to the fact that the case of the respondents is based on report of the local commission who appeared as P.W.1 in support of his report and proved the contents of the report; thus, the learned Courts below have rightly evaluated the evidence on record, especially when the petitioner has neither relied upon orders of the ADC (Consolidation), Narowal as required under Order XIII, Rules 1 & 2 of the Code of Civil Procedure, 1908 nor annexed the same with the written statement for judicial notice of the learned trial Court; thus, it is a settled principle of law that a party cannot go beyond its pleadings, so, any evidence led beyond proceedings cannot be read and considered. When the respondents proved their contention, by

producing trustworthy and unimpeachable evidence in support of their contention, they were entitled to the decree for possession and the learned Courts below have exercised vested jurisdiction in accordance with law.

6. Pursuant to the above, the concurrent findings recorded by the learned Courts below on facts, howsoever erroneous, cannot be interfered with while exercising revisional jurisdiction. Thus, in view of the above discussion and while placing reliance on *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469) and *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), the civil revision in hand stands dismissed being devoid of any force and substance. No order as to the costs.

(Y.A.) **Petition dismissed.**

PLJ 2021 Lahore (Note) 126

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD ASGHAR, and 4 others--Petitioners

versus

SARDAR and 6 others--Respondents

C.R. No. 2245 of 2006, heard on 14.5.2015.

Specific Relief Act, 1877 (I of 1877)--

----Ss. 42 & 54--Civil Procedure Code, (V of 1908), S. 115--Suit for declaration, permanent injunction--Decreed--Appeal--Accepted--Civil revision--Allowed--Case was remanded--Suit was decreed after pot remand proceedings--Concurrent findings--Alienation of land-- Excess of share by Respondent No. 1--Manipulations and cutting in special power of attorney--Mutations were wrongly entered and attested--Challenge to--Question of special power of attorney in favour of Muhammad Saleem, allegedly executed by Muhammad; Hussain, on basis of which mutations in dispute *i.e*. mutations No. 212 and 213 both dated 18.09.1994 were entered and sanctioned, has rightly been addressed by appellate Court because in same there are many manipulation and cutting, especially date 12.06.1996 to 14.11.1994 and names of Muhammad Hussain and Muhammad Islam, which make same doubtful--It is a settled proposition of law that one cannot transfer a title beyond his entitlement and ownership, but in present case it proved on record and evaluated, concurrently by Courts below, that Muhammad Hussain alienated land in excess of his share--No evidence has been brought on record showing actual ownership of Siraj Din, original propositus of parties--Courts below have rightly reached to conclusion after appraising and evaluating evidence, oral as well as documentary, in a proper way, concurrently, which cannot be interfered with--When impugned judgments and decrees are result of appreciation of evidence and law on subject in a true

perspective and no misreading and non-reading of evidence has been committed by Courts below and not perverse or arbitrary in nature, same cannot be interfered with in revisional jurisdiction--Revision petition disposed. [Para 5, 6 & 7] A, B, C & D

2014 SCMR 161 & 2010 SCMR 5 *ref.*

Hafiz Rizwan Aziz, Advocate for Petitioners.

Mr. Shahnawaz Khan Niazi and *Mr. Aqeel Afzal Awan*, Advocates for Respondents.

Date of hearing: 14.5.2015.

JUDGMENT

Sardar, Respondent No. 1/plaintiff instituted a suit for declaration with permanent injunction as a consequential relief in respect of suit land, fully described in Paragraph No. 1 of the plaint, against the Respondents No. 2 to 7 as well as present petitioners, wherein he challenged the Mutations No. 212 and 213, allegedly sanctioned on 18.09.1994, being null and void, against law and facts of the case and inoperative qua the rights of Respondent No. 1/plaintiff and claimed permanent injunction with prayer that Defendants No. 1 to 7 (in suit) be restrained from further alienation of suit land. Detailed facts can be recapitulated from the impugned judgment delivered by learned first Appellate Court.

The suit was contested by the present petitioners as well as Muhammad Hussain (deceased Respondent No. 2).

The learned trial Court framed issues; both the parties adduced their evidence, oral as well as documentary, in pro and contra.

The learned trial Court after hearing the arguments *vide* judgment and decree dated 29.05.1996 decreed the suit of Respondent No. 1/plaintiff; against which an appeal was preferred and the learned Appellate Court *vide* judgment and decree dated 10.04.1997 accepted the appeal and dismissed the

suit, which decision was challenged through C.R. No. 693 of 1997 before this Court, same was subsequently allowed *vide* judgment dated 04.02.2003 and matter was remanded to the learned trial Court for fresh disposal with the following observations:

> *"The learned counsel for the parties have been heard. During the course of hearing there is consensus in view of the variant approach of the two Courts below as to the entitlement of Muhammad Hussain Respondent No. 1 and the land actually disposed of by him, that the matter need to be re-determined by the trial Court as both the Courts below had failed to advert to the evidence on the record and to consider the same in its true perspective. In this view of the matter, the judgment of the trial Court dated 29.05.96 and that of the Appellate Court is set aside. As a consequence whereof, suit filed by Sardar petitioner will be deemed pending before the trial Court which shall be tried and decided afresh in accordance with law. If any of the parties may like to produce documentary evidence such an opportunity will be afforded by the trial Court and opportunity for rebuttal evidence will equally be given to the other side. There is also a consensus that the trial Court be directed to dispose of the matter finally before the commencement of summer vacations of 2003. The learned counsel for the respondents, however, has submitted that some of the vendees/respondents intended to dispose of the suit property purchased by them.*
>
> *Since the matter has been remanded to the trial Court, such a request can be made before the Court concerned which undoubtedly will be considered in accordance with law. Let the parties enter appearance before the learned District Judge, Sialkot on 20.02.2003, who will entrust this case to the trial Court for further proceedings. No order as to costs."*

On post remand, the Respondent No. 1 /plaintiff produced documents Ex.P16 to Ex.P19, while defendants relied on earlier evidence.

The learned trial Court after hearing arguments *vide* impugned judgment and decree dated 06.10.2003 decreed the suit in favour of Respondent No. 1/plaintiff and declared the Mutations No. 212 and 213, both dated 18.09.1994 as null and void as well as inoperative qua the rights of plaintiff. Being aggrieved, the rival party preferred an appeal, which was subsequently dismissed *vide* impugned judgment and decree dated 24.07.2006 passed by learned Addl. District Judge, Sialkot; hence, this civil revision.

2. Contends that the impugned judgments and decrees are against law and facts of the case. Learned Courts below have misread and non-read the evidence, oral as well as documentary, on record. Alleges that petitioners are lawful purchases from Respondent No. 2 through registered sale deed and mutation has also been sanctioned in their names and from the date of purchase they (petitioners) are in possession of the said property. Maintains that decision of Arbitrator Ex.D4 has not been given due weight and Respondent No. 2 Muhammad Hussain was valid owner of about 80 kanals of land; after transferring the land in favour of petitioners more land was available in the share of Respondent No. 2, therefore, mutations No. 212 and 213 could not be cancelled. Both the learned Courts have failed to consider law on the subject, rather misconstrued the same; therefore, the impugned judgments and decrees are not sustainable in the eye of law. By allowing civil revision in hand, the impugned judgments and decrees may be set aside and suit of the Respondent No. 1 may be dismissed.

3. On the contrary, learned counsel representing the respondents while favouring the impugned judgments and decrees has prayed for dismissal of the civil revision in hand.

4. Heard.

5. The question of special power of attorney in favour of Muhammad Saleem, allegedly executed by Muhammad; Hussain, on the basis of which mutations in dispute *i.e.* Mutations No. 212 and 213 both dated 18.09.1994 were entered and sanctioned, has rightly been addressed by learned appellate Court because in the same there are many manipuatims and cutting, especially the date 12.06.1996 to 14.11.1994 and names of Muhammad Hussain and Muhammad Islam, which make the same doubtful.

6. It came on record during evidence that Muhammad Hussain was owner of 01 kanal 02 marlas land, but he transferred the disputed land measuring 15 kanals 13 marlas in excess, which fact was proved on record through deposition of D.W.1-Muhamamd Hussain; meaning thereby Mutations No. 212 and 213 both dated 18.09.1994, placed on record as Ex.P8 and Ex.P9, were wrongly entered and attested.

D.W.1 further admitted that after death of his father Siraj Din, he alongwith his brother Muhammad Ali, Sardar and sisters Naseem Bibi and Khursheed Bibi as well as Umran Bibi (widow) were alive. Siraj Dini sold out about 59 kanals 18 marlas during his life time from his joint Khata measuring 198 kanals 08 marlas. Muhammad Ali, brother of Sardar and Muhammad Hussain died and his share of property devolved through inheritance Mutation No. 450 dated 4.4.1952 (Ex.P17), which culminated into civil litigation and was finally settled by the learned trial Court *vide* Ex.DA, Ex.D3 and Ex.D4 and Muhammad Hussain was given landed property measuring 20 kanals 02 marlas and he became owner of land measuring 51 kanals 07 marlas; meaing thereby at the relevant time of attestation of Mutations No. 212 and 213, Muhammad Hussain was not owner of land more than 01 kanal 02 marlas.

It is a settled proposition of law that one cannot transfer a title beyond his entitlement and ownership, but in the present case it proved on record and evaluated, concurrently by learned Courts below, that Muhammad Hussain alienated the land in excess of his share. No evidence has been brought on

record showing the actual ownership of Siraj Din, original propositus of the parties.

7. Pursuant to the above discussion, it divulges that the learned Courts below have rightly reached to the conclusion after appraising and evaluating the evidence, oral as well as documentary, in a proper way, concurrently, which cannot be interfered with. In this regard guideline can be sought from *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), wherein it has invariably been held that:-

> *'Revisional jurisdiction of High Court could not be invoked against conclusions of law or fact, which did not, in any way, affect jurisdiction of the Court--High Court could not have investigated into facts or exercised its jurisdiction on the basis of facts or grounds, which were already proved by parties by leading evidence--High Court was justified in not interfering in concurrent findings of facts which were based on material brought on record and proper appreciation of evidence.'*

When the impugned judgments and decrees are result of appreciation of evidence and law on the subject in a true perspective and no misreading and non-reading of evidence has been committed by learned Courts below and not perverse or arbitrary in nature, same cannot be interfered with in revisional jurisdiction. Reliance is placed on *Muhammad Idrees and others v. Muhammad Pervaiz and others* (2010 SCMR 5).

8. As a sequel of above, the instant civil revision being devoid of any force and substance stands dismissed.

9. No order as to costs.

(Y.A.) **Petition dismissed.**

2022 C L C 547

[Lahore]

Before Shahid Bilal Hassan, J

ARSHAD ALTAF TAHIR and others----Petitioners

Versus

TARIQ MAHMOOD HASHMI (DECEASED) through L.Rs. and others----Respondents

Civil Revision No.155 of 2009, decided on 8th November, 2021.

Civil Procedure Code (V of 1908)---

----S.115 & O.XLI, R.23---Revision---Remand of case by Appellate Court---Scope---Petitioners assailed order passed by Appellate Court whereby case was remanded to the Trial Court---Validity---Appellate Court had rightly pointed out the questions with regards to non-discussion of evidence produced by a respondent with regard to his agreement to sell---Trial Court had partially decreed the suit but had not considered and addressed the question of prior agreement to sell---No illegality or irregularity was apparent in the impugned judgment warranting interference by the High Court in exercise of its revisional jurisdiction---Revision petition was dismissed.

Doctor Imran Manzoor and another v. Mst. Nighat Bahar Khanum and 10 others 2015 CLC 1428 rel.

Abdul Hameed Chaudhry for Petitioners.

Malik Rab Nawaz for Respondents.

ORDER

SHAHID BILAL HASSAN, J.----Precisely, the petitioners instituted a suit for specific performance of agreement to sell dated 04.03.1990

against the respondents, which was duly contested by them. The respondent No.12 also instituted a suit for specific performance of agreement to sell dated 07.02.1990 (Ex.D1), wherein written statements were duly submitted by the defendants in that suit. Both the suits were consolidated and out of divergent pleadings of the parties, the learned trial Court framed consolidated issues on 20.11.1993 and later on additional issues were framed on 05.09.1998 and evidence of the parties, oral as well as documentary, was recorded. The learned trial Court vide consolidated judgment and decree dated 26.02.2000 decreed the suit of the petitioners, whereas the suit of the respondent No.12 was decreed only to the extent of 02-Kanals 13-Marlas. The respondent No.12 being aggrieved preferred two separate appeals: one with regards to his suit and other in respect of suit of the petitioners. The learned appellate Court vide impugned consolidated judgment dated 02.09.2008 accepted the appeals and by setting aside the judgment and decree dated 26.02.2000, remanded the case to the learned trial Court for decision afresh after considering all evidence and was also directed to discuss all issues independently; hence, the instant revision petition.

2. Heard.

3. Before this Court, the order of remand is in question and main suit is not before this Court; therefore, the question whether this Court is competent to uphold the decree passed by the learned trial Court while setting aside the remand order; the answer is in negative. In this regard reliance is placed on Doctor Imran Manzoor and another v. Mst. Nighat Bahar Khanum and 10 others (2015 CLC 1428-Lahore), wherein it has been observed:

> '------ Even through filing of an appeal against the order which was subsequently converted into civil revision, the main suit was not before the Court, rather the remand order was before this Court.

The question is that whether this Court was competent to uphold the decree passed by learned trial Court while setting aside the remand order. The answer is certainly in negative. When a lis i.e. the proceedings of original suit were not before the revisional Court and only a remand order passed by the learned first appellate Court was before this court, this Court was having no jurisdiction to restore the decree passed by the learned trial Court and to affirm the same by its own judgment."

4. Rule 23 of Order XLI, Code of Civil Procedure, 1908 provides that:-

"Remand of case by Appellate Court - Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, an shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

In the instant case, when the impugned judgment is considered and is put in juxtaposition with the judgment and decree passed by the learned trial Court, it appears that the learned appellate Court has rightly pointed out the questions with regards to non-discussion of evidence produced the respondent No.12 with regards to his agreement to sell (Ex.D1.), because the learned trial Court, without discussing the evidence produced in the shape of Ex.P1, Ex.P2, D.W.3, D.W.4 and D.W.5 proceeds to pass the said consolidated judgment and decree and that to believing the said evidence partially as the learned trial Court decreed the suit of the

respondent No.12 to the extent of 02, kanals and 13 marlas but could not consider and address the question of prior agreement to sell (Ex.D1). In this scenario, it is observed that the learned appellate Court has rightly appreciated the facts of the case and has reached to a just conclusion by exercising powers provided under Rule 23 of Order XLI, Code of Civil Procedure, 1908. There appears no illegality and irregularity in the impugned judgment warranting interference by this Court in exercise of revisional jurisdiction.

5. For the foregoing reasons, the impugned judgment passed by the learned appellate Court, being well-reasoned, does not call for any interference by this Court in exercise of revisional jurisdiction. Resultantly, the instant civil revision being devoid of any force and substance stands dismissed. No order as to the costs.

SA/A-128/L **Revision dismissed.**

2022 C L C 1871

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD AKHTAR----Petitioner

Versus

ABDUL REHMAN and another----Respondents

Civil Revision No.13326 of 2019, decided on 24th December, 2021.

Civil Procedure Code (V of 1908)---

----S.115, O.XXXVII, Rr.1, 2 & 4---Limitation Act (IX of 1908), Ss. 3 & 5---Recovery of money---Ex-parte judgment, setting aside of---Limitation---Proceedings beyond limitation---Effect---Petitioner / defendant sought setting aside of ex-parte judgment and decree passed against him---Trial Court declined to set aside judgment and decree in question as the same was filed beyond limitation---Validity---Limitation Act, 1908, is a substantive law and after lapse of prescribed period provided under law valuable right accrues in favour of opposite party in whose favour an order or judgment is passed---Party aggrieved has to explain delay of each and every day showing sufficient cause---Petitioner/defendant gained knowledge on 09-09-2015 but filed application for obtaining certified copies on 10-10-2015 i.e. after lapse of prescribed period for filing application for leave to appear and contest the suit after service or gaining knowledge---Lethargic attitude adopted by petitioner/defendant could not be ignored because ignorance of law was not ground for condoning delay---High Court maintained order passed by Trial Court, as there was no illegality and irregularity committed rather vested jurisdiction was aptly and judiciously exercised while passing order in question---Revision was dismissed, in circumstances.

Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212; United Bank Limited and others v. Noor-Un-Nisa and others 2015 SCMR 380; Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705; Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others 1992 SCMR 2435 and Mian Muhammad Sabir v. Malik Muhammad Sadiq through Legal Heirs and others PLD 2008 SC 577 rel.

Mohsin Shahzad Cheema for Petitioner.

Malik Sahib Khan Awan for Respondents.

Date of hearing: 16th November, 2021.

JUDGMENT

SHAHID BILAL HASSAN, J.----Facts, in precision, are as such that the respondent instituted a suit for recovery under Order XXXVII, Rules 1 and 2 of the Code of Civil Procedure, 1908 (the Code, 1908) against the present petitioner, wherein the petitioner was proceeded against ex parte and suit was decreed ex parte vide judgment and decree dated 09.01.2013. Allegedly, on 09.09.2015, the petitioner came to know about passing of the said ex parte decree, so after obtaining certified copies he filed an application under Order XXXVII, Rule 4, of the Code, 1908 along with an application for leave to contest as well as application for suspension of operation of the decree, on 12.11.2015. The said application was dismissed by the learned trial Court vide impugned order dated 28.11.2018; hence, the instant revision petition.

2. Heard.

3. In order to decide the instant petition, wherein the question of limitation is involved, the judgment reported as Dr. Muhammad Javaid

Shafi v. Syed Rashid Arshad and others (PLD 2015 Supreme Court 212) delivered by the apex Court of the country, has much relevance, wherein it has invariably and unequivocally been held:-

> " .. From the various dicta/ pronouncements of the superior court, it can be deduced without any fear of contradiction that such law is founded upon public policy and State interest. This law is vital for an orderly and organized society and the people at large, who believe in being governed by systemized law. The obvious object of the law is that if no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating to such cause of action, and a person is allowed to sue for the redressal of his grievance within an infinite and unlimited time period, it shall adversely affect the disciplined and structured judicial process and mechanism of the State, which is sine qua non for any State to perform its functions within the parameters of the Constitution and the rule of law. The object of the law of limitation and the law itself, prescribing time constraints for each cause or case or for seeking any relief or remedy has been examined by the courts in many a cases, and it has been held to be a valid piece of legislation, and law of the land. It is "THE LAW" which should be strictly construed and applied in its letter and spirit; and by no stretch of legal interpretation it can be held that such law (i.e. limitation law) is merely a technicality and that too of procedural in nature. Rather from the mandate of section 3 of the Limitation Act, it is obligatory upon the court to dismiss the cause/lis which is barred by time even though limitation has not been set out as a defence. And this shows the imperative adherence to and the mandatory application of such law by nature and is held to mean and serve as a major deterrent against the factors and the

elements which would affect peace, tranquility and due order of the State and society. The law of limitation requires that a person must approach the Court and take recourse to legal remedies with due diligence, without dilatoriness and negligence and within the time provided by the law; as against choosing his own time for the purpose of bringing forth a legal action at his own whim and desire. Because if that is permitted to happen, it shall not only result in the misuse of the judicial process of the State, but shall also cause exploitation of the legal system and the society as a whole. This is not permissible in a State which is governed by law and Constitution. And it may be relevant to mention here that the law providing for limitation for various causes/reliefs is not a matter of mere technicality but foundationally of the "LAW" itself. '

Moreover, in United Bank Limited and others v. Noor-Un-Nisa and others (2015 SCMR 380), wherein it was held:-

'Under section 3 of the Limitation Act, 1908, it is the bounden duty of every Court of law to take notice of the question of limitation even if not raised in defence by the other contesting party(s).'

Earlier to the above said celebrated judgments, the Hon'ble Supreme Court of Pakistan dealt with the same proposition in Lahore Development Authority v. Mst. Sharifan Bibi and another (PLD 2010 Supreme Court 705) and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others (1992 SCMR 2435).

In this backdrop it is observed that the Limitation Act is a substantive law and after lapse of prescribed period provided under law

valuable right accrues in favour of the opposite party in whose favour an order or judgment is passed and the party aggrieved has to explain delay of each and every day showing sufficient cause.

4. Apart from the above, when an identical matter came up before the Apex Court of country, it was observed in a judgment reported as Mian Muhammad Sabir v. Malik Muhammad Sadiq through Legal Heirs and others (PLD 2008 Supreme Court 577):-

> '5. ----------. Interestingly, the appellant in his application for condonation of delay even did not mention the date given by the copying agency to the appellant for obtaining the certified copy of the judgment. This Court in a case reported as Fateh Muhammad and others v. Malik Qadir Bakhsh (1975 SCMR 157) has held that the time "requisite" for obtaining copy of order within the meaning of section 12 of the Limitation Act, 1908, means only the interval between the date of application for supply of copy and the date when it is ready for delivery and that the time between the date on which the copy was ready for delivery, and the date on which the applicant choose to take delivery thereof is not a portion of time "requisite" for obtaining a copy. Even section 12(5) of the Limitation Act is of no help to the appellant as he failed to produce the chit/receipt issued by the copying agency showing the date for preparation of certified copy, inasmuch as, no such date has been indicated in the application for condonation of delay. Had the appellant produced a chit issued by the copying agency and the copy was not ready on the date indicated in the chit, then the appellant could have taken shelter under section

12(5) of the Limitation Act. This Court under the similar facts and circumstances of the case reported as Zulfiqar Ali v. Superintendent of police and others (2003 SCMR 1562) refused to condone the delay of nearly 50 days while in the present case the delay is of 249 days. The case of Zulfiqar Ali (ibid) applied to the facts and circumstances of the case in hand on all fours.

6. There is another aspect of the case. The appellant applied for certified copy on 12-2-1998 and he waited for a period of nearly eight months to inquire about the copy, as he obtained the copy on 1-10-1998. The appellant after applying for the certified copy of the judgment went into a deep slumber and did not enquire from the copying agency about the fate of his application for the grant of certified copy for approximately eight months. Even if it be presumed that no chit/receipt was issued by the copying agency, the appellant was a prudent person should have acted with reasonable promptitude and diligent and should have approached the copying agency inquiring about certified copy within a reasonable time. The appellant was extremely negligent in securing the certified copy of the judgment and did not bother to inquire from the copying agency about the preparation of certified copy for nearly 8 months, which was ready for delivery on 21-2-1998. Learned counsel for the respondents has rightly referred para-3 of the application for condonation of delay, in which he appellant stated that he visited the copying branch several times for collecting the certified copy but was told that the same has not yet been prepared. Suffice it to say that the said assertion, on the face of it seems to be erroneous. Had the appellant visited the copying agency after 21-2-1998 he would have definitely got the certified copy as according to him it was prepared on the said date.

It leads to the irresistible conclusion that the appellant never visited copying agency during the period from 21-2-1998 to 1.10.1998.' (Underline for emphasis)

5. Thus, from whichever angle this Court perceives, the petitioner has not been able to sufficiently explain the delay in filing his application under Order XXXVII, Rule 4, C.P.C. along with an application for leave to appear and contest the suit as well as application for suspension of operation of the ex parte decree dated 09.01.2013, because admittedly he gained knowledge about passing of the decree on 09.09.2015 but he filed the applications on 12.11.2015, which otherwise ought to have been filed soon after he purportedly gained knowledge as Article 159 of Limitation Act, 1908 provides period of 10 days for filing application for leave to appear and defend when the summons is served or defendant comes to know about the pendency of proceedings or passing of the decree as per precedents of the higher Courts. Indifferent and adamant demeanor of the petitioner is evident from the fact that he gained knowledge on 09.09.2015 but filed application for obtaining certified copies on 10.10.2015 i.e. after lapse of prescribed period for filing application for leave to appear and contest the suit after service or gaining knowledge, as stated above. In this view of the matter, the lethargic attitude adopted by the petitioner cannot be ignored because ignorance of law is no ground for condoning delay.

In addition to the above, it has emerged on record that application under section 12(2) of the Code of Civil Procedure, 1908 was also filed on behalf of the petitioner, though he has negated the alleged filing of application by him but the said stance was not substantiated by him showing initiation of any proceedings allegedly taken by him against the counsel who filed the said application, before the proper forum; therefore,

the plea taken up by the petitioner has rightly been disbelieved and discarded by the learned Court below.

6. The compendium of the discussion above is that there appears no illegality and irregularity alleged to have been committed by the learned Court below rather vested jurisdiction has aptly and judiciously been exercised while passing the impugned order. Resultantly, the revision petition in hand comes to naught and hence the same is hereby dismissed. No order as to the costs.

MH/M-19/L **Revision dismissed.**

2022 M L D 137

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD SHAHBAZ---Petitioner

Versus

PROVINCE OF PUNJAB through Chief Secretary,Punjab and 7 others---Respondents

Writ Petition No.21192 of 2020, decided on 10th August, 2020.

Auction---

----First right of refusal---Matching of bid---Parties participated in auction of lease hold rights of an amusement park which was already in possession of respondent---Petitioner was the highest bidder but contract was awarded to respondent in exercise of condition of First right of refusal---Validity---Petitioner did not have experience in respect of running amusement park as required by authorities---Such experience was essential and necessary so as to protect lives of people especially the children coming to such recreational places for amusement purposes---Petitioner did not agitate the matter at relevant time before competent authority and kept mum, rather participated in bidding process---Respondent was in legal possession of subject matter and had right of first refusal of the highest bid and that was for him to decide whether such rate was acceptable or not---When respondent opted to retain lease on the highest bid, the authorities were under obligation to execute fresh lease in his favour and the same was done as per terms and condition of tender notice/advertisement---Such clause of advertisement was not against rights of petitioner and other participants---High Court in exercise of Constitutional jurisdiction under Art.199 of the Constitution, declined to interfere in the decision made by the authorities as there was no arbitrariness, illegality, irrationality and procedural impropriety or mala fide on their part--- Constitutional petition was dismissed, in circumstances.

Ishaq Khan Khakwani and another v. Railway Board through Chairman and others PLD 2019 SC 602; Suo Motu Case No.13 of 2009 PLD 2011 SC 619; Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others 1998 SCMR 2268; Ahmad Mehmood v. Government of Punjab through Chief Secretary and others PLD 2019 Lah. 206; Hakim Ali v. Province of Sindh through Secretary, Coal Mines Development Depart and 6 others 2017 CLC 979; Tarique Hussain v. Government of Sindh through Secretary Auqaf and 3 others 2017 CLC Note 185; Haji Amin v. Pakistan Trading Corporation (Pvt.) Ltd. and another PLD 2009 Kar. 112; Mrs. Irene Wahab v. Lahore Dolsesan Trust Association 2002 SCMR 300; Muhammad Akram v. Additional District Judge and others PLD 2008 Lah. 560; Ghulam Muhammad and others v. Muhammad Hussain and others PLD 2006 Lah. 223; Sapphire Textile Mills Ltd. and others v. A.P.L. Pakistan (Pvt.) Ltd. and others 2002 CLD 1767; Mst. Gul Shahnaz v. Abdul Qayyum Soomro and another PLD 2002 Kar. 333 and Gul Sher and others v. Additional District Judge, Mirpur Mathelo and others 2000 YLR 1147 distinguished.

Siraj Ahmed through L.Rs. v. Faysal Bank Limited and others PLD 2018 SC 91 rel.

Arshad Nazir Mirza for Petitioner.

Muhammad Azhar Siddique and Mian Ali Asghar for Respondent No.6.

Zafar Rahim Sukhaira, A.A.G.

ORDER

SHAHID BILAL HASSAN, J.----Tersely, the facts as have been gathered from the memorandum of the instant petition, are as such that the respondent No.6 was granted leasehold rights of establishing and running an amusement park at Iqbal Stadium, Faisalabad for a period of

15 years which was further extendable for another term of five years with mutual consent of the parties in December, 1998 by the respondents Nos.2 to 5. The said contract expired on 14.11.2014, which was extended for another term of five years but a term for further extension for another five years was incorporated in the same allegedly in violation of original terms and conditions as incorporated in the agreement of the year 1998. The extendable period came to an end on 14.11.2019, whereafter the lease hold rights of the subject site were put to an open auction vide advertisement dated 29.01.2020. The petitioner along with others as well as respondent No.6 participated in the bidding process. The petitioner was highest bidder with the maximum bid of Rs.12.1 Million. Purportedly, after the successful completion of bidding process and declaration of the petitioner as highest bidder, the respondents Nos.2 to 5, since in league with respondent No.6, managed to get instituted Writ Petition No.9588 of 2020 but during pendency of the said writ petition, the respondents Nos. 2 to 5 on the basis of first right of refusal clause as put in the advertisement dated 29.01.2020 awarded the contract to the respondent No.6 vide the impugned agreement dated 21.02.2020; hence, the instant constitutional petition.

2. Learned counsel for the petitioner has argued that the whole exercise is tainted with malice and mala fide in order to benefit the respondent No.6 at the cost of State exchequer and rights of the petitioner; that the respondents Nos.2 to 5 maliciously designed the terms of advertisement for participation in the bidding process only to accommodate the respondent No.6. Adds that the maximum length of contract of leasehold rights which could have been granted to the respondent No.6 was upto 20 years which have already been enjoyed by the respondent No.6, as such introduction of the term of further extension for five years in the subsequent contract dated 14.11.2014 as well as conferring the right of first refusal to the respondent No.6 is beyond the domain of the respondents; that even otherwise once the respondent No.6 has participated in the bidding process and abstained from further

competing with the rest of participants, how can the benefit of first right of refusal be granted to the respondent No.6; that even if the right of first refusal was available to the respondent No.6, the same stood waived once the respondent No.6 actively participated in the bidding process; that the respondents Nos.2 to 5 being public functionaries are required to act fairly, justly and impartially but in the instant case they have acted in utter disregard to the above considerations; hence, by allowing the constitutional petition in hand, the act of awarding the contract regarding the leasehold rights of the playland/amusement park at Iqbal Stadium, Faisalabad to the respondent No.6 by the respondents Nos.2 to 5 in the garb of first right of refusal may kindly be declared to be result of malice, collusion, without jurisdiction, result of colourable exercise of authority, against the principle of open bidding, against the fundamental rights of the petitioner and the agreement dated 21.02.2020 may be declared to be of no legal effect and the respondents Nos.2 to 5 may be directed to award the subject contract to the petitioner being the highest bidder. Reliance has been placed on Ishaq Khan Khakwani and another v. Railway Board through Chairman and others (PLD 2019 Supreme Court 602), Suo Motu Case No.13 of 2009 (PLD 2011 Supreme Court 619), Messrs Airport Support Services v. The Airport Manager, Qauid-e-Azam International Airport, Karachi and others (1998 SCMR 2268), Ahmad Mehmood v. Government of Punjab through Chief Secretary and others (PLD 2019 Lahore 206), Hakim Ali v. Province of Sindh through Secretary, Coal Mines Development Depart and 6 others (2017 CLC 979 Sindh), Tarique Hussain v. Government of Sindh through Secretary Auqaf and 3 others (2017 CLC Note 185), Haji Amin v. Pakistan Trading Corporation (Pvt.) Ltd. and another (PLD 2009 Karachi 112), Mrs. Irene Wahab v. Lahore Dolsesan Trust Association (2002 SCMR 300), Muhammad Akram v. Additional District Judge and others (PLD 2008 Lahore 560), Ghulam Muhammad and others v. Muhammad Hussain and others (PLD 2006 Lahore 223), Sapphire Textile Mills Ltd. and others v. A.P.L. Pakistan (Pvt.) Ltd. and others (2002 CLD 1767 Karachi), Mst. Gul Shahnaz v.

Abdul Qayyum Soomro and another (PLD 2002 Karachi 333) and Gul Sher and others v. Additional District Judge, Mirpur Mathelo and others (2000 YLR 1147-Karachi).

3. On the contrary, learned counsel for the respondent No.6 and learned Law Officer have submitted that all the legal and codal formalities as required by law have been followed and as per mandate of law on the subject the leasehold rights of the playland/amusement park at Iqbal Stadium, Faisalabad have been granted to the respondent No.6 on the basis of right of first refusal; thus, the instant writ petition may be dismissed with costs.

4. Heard.

5. The relevant terms and conditions, as per advertisement dated 29.01.2020 in "Daily Dunya", to the present case are necessary to be reproduced here, which are:-

'5. The intending firms/parties shall have 20 years experience in running the sizeable Amusement Park spreading over 15-20 Kanals along with authenticated documentary proof.

6. The offers tendered by parties who have been in litigation with any Government department/agency shall not be entertained. The firm should also submit affidavit on judicial paper that it has not been blacklisted by any government department/agency.

7. The first right of refusal shall be given to the previous lessee in respect of highest offer received.'

In respect of clause-5 ibid a Writ Petition bearing No.7316 of 2020 titled "Javed Iqbal Shah and others v. Management Iqbal Stadium Faisalabad and others was filed, certified copy of which has been submitted by the learned counsel for the respondent No.6 and this Court while deciding the same on 10.02.2020 observed:-

'3. At the very outset, it is noted that the Petitioners have

challenged the requirements of the tender which essentially calls for experience in awarding the tender for lease of amusement park. There seems no vested right or interest of the Petitioners on the basis of which the instant petition has been filed. The Respondents are well within their authority to prescribe for qualifications for issuance of tender and such requirements do not operate as a clog on the right of the Petitioners or any other person to participate in the tender process, if the Petitioners are duly qualified. Merely having a desire to participate in the tender for a specific purpose does not entitle the Petitioners to any vested right on the basis of which this petition has been filed.

4. Under the circumstances, no case for interference is made out. Petition stands dismissed in limine.'

After such order, there appears no reason to deliberate further on the issue because the said order has attained finality because nothing on record has been brought to show that the same was further agitated by filing Intra Court Appeal or before the apex Court of the country. Thus, the objection of the petitioner with regards to the clause-5 has no worth, rather the respondents were well within their authority to prescribe for qualifications germane to submission of bids in respect of tender.

The petitioner did not have experience in respect of running an amusement park as required by the respondents Nos.2 to 5, as he did not submit any proof or evidence before the Administrator, Iqbal Stadium, Faisalabad, because such an experience is essential and necessary so as to protect the lives of the people especially the children coming to such recreational places for amusement purposes.

6. In addition to the above, the petitioner did not agitate the matter at the relevant time before the competent authority and kept mum, rather participated in the bidding process. The respondent No.6 being in legal possession of the subject matter had the right of first refusal of the highest bid and that was for him to decide whether present rate was acceptable or

not and if he opted to retain the lease on highest bid, the authorities were under obligation to execute the fresh lease in his favour and the same was done as per terms and condition, especially by following clause-7 of the tender notice/ advertisement dated 29.01.2020, which clauses have already been declared not to be against rights of the petitioner and other participants vide order dated 10.02.2020 passed by this Court in W.P.No.7316 of 2020, which has attained finality.

7. Apart from the above, clause-4 of the lease deed dated 14.11.2014 reads 'That the duration of tenancy shall be for a period of (5) years and extendable for further five years terms on rent mutually agreed between the parties, with 25% increase in rent after every three years' but despite such a vivid clause, the respondent No.6 raised no objection on open bidding, however, when the respondent No.6/previous lessee was in possession of the amusement park, the subject matter, he had right of first refusal to the highest bid, which was rightly offered to the respondent No.6 by the respondents Nos.2 to 5 as per clause 7 of the Advertisement dated 29.01.2020. In Siraj Ahmed through L.Rs. v. Faysal Bank Limited and others (PLD 2018 Supreme Court 91), it has been invariably held:-

> The matter is remanded to the executing Court i.e. Judge, Banking Court, Bahawalpur with the direction to conduct a fresh auction in accordance with law. The auction purchaser/Respondent No.2 shall have the right to participate in the fresh auction (if he so desires). He shall also be given the right of first refusal if he matches the highest bid. In the even he does not wish to participate in the fresh auction or exercise his right of first refusal, the respondent-Bank shall refund to him the entire amount paid by him together with make up at the rate fixed by the State Bank of Pakistan from the date of the auction till the amount is refunded to him.' (underline mine for emphasis)

8. It has surfaced that the auction proceedings were held under the supervision of Supervisory Committee comprising of the following on the

scheduled date and time i.e. 12.02.2020:-

1. The Additional Deputy Commissioner (F&P), Faisalabad;
2. The Additional Deputy Commissioner (Hd.Q), Faisalabad;
3. The District Officer (Sports), Faisalabad)

At the relevant time, no objections as have been agitated in the instant petition were raised by the petitioner and as stated above, when the petitioner offered the highest bid, as per clause-7 of the Advertisement dated 29.01.2020, the respondent No.6 was offered as first right of refusal, who accepted the offer vide written consent dated 12.02.2020, so the lease agreement was executed in his favour and possession was handed over to him.

9. In view of the above, there appears no arbitrariness, illegality, irrationality and procedural impropriety or mala fide on the part of the respondents Nos.2 to 5, calling for interference by this Court in exercise of extraordinary constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, rather it is observed that the agreement has been executed in a transparent manner, legally, fairly and justly without any arbitrariness or irrationality and public money and public property has not been stolen/misspent and squandered.

10. So far as the case law relied upon by the learned counsel for the petitioner is concerned, with utmost respect, the same has not relevance to the peculiar facts and circumstances of the case in hand; thus, being distinguished one are not helpful to the petitioner's case.

11. The compendium of the above discussion is that the constitutional petition in hand comes to naught, the same stands dismissed.

MH/M-59/L **Petition dismissed.**

2022 M L D 678

[Lahore]

Before Shahid Bilal Hassan, J

Mst. ANWARI BEGUM---Petitioner

Versus

MUHAMMAD AKRAM---Respondent

Civil Revisions Nos.3438 and 3439 of 2012, decided on 8th June, 2021.

Specific Relief Act (I of 1877)---

----S.42---Suit for declaration---Gift---Scope---Petitioner as well as respondent claimed ownership over the disputed property on the basis of alleged gifts made by their father, registered in favour of petitioner and oraly in favour of respondent---Validity---Petitioner had failed to plead and prove as to when, where and in whose presence the offer was made, which was accepted and there-after possession was delivered, though in such eventuality constructive possession was considered but the same was also lacking in the case---Petitioner could not produce the revenue officials so as to prove that father of the parties had appeared before them and had got the gift deed registered in favour of the petitioner---Respondent, on the other hand, also could not prove as to where the offer was made, which was accepted and possession was delivered to the respondent, because in such like cases of oral gift or agreements, unimpeachable, cogent, confidence inspiring and reliable evidence was required to be produced---Respondent while recording his statement in the court had got recorded his age as 45 years, meaning thereby that at the time of alleged gift in the year 1978, he was aged about 12 years, but during cross-examination he claimed his age at that time as 24/25 years,

which was sufficient to declare him a liar and not trustworthy---Courts below had misread and non-read the evidence on record and had committed material illegalities and irregularities while passing the decree in favour of respondent declaring him to be owner in possession of the disputed property on the basis of oral gift---Revision petition was allowed, property was reverted back to the deceased father of the parties and had to be devolved upon the parties according to their shares in accordance with law.

Muhammad Iqbal Awan and Ejaz ul Hassan Mughal for Petitioners.

Qaiser Mahmood Chaudhry for Respondents.

ORDER

SHAHID BILAL HASSAN, J.----This single order will dispose of the captioned civil revision as well as connected revision petition bearing No.3439 of 2012, as in both one and the same consolidated judgments and decrees have been called into question.

2. Precisely, the present petitioner Mst. Anwari Begum instituted a suit for possession of three rooms in a house constructed on 4 marlas of land bearing Khasra No.643/249 Khata and Khatuni No.23/25 situated within area of Municipal Committee Sarai Alamgir, against the respondent and alleged that she is owner in possession of the whole house by virtue of registered gift deed No.521/1 dated 02.011.1999 (Ex.P3) and period Record for the year 1999-2000 (Ex.P2). The suit was decreed ex parte but the said decree was set aside by the learned trial Court and respondent/defendant contested the suit by filing written statement as well as the respondent/ defendant instituted a separate suit for declaration with consequential relief related to the same subject matter and alleged that he was owner in possession of the suit property on the basis of oral gift made

by father of the parties in the year 1978. Registered gift deed in favour of the petitioner was sought to be declared ineffective.

The present petitioner contested suit of the respondent. Both the suits were consolidated and consolidated issues were framed by the learned trial Court. Both the parties adduced their evidence. The learned trial Court vide impugned consolidated judgment and decree dated 19.10.2011 dismissed suit of the petitioner for possession and decreed the suit of the respondent for declaration with consequential relief. Being aggrieved, the present petitioner preferred two separate appeals and the learned appellate Court vide impugned consolidated judgment and decree dated 09.07.2012 dismissed the appeal, which has necessitated in filing the instant revision petition as well as connected civil revision.

3. Heard.

4. Both the parties claiming their ownership possession over the disputed property on the basis of alleged gifts made by their father Muhammad Ramzan: registered in favour of the present petitioner and oral in favour of the respondent. However, the petitioner has failed to plead and prove as to when, where and in whose presence the offer was made, which was accepted and there-after possession was delivered, though in such eventualities constructive possession is considered but the same is also lacking in this case. Deposition of P.W.2 on behalf of the present petitioner is based on hearsay so the same has no evidentiary value in the eye of law. Moreover, the P.W.1 special attorney of the present petitioner is her husband, who is an interested witness. Apart from this, the petitioner could not produce the revenue officials so as to prove that father of the parties appeared before the revenue officer and got the gift deed registered in favour of the present petitioner. Furthermore, the

alleged gift deed does not find mentioned the National Identity Card of the donor Muhammad Ramzan. Even otherwise, at the time of recording evidence Muhammad Ramzan, father of the parties/donor, was alive but the present petitioner did not produce him in the witness box and it has been argued that he appeared during ex parte proceedings and recorded his statement in favour of the petitioner, but it is worth-mentioning that his age was recorded as 90 years, meaning thereby he was not in a condition to know the pros and cons of his statement and he did not face any cross-examination on behalf of the respondent. Moreover, the said ex parte proceedings and decree have been set aside, so the value of the said statement has rightly been discarded by the learned Courts below.

In addition to the above, the petitioner could not lead any evidence that she temporarily gave the disputed property to the respondent and he later on refused to hand over vacant possession of the same. As such, the learned Courts below have rightly non-suited the petitioner, concurrently, by dismissing her suit for possession of three rooms.

5. So far as the claim of the respondent is concerned, the same is based on oral gift by Muhammad Ramzan, deceased father of the parties. However, the respondent could not prove as to where the offer was made, which was accepted and possession was delivered to the present respondent, because in such like cases of oral gift or agreements, unimpeachable, cogent, confidence inspiring and reliable evidence is required to be produced, which is lacking in this case of the present respondent. D.W.3 while recording his statement in the Court on 11.07.2011 recorded his age as 45 years, meaning thereby at the time of alleged oral gift in the year 1978, he was aged about 12 years, but during cross-examination he claimed his age at that time as 24/25 years, which is

sufficient to declare him a liar and not trust-worthy. Moreover, there is contradiction in the depositions of D.Ws. with regards to construction of the house either by Muhammad Ramzan or Muhammad Akram, because D.W.2 deposed that house was constructed by Muhammad Ramzan and D.W.3 stated that only one room was constructed by Muhammad Ramzan and other rooms and upper storey was constructed by Muhammad Akram. Therefore, such like contradictory evidence cannot be relied upon to determine the rights of the parties. It seems that when the petitioner Mst. Anwari Begum asserted ownership on the basis of registered gift deed, the present petitioner raised his claim on the basis of oral gift as back as in the year 1978 by Muhammad Ramzan, deceased father of the parties. Same remained the situation with the present respondent that he could not bring on record that statement of his father Muhammad Ramzan during his evidence.

6. In view of the above, the learned Courts below have misread and non-read evidence on record and have committed material illegalities and irregularities while passing the decree in favour of the respondent declaring him to be owner in possession of the disputed property on the basis of oral gift. As such, the same cannot be allowed to hold field further.

7. For the foregoing reasons, the revision petition in hand bearing No.3438 of 2012 is allowed, impugned consolidated judgments and decrees, to the extent of decreeing the suit of the respondent for declaration with consequential relief is set aside, consequent whereof the suit stands dismissed, whereas the connected revision petition bearing No.3439 of 2012 stands dismissed. In this backdrop the property will revert to Muhammad Ramzan, deceased father of the parties and will be

devolved upon the parties according to their shares in accordance with law. No order as to the costs.

SA/A-79/L **Petition allowed.**

2022 M L D 939

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD RAFIQ---Appellant

Versus

HUSSAIN and another---Respondents

R.S.A. No.132 of 2013, heard on 2nd November, 2021.

(a) Specific Relief Act (I of 1877)---

----S.27---Suit for specific performance of agreement---Subsequent purchaser, bona fide status of---Knowledge of agreement---Onus of proof, discharge of---Essentials---Appellant allegedly approached few days prior to mutually extended date for payment of balance money, but one of the respondents refused to accept the same and disclosed that the suit property was sold out to third party---Said "third party" entered the suit by moving application under O.I, R.10 of Civil Procedure Code, 1908---Third party asserted that he purchased the suit land vide four mutations (numbers given in written statement); that he was owner in possession of suit land; and that one of the defendants in collusion with appellant was trying to take possession after sale; and that real brother of one of the respondent filed suit for possession on basis of pre-emption against third party---Appellant's suit was concurrently dismissed---Validity---Appellant's agreement to sell and payment of earnest money was undisputed and concluded by both Courts below---Emerged on record through evidence that parties were residents of same vicinity and well known to one another---Agreement between appellant and one of the respondent must had been in knowledge of inhabitants of village---Nothing on record to show whether "third party" had made inquiry about existence of said agreement even in summary manner---Third party had

not exhibited alleged four mutations in his favour to prove that same were sale mutations for value---Passing of consideration was also not proved on record---No confidence inspiring evidence germane to making of inquiry about original contract by third party was made as required by law/settled principles---Appeal was allowed and suit of appellant/plaintiff was decreed with direction to deposit remaining sale price within 30 days, otherwise the same would be deemed to have been dismissed.

(b) Specific Relief Act (I of 1877)---

----S.27---Subsequent purchaser, bona fide character of---Proof---Subsequent vendee had to discharge the initial onus: firstly, that he acquired property for due consideration and thus was a transferee for value; secondly, that there was no dishonesty of purpose or tainted intention to enter into the transaction which would settle that he acted in good faith/bona fide, thirdly, that he had no knowledge/notice of the original sale agreement between the plaintiff and vendor; fourthly, that he made some inquiries with the persons having knowledge of the property and also with the neighbours.

Hafiz Tasseduq Hussain v. Lal Khatoon PLD 2011 SC 296 and Bahar Shah and others v. Manzoor Ahmad Civil Appeal No. 389 of 2015 decided by Supreme Court on 14/10/2021 rel.

(c) Specific Relief Act (I of 1877)---

----S.27---Suit for specific performance of agreement---Bona fide purchaser---Proof---Inquiry as to title of property---Essentials---Where subsequent vendee conducted no inquiry regarding the title of property in question, he would not be deemed to have purchased property in question for value, in good faith and without notice of original contract.

Muhammad Sham v. Muhammad Sarwar and others 1997 CLC 1231 rel.

(d) Civil Procedure Code (V of 1908)---

----S.100---Second appeal---Power/jurisdiction of High Court to reverse concurrent findings of courts below---Scope---High Court had ample power to undo the concurrent findings recorded by Courts below in exercise of appellate jurisdiction.

Mian Muhammad Faheem Bashir for Appellant.

Ex parte: on 8-5-2014 for Respondent No.1.

Ex parte: on 29-9-2021 for Respondent No.2.

Date of hearing: 2nd November, 2021.

JUDGMENT

SHAHID BILAL HASSAN, J.----Succinctly, the appellant instituted a suit for specific performance of agreement to sell by alleging that respondent No.1 being owner of the land measuring 38 kanals 12 marlas entered into an agreement to sell with the appellant for a consideration of Rs.350,000/-. The agreement was reduced into writing on 30.06.1996; earnest money Rs.200,000/- was paid and in this respect an acknowledgment report was executed by the respondent No.1 on the same day i.e. 30.06.1996. The remaining amount was to be paid on 24.12.1997 and the registered sale deed was to be executed. The appellant could not arrange the remaining amount and he got extension of six months from the respondent No.1 which was granted by him and the next date was fixed as 24.06.1998, which was further extended till 24.12.1998. Allegedly, few days prior to 24.12.1998, the appellant approached the respondent No.1 and showed his readiness to pay the remaining amount but the respondent No.1 dilly-dally the matter and upon refusal the appellant instituted the suit. The respondent No.1 appeared and contested the suit and further disclosed that the suit property was sold out to respondent No.2 Shahmand Ali, who was got arrayed by the appellant

moving an application under Order I, Rule 10 of the Code of Civil Procedure, 1908. The respondent No.2 appeared and filed his contesting written statement wherein he asserted that he purchased the suit land from the respondent No.1 vide Mutation No.436 dated 08.09.1996, Mutation No.438 dated 08.09.1996, Mutation No.440 dated 30.09.1996 and Mutation No.443 dated 23.11.1996 and contended that he was owner in possession of the suit property from the date of its purchase; that the appellant and respondent No.1 were collusive with each other and that the respondent No.1 had been trying to take possession after sale; that the real brother of respondent No.1 namely Hassan filed a suit for possession on the basis of pre-emption against the respondent No.2. The divergence in the pleadings of the parties was summed up into issues by the learned trial Court and evidence of the parties was recorded. The learned trial Court vide impugned judgment and decree dated 28.07.2009 dismissed suit of the appellant. The appellant being aggrieved of the same preferred an appeal but the learned appellate Court vide impugned judgment and decree dated 26.08.2013 dismissed the appeal; hence, the instant regular second appeal.

2. Perusal of record shows that many a time notice were issued to the respondents but despite personal service they did not bother to appear before the Court and on 08.05.2014 the respondent No.1 was proceeded against ex parte and on refusal to accept the notice by respondent No.2 for 29.09.2021, he was proceeded against ex parte on the said date.

3. Learned counsel for the appellant has been heard and record has been gone through with his able assistance.

4. Undisputed fact is that the appellant entered into agreement to sell dated 30.06.1996 with the respondent No.1. The appellant by producing the marginal witnesses P.W.4 and P.W.5 as well as scribe (P.W.1) has proved the execution of agreement to sell (Ex.P1) and receipt (Ex.P2)

with regards to payment of earnest money Rs.200,000/-. Both the learned Courts below are unanimous on this point that the appellant has succeeded in proving that he entered into an agreement to sell (Ex.P1) with the respondent No.1 and when the impugned judgments and decrees are on this score are read together with the evidence of the parties, it appears that this conclusion is based on proper appraisal of evidence on record.

5. The main thrust of the appellant's counsel is on the point that the respondent No.2 was well within knowledge of the agreement to sell (Ex.P1) inter se the appellant and the respondent No.1 and he was not a bona fide purchaser without notice, so the protection under section 27(b) of the Specific Relief Act, 1877 was not available to him, because simple denial was not sufficient to discharge the onus, rather he should have proved good faith and lack of knowledge of earlier agreement after reasonable care. Admittedly, both the parties are residents of the same vicinity as this factum has emerged on record through evidence and well known to one another, so the factum of entering into agreement by the appellant with the respondent No.1 must have been in knowledge of the inhabitants of the village. Had the respondent No.2 made inquiry even in a summary manner, he would have come to know that there exists an agreement inter se the appellant and the respondent No.1, but there is nothing on record to show making of any such exertion on behalf of the respondent No.2. Moreover, the respondent No.2 did not get exhibited four mutations allegedly entered into in his favour so as to prove that the same were sale mutations for value, so the passing of consideration is also not proved on record. In the case of Hafiz Tassaduq Hussain v. Lal Khatoon (PLD 2011 SC 296), it has been invariably held by the Hon'ble Supreme Court that the subsequent vendee has to discharge the initial onus: 1). That he acquired the property for due consideration and thus is a transferee for value, meaning thereby that his purchase is for the price paid to the vendor and not otherwise; 2). There was no dishonesty of

purpose or tainted intention to enter into the transaction which shall settle that he acted in good faith or with bona fide; 3). He had no knowledge or notice of the original sale agreement between the plaintiff and the vendor at the time of his transaction with the latter. Moreover, in a recent judgment handed down on 14.10.2021 in Civil Appeal No.389 of 2015 titled Bahar Shah and others v. Manzoor Ahmad the apex Court of the country has held:-

> '7. The presupposition of know-how or prior notice of earlier agreement of the same property stem from calculated abstention from an enquiry by the alleged bona fide purchaser. A conscious and purposive circumvention of an enquiry and due diligence which a buyer ought to have made would always communicate a presumption of definite notice. In a position taken as bona fide purchase, it should be established by a fair preponderance of the evidence and the fact of notice may be inferred from the circumstances as well as proved by direct evidence. An honest buyer should at least make some inquiries with the persons having knowledge of the property and also with the neighbors. An equitable interest can be hammered or resisted by a bona fide purchaser for value without notice of the legal interest in the property but it is also significant that Section 27(b) of the Specific Relief Act shields and safeguards the bona fide purchaser in good faith for value without notice of the original contract which is in fact an exception to the general rule. The doctrine of purchaser without notice embodies the maxim that "where equities are equal the law will prevail". Under Section 3 (Interpretation Clause) of Transfer of Property Act 1882, "a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search, which he ought to have made, or gross negligence, he would have known it. Explanation

> II, further expounds that "Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

It is a settled law that where subsequent vendee conducted no inquiry whatsoever with regards to title of the property in question, he would not be deemed to have purchased property in question for value, in good faith and without notice of original contract. As stated above, it has come on record that inhabitants of the village knew about the original contract inter-se the appellant and respondent No.1. Such observation has already been rendered by this Court in Muhammad Sham v. Muhammad Sarwar and others (1997 CLC 1231 Lahore).

6. Pursuant to the above, when it is proved that the appellant entered into agreement to sell with the respondent No.1 and Rs.200,000/- were paid as earnest money where upon agreement to sell (Ex.P1) and receipt (Ex.P2) were executed and no confidence inspiring evidence germane to making of inquiry about the original contract by the respondent No.2 was made as required by law and settled principles, it can safely be concluded that the learned Courts below have failed to appreciate the evidence on record as well as have failed to construe law on the subject in a proper and judicious way. When the position is as such, this Court enjoys ample powers to undo the concurrent findings recorded by the learned Courts below in exercise of jurisdiction under section 100 of the Code of Civil Procedure, 1908.

7. The compendium of the discussion above is that the impugned judgments and decrees are contrary to law and the learned Courts below have failed to determine pivotal issues as referred above while applying independent judicious mind and construing law on the subject in a right way. Resultantly, the impugned judgments and decrees passed by the

learned Courts below cannot be allowed to sustain further; as such, the appeal in hand is allowed, impugned judgments and decrees are set aside, consequent whereof the suit of the appellant/plaintiff is decreed as prayed for. The appellant/plaintiff is directed to deposit the remaining sale price with the learned trial Court within 30 days from today, which shall be withdrawn by the respondent No.1, failing which the suit shall be deemed to have been dismissed. No order as to the costs.

ZH/M-13/L **Appeal allowed.**

2022 M L D 1745

[Lahore]

Before Shahid Bilal Hassan, J

TUFAIL MUHAMMAD---Petitioner

Versus

NAZAR HUSSAIN and others---Respondents

Civil Revision No.1035 of 2008, decided on 25th May, 2022.

(a) Specific Relief Act (I of 1877)---

----S.12---Limitation Act (IX of 1908), Art.113---Civil Procedure Code (V of 1908), O.VI, R.2 & O.VII, R. 2---Suit for specific performance---Oral agreement---Pleadings---Subject-matter of the suit is immovable property---Limitation---Scope---Plaintiff filed suit for specific performance on the basis of an oral agreement to sell and sought cancellation of mutation against the defendants---One of the defendants (to whom the suit property was sold by other defendants) filed a suit for possession of the suit property on the basis of mutation---Suit filed by plaintiff was concurrently decreed---Validity---Plaintiff had failed to plead and prove the time, date and place of alleged transaction of oral agreement---Plaintiff had not even pleaded the names of witnesses in whose presence bargain of oral agreement was stuck---No receipts with regard to payment of the sale consideration had been brought on record---Description of the suit property had not been given in the plaint---Oral agreement was arrived at between the parties as back as in the year 1975 and the suit was instituted in the year 2002---Suit was barred by limitation---Defendant had a mutation in his favour which had been entered, sanctioned and incorporated in the revenue record after due process, thus, he was entitled to the decree for possession because he was lawful owner of the disputed property---Civil revision was allowed,

judgments and decrees passed by courts below were set aside and the suit filed by defendant was decreed.

Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and others 2013 SCMR 1300 and Karamdad v. Manzoor Ahmad and 2 others 2015 CLC 157 rel.

(b) Specific Relief Act (I of 1877)---

----S.12---Civil Procedure Code (V of 1908), O.VI, R.2---Suit for specific performance---Oral agreement---Pleadings---Scope---When a case is instituted on the basis of oral agreement, minute detail of each and every event has to be pleaded and proved.

(c) Civil Procedure Code (V of 1908)---

----O.VI, R. 2 & O. VIII, R. 2---Pleadings to state material facts and not evidence---New facts must be specifically pleaded---Maxim: Secundum allegata et probata---Scope, party has to first plead facts and pleas in pleadings and then prove the same through evidence---Party cannot be allowed to improve its case beyond which was originally set up in the pleadings---Principle of "secundum allegata et probata", that a fact has to be alleged by a party before it is allowed to be proved has full backing of provisions of O.VI, R.2 & O.VIII, R.2 of Code of Civil Procedure.

Muhammad Wali Khan and another v. Gul Sarwar and another PLD 2010 SC 965 and Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another 2012 SCMR 254 ref.

(d) Limitation Act (IX of 1908)---

----Art.113---Specific Relief Act (I of 1877), S. 12---Suit for specific performance---Limitation---Scope---Article 113 of the Limitation Act, 1908, provides three years' limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice, that performance is refused.

Shaigan Ijaz Chadhar and Irfan Khokhar for Petitioners.

Respondents Nos.2 to 4 ex parte on 22-4-2009.

Respondents Nos.5 and 6 ex parte on 17-11-2021.

ORDER

SHAHID BILAL HASSAN, J.----Tersely the respondent instituted a suit for specific performance on the basis of an oral agreement and cancellation of Mutation No.643 dated 09.05.1993 against the petitioner and respondents Nos.2 to 6 by maintaining that he purchased the land measuring 08-Marlas from Faqir Muhammad, etc. through an oral agreement for a consideration of Rs.5600/- in 1975, so the subsequent mutation dated 09.05.1993 in favour of the petitioner was liable to be cancelled and a decree for specific performance may be passed in his favour. The present petitioner resisted the suit and also instituted a separate suit for possession of the disputed Ihata on the ground that Faqir Muhammad and others sold out the disputed Ihata to him vide Mutation No.643 dated 09.05.1993 and he (petitioner) rented out the same to the respondent No.1 on monthly rent of Rs.500/-. Both the suits were consolidated and out of the divergent pleadings of the parties, the learned trial Court framed consolidated issues. Evidence of the parties, in pro and contra, was recorded. The learned trial Court vide impugned judgment and decree dated 21.02.2007 dismissed suit of the petitioner for possession and decreed suit of the respondent No.1 for specific performance. The said decree was assailed in appeal by the petitioner but the same was dismissed vide impugned judgment and decree dated 17.06.2008; hence, the instant civil revision.

2. Heard.

3. In respect of oral agreement, the parameters have been settled by the Hon'ble Supreme Court in an esteemed judgment reported as

Muhammad Nawaz through L.Rs. v. Haji Muhammad Baran Khan through L.Rs. and others (2013 SCMR 1300) that:-

> ' ..... We also hold that although it is not the requirement of law that an agreement or contact of sale of immovable property should only be in writing, however, in a case where party comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the party to prove that there was consensus ad idem between both the parties for a concluded oral agreement. An oral agreement by which the parties intended to be bound is valid and enforceable, however, it requires for it prove clearest and most satisfactory evidence.'

The said esteemed judgment was followed by this Court in Karamdad v. Manzoor Ahmad and 2 others (2015 CLC 157-Lahore) and it was further observed that:-

> '6. The perusal of plaint reveals that respondent/plaintiff did not disclose the name of witnesses before whom the alleged oral sale was struck between the parties. Even no period has been mentioned by the respondent/plaintiff in his plaint for completion of oral agreement to sell. No doubt, an oral agreement to sell is permissible in law, but it has to be proved through credible and un-impeachable evidence.'

4. Now, when the facts of the instant case are considered on the touchstone of the two judgments ibid it appears that the petitioner has failed to prove the alleged oral agreement to sell because he failed to plead and prove the time, date and place of alleged transaction of oral agreement inter se the petitioner and the respondents Nos.2 to 6 and even he did not plead the names of witnesses in whose presence such bargain of oral agreement was struck in between him and the respondents Nos.2 to

6. When a case is instituted on the basis of oral agreement, minute detail of each and every event has to be pleaded and proved, which is lacking in this case. It is a settled principle of law that a party has to first plead facts and pleas in pleadings and then to prove the same through evidence. A party cannot be allowed under the law to improve its case beyond what was originally set up in the pleadings. The principle of "secundum allegata et probata", that a fact has to be alleged by a party before it is allowed to be proved is fully attracted in this case, which has full backing of provisions of Order VI, Rule 2 and Order VIII, Rule 2, Code of Civil Procedure, 1908. When the petitioner has not pleaded the names of the witnesses in whose presence the alleged oral transaction took place, the witnesses produced by him in evidence would not be helpful to the petitioner's case because their evidence would be nothing but an improvement, as any evidence led by a party beyond the pleadings is liable to be ignored. Reliance is placed on judgments reported as Muhammad Wali Khan and another v. Gul Sarwar and another (PLD 2010 SC 965) and Haider Ali Bhimji v. VIth Additional District Judge, Karachi (South) and another (2012 SCMR 254). Moreover, no receipt with regards to payment of the sale consideration has been brought on record and mere an assertion has been put that entire sale consideration was paid, which does not appeal to prudent mind. Furthermore, description of the property in question has not been narrated properly in the plaint, which otherwise ought to have been inserted in a vivid and categorical manner especially in case of an oral agreement.

In addition to the above, the alleged oral agreement to sell was reached at between the respondent No.1 and the respondents Nos.2 to 6 as back as in the year 1975 and the suit was instituted in the year 2002, which is badly barred by limitation, because Article 113 of the Limitation Act, 1908 provides three years' limitation from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that

performance is refused.

5. As against this, the petitioner has a mutation in his favour which has been entered, sanctioned and incorporated in the revenue record after due process, thus, he is entitled to the decree for possession because he is lawful owner of the disputed property.

6. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).

7. For the foregoing reasons, material illegality and irregularity has been committed and the learned Courts below have failed to exercise vested jurisdiction in an apt and judicious manner; therefore, while placing reliance on the judgments supra the civil revision in hand is allowed, impugned judgments and decrees are set aside, consequent whereof suit of the petitioner for recovery of possession is decreed whereas the suit for specific performance on the basis of an oral agreement instituted by the respondent No.1 stands dismissed. No order as to the costs.

SA/T-17/L **Revision allowed.**

2022 M L D 1784

[Lahore]

Before Shahid Bilal Hassan, J

NAZAR ABBAS---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and another---Respondents

Writ Petition No.21779 of 2017, decided on 3rd March, 2022.

Civil Procedure Code (V of 1908)---

----O.II, R.6-A---Consolidation of suits ----Petitioner instituted suit for declaration challenging mutation against the respondent, whereas respondent instituted a suit for specific performance agreement with regard to land in disputed khata---Both parties contested each other's suit---Both suits were consolidated and consolidated issues were farmed---Both parties adduced their evidence in support of their respective contentions and had closed their evidence, whereas respondent also closed her evidence in rebuttal---Later on, respondent produced three witnesses but on an objection raised by the petitioner, Trial Court refused to record evidence of the said witnesses---Revisional Court accepted the revision and declared that the right of rebuttal of evidence of respondent in second suit was still open----Held, that in case of similar issues in different suits, suits would be consolidated and decided conjointly on the basis of consolidated trial---In the present case after considering facts of both suits Trial Court consolidated the suits and respondent was treated as plaintiff, whereas petitioner was designated as defendant---Respondent/plaintiff produced her affirmative evidence in support of her contentions and after evidence of petitioner/defendant, respondent/ plaintiff after submitting cancellation report with regard to FIR closed her evidence in rebuttal, meaning thereby, respondent / plaintiff availed of her right to produce affirmative as well as rebuttal evidence in both suits and she could not reopen the case in the garb that rebuttal evidence in connected suit instituted by petitioner was not recorded---Constitutional petition was

allowed, in circumstances.

Jhanda through Legal Heir v. Muhammad Younas reported as PLD 1994 Lah. 100 rel.

Rana Muhammad Naeem Khan for Petitioner.

Shahid Mehmood Khan Khilji for Respondent No.2.

Date of hearing: 3rd March, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.----Tersely, the petitioner instituted a suit for declaration challenging the vires of Mutation No.3234 dated 09.09.2010 against the respondent No.2; whereas the respondent No.2 instituted a suit for specific performance of agreement with regard to land measuring 13 Marlas in disputed Khata No.2874. Both the rival parties contested each other's suit. On application of the respondent No.2, both the suits were consolidated vide order dated 27.04.2015 and consolidated issues were framed. Both the parties adduced their evidence in support of their respective contentions and closed their evidence, whereas the respondent No.2 also closed her evidence in rebuttal. Later on, on 20.10.2016, the respondent No.2 produced three witnesses but an objection on behalf of petitioner side was raised, so the learned Trial Court vide order dated 10.01.2017 refused to record evidence of the proposed witnesses produced by the respondent No.2, who feeling aggrieved of the said order, filed revision petition and the learned Revisional Court vide impugned order dated 30.03.2017 accepted the revision petition, set aside the order dated 10.01.2017 and declared that the right of rebuttal evidence of Ghulam Fatima respondent No.2 in second suit is still open. Hence, the instant constitutional petition, calling into question the legality of impugned order dated 30.03.2017, passed by the learned Revisional Court, has been filed by the petitioner.

2. Heard.

3. Considering the arguments and going through the record, it is

observed that on 27.04.2015 while deciding application for consolidation of both the suits ibid, the learned Trial Court in a categorical way ordered that:

> "In this state of affairs, the controversy between the parties regarding subject matter is the same and the parties are also same, therefore, to avoid from conflicting judgment and for convenience of the parties, the instant application is accepted and the above said suit is hereby consolidated with the instant suit the proceedings will be conducted in the instant suit."

It is worth mentioning here that Rule 6-A, Order II has been inserted in Code of Civil Procedure, 1908, which relates to the consolidation of suits and the same provides:

> "6-A. Consolidation of suits.- Where two or more suits or proceedings of the same nature requiring determination of similar issues between the same parties are pending in relation to the same subject matter, the Court may if considers it expedient for avoiding multiplicity of litigation or conflict in judgments, direct the consolidation of such suits or proceedings as one trial, whereupon all such suits or proceedings shall be decided on the basis of the consolidated trial"

Bare perusal of the above provision of law enunciates that in case of similar issues in different suits, the said suits will be consolidated and will be decided conjointly on the basis of consolidated trial. In the present case after considering facts of both these suits instituted by the rival parties i.e. respondent No.2 and the present petitioner, the learned Trial Court consolidated the suits and the respondent No.2 was treated as plaintiff, whereas the present petitioner was designated as defendant. Respondent No.2 produced her affirmative evidence in support of her contentions and after evidence of the present petitioner, the respondent No.2 on 13.07.2015 after submitting cancellation report with regard to F.I.R. No.36 of 2014 as Ex.P-4 closed her evidence in rebuttal, meaning thereby, the respondent No.2 availed of her right to produce affirmative as

well as rebuttal evidence in both the suits and she cannot reopen the case in the garb that rebuttal evidence in the connected suit instituted by the present petitioner was not recorded. In case of Jhanda through Legal Heir v. Muhammad Younas reported as (PLD 1994 Lahore 100), it was held by this Court that:

> "Plaintiff has unreservedly closed his affirmative evidence and hence, he could not have been permitted to record the statement in affirmative after the close of defense evidence to that extent his testimony carried little weight."

However, in the present case as observed above, the respondent No.2 has produced her affirmative as well as rebuttal evidence, therefore, the learned Revisional Court while travelling beyond vested jurisdiction has wrongly adjudicated upon the matter in hand. The impugned order suffers from legal infirmity, thus the same cannot be allowed to hold field further.

4. The epitome of the discussion above is that the constitutional petition in hand succeeds and the same is allowed, consequence whereof the impugned order dated 30.03.2017 passed by the learned Addl. District Judge concerned is set aside and order dated 10.01.2017 passed by the learned Trial Court stands restored. No order as to the costs.

MHS-N-17/L **Petition allowed.**

2022 M L D 1945

[Lahore]

Before Shahid Bilal Hassan, J

Mst. AZIZAN BIBI---Petitioner

Versus

NASIR MEHMOOD---Respondent

Civil Revision No.547 of 2012, decided on 22nd December, 2021.

(a) Specific Relief Act (I of 1877)---

----S.42---Qanun-e-Shahadat (10 of 1984), Arts. 76, 79 & 113---Suit for possession, specific performance and permanent injunction filed by respondent alleging that the petitioner agreed to sell the subject property on consideration out of which certain amount was paid as earnest money---Respondent's suit was concurrently decreed---Validity---Execution of alleged agreement to sell was admitted---Petitioner admittedly did not provide the Fard Milkiyat 10 days prior to the target date as per specifically written terms of the agreement to sell---Said agreement was reciprocal and not the unilateral---Petitioner further tried to sale the subject property---Respondent had obtained the injunctive order from the Court of competent jurisdiction---Petitioner had not exhibited any document but marked which had no sanctity in the eye of law---Receiving of earnest money was not denied by the petitioner---Respondent was entitled to the decree for specific performance---Revision petition was dismissed accordingly.

Mst. Rehmat and others v. Mst. Zubaida Begum and others 2021 SCMR 1534; Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others PLD 2010 SC 604; State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal 2011

SCMR 1013; Anwar Ahmad v. Mst. NafizBano through Legal Heirs 2005 SCMR 152 rel.

(b) Qanun-e-Shahadat (10 of 1984)---

----Art.76---"Marked" document---Not duly submitted---Scope---Relying upon marked documents would be illegal.

Fazal Muhammad v. Mst. Chohara and others 1992 SCMR 2182 rel.

(c) Civil Procedure Code (V of 1908)---

----S.115---Revision---Concurrent findings---Revisional jurisdiction---Scope---Concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction.

Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161 and Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679 rel.

Sheikh Usman Karim ud Din for Petitioner.

Rana Saeed Akhtar for Respondent.

Date of hearing: 18th October, 2021.

ORDER

SHAHID BILAL HASSAN, J.---Succinctly, the respondent instituted a suit for possession through specific performance of agreement and permanent injunction with regards to agreement dated 02.09.2005 germane to the disputed property, allegedly entered into by the petitioner with the respondent for a sale consideration of Rs.10,00,000/- out of

which Rs.200,000/- was paid as earnest money and remaining amount was to be paid on 02.12.2005 at the time of execution of the registered sale deed, against the present petitioner, which was duly resisted by her while submitting written statement. The learned trial Court, out of the divergent pleadings of the parties, framed issues and evidence of the parties was recorded. The learned trial Court, thereafter, vide impugned judgment and decree dated 18.12.2010, after hearing arguments of learned counsel for the parties, decreed the suit in favour of the respondent/plaintiff and against the petitioner/defendant. The petitioner being aggrieved of the said judgment and decree preferred an appeal; the learned appellate Court vide impugned judgment and decree dated 23.01.2012 dismissed the appeal; hence, the instant civil revision.

2. Heard.

3. Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 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; meaning thereby when two persons enter into any agreement pertaining to financial or future obligations, the instrument should be attested by two men or one man and two women, so that one may remind the other. In the present case, it is case of the respondent that the petitioner entered into agreement to sell the disputed property in a consideration of Rs.10,00,000/- in presence of witnesses, thereafter the agreement was reduced into writing on 02.09.2005 and possession was delivered to him, which is still with him, this shows that the requirement of Article 17 of the Order, 1984 was fulfilled in letter and spirit.

Article 79 of the Qanun-e-Shahadat Order, 1984 enumerates the procedure of proof of execution of document required by law to be

attested; for ready reference the said provision of law is reproduced here:-

> '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.'

However, in the present case, the execution of alleged agreement to sell is admitted one and it is specifically written in the same that the present petitioner would provide copy of Fard Milkiyat to the respondent 10 days prior to the target date, so that the stamp papers for the registered sale deed could be purchased and further proceedings could be completed, but the present petitioner admittedly did not provide the Fard Milkiyat as per terms of the agreement to sell because the alleged agreement to sell was not unilateral but was reciprocal. Thus, it is the petitioner who has failed to perform her part of agreement. Even she tried to further sale out the property, which forced the respondent to institute a suit for permanent injunction and injunctive order was obtained therein from the Court of competent jurisdiction. In a judgment, relied upon by the learned counsel for the petitioner, reported as Mst. Rehmat and others v. Mst. Zubaida Begum and others (2021 SCMR 1534), the Hon'ble Supreme Court of Pakistan has invariably held that:-

> "10. The crucial question that now requires consideration of this Court is as to whether the time is essence of the agreement dated April, 1973. Perusal of the said agreement reveals that the vendor Mst. Ashfaq Jahan sold the suit property as an absolute owner to the respondent No.1 Mst. Begum in lieu of Rs.45,000/- (Rupees Forty-Five Thousand Only), whereof a sum of Rs.500/- was paid as earnest money as mentioned in clause (1) of the said agreement.

Clause 2 of the said agreement mentioned that "The balance of the said sale price that is, Rs.44,500/- (Rupees Forty Four Thousand and Five Hundred) only shall be paid by the SECOND PARTY to the FIRST PARTY in cash before the Registrar Hyderabad, at the time of registration of sale deed in respect of the said property or if the parties agree, at any time before registration. It is pertinent to mention here that no cut-off date was given in the sale agreement for the payment of remaining sale consideration as it was settled between the parties that the remaining sum could be paid at the time of registration of sale deed or at any time before registration. Clause 4 of the said agreement made it mandatory for the "First Party" that is the vendor Mst. Ashfaq Jahan to obtain all documents necessary for registration of the suit property in the following terms:

"4) That the FIRST PARTY shall obtain all documents necessary for registration of the said property in the name of the SECOND PARTY, namely:-

i. Income Tax clearance certificate.

ii. No objection certificate from the Excise and Taxation Authority, Hyderabad.

iii. Certificate/Receipt showing payment of electricity and water charges.

iv. Mutation in the City survey record kept in the City Survey office, Hyderabad.- - -."

11. ----------. These conditions manifest that the agreement dated April 1973 contained reciprocal promises on the part of

vendor as well vendee and both the parties were required to perform their respective part of the contract in order to accomplish the sale transaction; however, the vendor failed to perform her part of reciprocal obligations and did not procure requisite documents, except the Income Tax Clearance Certificate; which is also apparent from the perusal of notices Ex.19, Ex.116, Ex.118. As the vendor Mst. Ashfaq Jahan herself failed to perform her part of contract, therefore, she could not rescind and revoke the agreement dated April 1973, after the delivery of possession of the suit property to the respondent No.1 and the receipt of a sum of Rs.36000/= i.e. 80% of the total sale consideration in part performance of sale transaction. It can safely be concluded that the time was never the essence of the agreement dated April 1973 and the failure on the part of the promisor/vendor to perform her part of contract could not put her into a position of rescinding or revoking the contract in terms of section 51 of the Contract Act, 1872. Moreover section 54 of the Contract Act, 1872 even makes the promisor liable to make compensation to the promise for any loss suffered by him due to non-performance of a reciprocal promise on the part of promisor. Section 54 reads as follows:-

"54 Effect of default as to that promise which should be first performed.--- In contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last-mentioned fails to perform it, such Promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the

contract."

Moreover, in the present case, the petitioner did not exhibit any document but "marked", which has no sanctity in the eye of law as has been held in Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others (PLD 2010 Supreme Court 604) that:-

> "The document which has not been brought on record through witnesses and has not duly exhibited, cannot be taken into consideration by the Court."

Furthermore, the Hon'ble apex Court ruled in State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013) that:-

> 'We are not convinced that, such document, which has not been produced and proved in evidence but only "marked" can be taken into account by the Courts as a legal evidence of a fact.'

The said ratio was ruled in Anwar Ahmad v. Mst. Nafiz Bano through Legal Heirs (2005 SCMR 152). Requirements of Article 76 of the Qanun-e-Shahadat Order, 1984 were not adhered to, thus, relying upon marked documents would be illegal as has been held in Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182).

Apart from the above, it is a settled proposition of law that admitted facts need not to be proved; however, in the present case, the respondent produced one marginal witness and scribe of the agreement to sell (Ex.P1). Receiving of earnest money is not denied by the petitioner and she only stated that the respondent did not appear in the office of Sub-Registrar for registration of the sale deed and payment of remaining sale consideration, but as observed above, the petitioner did not provide copy of Fard Milkiyat to the respondent as per settled terms of the

agreement to sell; thus, the learned Courts below after evaluating evidence on record in a minute manner have reached to a just conclusion that the respondent is entitled to the decree for specific performance of agreement to sell and discretionary relief has rightly been granted to him (respondent).

4. In addition to the above, concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction. Reliance is placed on Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161) and Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679).

5. In view of the above, the learned Courts below have rightly exercised vested jurisdiction and have not committed any illegality and irregularity while passing the impugned judgments and decrees, warranting interference by this Court in exercise of revisional jurisdiction. Resultantly, while placing reliance on the judgments supra, the civil revision in hand having no force and substance stands dismissed. No order as to the costs.

ZH/A-13/L **Revision dismissed.**

P L D 2022 Lahore 600

Before Shahid Bilal Hassan, J

SAWERA IKRAM---Applicant

Versus

AMIR NAVEED---Respondent

Transfer Application No. 71691 of 2021 (and connected T.As.), decided on 15th December, 2021.

(a) Family Courts Act (XXXV of 1964)---

----Preamble---Object, purpose and scope---Purpose of enacting special law regarding family disputes is advancement of justice and to avoid technicalities which are hindrance in ultimate justice between the parties---Family Court has to proceed on the premises that every procedure is permissible unless a clear prohibition is found in law---Court can exercise its own powers to prevent course of justice being refracted from the path---Main object of Family Courts Act, 1964, is for protection and convenience of the weaker and vulnerable segments of society i.e. women and children.

Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool and others 2010 SCMR 1840 rel.

(b) Family Courts Act (XXXV of 1964)---

----S.13 (4)---Civil Procedure Code (V of 1908), O.XXI---Execution of decree---Procedure--- Provision S. 13 (4) of Family Courts Act, 1964 has two parts: first part says that a decree can be executed by the Court itself and second part says that a decree can be executed by Civil Court as directed by general or special order by District Judge---When a Civil Court is designated and entrusted with duties to execute decrees passed by a Court: Civil or Family, it enjoys powers vested under O. XXI, C.P.C.

(c) Family Courts Act (XXXV of 1964)---

----Ss. 5, 13(4) & 25-A---Civil Procedure Code (V of 1908), S.46---Execution of decree, transfer of---Principle---Applicant was wife of respondent who sought transfer of execution proceedings from the district where property was situated the place of her abode---Validity---Held, there was no need to transfer execution petition to any other Court out of one district to other district where judgment-debtor resided---Executing Court seized of the matter could adopt procedure provided under law by sending a precept through proper channel to the Court where judgment debtor resided or had movable/immovable property so as to attach the same and recover decretal amount as arrears of land revenue, following methodology as provided in S.46, C.P.C.---When all proceedings at trial stage were carried out at a place where women and children resided, forcing them to get transferred execution petition or decree to some other Court, out of District, would cause inconvenience and troubles to them, such was not the myth and essence of Family Courts Act, 1964, as highlighted in its 'Preamble'---High Court for future proceedings directed all District Judges and Family Courts in Punjab Province that while passing money decree in respect of maintenance allowance, alternate prices of dower or dowry articles be fixed and provisions of S.13(3) of Family Courts Act, 1964 should be adhered to---High Court further directed that District Judges to designate a Civil Judge as Executing Court in their Districts as well as Tehsils, where execution petitions for satisfaction of decrees passed by Family Court would be filed and executed/satisfied in accordance with law by adopting all measures in that regard---High Court also directed that in case judgment debtor resided in some other District and owned property, precept would be transmitted for attachment purposes and further proceedings were to be taken in accordance with law---Application was disposed of accordingly.

Amjad Iqbal v. Mst. Nida Sohail and others 2015 SCMR 128; Haji Muhammad Nawaz v. Samina Kanwal 2017 SCMR 321 and Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others 2014 SCMR 1365 ref.

Moazzam Saleem for Petitioner.

Muhammad Mahmood Chaudhry as amicus curiae.

ORDER

SHAHID BILAL HASSAN, J.---This order will dispose of the captioned transfer application as well as following transfer applications seeking transfer of execution petitions:-

1. T.A. No.68040 of 2021 titled Mst. Saba Nasir v. Muhammad Uzman, 2. T.A. No.68728 of 2021 titled Muafia v. Zahid Mehmood, etc., 3. T.A. No. 68832 of 2021 titled Sumera Ameen, etc. v. Faryad Ali, 4. T.A. No.69289 of 2021 titled Iram Farhan etc. v. Raja Farhan Mehmood, 5. T.A. No.68970 of 2021 titled Mst. Rehana Kausar v. Mudasir Hussain, 6. T.A. No.68740 of 2021 titled Iram Shehzadi v. Shabbih Haider, 7. T.A. No. 67912 of 2021 titled Syeda Umm-e-Laila, etc. v. Syed Qamar Abbas Shah, etc., 8. T.A.No.55220 of 2021 titled Sitara Iqbal, etc. v. M. Rashid, 9. T.A.No.70294 of 2021 titled Khalida Parveen v. Adnan Bilal Sial, 10. T.A.No.67734 of 2021 title Mst. Maryum Yousaf v. Qaiser Mehmood, 11. T.A.No.59167 of 2021 titled Mst. Fozia Amjad v. Amjad Farooq, 12. T.A.No.69553 of 2021 titled Mst. Nadaas Bibi, etc. v. Ghulam Rasool, 13. T.A.No.56094 of 2021 titled Nusrat Bibi v. Yasir Mehmood, 14. T.A.No.69898 of 2021 titled Mst. Tayyaba Nafees, etc. v. Tayyab Ali, 15. T.A.No.67606 of 2021 titled Pro. Dr. Umbreen Javed v. Noshad Mahmood, 16. T.A.No.65187 of 2021 titled Ayesha Bibi, etc. v. Ajmal Shahzad, etc., 17. T.A.No.61499 of 2021 titled Azra Parveen v. M. Shafique, 18. T.A.No.59746 of 2021 titled Naveera Irshad v. M. Abdullah, 19. T.A.No.59362 of 2021 titled Mst. Noor Jahan v. Saif Ullah, 20.

T.A.No.57711 of 2021 titled Asma Liaqat, etc. v. Mubashir Raheel Riaz, 21. T.A.No.55971 of 2021 titled Asma Yaqoob v. Jamshed Ali, 22. T.A.No.57230 of 2021 titled Fouzia Yasmeen, etc. v. Khalid Mahmood, 23. T.A.No.68994 of 2021 titled Syeda Ayesha Shakeel v. Syed Kamran Khalid, 24. T.A.No.58421 of 2021 titled Mst. Anam Bibi, etc. v. Muhammad Waqas Adil, 25. T.A.No.65274 of 2021 titled Khalida Usman v. Muhammad Shahzad, 26. T.A.No.68227 of 2021 titled Mst. Rehmat Bibi, etc. v. Muhammad Arshad Zaman, 27. T.A.No.69863 of 2021 titled Tayyaba Manzoor v. Nasir Ali, 28. T.A.No.69908 of 2021 titled Mehvish Bibi v. Atta Ullah, 29. T.A.No.42451 of 2021 titled Mst. Shamim Akhtar v. Muhammad Suleman, 30. T.A.No.61325 of 2021 titled Tayaba Afzal v. Farrukh Yasin, 31. T.A.No.69429 of 2021 titled Mugheesa Munir v. Muhammad Rizwan, 32. T.A.No.65380 of 2021 titled Sumaira Arif v. Shahbaz Ali, 33. T.A.No.59839 of 2021 titled Shumyla Mansha v. Khurram Shahzad, 34. T.A.No.67789 of 2021 titled Mst. Samina Bibi v. Muhammad Bukhsh, 35. T.A.No.69567 of 2021 titled Nazish Nazir v. Muhammad Bilal, etc., 36. T.A.No.55531 of 2021 titled Pathani Bibi v. Muhammad Ikram, 37. T.A.No.67640 of 2021 titled Iqra v. Muhammad Nadeem, 38. T.A.No.54307 of 2021 titled Amna Yasin, etc. v. Muhammad Kalim, 39. T.A.No.60947 of 2021 titled Amna Nasir, etc. v. Muhammad Usman Baig, 40. T.A.No.69005 of 2021 titled Afshan Rani, etc. v. Khurram Shahzad, 41. T.A.No.69829 of 2021 titled Mst. Muqadas Bibi v. Asad Iqbal, 42. T.A.No.59170 of 2021 titled Mst. Shazia Parveen v. M. Younas, 43. T.A.No.70461 of 2021 titled Mst. Rukhsana Aslam, etc. v. Khalid Mehmood, 44. T.A.No.65771 of 2021 titled Mst. Ruqia Naz, etc. v. Shakeel Ahmad, 45. T.A.No.71406 of 2021 titled Sumera Bibi, etc. v. Muhammad Saleem, 46. T.A.No.70924 of 2021 titled Mst. Nirma Khalid v. Muhammad Amir Shahzad, 47. T.A.No.71438 of 2021 titled Naeema, etc. v. Javaid Iqbal, 48. T.A. No.71416 of 2021 titled Khalida Parveen etc. v. Muhammad Arshad, 49. T.A.No.66214 of 2021 titled Kaneez Fatima v.

Iftikhar Ahmad and 50. T.A.No.64567 of 2021 titled Shafqat Parveen, etc. v. Amjad Hussain.

2. Heard.

3. Preamble of the Family Courts Act, 1964 elaborates the purpose of promulgation of the enactment, which reads:-

> 'Whereas it is expedient to make provision, for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith.'

Meaning thereby the Family Courts Act, 1964 is a special statute and has been enacted with a specific purpose to precede expeditious settlement and disposal of disputes relating to marriage and family affairs and also matters connected therewith. Furthermore, the purpose of enacting special law regarding family disputes is advancement of justice and to avoid technicalities which are hindrance in the ultimate justice between the parties. Family Court has to proceed on the premises that every procedure is permissible unless a clear prohibition is found in law. The Court can exercise its own powers to prevent the course of justice being refracted from the path; reliance is placed on Sayed Abbas Taqi Mehdi v. Mst. Sayeda Sabahat Batool and others (2010 SCMR 1840). The main object of this enactment is for protection and convenience of the weaker and vulnerable segments of the society i.e. women and children; it is due to this reason that "Nikah" is to be registered where the bride is living; if bridegroom fails to pay maintenance, application for securing maintenance is competent before Union Council where the bride resides and in case permission is required to be sought by the bridegroom for contracting second marriage, application has to be submitted to the Chairman Union Council where the wife resides; same like Talaq proceedings are to be carried out in the Union Council where the wife

resides and if any offence relating to offences detailed in the Family Courts Act, 1964, its trial has to be conducted by Family Court within the precincts where the wife resides; moreover, if a father intends to get custody of the minor children, he has to initiate proceedings at a place where the children reside. All these go to divulge that the main purpose of the enactment is to accommodate the women and the children, weaker segments of the society, due to this reason under section 14(3) of the Act, 1964 provides that no appeal or revision shall lie against an interim order passed by a Family Court.

4. Having said above, now when after passing of a decree by a Family Court, the execution petition is filed, the Family Court executing the decree has to proceed with the same under Section 13 of the Act, 1964 and subsection (4) of the said Section is relevant which reads:-

> 'The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order, direct.'

Section 13(4) of the Act, 1964 has two parts: first part says that a decree can be executed by the Court itself and second part says that a decree can be executed by the Civil Court as directed by general or special order by the District Judge; meaning thereby when a Civil Court is designated and entrusted with duties to execute the decrees passed by a Court: Civil or Family, it enjoys powers vested under Order XXI of the Code of Civil Procedure, 1908, though section 17 of the Family Courts Act, 1964 provides that the provisions of Qanun-e-Shahadat Order, 1984 and Code of Civil Procedure, 1908 except sections 10 and 11 shall not apply to the proceedings before any Family Court. The bar contained in this section has been manifestly addressed by the Apex Court of the country in Amjad Iqbal v. Mst. Nida Sohail and others (2015 SCMR 128), wherein it has invariably been held:-

> 'Thus the technical trappings of execution provided in the C.P.C. are excluded from application before the Family Court in execution of a decree for maintenance. Section 13(3) of the Act itself provides that "Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court [not exceeding thirty days the same shall, if the Court so directs to recover as arrears of land revenue, and on recovery shall be paid to the decree-holder." This provision in the Act empowers the Family Court to execute its own decree for payment of money by adopting modes provided for recovery of arrears of land revenue. In the West Pakistan Land Revenue Act various modes of recovery of arrears of land revenue are spelt out and one of the modes provided for recovery of arrears of land revenue is by selling the immovable property of the defaulter.' (Underline for emphasis)

Therefore, in order to avoid technical trapping, there remains no need to transfer the execution petition to any other Court out of one district to the other district where the judgment debtor resides. The learned Executing Court seized of the matter may adopt procedure provided under law by sending a precept through proper channel to the Court where the judgment debtor resides or has movable/immovable property so as to attach the same and recover the decretal amount as arrears of land revenue, following the methodology as provided in section 46 of the Code of Civil Procedure, 1908, which enumerates:-

> 'Precepts.---(1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree.

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.'

It is not meant that the provisions of the Code of Civil Procedure, 1908 are going to be followed in stricto sensu rather the procedure provided therein is to be adhered to by the Family Court because the Family Court is governed by the general principle of equity, justice and fair-play. In addition to this, if the judgment debtor is employed in any department his salary can also be ordered to be attached by the concerned quarters through proper channel and he can be forced to satisfy the decree; thus, when the main purpose of the enactment is to protect the convenience of the weaker and vulnerable segments of the society i.e. women and children, the same cannot be achieved by transferring the decree to a place where they (women and children) do not reside because they will suffer the agony of travelling from a place to the other in order to pursue the proceedings in execution petition before the transferee Court and it would also endanger their lives at the hands of judgment-debtor because of obtaining a decree against him (judgment-debtor). When we go through the ratio of judgment Amjad Iqbal (supra) it comes on surface that the Executing Court of a decree passed by a Family Court may adopt every method in order to get the decree satisfied including attachment of property (movable or immovable), selling the property, attachment of the

salary and ordering for arrest of the judgment debtor; all these methods are not provided under the Family Courts Act, 1964 but the same are taken from the Code of Civil Procedure, 1908 as these methods are not inconsistent with the provisions of the Act, 1964 for the purpose of satisfaction of the decree because proceedings of the Family Court, whether as a Trial Court or an executing Court are governed by the general principle of equity, justice and fair-play, as has been held in Haji Muhammad Nawaz v. Samina Kanwal (2017 SCMR 321). In addition to this, in a judgment reported as Muhammad Tabish Naeem Khan v. Additional District Judge, Lahore and others (2014 SCMR 1365), the Apex Court has invariably held:-

> 'Family Court was a quasi-judicial forum, which could draw and follow its own procedure, provided such procedure was not against the principle of fair hearing and trial.'

5. Pursuant to the above, when all the proceedings at trial stage are carried out at a place where the women and children reside, forcing them to get transferred the execution petition or decree to some other Court, out of District, would certainly, as stated above, cause inconvenience and troubles to them, which is not the myth and essence of the Family Courts Act, 1964 as has been highlighted in its "Preamble".

6. Concluding the above discussion and observations, the following directions are issued to be followed by the District Judges of the Punjab and the Family Courts in future:-

1. While passing the money decree in respect of maintenance allowance, alternate prices of dower or dowry articles, the provisions of section 13(3) of the Family Courts Act, 1964 should be adhered to, which provides that, 'Where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court [not exceeding thirty days] the same

shall, if the Court so directs, be recovered as arrears of land revenue, and on recovery shall be paid to the decree-holder.'

2. The District Judge will designate a Civil Judge as Executing Court in the District as well as Tehsils, as the case may be, where the execution petitions for satisfaction of decrees passed by the Judge Family Court will be filed and executed/satisfied in accordance with law by adopting all measures in this regard.

3. In case the judgment debtor resides in some other District and owns property, precept will be transmitted for attachment purposes and further proceedings will be taken in accordance with law.

7. In the light of the above, the instant petition and transfer applications, detailed supra, are hereby disposed of, accordingly.

MH/S-6/L **Order accordingly.**

2022 Y L R 1118

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

Mst. SHAKEELA NAZ---Petitioner

Versus

Mst. NAZIR BEGUM through L.Rs. and others---Respondents

Civil Revision No. 1220-D of 2002, decided on 13th July, 2021.

Civil Procedure Code (V of 1908)---

----O. VI, R. 15 & S. 2(2)---Suit for partition---Defendant/petitioner in written statement contended that half portion of the suit land was given to his wife as dower by his father/predecessor in interest of the plaintiffs and defendant---Petitioner/wife of defendant/ petitioner was not initially party to suit, however, she subsequently entered into the suit and adopted the same written statement submitted by her husband---Suit was decreed---Appeal of the petitioner was accepted and case was remanded with observation that decree be treated as preliminary---Held, that omission to verify the pleadings on oath or on solemn affirmation was merely a procedural defect and the same could be rectified at any stage of the proceedings---Petitioner neither submitted written statement which was verified on oath nor appeared in the witness box so as to depose on oath in support of her version---Courts below had rightly concluded that the petitioner had failed to prove her case by leading unimpeachable evidence---Nikahnama did not bear signatures of father/ predecessor in interest of the respondents (including husband of the petitioner)---Appellate Court ordered the decree to be treated as preliminary instead of final, whereas the findings recorded by Trial Court were kept intact---Trial Court misapprehended/misconceived the judgment passed by the Appellate Court and passed decree excluding half portion of the disputed

property, but actually its prior decree had attained finality---Signatures of counsel for parties were obtained on the margin of the order sheet---Petitioners had given consent to proceed with the matter as per direction of Appellate Court, so she could not take a u-turn/other stance---Revision petition was dismissed accordingly.

Syed Muhammad Ali Gilani for Petitioner.

Zulfiqar Ahmad Qureshi for Respondents.

ORDER

SHAHID BILAL HASSAN, J.--- Succinctly, the respondents Nos.1 to 8 instituted a suit for partition of the disputed residential property, detailed in the head-note of the plaint by contending that the same was owned by Mian Elahi Bukhsh, predecessor in interest of the respondents Nos. 1 to 8 and present respondent No.9/defendant No. 1. The present petitioner was initially not arrayed as defendant, but later on, she was impleaded as defendant. The defendant No.1/respondent No.9 submitted written statement wherein he controverted the averments of the plaint and contended that half portion of the disputed house was given to his wife by his father, so the same would be excluded from the partition proceedings. Meanwhile, on 25.06.1995, Hafiz Muhammad Ishaque (respondent No.1-a) made a statement before the learned trial Court that he was not in knowledge of the fact of transfer of half portion of the house as dower in favour of the present petitioner. The present petitioner subsequently adopted the written statement filed by her husband/respondent No.9/defendant No.1 as allegedly it was meeting with the requirements of the written statement to be filed by the petitioner, in this respect statement of learned counsel for the petitioner was recorded on 21.0411996. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned trial Court vide judgment and decree dated 29.06.1999 decreed the suit with regards to the whole of property. The present petitioner preferred an appeal,

which was accepted on 09.02.2000 with the observation that the decree dated 29.06.1999 be treated as preliminary instead of final and further proceedings be carried out and case was remanded to the learned trial Court. In post remand proceedings, the learned trial Court vide judgment and decree dated 14.02.2001 decreed the suit to the extent of half share in the disputed house. Appeal preferred by the respondents Nos.1 to 8 was allowed on 14.02.2002 with concurrence and matter was remanded with direction to proceed with the lis as per direction of the learned appellate Court dated 09.02.2000. After remand, the petitioner moved a application for adducing additional evidence on 26.02.2002 but the said application was dismissed on 16.05.2002 and the learned trial Court vide impugned judgment and decree dated 12.06.2002 passed preliminary decree in favour of the respondents Nos.1 to 8 in respect of whole of the property. The petitioner assailed the same by filing an appeal and during pendency of the appeal filed an application for producing additional evidence, but the learned appellate Court dismissed the said application on 26.07.2002 and also dismissed the appeal vide impugned judgment and decree dated 04.09.2002; hence, the instant civil revision.

2. Heard.

3. Rule 15 of Order VI, Code of Civil Procedure, 1908 provides:--

> '15. Verification of pleadings.---(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.'

Clause 4 of Chapter I, Part-C of Volume 1 of the high Court Rules and Orders provides that:--

'4. Signing and verification.---The plaint must be signed by the plaintiff, or, if by reason of absence or other good cause the plaintiff is unable to sign it, by his duly authorized agent. It must also be signed by the plaintiff's pleader (if any) and be verified by the plaintiff, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

The personal attendance of the plaintiff in Court for the purpose of verification is unnecessary. The verification must, however, be signed by the person making it.'

Apart from the above provisions of law, Rule 2 of Order X, Code of Civil Procedure, 1908 is also relevant, for the purpose of the instant case, which reads:--

'2. Oral examination of the party or companion of party.---At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, shall be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.'

A bare reading of the above provision of law makes it vivid that a person verifies the pleadings on oath or on solemn affirmation; however, such omission is mere a defect in procedure and same can be rectified at any stage of the proceedings; reliance is placed on a judgment handed down by a Division Bench of this Court reported as Messrs Aziz Flour Mills and 2 others v. The Industrial Development Bank of Pakistan (1990 CLC

1473-Lahore) and Fazal-Ur-Rehman and 2 others v. Begum Sughra Haque (2000 MLD 562-Lahore), Wherein it was held that:--

> The provisions contained in Order VI, Rules 14 and 15, C.P.C. with regard to signing and verification of plaint are mere matters of procedure and if plaint is not properly signed or verified but is admitted and entered in the register of suits, it does not cease to be a plaint and the suit cannot be said not to have been instituted merely because of the existence of mere defect or irregularities in the matter of signing and verification of plaint. If defects in regard to the signature, verification or presentation of the plaint are cured on a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to subsequent date.'

In the present case, the petitioner relied upon and adopted the written statement submitted by the defendant No.1/ respondent No.9/her husband as it was purportedly meeting with the requirements of the defence to be taken by the petitioner. However, when she neither submitted written statement, which is verified on oath, nor appeared in the witness box so as to depose on oath in support of her version, the learned Courts below have rightly concluded that the petitioner has failed to prove her case by leading unimpeachable evidence because the Nikahnama does not bear signatures of Mian Elahi Bukhsh in the relevant column and he only signed the Nikahnama as a witness for appointment of attorney of the groom. The findings recorded by the learned Courts below on this point are upto the dexterity as the same are result of proper appreciation of evidence on record, which are maintained and upheld.

4. In addition to the above, the suit was decreed by the learned trial Court germane to entire disputed property and the claim of the petitioner was declined vide judgment and decree dated 29.06.1999. The said decree was assailed by the present petitioner in appeal and the learned appellate Court, keeping the findings recorded by the learned trial Court intact, vide

judgment dated 09.02.2000 observed that 'the impugned judgment to the extent of issue No.6 is hereby set aside with the direction to the learned trial court to amend the judgment dated 29-6-1999 with the change in the relief only to the extent of treating the impugned judgment as preliminary and adopt the procedure of partition by appointing a local commission and thereafter proceed quite in accordance with law.' Meaning thereby the decree passed by the learned trial Court was ordered to be treated as preliminary instead of final, whereas the findings recorded by the learned trial Court, as stated above, were kept intact. However, the learned trial Court misapprehended and misconceived the judgment dated 09.02.2000 passed by the learned appellate Court and instead of treating the decree dated 29.06.1999 as preliminary decree again passed decree excluding half portion of the disputed property allegedly given to the petitioner as dower vide judgment and decree dated 14.02.2001 but in actual the decree dated 29.06.1999 had attained finality. So much so, when the respondents Nos.1 to 8 preferred an appeal against the decree dated 14.02.2001 passed by the learned trial Court, the learned counsel for the parties agreed by recording their statement that the learned trial Court committed illegality, so with concurrence the decree dated 14.02.2001 was set aside by accepting the appeal with the direction to proceed with the matter according to law and procedure as per direction of the appellate Court dated 09.02.2000. The signature of the learned counsel for the parties were also obtained on the margin of order sheet in this regard. For ready reference, the order dated 14.02.2002 is reproduced:--

> 14-2-2002.
>
> Present: Counsel for the parties.
>
> Learned counsel for the parties agreed that the learned trial court has committed illegality for no obeying the order dated 19.2.2000 of the appellate court, hence, the appeal be accepted and the impugned judgment and decree dated 14.2.2001 of the learned trial

court be set aside with the direction that the learned trial court should firstly comply with the order of the appellate court dated 09.02.2000 and proceed according to law and procedure.

R.O. and A.C.

Dated: Addl. District Judge,

14.2.2002. Jampur

Presence: As before.

In view of the statements of learned counsel for the parties the impugned judgment and decree of the learned trial court dated 14.2.2001 is set aside and the suit is hereby remanded to the learned trial court after accepting this appeal with no order as to cost with the direction to proceed according to law and procedure as per direction of the appellate court dated 09.2.2000.

2. This order will not prejudice the rights of the parties if challenged further in the appellate court.

3. Parties are directed to appear before the trial court on 26.02.2001. All the record of this court be consigned and that of learned lower court be sent back immediately.

Announced.

14.2.2002 Addl. District Judge, Jampur'

In this view of the matter, the petitioner's side has given the consent to proceed with the matter as per direction issued by the learned appellate Court vide judgment dated 09.02.2000 and now she cannot take a U-turn or other stance, being left with no remedy except to accept the consequences of the same. Even otherwise, the decree dated 29.06.1999 had attained finality after passing of the judgment dated 09.02.2000 by the learned appellate Court wherein findings recorded by the learned trial

Court were maintained and said decree was ordered to be treated as preliminary instead of final, because the said judgment dated 09.02.2000 was not further challenged by the petitioner. No illegality and irregularity has been committed by the learned Courts below while passing the impugned judgments and decrees warranting interference by this Court in exercise of supervisory revisional jurisdiction, which otherwise has a limited scope.

5. Apart from the above, it is a settled proposition of law that concurrent findings, on facts, recorded by the learned Courts below cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction as has been held in Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469) and Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161).

6. Epitome of the discussion above is that the revision petition in hand being meritless comes to naught; hence, the same stands dismissed. No order as to the costs.

ZH/S-87/L **Revision dismissed.**

2022 Y L R 1597

[Lahore (Multan Bench)]

Before Shahid Bilal Hassan, J

ALLAH WASAI (deceased) through L.Rs. and others---Petitioners

Versus

KHUDA BUKHSH (deceased) and others---Respondents

Civil Revision No.964-D of 2003, heard on 18th May, 2021.

Specific Relief Act (I of 1877)---

----S. 42---Suit for declaration---Cancellation of gift mutation---Scope---Plaintiffs/donees instituted two separate suits for declaration wherein they challenged cancellation of gift mutations by the Assistant Collector---Trial Court and Appellate Court concurrently decreed the suits---Validity---Record revealed that donor was incapable of getting his statement recorded and even he was unable to understand the events of alleged gift, entered in the revenue record, in favour of his sons/plaintiffs, by depriving his daughter---Basic ingredients for gift i.e. offer, acceptance and delivery of possession were not detailed in the plaint---Plaintiffs could not plead as to when, where and in whose presence the deceased had made an offer for gifting out the property, which was accepted in presence of such and such witnesses, where after possession was delivered to the plaintiffs---Assistant Collector had rightly cancelled the alleged gift mutations--- Possession of disputed property was with the plaintiffs under the donor, father of the parties and it was not in pursuance of the alleged gift---Revision petition was accepted and the impugned judgments and decrees were set aside, in circumstances.

Farhan Aslam and others v. Mst. Nuzba Shaheen and another 2021

SCMR 179 and Muhammad Sarwar v. Mumtaz Bibi and others 2020 SCMR 276 ref.

Atta Muhammad and others v. Mst. Munir Sultan (Deceased) through her L.Rs. and others 2021 SCMR 73 and Mst. Saadia v. Mst. Gul Bibi 2016 SCMR 662 rel.

Malik Muhammad Fayyaz Ul Haq Arain for Petitioner (in C.R. No.964-D of 2003).

Haji Muhammad Tariq Aziz Khokhar for Petitioner (in C.R. No.963-D of 2003).

Malik Javed Akhtar Wains for Respondents.

Date of hearing: 18th May, 2021.

JUDGMENT

SHAHID BILAL HASSAN, J.---This single judgment will dispose of the captioned civil revision as well as connected Revision Petition bearing No.963-D of 2003, as in both one and the same judgments and decrees have been called into question.

2. Tersely, Khuda Bukhsh, respondent and Nasir Ali along with Amir Ali both sons of Faiz Bukhsh, instituted two separate suits, for declaration, wherein they challenged the validity and veracity of Mutation No. 334 dated 10.04.1998 and order dated 09.02.1998 passed by AC-II, Kehror Pakka whereby he cancelled the mutations of gifts bearing Nos. 317, 318, 319 and 320, by maintaining that the same have wrongly been cancelled as the alleged donor Ghulam Ali deceased himself gifted out the property in his life time; thus, the subsequent inheritance Mutation No. 334 dated 10.04.1998, after cancellation of the above said gift mutations through order dated 09.02.1998, has been entered without any

jurisdiction, illegally, which is liable to be set aside.

The suit was contested by the present petitioner (in both revision petitions) while submitting written statement who denied the averments of plaints and prayed for dismissal of the suits.

Out of the divergent pleadings of the parties the learned trial Court framed issues and vide impugned separate judgments and decrees in both the suits dated 15.03.2001, passed decrees in favour of the respondent(s)/plaintiff(s). The petitioner being aggrieved preferred two separate appeals, which were decided through impugned consolidated judgment and decree dated 17.06.2003 whereby appeals were dismissed; hence, the same has resulted in filing of the revision petitions in hand.

3. Heard.

4. Being a Muslim State, it is essential and sine qua non that the commandments ordained by ALLAH in the Holy Quran should and must be adhered to, but, of course, with a cricking and wrenching heart, it is observed that we, as a nation, have travelled far away from the teachings of Islam. With a heavy heart it is further observed that even in the 21st century, after more than 1400 years of emergence of Islam, a number of people try to deprive the females of their rights of inheritance despite the fact that ALLAH in a categorical and vivid way has ordained that:-

> 'And let those fear (in their behaviour toward orphans) who if they left behind them weak offspring would be afraid for them. So let them mind their duty to Allah, and speak justly.'
>
> 'Lo! Those who devour the wealth of orphans wrongfully, they do but swallow fire into their bellies, and they will be exposed to burning flame.'

(Verses 9 and 10 of Surah An-Nisa (4) translated by Muhammad William Pickthall)

In the present case, a daughter/sister i.e. the present petitioner has been deprived of her right of inheritance for about 23 years from now, which must have been unbearably painful for her and she has breathed her last without enjoying the fruits of her rights with the inherited property of her father, despite the fact that the deceased Ghulam Ali, father of the parties, was admittedly suffering from some serious diseases before his death and even P.W.2 admitted that he was paralyzed about 3/4 days before his death. Meaning thereby deceased Ghulam Ali was incapable of getting his statement recorded and even to understand the events of alleged gift, entered in the revenue record, in favour of the respondents/sons, by depriving the present petitioner/daughter. Despite appreciating this factum, the learned Courts below have passed the impugned judgments and decrees, which show their lack of legal and judicial acumen as well as understanding. In a recent judgment reported as Farhan Aslam and others v. Mst. Nuzba Shaheen and another (2021 SCMR 179), the Apex Court of the country invariably held:--

> 'The Constitution of the Islamic Republic of Pakistan (the 'Constitution') safeguards property (including inherited property) under Article 24(1) of the Constitution and protection of women and children is guaranteed by Article 25(3) of the Constitution. The Constitution sets out the goals which the people of Pakistan have set out for themselves in the 'Principles of Policy', which include the protection of 'mother and the child' (Article 35) and require the 'promotion of social justice and eradication of social evils' (Article 37). Depriving a mother and her child from their inheritance does not protect them but preys on them. Such conduct

is a prevalent social evil and inherently unjust. It is expected that the organ and authority of the State will act in accordance with the Principle of Policy as provided by Article 29(2) of the Constitution. Therefore, claims by orphans and widows alleging that they have been deprived of their inheritance must be expeditiously decided by the concerned organ and authority of the State, including the courts.

9. The revenue authorities must also be extra vigilant when purported gifts are made to deprive daughters and widows from what would have been constituted their shares in the inheritance of an estate. The concerned officers must fully satisfy themselves as to the identity of the purported donor/ transferee and strict compliance must be ensured with the applicable laws, as repeatedly held by this Court, including in the cases of Islam-ud-Din v. Noor Jahan (2016 SCMR 986) and Khlida Azhar v. Viqar Rustan Bakhshi (2018 SCMR 30). Purported gifts and other tools used to deprive female family members, including daughters and widows, are contrary to law (shariah in such cases), the Constitution and public policy.'

The same view has been reiterated and affirmed in Atta Muhammad and others v. Mst. Munir Sultan (Deceased) through her L.Rs. and others (2021 SCMR 73).

Here in this case, the facts and figures are almost the same as in the above said case, because in this case, as stated above, a daughter (petitioner) has been deprived of her share in inheritance through purported gift deeds, which were not proved by the respondents as per requirement of law, because the basic ingredients for gift i.e. offer, acceptance and delivery of possession are missing in the plaint, as the

plaintiffs could not plea as to when, where and in whose presence the deceased Ghulam Ali made offer for gifting out the property, which was accepted in presence of such and such witnesses, whereafter possession was delivered to the respondents/sons as entering the mutation of gift a subsequent event and when the respondents failed to prove the prior event, entering of mutation and alleged Roznamcha are not helpful to them. Moreover, when a question mark was raised upon the health of deceased Ghulam Ali, it was incumbent upon the respondents/plaintiffs, being beneficiaries to bring on record cogent and plausible evidence showing that the said deceased was enjoying good health and was in good senses when he gifted out the property to them; as against them it has come on record that he was suffering from some serious diseases and was paralyzed about 3/4 days before his death, so in such an eventuality any transaction, allegedly made by him, cannot be said to be with an independent mind; thus, when the revenue officer/AC-II found him (Ghulam Ali) unable to make statement, he had rightly cancelled the alleged gift mutations. With this backdrop, it is observed that the revenue officer has exercised his powers vigilantly and he seems to be a God-fearing person. It has been held in Muhammad Sarwar v. Mumtaz Bibi and others (2020 SCMR 276) that:--

> 'The petitioner also failed to independently prove the validity of the alleged gift mutation. This Court has held in a number of judgments that where the validity of a gift mutation is challenged, it is incumbent upon the beneficiary not only to prove the validity and legality of the gift mutation by producing all relevant evidence but it is also necessary that the gift itself be proved through cogent and reliable evidence. Both the said requirements were admittedly not met. Neither the alleged oral gift was proved by any credible evidence nor was the legality or validity of the alleged gift

mutation proved by producing credible evidence.'

Same is the case in hand, because the respondents could not prove the gifts itself and the gift mutations by producing cogent and reliable evidence, because they could not plead the names of witnesses in whose presence the alleged process of offer, acceptance and delivery of possession was made nor produced the marginal witnesses and revenue officials in support of their stance. Even, it is on record that the possession of the disputed property was with the respondents under the deceased Ghulam Ali, father of the parties and it was not in pursuance of the alleged gift.

5. Another aspect in this case is that the respondents could not specifically plead and assert the date of death of deceased Ghulam Ali, after alleged gifts made in their favour and it has only been pleaded in paragraph No.2 of the plaint that deceased Ghulam Ali made offer to transfer the property through Tamleek in favour of plaintiff about two months before, which was accepted and deceased Ghulam Ali delivered the physical possession in pursuance of the tamleek to the plaintiff. It is not clear whether two months before institution of the suit or before his death, so such a vague plea creates aspersions about the events of purported gift.

6. Pursuant to the above discussion, it is observed that the learned Courts below have failed to appreciate the true facts of the case and have committed material illegalities and irregularities while passing the impugned judgments and decrees, which cannot be allowed to hold field. Thus, by placing reliance on the judgments supra as well as Mst. Saadia v. Mst. Gul Bibi (2016 SCMR 662), the revision petition in hand and connected petition bearing C.R. No. 963-D of 2003 are allowed, impugned judgments and decrees are set aside, consequent whereof the

suits titled "Khuda Bukhsh v. Allah Wasai, and others" and "Nasir Ali, and others v. Allah Wasai, and others" for declaration are dismissed with costs throughout.

SA/A-88/L **Revisions allowed.**

2022 Y L R 1867

[Lahore]

Before Shahid Bilal Hassan, J

Shaikh MUHAMMAD TARIQ---Petitioner

Versus

Messrs PREMIUM DEVELOPERS through C.E.O.---Respondent

Civil Revision No.49091 of 2021, decided on 11th March, 2022.

Civil Procedure Code (V of 1908)---

----Ss.2(14) & 36---Specific performance---Execution petition---"Executable order"---Scope---Petitioner agreed to sell 30 acres of land for a consideration of Rs.94 crore bounding the respondent to pay 1/4th amount of total consideration amount within 50 days and remaining amount was to be paid in 6 equal installments till performance date (i.e. 01.03.2019)---Respondent filed suit for specific performance of agreement and Trial Court ordered the respondent to deposit the remaining consideration amount in the Court but respondent failed to deposit the same---Responded submitted application and prayed for the suit to be decided in terms of compromise and on the same day counsel for the respondent got recorded his statement before the Court for vacation of stay to the extent of 15 acres 12 marlas land belonging to the petitioner, which was vacated---Respondent paid 5% amount (i.e. Rs.37,920,330/-) of the totalsale consideration---Respondent also paid amount of Rs.90,000,000/- to the petitioner---Petitioner contended that respondent did not comply with the compromise and failed to pay the remaining amount under terms of compromise---Trial Court passed detailed order directing the respondent to pay the remaining amount---Respondent did not comply with the said order, instead filed revision petition before High Court which was pending---Respondent filed

execution petition and the executory Court ordered the petitioner to get 30 acres of land in respect of the response to the received amount---Validity---Order of Trial Court divulged that the same was passed only for vacation of stay order to the extent of 30-acres land---Such order did not mention that the said 30-acres land would be transferred in the name of the respondent in pursuance of amount of Rs.90,000,000/---As per terms of the compromise, the respondent was bound to pay 1/4th of the agreed amount, whereas the amount paid by respondent i.e. Rs.90,000,000/-, in no way was 1/4th of the total amount---Orders sought to be executed by filing execution petition as per S.36 of the Code of Civil Procedure, 1908, were not executable---No "executable order" was in the field---Revision petition was accepted accordingly.

Bakhtawar and others v. Amin and others 1980 SCMR 89 rel.

Mian Muhammad Hussain Chotiya and Adnan Naseer Chohan for Petitioner.

Shazib Masud and Mirza Nasar Ahmad for Respondent.

Date of hearing: 1st February, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Tersely, the petitioner was the exclusive owner in possession of a duly approved housing scheme from the TMA, Ferozwala under the name and style of Lahore Garden Housing Scheme, situated at Jaranwala Road, Tehsil Ferozwala, District Sheikhupura who entered into an agreement to sell in respect of his some developed and undeveloped land of the above said scheme with the respondent on 01.03.2018 for a consideration of Rs.94 crore; that according to the terms and conditions of the above said agreement the respondent was bound to pay 1/4th amount of total consideration amount and remaining amount was to be paid in 6 equal installments till

performance date i.e. 01.03.2019. However, the respondent instituted a suit for possession through specific performance of agreement to sell. On 27.03.2018, the learned trial Court ordered the respondent to deposit the remaining amount of consideration in the Court but the respondent failed to honour the direction and did not deposit the amount in the Court. On 08.06.2018, the respondent/plaintiff filed an application under Order XXIII, Rule 3, Code of Civil Procedure, 1908 apprising the Court that both the parties had arrived at a compromise out of Court and prayed that the suit may be decided in terms of compromise and on the same day learned counsel for the respondent got recorded his statement before the Court for vacation of stay to the extent of 15 acres 12 marlas land belonging to the petitioner, which was vacated and the respondent paid 5% amount Rs.37,920,330/- of the total sale consideration under clause (b) of the compromise for the purpose mentioned in clause (d) to satisfy the claim of creditors of the petitioner, who had already filed litigation against him (petitioner) as well as against the sold scheme; thus, allegedly the said amount was not price of 15 acres 12 marlas land. On 09.0.2018(sic), the respondent paid amount to the extent of Rs.90,000,000/- to the petitioner under clause (e) of the compromise which was part payment of 1/4th earnest money as the respondent was bound to pay 1/4th amount of the total sale consideration within 50 days but after making this part payment, the respondent started to linger on the matter and did not reach even at the figure of 1/4th earnest money that is why the compromise could not be finalized and this amount was also not the sale price of 30 acres of land but it was part payment of 1/4th earnest money; moreover, purportedly this 30 acres land was not part of the agreement and was not transferable in the name of the respondent. On 09.10.2018, allegedly the stay order was vacated on the statement of the learned counsel for the respondent because the 30 acres land was not part of the compromise. It has been submitted that the

respondent did not comply with the compromise as he did not pay the remaining amount under terms of compromise.

The petitioner instituted a suit for cancellation of documents on 03.05.2019 wherein status quo order was passed on 14.05.2019.

After failure of compromise, the learned trial Court passed detailed order on 16.11.2019 directing the respondent for deposit of the remaining amount of Rs.619,486,272/ out of the Rs. 758,406,602/- deducting already paid amount Rs.128,920,330/- after determination of actual sale consideration subject to adjustment at the time of final adjudication of the case. However, the respondent instead of complying with the said order, challenged the same by filing C.R. No.74574 of 2019 before his Court and got suspended operation of the above said order on 09.12.2019 which is still intact and revision petition is pending before this Court. However, the respondent, in the meanwhile, filed an execution petition on the basis of orders dated 08.06.2018 and 09.10.2018 for transferring 30 acres of land and the learned Executing Court vide impugned order dated 26.07.2021 directed the present petitioner to get transferred land measuring 30 acres in response to the received amount of Rs. 9-crores vide pay order No.0208-4533054 dated 20.08.20218, on 09.10.2018. Being aggrieved of the said order, the petitioner has filed the instant revision petition.

2. Heard.

3. Order dated 09.10.2018, execution of which has been sought by the respondent reads:--

'Today the case is fixed for submission of written statement on behalf of the defendant. However, at the very outset learned counsel for the defendant has stated at bar that compromise has been effected inter-se the parties to the extent of whole property. However, presently an amount of Rs.9,00,00,000/- has been received by the defendant vide

pay order No.0208-4533054 dated 20.08.2018, hence, if the stay order may be vacated to the extent of 30-acres land they shall have no objection. Learned counsel for the plaintiff has frankly conceded the contention on behalf of the defendant. Both the learned counsel for the parties have acknowledged the earlier recorded statement vide order dated 08.06.2018 in furtherance of compromise deed Mark-C. Signatures of learned counsel for the parties as well as signature of defendant are obtained on the margin of order sheet as token of correctness. In furtherance thereof the stay order to the extent of 30-acres land is hereby vacated. As per request to come up for making an efforts for remaining compromise and for submission of written statement on behalf of the defendant for 15.11.2018.'

Now, the alleged compromise, mutually reached at, between the parties is necessary to be considered, which has been submitted before the learned trial Court in the form of application under Order XXIII, Rule 3 read with section 151, C.P.C. for recording of compromise, which reads:--

'a) That at the time of execution of questioned agreement of sale, the approximate agreed available land under sale transaction was 1100 Kanals which has now been roughly calculated as 1284 Kanals (subject to final measurement), due to which the agreed sale consideration amount of the sale transaction after deduction of approximate arrears of Rs.405,300,000/- of the already sold units of the scheme (subject to finalization upon providence of actual sales record) has now comes to Rs.75,84,066,02 instead of Rs.54,00,000,00/-.

b) That it has been agreed between the parties that the defendant is ready to handover the possession of the entire sold scheme of their agreement of sale to the plaintiff subject to payment of an amount of

5% of the total sale consideration which as per new roughly calculation of the land of the scheme comes to Rs.3,79,20,330/-, receipt of which the defendant hereby acknowledges in presence of this Hon'ble Court through P.O. No. 4213840 dated 05.06.18.

c) That it has further been agreed between the parties that upon receipt of above 5% of the actual sale consideration by the defendant, the defendant besides handing over possession of entire assets of the scheme to the plaintiff, will also transfer his ownership of his already sold units in the scheme to the extent of 15 Acre in favour of the plaintiff.

d) That as the defendant is receiving the above amount of 5% from the plaintiff to satisfy the claims of his creditors who had already filed litigation against him as well as against the sold scheme, therefore, it has been agreed upon that both the parties will jointly make efforts to satisfy all the said claims

and pending litigation within 50 days from the date of receipt of above amount of 5% by the defendant out of total sale consideration.

e) That upon satisfaction of all the claims and pending litigation in respect of the sold scheme subject to finalization upon providence of actual sales record of the scheme and that of providence of actual measurement of the land of the scheme within the above agreed period of 50 days, the plaintiff will be liable to pay the agreed of the actual sale consideration to the defendant who upon receipt of said earnest amount will be liable to get transfer his ownership to the extent of received earnest amount in the sold scheme in favour of the plaintiff whereafter the rest of the agreement of sale will be proceeded as per its agreed terms till satisfaction of the same.

d) That in case despite lapse of above agreed period 50 days, the parties fail to satisfy the pending claims or that of the said any pending

litigation due to any reasons, then in such eventuality the said liability, with the consent of the defendant, will be satisfied by the plaintiff and any such payment made by him will be adjusted towards the remaining sale consideration of the scheme and thereafter the rest of the agreement to sale will be proceeded as per its agreed terms till satisfaction of the same. Besides the above, any other pending litigation, if any, will now be the liability of the plaintiff who will manage the same of its own at the cost and expense (inclusive of professional fee of lawyer, court fees and other litigation expenses) of the defendant and in case of non-payment of the same by the defendant, any payment if be made there under by the plaintiff for the satisfaction said litigation, will again be adjusted towards the remaining sale consideration of the scheme.

g) That again in case of any dispute in the matter with regard to the above settlement, the same in terms of the original agreed terms of the agreement of sale, be referred to the committee of arbitrators for amicable resolution thereof.'

4. Perusal of the above said order dated 09.10.2018 divulges that the same was passed only for vacation of stay order to the extent of 30-Acres land and not more than this; there is no mention in the said order that the said 30-Acres land will be transferred in the name of the respondent/plaintiff in pursuance of amount of Rs.90,000,000/- in terms of compromise Mark-C and even, upon bare perusal, the compromise Mark-C does not find mentioned the above said fact, rather in clause (e) of the said compromise Mark-C, it has been agreed that upon satisfaction of all the claims and pending litigation in respect of the sold scheme subject to finalization upon providence of actual sales record of the scheme and that of providence of actual measurement of the land of the scheme within the above agreed period of 50 days, the plaintiff will

be liable to pay the agreed 1/4 of the actual sale consideration to the defendant who upon receipt of the said earnest amount will be liable to transfer his ownership to the extent of received earnest amount in the sold scheme in favour of the plaintiff whereafter the rest of the agreement of sale will be proceeded as per its agreed terms till satisfaction of the same. If we calculate the agreed sale price after deduction of Rs.405,300,000/- of the already sold units of the scheme (subject to finalization upon providence of actual sales record) the same comes to Rs.758,406,602/-, so as per term (e) of the compromise Mark-C, the respondent/ plaintiff was bound to pay 1/4 of the agreed amount, whereas the respondent/ plaintiff has paid Rs.90,000,000/-, which in no way is 1/4 of the agreed amount. Moreover, the orders sought to be executed by filing execution petition before the learned trial Court as per section 36 of the Code of Civil Procedure, 1908, are not executable, because no such order, as stated above, has been passed by the learned trial Court, rather the said orders are only to the extent of vacation of the stay order with regards to certain patches of land.

5. No doubt, a Court is not precluded from getting its order executed when any 'executable order' is passed while adhering to the provisions of section 36 of the Code of Civil Procedure, 1908, which provides that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders; however, here in this case no such order is in field. Beside others, certain instances of executable orders in terms of section 36 of the Code, 1908 are given below:--

1. Ad-interim order regarding status quo.
2. An order disposing of suit in terms of compromise.
3. Undertaking given by a party in Court of law.
4. Order of Service Tribunal.

5. Order with regards to temporary and mandatory injunction.

6. Order for delivery of joint possession

7. A payment order under section 186, Companies Act.

8. Order passed by a tribunal.

9. Order for restitution of possession ante in some cases.

Moreover, in a judgment reported as Bakhtawar and others v. Amin and others (1980 SCMR 89), the Apex Court of the country while defining 'order' with reference to section 2(14) of the Code of Civil Procedure, 1908 has invariably held that:--

'9. At this place reference may be made to section 2(14) of the C.P.C. which defines an 'order' and states that 'order' means the formal expression of any decision of a civil Court which is not a decree". As a general rule an order by a Court of law is founded on objective consideration and as such is a judicial order which contains discussion of the question in issue and the reasons which prevailed with the Court to pass it.'

6. However, as stated above, in the orders, sought to be executed by filing an independent execution petition, which otherwise was not necessary, because the Court, if considers that the order passed by it is executable, it can get the same enforced/ executed at his own without formal filing of an execution petition as per provisions enunciated in the Code of Civil Procedure, 1908 in this regard, no such dilation was made and the said orders are not founded on objective consideration, rather the same are nothing but have been passed germane to vacation of stay, as has been referred in start of observations of the instant judgment. Even the order dated 08.06.2018 has also been passed with regards to vacation of stay to the extent of 15-Acres 12-Marlas land.

7. Keeping in view the above discussion, it is observed that the learned Executing Court ought to have firstly decided the question of maintainability of the execution petition and then to have proceeded to pass any further order, which exercise has been avoided by it. Thus, the learned executing Court has committed material illegality and irregularity as well as has failed to exercise vested jurisdiction as per mandate of law on the subject. As such, the impugned order dated 26.07.2021 cannot be allowed to hold field, which is hereby set aside by allowing the revision petition in hand.

8. Before parting with this judgment, as this Court has held that the orders sought to be executed by filing execution petition are not executable, the execution petition filed by the respondent being not maintainable stands dismissed as well. No order as to the costs.

ZH/M-100/L **Revision dismissed.**

2022 Y L R 2151

[Lahore]

Before Shahid Bilal Hassan, J

NADEEM SADIQ---Petitioner

Versus

DEWAN MASIH GULRAIZ and 3 others---Respondents

Civil Revision No. 958 of 2013, decided on 12th May, 2022.

(a) Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance---Petitioner/plaintiff claiming to be a bona fide purchaser, instituted a suit for specific performance against respondents/ defendants on the basis of agreement to sell---Two of the respondents appeared before Trial Court and recorded their statements to the effect that they had no objection on decreeing the suit in favour of petitioner---Third respondent submitted his written statement while confirming the sale of suit property to second respondent from whom first respondent purchased suit property and agreed to sell the same to the petitioner---Fourth respondent filed an application under O.I, R.10, C.P.C. for impleading him as defendant , which was accepted---Fourth respondent submitted written statement and alleged that a sale deed was executed in his favour during pendency of petitioner's suit---Petitioner moved an application under O.VI, R.17, C.P.C for amendment in plaint to the effect of sale deed in favour of fourth respondent to be declared null and void---Said application was accepted by Trial Court---Trial Court dismissed suit of petitioner/plaintiff---Appeal filed by petitioner was also dismissed by Appellate Court---Held, that there was no denial to the fact that petitioner derived his alleged right from first respondent as petitioner entered into agreement to sell with him (first respondent)but petitioner could not bring on record any document showing ownership of the first respondent with regards to the suit property , thus, when a person had no title with regards to the suit property, how could he entered into an agreement or transfer such property---When the position was as such, in presence of registered sale deed and mutation in favour of fourth

respondent , the status of petitioner was nothing but an alien to the suit property ---No evidence with regards to alleged fraud in respect of execution of registered sale deed had been brought on record by petitioner/ plaintiff--- Civil revision was dismissed.

(b) Civil Procedure Code (V of 1908)---

----S.115---Concurrent findings of fact could not be disturbed when the same did not suffer from mis-reading and non-reading of evidence, howsoever erroneous, in exercise of revisional jurisdiction---Civil revision was dismissed.

Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Gantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Muhammad Sarwar and others v. Hashmal Khan and others PLD 2022 SC 13 and Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21 rel.

A.D. Bhatti for Petitioner.

Tahir Gul Sadiq for Respondents Nos. 1(i), 2(ii).

Ch. Rashid Abdullah and M. Shahid Rafique Mayo for Respondent No.4.

Respondents Nos. 2(iii) to 2(viii) and 3 ex-parte on 16.02.2022.

Date of hearing: 12th May, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Precisely, the petitioner / plaintiff, allegedly being bona fide purchaser, instituted a suit for specific performance against the respondents Nos.1 to 3 on the basis of agreement to sell dated 19.09.2005. During the proceedings, the respondents Nos.1 and 2 appeared before the learned trial Court and recorded their statements to the effect that they had no objection on decreeing the suit in favour of the petitioner, whereas the respondent No.3 submitted his written statement while confirming the sale of the suit property to the

respondent No.2, from whom the respondent No.1 purchased the suit property and agreed to sell the same to the petitioner vide agreement to sell dated 19.09.2005. However, the present respondent No.4 filed an application under Order I, Rule 10, Code of Civil Procedure, 1908 for impleading him as defendant, which application was accepted and the petitioner submitted amended plaint in this regard. The respondent No.4 submitted his written statement and it transpired that the said respondent No.4 got executed a sale deed in his favour allegedly during pendency of the suit, therefore, the petitioner moved an application under Order VI, Rule 17, Code of Civil Procedure, 1908 seeking amendment in the plaint to the effect that sale deed No.745 dated 15.12.2005 in favour of respondent No.4 may be declared null and void; the said application was accepted and the petitioner filed second amended plaint. Out of the divergent pleadings of the parties, issues were framed and evidence of the parties was recorded. The learned Trial Court vide impugned judgment and decree dated 23.02.2012 dismissed the suit of the petitioner/plaintiff and appeal thereagainst also met with the same fate vide impugned judgment and decree dated 19.12.2012. Hence, the instant civil revision.

2. Heard.

3. There is no denial to the fact that the petitioner derived his alleged right from the respondent No.1 as he entered into agreement to sell with him (respondent No.1) but he could not bring on record any document showing ownership of the respondent No.1 with regards to the suit property, thus, when a person has no title with regards to the suit property, how can he enter into an agreement or transfer such property. When the position is as such, in presence of registered sale deed in favour of the respondent No.4 (Ex.D1) and mutation (Ex.D2), the status of the petitioner is nothing but an alien to the suit property. No evidence with regards to alleged fraud in respect of execution of registered sale deed (Ex.D1) has been brought on record by the petitioner. Therefore, both the learned Courts have evaluated evidence in true perspective and have reached to a just conclusion, concurrently and as such concurrent findings on facts cannot be disturbed when the same do not suffer from misreading

and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction; reliance is placed on Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Gantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Muhammad Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and Mst. Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21), wherein it has been held:--

> 'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and conclusion drawn is contrary to law.'

However, in the present case, no such occasion has arisen showing any jurisdictional error or defect of misreading and non-reading of evidence on record as well as conclusion drawn is contrary to law rather the finding recorded by the learned Courts below are upto the dexterity after minute discussion of the evidence, oral as well as documentary. Thus, the impugned judgments and decrees do not call for any interference in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908.

4. For the foregoing reasons, no illegality and irregularity has been committed, rather vested jurisdiction has aptly and justly been exercised by the learned Courts below; therefore, while placing reliance on the judgments supra the civil revision in hand being devoid of any force and substance stands dismissed. No order as to the costs.

MHS/N-23/L **Revision dismissed.**

2022 Y L R 2293

[Lahore]

Before Shahid Bilal Hassan, J

AFZAL AHMAD BUTTAR and another---Petitioners

Versus

MUHAMMAD YOUSAF---Respondent

Civil Revision No. 520 of 2022, decided on 11th January, 2022.

Guardians and Wards Act (VIII of 1890)---

----S.29---Specific Relief Act (I of 1877), S.12---Suit for specific performance of agreement to sell---Property of minor---Guardian Court, permission non-seeking of---Concurrent findings of two Courts below---Petitioners/vendees entered into agreement executed on behalf of respondent/minor through his mother regarding property owned by him---Trial Court and Lower Appellate Court dismissed suit and appeal filed by petitioners/vendees---Validity---Agreement to sell was entered into by mother of minor without seeking prior permission of Guardian Court---Such agreement was void ab initio and did not create any legal rights or liabilities in favour of petitioners/vendees and could not be enforced against respondent/minor---Agreement to sell executed by mother of respondent/minor in favour of petitioners/ vendees was void and its performance could not be sought with the aid of Court by filing civil suit---Concurrent findings of facts recorded by two Courts below did not suffer from any misreading and non-reading of evidence---High Court in exercise of revisional jurisdiction under S.115, C.P.C. could not interfere in such findings howsoever erroneous those might be---High Court declined to interfere in judgments and decrees passed by two Courts below who had rightly exercised vested jurisdiction and did not commit any illegality and irregularity while passing the same---Revision was dismissed, in circumstances.

Muhammad Ali through L.Rs. and another v. Manzoor Ahmed 2008 SCMR 1031; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161 and Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR

679 rel.

Khalid Pervaiz Warraich for Petitioners.

ORDER

SHAHID BILAL HASSAN, J.---Tersely, the petitioners instituted a suit for specific performance against the respondent/minor (Muhammad Yousaf) through his real mother Azra Tehsin, on the basis of an agreement to sell dated 05.12.2003, with respect to the suit property measuring 49-Kanals 09-Marlas falling in Khewat No.388, situated in Mauza Ferozwala, detailed in paragraph No.1 of the plaint. It was maintained by the petitioners that suit property was owned by respondent/minor; that mother of the respondent namely Mst. Azra Tehsin was appointed guardian by Guardian Court at Gujranwala vide order dated 24.05.2003; that mother/guardian of the respondent entered into an agreement to sell dated 05.12.2003 germane to the suit property for a consideration of Rs.20,00,000/-, out of which Rs.15,00,000/- were paid in presence of the marginal witnesses and possession of the suit property was delivered to the petitioners; that as per terms, the mother/ guardian of the minor/respondent within 15-days of issuance of guardian certificate was bound to execute registered sale deed in favour of the petitioners after receiving the remaining sale consideration Rs.500,000/- but later on she procrastinated and ultimately refused; hence, the suit. The respondent/ defendant was proceeded against ex parte on 26.03.2007 after observing all legal and codal formalities for procuring attendance.

Ex parte evidence of the petitioners, oral as well as documentary, was recorded and thereafter the learned trial Court vide impugned judgment and decree dated 28.02.2018 dismissed suit of the petitioners for specific performance, however, entitled the petitioners to recover Rs.15,00,000/- from the respondent/defendant. The petitioners being aggrieved of the same preferred an appeal but remained unsuccessful vide impugned judgment and decree dated 01.11.2021; hence, the instant revision petition under section 115 of the Code of Civil Procedure, 1908.

2. Heard.

3. There is no denial to the fact that the suit property is owned by minor and the same remained situation at the time of alleged agreement to sell (Ex.P1) dated 05.12.2003, which was entered into between the

petitioners and the mother of the minor who was admittedly appointed as guardian of the minor on 24.05.2003 and guardianship certificate (Ex.P3) was issued in her favour on 17.07.2003. However, before entering into any such transaction with the petitioners, the mother of the minor did not obtain any permission of the Court concerned, because she was not allowed to alienate, transfer, gift or mortgage the property owned by the minor, rather an impediment was put on such right of the guardian towards the property of the minor as is evident from the guardianship certificate (Ex.P3). When the position was as such the mother of the minor was not competent to enter into any agreement to sell with regards to the disputed property, owned by the minor, because section 29 of the Guardians and Wards Act, 1890 puts a clog in the manner:-

> '29. Limitation of powers of guardian of property appointed or declared by the Court. Where a person other than a Collector or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court.
>
> (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immov-able property of his ward, or
>
> (b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be minor.'

Thus, as stated above, the alleged agreement to sell (Ex.P1) was entered into by mother of the minor without seeking prior permission of the Court concerned, therefore, the same is voidab initio, which does not create any legal rights or liabilities in favour of the petitioners/vendees and the same cannot be enforced against the minor/respondent. In such scenario, this Court observes that the alleged agreement to sell (Ex.P1) executed by mother of the minor in favour of the present petitioners is void and the petitioners cannot seek its performance with the aid of the Court by filing civil suit. In Muhammad Ali through L.Rs. and another v. Manzoor Ahmed (2008 SCMR 1031), the Apex Court of the country, while referring the ratio, rendered in case of Chairman, District Screening Committee, Lahore, has held:-

'In the case of the Chairman, District Screening Committee, Lahore v. Sharif Ahmad Hashmi PLD 1976 SC 258 it was laid down that an agreement by person under a legal disability e.g. a minor was void ab inito and was incapable of rectification or confirmation. Law forbids such a transaction even if the minors were to ratify after attaining the age of majority. Therefore, the suit of the respondent against the petitioners for specific performance of the alleged agreement of transfer of 5 Killas of land could not be decreed. Needless to observe that Sultan, the petitioner No.2, was not even a party to the alleged agreement. The impugned judgment is not sustainable at law.'

4. In view of the above, it can safely be observed that the learned Courts below while construing law on the subject and appreciating evidence on record have reached to a just conclusion and have rightly non-suited the petitioners; therefore, the concurrent findings recorded on facts, when do not suffer from any misreading and non-reading of evidence, howsoever erroneous, cannot be interfered with in exercise of revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908. Reliance is placed on Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161) and Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679).

5. In view of the above, the learned Courts below have rightly exercised vested jurisdiction and have not committed any illegality and irregularity while passing the impugned judgments and decrees, warranting interference by this Court in exercise of revisional jurisdiction. Resultantly, while placing reliance on the judgments supra, the civil revision in hand, having no force and substance, stands dismissed, in limine.

MH/A-21/L **Revision dismissed.**

2022 Y L R 2450

[Lahore]

Before Shahid Bilal Hassan and Masud Abid Naqvi, JJ

EFU LIFE INSURANCE LTD.---Appellant

Versus

Mst. RUKHSANA MANZOOR---Respondent

Insurance Appeal No. 65704 of 2019, heard on 15th September, 2021.

(a) Administration of justice---

----Determination of question of law---Scope---Question of law even if not taken or raised by the party can be considered by the courts themselves at appellate and revisional stage.

Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705 and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others 1992 SCMR 2435 ref.

United Bank Limited and others v. Noor-Un-Nisa and others 2015 SCMR 380 rel.

(b) Limitation Act (IX of 1908)---

----S. 3---Dismissal of suits, etc. instituted after period of limitation---Scope---Court seized of the matter first has to determine whether it enjoys the jurisdiction to entertain the subject matter and whether the lis has been instituted or filed within limitation prescribed under law and then to proceed with the matter further.

Rana Rizwan Hussain for Appellant.

Faizan Saleem for Respondent.

Date of hearing: 15th September, 2021.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the respondent filed an application for claiming of policy proceeds under policy No.225550/39-EP and No.225551/39-EP amounting to Rs.750,000/- and Rs.500,000/- respectively along with liquidated damages under section 118 of the Insurance Ordinance, 2000. The present appellant filed written statement and raised preliminary as well as factual objections. Question of jurisdiction has also been raised. The learned Court below out of the divergent pleadings of the parties framed issues. During pendency of the application, the present appellant filed an application under Order VII, Rule 11 of the Code of Civil Procedure, 1908 seeking rejection of the application, which was duly resisted by the respondent. The learned Court below vide order dated 04.02.2017 disposed of the said application with the observation that the present appellant may file an application under Order VII, Rule 10 of the C.P.C. first if he considers that this Tribunal has got no jurisdiction to entertain this application. Later on, the appellant was proceeded against ex parte and application for setting aside the same was accepted on 01.03.2018 subject to payment of costs. However, on 25.09.2018, again the appellant defaulted and was proceeded against ex parte and the appellant filed application for setting aside ex parte proceedings on 22.04.2019, which was dismissed being barred by time vide impugned order dated 26.09.2019 and ex parte decreed the claim with costs as prayed for along with liquidated damages at the rate of 5% higher to the base rate under section 118 of the Insurance Ordinance, 2000. Therefore, the instant appeal has been preferred.

2. Heard.

3. It is a settled principle of law that question of law even if not taken or raised by the party, could be considered by the Courts themselves even at appellate and revisional stages. In judgment reported as United Bank Limited and others v. Noor-Un-Nisa and others (2015 SCMR 380), the

Apex Court of the country held that:--

> 'Under section 3 of the Limitation Act, 1908, it is the bounden duty of every Court of law to take notice of the question of limitation even if not raised in defence by the other contesting party(s).

Earlier to the above said celebrated judgment, the Hon'ble Supreme Court of Pakistan dealt with the same proposition in Lahore Development Authority v. Mst. Sharifan Bibi and another (PLD 2010 Supreme Court 705) and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others (1992 SCMR 2435).

Perusal of the written reply submitted by the present appellant goes to make it diaphanous that preliminary objections with regards to jurisdiction and limitation were raised by the appellant but the learned Court below without considering the same and dilating upon the said questions of law proceeded to ex parte decree the claim of the respondent, which is against the myth and scheme of law, because a Court seized of the matter first has to determine whether it enjoys the, jurisdiction to entertain the subject matter and whether the lis has been instituted or filed within limitation prescribed under law and then to proceed with the matter further. However, in the instant case, no such exertion has been made by the learned Court below despite the fact that such objections were raised by the appellant in his written reply and issues in this respect were framed. The learned Court below did not bother to give issue-wise findings. In this backdrop, such practice cannot be allowed to prevail. Therefore, we allow the appeal in hand, set aside the impugned order dated 26.09.2019 and by allowing the application for setting aside ex parte proceedings filed by the appellant, remand the case to the learned Court below with a direction to grant right of cross-examination to the appellant on the witnesses produced by the respondent and record

evidence of the appellant, where-after decide the case afresh, within a period of three months from the date of receipt of certified copy of this judgment. The adversaries are directed to appear before the learned Court below on 29.09.2021.

SA/E-4/L **Appeal allowed.**

PLJ 2022 Lahore 246

Present: SHAHID BILAL HASSAN, J.

Rana MUHAMMAD SALEEM--Petitioner

versus

ADDITIONAL DISTRICT JUDGE and others--Respondents

W.P. No. 25033 of 2014, decided on 9.2.2021.

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----Ss. 9 & 10--Constitution of Pakistan, 1973, Art. 199--Suit for recovery of maintenance allowances, dower amount and delivery expenses--Consolidated judgment--No evidence regarding snatching of gold ornament by petitioner--Financial status of petitioner--Courts below keeping in view needs of minors and Respondent No. 3 as well as financial status of petitioner while appreciating evidence on record have rightly fixed maintenance allowance of Respondents No. 3 to 5--Findings recorded by Courts below on this score do not call for any interference which are upheld and maintained--Gold ornaments are considered to be in possession of women folk, being their personal gifts and property as well as dear to them and when there is no evidence on record showing that same were snatched by petitioner, findings recorded by appellate Court on this point are exceptional and do not call for any interference at this stage--There appears no legal infirmity or error in impugned judgments and decrees warranting interference by High Court in exercise of extraordinary constitutional jurisdiction--Petition dismissed.[P. 248] A, B & C

Mr. Azam Jan Muhammad, Advocate for Petitioner.

Mr. Adeel Khawar Nahra, Advocate Vice Counsel for Respondents No. 3 to 5.

Date of hearing: 9.2.2021.

ORDER

This single order will dispose of the captioned petition as well as connected W.P. No. 25670 of 2014, as in both one and the same judgments and decrees have been impugned.

2. Precisely, the Respondents No. 3 to 5 instituted a suit for recovery of maintenance allowance, dower amount, 3 tolas golden ornaments and delivery expenses of Respondent No. 5 against the present petitioner Rana Muhammad Saleem, which was duly contested by him while submitting written statement. Out of divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned trial Court *vide* impugned judgment and decree dated 22.01.2014 in the following terms:

> *'------- Plaintiff No. 1 is entitled to receive maintenance allowance @ Rs. 1500/- per month from the date of her expulsion i.e. 10.04.2011 till the existence of marriage and plaintiffs No. 2, 3 are entitled to receive maintenance allowance @ Rs. 2000/- each per month from the date of their birth till the age of majority of Plaintiff No. 2 and till the marriage of Plaintiff No. 3 with 10% annual increment. Further Plaintiff No. 1 is entitled to receive Rs. 20,000/- and three tola gold ornaments as dower amount or its alternative current value. Further Plaintiff No. 1 is entitled to receive Rs. 20,000/- as delivery expenses from the defendant.'*

Both the parties being aggrieved of the said judgment and decree preferred separate appeals. The learned appellate Court *vide* impugned consolidated judgment and decree dated 02.07.2014 partly allowed appeal preferred by the petitioner and set aside the judgment of learned trial Court to the extent of dower and dismissed claim of the Respondent No. 3 with regards to dower; hence, the instant constitutional petition as well as connected W.P. No. 25670 of 2014.

3. Heard.

4. In the instant constitutional petition, the petitioner has only called into question the impugned judgments and decrees to the extent of quantum of maintenance allowance; however, it is observed that the learned Courts below keeping in view the needs of the minors and Respondent No. 3 as well as financial status of the petitioner while appreciating evidence on record have rightly fixed the maintenance allowance of the Respondents No. 3 to 5. The findings recorded by the learned Courts below on this score do not call for any interference which are upheld and maintained.

5. So far the claim of the dower of Respondent No. 3 is concerned, the learned appellate Court considering the contents of the Nikahnama has rightly observed that the dower was fixed as Rs. 20,000/- and in lieu thereof 3 tolas gold ornaments were given to the Respondent No. 3 by the petitioner. The gold ornaments are considered to be in possession of the women folk, being their personal gifts and property as well as dear to them and when there is no evidence on record showing that the same were snatched by the petitioner, the findings recorded by the learned appellate Court on this point are exceptional and do not call for any interference at this stage.

6. In view of the above, there appears no legal infirmity or error in the impugned judgments and decrees warranting interference by this Court in

exercise of extraordinary constitutional jurisdiction. Resultantly, the petition in hand as well as connected W.P.No. 25670 of 2014 being without any force and substance stand dismissed with no order as to the costs.

(Y.A.) **Petition dismissed.**

PLJ 2022 Lahore 525

Present: SHAHID BILAL HASSAN, J.

MUHAMMAD YOUSAF KHAN--Petitioner

versus

GHULAM AHMED, etc.--Respondents

C.R. No. 3077 of 2011, decided on 24.9.2021.

Civil Procedure Code, 1908 (V of 1908)--

----O.XVII R. 3--Specific Relief Act, (I of 1877), S. 12--Suit for specific performance--Closing of right to producing evidence--Petitioner was failed to produce evidence--Dismissal of suit--Appeal--Dismissed--Leniency show by trial Court regarding producing of evidence--Disobedience of orders of Court--A leniency shown by trial Court instead of complying with clear-cut direction and order, neither he appeared himself in witness box nor produced his evidence--How petitioner pursued his case and shows his disobedience toward orders of Court; thus, such like indolent persons cannot seek favour of law, because law favours vigilant and not indolent--Civil revision was dismissed.[Pp. 526 & 527] A & B

2015 SCMR 1401 and 2020 SCMR 300 *ref.*

Nemo for Petitioner.

Mr. Abdul Rauf and Mr. Muhammad Javed Hanif, Advocates for Respondents.

Date of hearing: 24.9.2021.

ORDER

Despite reflection of name of the learned counsel for the petitioner in the cause list, none has entered appearance on his behalf; thus, the instant

petition being old one is going to be decided after hearing learned counsel for the respondents and going through the available record.

2. Precisely, the petitioner instituted a suit for specific performance of agreement to sell against the respondents/defendants, which was contested by the respondents/defendants. Issues were framed and case was adjourned for evidence of the petitioner but the petitioner despite availing numerous opportunities failed to produce his witnesses for facing the cross-examination, thus, the learned trial Court *vide* impugned order dated 07.04.2010 closed his right to produce evidence by invoking powers under Order XVII, Rule 3 of the Code of Civil Procedure Code 1908 and vide even dated judgment and decree dismissed the suit for want of evidence. The petitioner being aggrieved preferred an appeal but the same was also dismissed *vide* impugned judgment and decree dated 13.07.2011; hence, the instant civil revision.

3. Heard.

4. Considering the arguments and perusing the record, made available, as well as going through the impugned order, judgments and decrees passed by the learned Courts below, it becomes diaphanous that the suit under discussion was instituted on 05.01.2006 and issues were framed. After that, on different dates the petitioner/plaintiff was directed to produce his evidence, he got examined P.W.1 to P.W.5 but despite availing of many opportunities he failed to produce his witnesses for the purpose of cross-examination. On 17.03.2010, the petitioner was granted, one last opportunity for production of his complete evidence with a warning that if he failed to avail the same his right to lead evidence will be closed; however, on the date fixed neither the petitioner nor his witnesses nor his counsel appeared, which shows that he paid a deaf car to such a vivid direction. Despite such a leniency shown by the learned trial Court instead of complying with the

clear-cut direction and order, neither he appeared himself in the witness box nor produced his evidence, Which shows his unyielding and adamant attitude towards the orders of the Court. The above picture of affairs makes it lurid that how the petitioner pursued his case and shows his disobedience toward the orders of the Court; thus, such like indolent persons cannot seek favour of law, because law favours the vigilant and not the indolent. In this regard reliance is placed on *Rana Tanveer Khan v; Naseer-ud-Din and others* (2015 SCMR 1401), wherein it has been unequivocally held:

> *'..... it is clear from the record that the petitioner had availed four opportunities to produce his evidence and in two of such dates (the last in the chain) he was cautioned that such opportunities granted to him at his request shall be that last one, but still on the day when his evidence was closed in terms of Order XVII, Rule 3, C.P.C. no reasonable ground was propounded for the purposes of failure to adduce the evidence and justification for further opportunity, therefore, notwithstanding that these opportunities granted to the petitioner were squarely fell within the mischief of the provisions ibid and his evidence was rightly closed by the trial Court. As far as the argument that at least his statement should have been recorded, suffice it to say that the eventuality in which it should be done has been elaborated in the latest verdict of this Court (2014 SCMR 637). From the record it does not transpire if the petitioner was present on the day when his evidence was closed and/or he asked the Court to be examined; this has never been the case of the petitioner throughout the proceedings of his case at any stage; as there is no ground set out in the first memo. of appeal or in the revision petition.'*
>
> It was further held that:-

'2. ... Be that as it may, once the case is fixed by the Court for recording the evidence of the party, it is the direction of the Court to do the needful, and the party has the obligation to adduce evidence without there being any fresh direction by the Court, however, where the party makes a request for adjourning the matter to a further date(s) for the purpose of adducing evidence and if it fails to do so, for such date(s), the provisions of Order XVII, Rule 3, C.P.C. can attract, especially in the circumstances when adequate opportunities on the request of the party has been availed and caution is also issued on one of such a date(s), as being the last opportunity(ies).'

While affirming the above said view, the Apex Court of country in a judgment reported as *Moon Enterpriser CNG Station. Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* (2020 SCMR 300) has invariably and vividly further held that:

4……..It is unfortunate that the prevailing pattern in the conduct of litigation in the Lower Courts of Pakistan is heavily permeated with adjournments which stretch, what would otherwise be a quick trial, into a lengthy, expensive time-consuming and frustrating process both for the litigant and the judicial system. While some adjournments are the consequences of force majeure, most are not. To cater for the later and to discourage misuse, the C.P.C. through Order XVII, Rule 3 has provided the Court with a curse of action that checks such abuse. '

In the said judgment, it was further held:

'6. A bare reading of Order XVII, Rule 3, C.P. C. and case law cited above clearly shows that for Order XVII, Rule 3, C.P.C. to apply and

the right of a parly to produce evidence to be closed, the following conditions must have been met:-

i. at the request of a party to the suit for the purpose of adducing evidence, time must have been granted with a specific warning that such opportunity will be the last and failure to adduce evidence would lead to closure of the right to produce evidence; and

ii. the same party on the date which was fixed as last opportunity fails to produce its evidence.

In our view it is important for the purpose of maintaining the confidence of the litigants in the Court systems and the presiding officers that where last opportunity to produce evidence is granted and the party has been warned of consequences, the Court must enforce its order unfailingly and unscrupulously without exception. Such order would in our opinion not only put the system back on track and reaffirm the majesty of the law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Where the Court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the parties to the is that no further adjournments will be granted for any reason. The Court must enforce its order and honor its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last opportunity coupled with a warning. The trend of granting (Akhri Mouqa) then (Qatai Akhri Mouqa) and then (Qatai Qatai Akhri-Mouqa) make a mockery of the provisions of law and those

responsible to interpret and implement it. Such practices must be discontinued, forthwith.'

5. In view of the above discussion and observations as well as by placing reliance on the judgments supra, the civil revision in hand comes to naught and stands dismissed. No order as to the costs.

(Y.A.) **Revision dismissed.**

PLJ 2022 Lahore 993

Present: SHAHID BILAL HASSAN, J.

NOOR ZAMAN--Petitioner

versus

***Mst.* GULLAN (deceased) through L.Rs.--Respondents**

C.R. No. 70819 of 2021, decided on 12.1.2022.

Civil Procedure Code, 1908 (V of 1908)--

----S. 24-A(2) & 115--High Court Rules & Orders, Para 6, Chapter XIII, Vol.-I--Transfer of suit from one Court to another Court--Administrative order--No notice for parvee was issued to parties or their counsel by transferee Court--Suit was dismissed for non-producing of evidence--Appeal--Dismissed--Challenge to--Case was transferred under administrative order without fixing a date to appear before transferee Court and no information in this regard was imparted to parties--Impugned order, dismissing suit for want of evidence, it is harsh in nature, especially when after transfer of case from one Court to other Court, petitioner was not informed, so as to enable him to produce his evidence and even he was not warned to face consequences in case of his failure to produce complete set of evidence--High Court while exercising revisional jurisdiction has ample power to correct illegality and irregularity committed by Courts below--Revision petition allowed.

[Pp. 996 & 997] A, B, C & D

2020 SCMR 300 & PLD 1975 Lahore 879 *ref.*

Mr. Muhammad Akmal Khan, Advocate for Petitioner.

Mr. Muzaffar Abbas Khan Ghadhi, Advocate for Respondents.

Date of hearing: 12.1.2022.

ORDER

Succinctly, the petitioner instituted a suit for specific performance of contract with permanent injunction against the deceased respondent *Mst.* Gullan, who entered appearance and submitted her written statement. She also filed a separate suit for declaration with consequential relief, which was contested by the present petitioner. Both the suits were consolidated and consolidated issues were framed. However, on 15.02.2021, the learned trial Court closed the right of the petitioner to lead evidence and dismissed his suit for want of evidence on the said date. The petitioner being aggrieved of the same preferred an appeal but remained unsuccessful vide impugned judgment and decree dated 04.03.2021; hence, the instant revision petition.

2. Heard.

3. It is an established and admitted fact on record that when under administrative order the case was transferred from one Court to the other Court, no notice parvee was issued by the transferee Court to the parties or their counsel, as is evident from the order dated 05.01.2021, which is reproduced as under:-

ORDER

05.01.2021

Present: Advocates are observing strike today.

Received through transfer. Be Registered.

Today, instant case was fixed for evidence of plaintiff. Evidence of plaintiff is not available. Due to strike, suit is adjourned, absolute last opportunity is granted to the plaintiff to produce complete evidence.

Adjourned till 15.02.2021 for evidence of plaintiff.

Announced: 05.01.2021 *Muhammad Adeel Asghar Mian*
Civil Judge Class-II, Sillanwali

Instead of passing such an order, giving absolute last opportunity, the learned trial Court ought to have issued the notices parvee to the parties, because the case was transferred under administrative order and not under section 24-A(2) of the Code of Civil Procedure, 1908 where the parties are directed to appear before the learned transferee Court and if party fails to appear then penal order can be passed against such party; however, here the case is not as such, rather otherwise, as highlighted above. Para 6, Chapter XIII, Volume I of High Court Rules and Orders provides:

> *"6. When a case is transferred by administrative order from one Court to another, the Presiding Officer of the Court from which it has been transferred shall be responsible for informing the parties regarding the transfer, and of the date on which they should appear before the Court to which case has been transferred. The District Judge passing the order of transfer shall see that the records are sent to the Court concerned and parties informed of the date fixed with the least possible delay. When a case is transferred by judicial order the Court passing the order should fix a date on which the parties should attend the Court to which the case is transferred."*

However, in the present case, none of the requirements enunciated in the above para 6 of the Chapter XIII, Volume I of the High Court Rules and Orders has been adhered to because nothing is on record to suggest that the Court from which the case was transferred ever informed the parties to appear before the transferee Court on such and such date, rather it has manifested from the record that the case was transferred under administrative order without fixing a date to appear before the transferee Court and no information in this regard was imparted to the parties; thus, it was required

by the learned transferee Court to issue notice parvee to the parties and their counsel, fixing a date to appear before it but no such exercise has been done. In such scenario, what to speak of passing a penal order without putting the petitioner on caution as has been held by the Apex Court of the country in a judgment reported as *Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* (2020 SCMR 300); thus, the said precedent being on different facts is not attracted in the instant case and the ratio of the same has wrongly been appreciated by the learned subordinate Courts.

This Court while dilating upon a case of almost identical facts, wherein the defendant was proceeded against *ex-parte* by the Court where the suit was pending and was transferred to some other Court under administrative order and without issuing notice to him he was proceeded against *ex-parte*, reported as *Azizullah Khan and 4 others v. Arshad Hussain and 2 others* (PLD 1975 Lahore 879) has held:

> *'According to Section 24-A(2), C.P.C. and the relevant rule of High Court Rules and Orders, as referred to above, if the order of the learned District Judge transferring the case had been passed in the presence of the absentee defendants or they had been intimated in accordance with that order, then in case of their absence before the transferee Court they could be lawfully proceeded against ex-parte. If the absentee defendant can join the proceedings at the subsequent stage even after ex-parte order has been passed against him, as also held in Messrs Landhi Industrial Trading Estages Ltd., Karachi v. Government of West Pakistan through Excise and Taxation Officer 1970 SCMR 251, then how it can be presumed that in the absence of any intimation duly furnished to him with regard to transfer of the case from one Court to another he can be proceeded against ex-parte*

simply on the basis of ex-parte order already passed against him. His right to join future proceedings implies that after the transfer of the case from the Court where such proceedings are pending if the same have not been transferred in his presence or without intimation to him, then he cannot be proceeded against ex-parte unless duly served upon with regard to transfer of the case to the successor Court. In this view of the matter the contention of the learned counsel for the respondents, that since there is no clear provision in the amended law to issue notice to the parties after the case has been received on transfer, therefore, said notice cannot be issued, has no substance. As laid down in 1970 SCMR 251, the rules of procedure as laid down in the Code are principally intended for advancing justice and not for retarding it on bare technicalities.'

4. Pursuant to the above discussion it can safely be held that the impugned order, dismissing the suit for want of evidence, it is harsh in nature, especially when after transfer of the case from one Court to the other Court, the petitioner was not informed, so as to enable him to produce his evidence and even he was not warned to face the consequences in case of his failure to produce complete set of evidence; thus, the impugned order, judgment and decrees cannot be allowed to hold field further, because it is requirement of law that cases should be decided on merits and technicalities should be avoided. Moreover, this Court while exercising revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908, has ample power to correct the illegality and irregularity committed by the learned Courts below.

5. The crux of the discussion above is that the revision petition in hand is allowed, impugned order, judgment and decrees are set aside and case is remanded to the learned trial Court which will be deemed to be

pending at the stage when the impugned order dated 15.02.2021 was passed with a direction to afford two clear opportunities to the petitioner for production of his complete set of evidence. The parties are directed to appear before the learned trial Court on 31.01.2022, positively.

(Y.A.) **Petition allowed.**

PLJ 2022 Lahore (Note) 86

Present: SHAHID BILAL HASSAN, J.

ABDUL HAMEED--Petitioner

versus

MANSHAD AHMED and 5 others--Respondents

C.R. No. 1869 of 2014, heard on 16.2.2018.

Civil Procedure Code, 1908 (V of 1908)--

----O.IX R. 13--Specific Relief Act, (I of 1877), Ss. 8, 12 & 42--Suit for declaration through specific performance and possession--Decreed--Ex-parte decision of appeal--Dismissal of application for restoration of main appeal--Non-filing of application for condonation of delay--Vague plea--No affidavit of clerk of counsel was submitted with appeal--Limitation--Petitioner filed an application for rehearing of appeal well within time, which was dismissed in default and present petitioner filed application for restoration of said application with a vague plea that clerk of his counsel noted down date as 22.07.2013, without embellishing same with application for condonation of delay--This plea has not been substantiated by appending copy of diary of counsel or photocopy of brief on which such date was noted down by clerk of counsel and no affidavit of clerk or counsel was submitted--Appellate Court has minutely scanned and gone through evidence as well as record while passing impugned ex parte judgment and decree--Consenting written statement cannot be taken or considered as evidence especially when said respondents did not appear before trial Court for recording their evidence and facing cross-examination--Revision petition dismissed. [Para 6, 7 & 8] B, C, D & E

Limitation Act, 1908 (IX of 1908)--

----Art. 163--Limitation for filing application--Law of limitation provides 30 days for filing any application seeking setting aside of any order with regard to dismissal of case due to non-prosecution, which is governed by Article 163 of Limitation Act, 1908. [Para 6] A

Mr. Shamim Akhtar, Advocate for Petitioner.

Mr. Asim Farid Sanotra, Advocate for Respondent No. 1.

Date of hearing: 16.2.2018.

JUDGMENT

Tersely, the facts relevant are as such that petitioner/plaintiff Abdul Hameed instituted a suit for declaration alongwith possession through specific performance contending therein that the Respondents No. 2 to 6 were owners of property measuring 14 kanals 18 marlas, fully detailed in paragraph No. 1 of the plaint. They allegedly sold out the property measuring 06 kanals out of the total land to him against a sale price of Rs. 120,000/-. They promised to handover the possession of the suit property to Abdul Hameed on his demand, failing which the Respondents No. 2 to 6 were responsible to pay a sum of Rs. 100,000/- to him as damages. In this connection an Iqrarnama dated 26.07.1999 was reduced into writing between the parties. It was averred that since Abdul Hameed petitioner was an army personnel, therefore, he repeatedly asked the Respondents No. 2 to 6 to execute the requisite sale deed but they deferred the mater on one pretext or the other; ultimately, on 21.08.2004, Respondents No. 2 to 5 alienated the landed property measuring 03 kanals 06 marlas in favour of the present petitioner and Respondent No. 6 namely Yasmeen alienated land measuring 14 marlas in favour of Respondent No. 1 namely Manshad on 31.08.2006. The petitioner/plaintiff made repeated requests to defendant for alienating the property in dispute in his favour but on their final refusal he instituted the suit.

Respondents No. 2 to 6 jointly filed the written statement, wherein they admitted the execution of Iqrar-Nama dated 26.07.1999, but stated that since Abdul Hameed (petitioner) failed to perform his part of contract, therefore, transaction made by Iqrarnama dated 26.07.1999 was abrogated. On merits, they controverted all the allegations leveled in the plaint. The Respondent No. 1, being Defendant No. 6 in the suit filed his separate

written statement and controverted all the allegations made in the plaint and sought for dismissal of the suit.

2. Out of the divergent pleadings of the parties, the learned trial Court framed issues. Both the parties adduced their evidence in support of their respective contentions. The learned trial Court *vide* judgment and decree dated 05.06.2012 decreed the suit in favour of the present petitioner. The Respondent No. 1 being aggrieved of the said judgment and decree preferred an appeal, which was subsequently accepted *vide* impugned exparte judgment and decree dated 13.12.2012 and by setting aside the judgment and decree dated 05.06.2012, the suit instituted by the present petitioner was dismissed. On knowing about the factum of decision of appeal ex parte, the present petitioner filed an application for rehearing of the main appeal, which remained pending but the said application was subsequently dismissed for non-prosecution on 22.06.2013.Again the present petitioner moved an application for restoration of the said application, but the said application was dismissed on 07.04.2014; hence, the instant civil revision.

3. Learned counsel for the petitioner has argued that the impugned order, judgment and decree are against law and facts of the case, as the petitioner has been condemned unheard. That the impugned judgment and decree dated 13.12.2012 are result of non-reading and misreading of evidence on record, which has been rendered in a fanciful manner. Adds that according to the record, the process server reported that the petitioner and Respondents No. 2 to 6 were not residing at the given address and the Respondent No. 1 was ordered to provide proper address but the Court did not issue any process again and did not fulfill the requirements of substituted service; rather passed ex parte order against the petitioner and Respondents No. 2 to 6 and by setting aside the judgment and decree passed by the learned trial Court, dismissed the suit of the present petitioner in a hasty manner; that the Respondents No. 2 to 6 admitted the execution of agreement to sell and failed to substantiate its rescission, thus, the learned trial Court

rightly decreed the suit but the learned appellate Court acted beyond vested jurisdiction; that the learned appellate Court did not apply its judicious mind while passing the impugned order, judgment and decree; that the impugned order dated 07.04.2014 is also against law because for seeking restoration of an application moved under Order IX, Rule 13 or Order XLI, Rule 21 of the Code of Civil Procedure, 1908, the limitation provided in residuary Article 181 of the Limitation Act, 1908 would be applicable, but this aspect has not been considered and taken into account by the learned appellate Court. Thus, by allowing the civil revision in hand, the impugned order, ex parte judgment and decree may be set aside and the case may be remanded to the learned Appellate Court for decision of the appeal afresh on merits in accordance with law. Relies on *Sain v. Shah Asghar Shah* (PLD 1952 Peshawar 44), *Muhammad Suleman v. Ehsan Ali* (Represented by Legal Heirs) (PLD 1983 Karachi 537), *Government of N.-W.F.P. through Collector, Mardan and another v. Gul Hayat and another* (1989 CLC 2080-Peshawar), *Elite D. Silva v. Dilawar Hussain* (1993 CLC 361-Karachi), *Muhammad Akhtar v. Mst. Manna and 3 others* (2001 SCMR 1700) and *(Lt.-Col. Retd.) Ashfaq Ahmed v. Altaf Ahmed Gujjar and 6 others* (2017 YLR Note 435).

4. On the contrary, learned counsel representing the Respondent No. 1 has supported the impugned order, judgment and decree passed by the learned appellate Court and has prayed for dismissal of the civil revision in hand. He has placed reliance on *Hafiz Tassaduq Husain v. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241), *Farzand Ali and another v. Khuda Bakhsh and others* (PLD 2015 Supreme Court 187), *Gopimal through attorney v. KhanMuhammad through Legal Heirs and another* (2016 YLR 2786) and *Malik Imam Bakhsh v. Muhammad Boota(Deceased) through Legal Heirs* (2017 SCMR 516).

5. Heard.

6. Law of limitation provides 30 days for filing any application seeking setting aside of any order with regard to dismissal of the case due to

non-prosecution, which is governed by Article 163 of the Limitation Act, 1908 as it speaks, *'By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs'* and it runs from the date of dismissal, thus, the argument that residuary Article 181 of the Act will come in force in such a circumstance has no force and the same is discarded.

Ex-parte judgment and decree was passed on 13.12.2012 by the learned appellate Court; the present petitioner filed an application for rehearing of the appeal on 29.12.2012 *i.e.* well within time, which was dismissed in default on 22.06.2013 and the present petitioner filed application for restoration of said application on 24.07.2013 with a vague plea that clerk of his counsel noted down the date as 22.07.2013, without embellishing the same with application for condonation of delay under Section 5 of the Limitation Act, 1908. The reasoning assigned by the learned appellate Court while passing the impugned order dated 07.04.2014 is cogent one; had the date been noted as 22.07.2013 instead of 22.06.2013, the learned counsel would have filed application for restoration, on appearing before the learned appellate Court on 22.07.2013, when his case *i.e.* application was not reflected in the cause list, but no such exertion was made and after two days *i.e.* 24.07.2013, the application was moved, which goes to make it diaphanous that such plea was afterthought and maneuvered just to obtain favourable order. Even this plea has not been substantiated by appending copy of diary of the counsel or photocopy of the brief on which such date *i.e.* 22.07.2013 was noted down by the clerk of the counsel and no affidavit of clerk or counsel was submitted; thus, the learned appellate Court rightly dismissed the application for restoration of the application for rehearing of the appeal and has exercised vested jurisdiction in accordance with law.

7. So far as the impugned judgment and decree dated 13.12.2012 is concerned, it is evident from the record that the same is in line with the

evidence adduced by the parties and the learned appellate Court has minutely scanned and gone through the evidence as well as record while passing the impugned ex parte judgment and decree, because the petitioner, during cross-examination admitted that he contracted with Defendant No. 1 only and that was to the extent of six kanals. Moreover, the petitioner did not produce any witness in support of his contention and witnesses produced as P.W.3 & P.W.4 categorically admitted that stamp paper dated 26.07.1999 did not bear their signatures or thumb impressions as witnesses; meaning thereby the document was unproved and did not fulfill the requirement as provided under Article 17 & 79 of the Qanun-e-Shahadat Order, 1984. Reliance is placed on *Hafiz Tassaduq Husain v. Muhammad Din through Legal Heirs and others* (PLD 2011 Supreme Court 241) and *Farzand Ali and another v. Khuda Bakhsh and others* (PLD 2015 Supreme Court 187)

8. In addition to the above, the consenting written statement cannot be taken or considered as evidence especially when the said respondents did not appear before the learned trial Court for recording their evidence and facing the cross-examination.

9. In view of the above, the case law relied upon by the learned counsel for the petitioner, with utmost respect to the same, has no relevance to the peculiar facts and circumstances of the case in hand; thus, it does not render any assistance on help to the petitioner's case.

10. For the foregoing reasons, while placing reliance on the judgments supra, the civil revision in hand being without any force and substance stands dismissed. No order as to the costs.

(Y.A.) **Petition dismissed.**

PLJ 2022 Lahore (Note) 89

Present: SHAHID BILAL HASSAN, J.

***Mst.* AZIZ BEGUM and others--Appellants**

versus

ATTA MUHAMMAD and others--Respondents

R.S.A. No. 242 of 2010, decided on 26.1.2017.

Specific Relief Act, 1877 (I of 1877)--

---S. 8--Punjab Pre-emption Act, 1994, S. 13--Suit for possession through pre-emption--Transaction in question is exchanged—Appellants were failed to fulfill requisite talbs--Talb-e-ishhad--It is, by now, a settled principle of law that performance and proving of talbs in accordance with is sine qua non in order to succeed in a suit for possession on basis of pre-emption and if performance of single talb skips or not proved, superstructure and edifice of suit falls on ground, as it results fatal to pre-emptor--When performance of foundational talb *i.e.* talb-e-muwathibat has not been proved by appellants, Question of making subsequent talbs in accordance with law does not arise--When petitioner has failed to prove performance of Talbs as per dictates of law, no decree for possession through pre-emption can be passed in his favour--Petition dismissed. [Para 6, 7 & 8] A, B & C

PLD 2007 Supreme Court 302; PLD 2005 Supreme Court 977.

Ch. Zahid Imran, Advocate for Appellants.

Sheikh Naveed Shehryar and Ms. Uneza Siddiqui, Advocates for Respondents.

Date of hearing: 26.1.2017.

ORDER

Briefly, the facts of the case are as such that the predecessor in interest of the appellants Raja Khuda Bukhsh instituted a suit for possession through pre-emption on the superior rights regarding the agricultural land falling in Khewat No. 53, measuring 54 kanals, situated in Chak No. 35/NB, Tehsil and District Sargodha, which was purchased by the respondents

against a sum of Rs. 202,500/- through mutation No. 607 dated 30.09.1990 from Nazar Muhammad son of Mian Muhammad.

2. The respondents/defendants contested the suit by filing written statement and controverted the averments of the plaint. The learned trial Court framed issues; both the parties adduced their evidence, oral as well as documentary, in pro and contra. The learned trial Court after hearing the arguments and appraising evidence *vide* judgment and decree dated 31.03.2001 partly decreed the suit of the appellants to the extent of 1/2 share of the total disputed property. The appellants as well as the respondents assailed the said judgment and decree before the learned lower appellate Court. The learned appellate Court through consolidated judgment and decree dated 29.06.2010, accepted the appeal preferred by the respondents and by setting aside the judgment and decree passed by the learned trial Court, the suit instituted by the appellants was dismissed.

3. Advancing the arguments, the learned counsel for the appellants has submitted that the appellants have fulfilled the required Talbs in accordance with law. Maintains that misreading and non-reading of evidence has been committed by the learned Appellate Court while passing the impugned judgment and decree and law on the subject has wrongly been interpreted; a well reasoned judgment and decree passed by the learned trial Court has been undone without any plausible reasoning. Adds that material irregularities and illegalities have been committed by learned Appellate Court. Minor discrepancies occurred during the deposition of the P.Ws. are natural and same cannot be said to be fatal to the appellants' case. Without application of independent judicious mind, the impugned judgment and decree has been passed mere on the basis of surmises and conjectures. The learned Appellate Court has failed to exercise vested jurisdiction rather has gone beyond it and has passed the impugned judgment and decree, which resulted in miscarriage of justice. Therefore, by allowing the appeal in hand, impugned judgment and decree may be set aside, which otherwise is not sustainable in the eye of law; consequent whereof suit instituted by the appellants may be decreed as prayed for by modifying the judgment and decree dated 31.03.2001 passed by the learned trial Court to the extent of 1/2 share of the property. Relies on *Daud Shah v. Waris Shah and others* (2014

SCMR 852), *Abdul Malik v. Mst. Gul Reban* (2016 YLR 685-Peshawar), *Machia through L.Rs. and others v. Altaf Hussain Shah through L.Rs. and others* (2015 CLC 657-Lahore), *Hayat Muhammad and others v. Mazhar Hussain* (2006 SCMR 1410), *Nadir Khan v. Itebar Khan* (2001 SCMR 539), *Abdul Aziz through L.Rs. and others v. Malik Aman* (2007 SCMR 383), *Abdul Latif alias Muhammad Latif alias Babu v. Dil Mir and others* (2010 SCMR 1087), *Allah Wasaya and others v. Yousuf and others* (1994 CLC 124-Lahore), *Muhammad Aslam and others v, Muhammad Shafi* (1995 MLD 441-Lahore), *Mst. Samina Bibi and 9 others v. Muhammad Ramzan and 3 others* (2015 YLR 539-Peshawar) and *Shah Oasim and others v. Arshan Bibi and others* (2015 YLR 1751-Peshawar).

4. Contrarily, learned counsel appearing on behalf of the respondents has vehemently gainsaid the submissions made by the learned counsel for the appellants and has submitted that the transaction in question is exchange and not a sale; even if the same is considered as sale mutation, the appellants have badly failed to fulfill the requisite talbs in accordance with law as no date, time and place of making Talb-e-Muwathibat has been narrated in the plaint and even the name of informer is missing. In addition to this, date of performing Talb-e-Ishhad has not been mentioned in the plaint; as such the learned appellate Court has reached to a just conclusion. He has, by favouring the impugned judgment and decree passed by the learned appellate Court, prayed for dismissal of the appeal in hand.

5. Heard.

6. It is, by now, a settled principle of law that performance and proving of talbs in accordance with is sine qua non in order to succeed in a suit for possession on the basis of pre-emption and if performance of single talb skips or not proved, the superstructure and edifice of the suit falls on the ground, as it results fatal to the pre-emptor.

Now, when, on the touchstone of the above criteria, the impugned judgment and evidence of the parties are gone through and seen together, it comes on surface that evidence of the parties has been thwarted and appreciated while recording the judgment by the learned appellate Court in its totality, as it is evident from the record that appellants have not mentioned

the time, date and place of gaining knowledge, rather in paragraph (2) of the plaint it has been narrated that:

"نمبر 2۔ یہ کہ من مدعی کو سودا مذکور کا علم آج سے اکیس 21 روز قبل ہوا۔ جونہی من مدعی کو سودا مذکور کا علم ہوا من مدعی نے روبرو گواہان فورا " اعلان شفع کیا ...."

The above narration discloses that even the name of informer is missing in the narrative of the plaint, when the position is as such performing of Talb-i-Muwathibat becomes dubious; as such, no misreading and non-reading of evidence has surfaced, rather law on the subject has rightly been construed and by considering each and every aspect of the case the learned appellate Court has reached to a just conclusion on this point, as non-mentioning of date, time and place of gaining knowledge results fatal to the pre-emptor. In this regard reliance is placed on *Mian Pir Muhammad and another* (PLD 2007 Supreme Court 302).

7. When the performance of foundational talb *i.e*. Talb-e-Muwathibat has not been proved by the appellants, the question of making subsequent Talbs in accordance with law does not arise.

8. Pursuant to the above discussion, when the petitioner/plaintiff has failed to prove performance of Talbs as per dictates of law, no decree for possession through pre-emption can be passed in his favour. Reliance is placed on *Mst. Sahib Jamala v. Fazal Subhan and 11 others* (PLD 2005 Supreme Court 977).

9. The case law furnished by the learned counsel for the appellants, with utmost respect, is different from the facts and circumstances of the case in hand; therefore, it does not extend any assistance or help to the appellants' case.

10. The crux of the above discussion is that while placing reliance on the judgments referred hereinbefore, the appeal in hand being devoid of any force and substance stands dismissed. No order as to costs.

(J.K.) **Petition dismissed.**

PLJ 2022 Lahore (Note) 98

Present: SHAHID BILAL HASSAN, J.

***Mst.* AMNA BIBI--Petitioner**

versus

AHMED (deceased) through L.Rs. and others--Respondents

C.R. No. 579 of 2013, decided on 31.3.2022**.**

Specific Relief Act, 1877 (I of 1877)--

----Ss. 42 & 54--Qanoon Suit for declaration and permanent injunction--Will deed--Deprivation from valuable right--Separate statements were managed--Legal heirs of Respondent No. 5 were filed application that their written statements were forged and fabricated--Dismissal of application--Suit was decreed--Challenge to--Separate written statements have been managed to be filed but during trial, legal heirs of *Mst.* Hajran, Defendant No. 5 filed an application to effect that written statement submitted on their behalf was forged and fabricated and it does not bear their thumb impressions and signatures while exercising powers under Article 84 of the Qanun-e-Shahadat Order, 1984--Trial Court ought to have ordered petitioner to make amendment in her plaint with regards to facts emerged in evidence by exercising *suo motu* jurisdiction--Case is remanded to trial Court with a direction to allow petitioner to amend her plaint, if she desires, also summon all relevant record from concerned quarters and decide case afresh in accordance with law--Revision petition allowed. [Para 3 & 4] A, B & C

Ms. Naila Mushtaq Dhoon, Advocate for Petitioner.

Mr. Wazir Ahmad Makhdoom, Advocate for Respondents.

Date of hearing: 31.3.2022.

JUDGMENT

Succinctly, *Mst.* Amna Bibi, the petitioner instituted a suit for declaration alongwith permanent injunction against the respondents/ defendants contending therein that land measuring 215-Kanals and 05-Marlas was owned by Muhammad Suleman, predecessor of the parties, who died on 28.02.1983;;that the Respondents No. 1 and 2 purportedly managed will-deed dated 13.02.1983 after death of Muhammad Suleman deceased with the intention to deprive the petitioner from her valuable right *i.e*. legal share from the legacy of Muhammad Suleman, predecessor of the parties; that the Respondents No. 1 and 2 are educated persons while the petitioner is uneducated parda-nasheen lady; that on the basis of the said will Respondents No. 1 and 2 got attested Mutation No. 636 dated 26.07.1984 in their favour; thus, the same alongwith subsequent mutations are liable to be cancelled being against facts and law, without authority, void, based on collusion, fictitious and ineffective upon the rights of the petitioner. The suit was contested by the respondents/defendants while submitting separate written statements. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned trial Court *vide* impugned judgment and decree dated 07.04.2011 dismissed suit of the petitioner. The petitioner being aggrieved of the said judgment and decree preferred an appeal; however, the learned appellate Court *vide* impugned judgment and decree dated 10.01.2013 dittoed the findings of the learned trial Court and dismissed the appeal, which has culminated in filing the revision petition in hand.

2. Heard.

3. Matter in issue is with regards to inheritance and deprivation of daughters from the legacy of their deceased father on the basis of alleged will deed dated 13.02.1983, whereas the predecessor of the parties breathed his last on 28.02.1983, which factum strengthens the stance of the petitioner that

Muhammad Suleman, predecessor of the parties, was aged about 100 years, because the said factum has not been negated by the Respondents No. 1 and 2 who are beneficiaries of the said will deed. Though separate written statements have been managed to be filed but during the trial, the legal heirs of *Mst.* Hajran, Defendant No. 5 filed an application to the effect that written statement submitted on their behalf was forged and fabricated and it does not bear their thumb impressions and signatures. After such application, it was duty of the learned trial Court to compare their thumb impressions/signatures while exercising powers under Article 84 of the Qanun-e-Shahadat Order, 1984 or would have sent the admitted signatures/thumb impressions to the finger print expert but the learned trial Court without adhering to the said procedure out-rightly dismissed the application on 28.07.2010. In such like cases, great care and caution is required to be made and the learned trial Court would have summoned all the relevant documents from the concerned quarters so as to reach to a just conclusion in the matter because the learned trial Court was not denuded of powers to summon all the necessary record in this regard and even the learned trial Court ought to have ordered the petitioner to make amendment in her plaint with regards to facts emerged in the evidence by exercising *suo motu* jurisdiction. In judgment reported as *Mst. Fazal Jan v. Roshan Din and 2 others* (PLD 1992 Supreme Court 811), wherein the matter of inheritance was under adjudication, the Apex Court of the country held:

> *'-----We summoned the record also but it is clear from its examination that the case was badly conducted not only from the petitioner's side but also from the respondents' side. All the relevant documents were not brought on record. The trial Court was not denuded of power to summon all the necessary Revenue Record and also to summon the Patwari so as to supply omissions from both sides. It was also the duty of two higher appellate Courts. It seems that it was an appropriate case for exercise of power under Order*

XLI, Rule 27, C.P.C. for brining on record additional evidence. The suo motu exercise of this power would also have been fully justified in the facts and circumstances of the case.'

4. In view of the above, the revision petition in hand is allowed, impugned judgments and decrees are set aside and case is remanded to the learned trial Court with a direction to allow the petitioner to amend her plaint, if she desires, also summon all relevant record from the concerned quarters and decide the case afresh in accordance with law. The adversaries are directed to appear before the learned District Judge Mianwali on 18.04.2022 who will further entrust the case to the concerned Court.

(Y.A.) **Petition allowed.**

2023 C L C 543

[Lahore]

Before Shahid Bilal Hassan, J

Mst. NIGHAT WAHEED and others----Appellants

Versus

ARIF LATIF----Respondent

R.S.A. No.33740 of 2019, decided on 21st April, 2022.

(a) Gift ---

----Proof---Essential ingredients---Basic ingredients for a valid gift are, offer, acceptance and delivery of possession.

Bilal Hussain Shah and another v. Dilawar Shah PLD 2018 SC 698 and Khalid Hussain and others v. Nazir Ahmad and others 2021 SCMR 1986 ref.

(b) Gift---

----Proof---Essential ingredients to prove the oral gift missing---Perusal of the plaint reveled that it did not provide description of making of offer and acceptance of the same by the plaintiff/alleged donee as well as names of witnesses, in whose presence such transaction took place, which were necessary to be pleaded and proved---Furthermore, submission of contesting written statement on behalf of the alleged donor along with the other defendants negating the making of alleged oral gift as well as execution of acknowledgment deed put a heavy burden upon the plaintiff/alleged done to prove the same by producing strong and unimpeachable evidence but he miserably failed to do so---In addition to this, the alleged oral gift was with regards to 8-Kanals 12-Sq.Ft. of the land but the acknowledgment deed of the gift mentioned only 8-Kanals---Moreover, the possession of the disputed property was also not with the

alleged plaintiff/alleged donee---Appeal was allowed and suit filed by plaintiff/alleged donee was dismissed.

(c) Civil Procedure Code (V of 1908)---

----O.VI, R.7---Pleadings, departure from---Party cannot lead any evidence beyond its pleadings.

Zulfiqar and others v. Shahdat Khan PLD 2007 SC 582; Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others 2014 SCMR 914; Combined Investment (Pvt.) Limited v. Wali Bhai and others PLD 2016 SC 730 and Saddaruddin (since deceased) through LRs. v. Sultan Khan (since deceased) through LRs and others 2021 SCMR 642 ref.

(d) Civil Procedure Code (V of 1908)---

----O.VI, R.7---Gift---Proof---Alleged witnesses to the oral gift not pleaded in the plaint---Names of two witnesses of the alleged gift deposed during evidence would be considered beyond pleadings---Even otherwise, in the present case the said two witnesses had not been produced in the witness box and it had been deposed that both of them had expired but no proof in the shape of their death certificates had been brought on record by the plaintiff/alleged done---Even if they had appeared in the witness box, non-pleading of their names in the plaint would have come in their way and would have caused impediment in recording their depositions as witnesses---So far as the execution of acknowledgment deed (of the alleged oral gift) was concerned, its witnesses were the same two witnesses of the alleged oral gift --- When the said two witnesses had not been produced in the witness box along with the revenue officer, who allegedly recorded statement of alleged donor, a serious dent with regards to authenticity of the acknowledgment deed had been caused---Appeal was allowed and suit filed by plaintiff/alleged donee was dismissed.

(e) Gift---

----Proof---When the validity and correctness of a gift transaction is challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the same.

(f) Gift---

----Proof---Oral gift allegedly made from inheritable property to the exclusion of other legal heirs---In such a case the donee is under heavy burden to prove valid execution of oral gift and subsequent acknowledgement deed, because he cannot take benefit of the shortcomings in the evidence of defendants, rather he has to stand on his own legs.

Mushtaq Ul Aarifin and others v. Mumtaz Muhammad and others 2022 SCMR 55; Mst. Parveen (deceased) through LRs. v. Muhammad Pervaiz and others 2022 SCMR 64 and Mst. Hayat Bibi and others v. Alamzeb and others 2022 SCMR 13 ref.

(g) Civil Procedure Code (V of 1908) ---

----S.100---Second appeal---Concurrent findings of courts below based on misreading of evidence of the parties---When the position is such, the High Court is vested with authority to set aside such concurrent findings.

Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630 and Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 rel.

Khalid Ishaque, Usman Nassir Awan, Rahil Riaz, Wajahat Ali, Danyal Akbar, Nouman Ihsan and Faizan Ahmad for Appellants.

Aurangzeb Daha and Muhammad Ashfaq Jutt for Respondents.

Date of hearing: 4th February, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.----Brief facts, giving rise to the instant regular second appeal are as such that the respondent instituted a suit for

declaration and possession against the present appellants as well as against his father Mr. C.M. Latif (defendant No.1) by maintaining that Mr. C.M. Latif was owner of bungalow No.SE-35-R-6, measuring 23-Kanals 14-Marlas and 45 Sq.Ft. known as 2-Kashmir Road, Lahore; that out of the said property the defendant No.1 transferred to the respondent/plaintiff a plot measuring 8-Kanlas and 12-Sq.ft. bearing Khasra No.1023(min) through a transaction of oral gift dated 15.07.1963; that subsequently the said oral gift was confirmed through deed of acknowledgment dated 10.03.1966. He prayed for passing a declaratory decree in his favour in this regard.

The suit was contested by the present appellants/ defendants while submitting written statement whereby defendant No.1 categorically denied the alleged fact of gift of the suit property in favour of the respondent/plaintiff. However, defendant No.1 died on 10.03.2004 during the pendency of the suit before the stage of recording of evidence.

After framing of necessary issues out of the divergent pleadings of the parties, the learned trial Court recorded evidence of the parties and vide impugned judgment and decree dated 18.09.2012 decreed the suit in favour of the respondent/ plaintiff. The present appellants being dissatisfied with the same preferred an appeal, whereas the respondent filed cross objections against the judgment passed by the learned trial Court to the extent of findings under issue No.5-I. The learned appellate Court vide impugned consolidated judgment and decree dated 14.05.2019 dismissed the appeal preferred by the present appellants and accepted the cross objections filed by the respondent. Hence, the instant regular second appeal.

2. Heard.

3. The basic ingredients for a valid gift are: offer, acceptance and delivery of possession. See Bilal Hussain Shah and another v. Dilawar Shah (PLD 2018 Supreme Court 698) and Khalid Hussain and others v.

Nazir Ahmad and others (2021 SCMR 1986). In the present case paragraph No.2 of the plaint deals with the alleged gift made by the defendant No.1 in favour of the respondent/plaintiff, which reads:-

> '2. That the defendant No.1 out of the said property gifted away to the plaintiff a plot measuring 8 kanals 12 sq. ft. bearing Khasra No.1023(min) vide an oral gift dated 15-7-1963. The possession of the same was also delivered to the plaintiff there and then after the gifting of the same to the plaintiff. The property thus gifted to the plaintiff may herein be called as the property in dispute.'

Bare reading of the above paragraph divulges that no description of making of offer and acceptance of the same by the respondent/plaintiff as well as names of witnesses, in whose presence such transaction took place are missing, which are necessary to be pleaded and proved, because a party cannot lead any evidence beyond its pleadings. Reliance is placed on judgments reported Zulfiqar and others v. Shahdat Khan (PLD 2007 SC 582), Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914), Combined Investment (Pvt.) Limited v. Wali Bhai and others (PLD 2016 SC 730) and Saddaruddin (since deceased) through LRs. v. Sultan Khan (since deceased) through LRs and others (2021 SCMR 642), wherein it has been held that:-

> ' .. the parties are required to lead evidence in consonance with their pleadings and that no evidence can be laid or looked into in support of a plea which has not been taken in the pleadings. A party, therefore, is required to plead facts necessary to seek relief claimed and to prove it through evidence of an unimpeachable character.'

Therefore, the names of witnesses deposed during evidence would be considered beyond pleadings; even otherwise, the said witnesses namely Ishaque and Molvi Umar Din have not been produced in the witness box

and it has been deposed that both of them have expired but no proof in the shape of their death certificates has been brought on record by the respondent. Even if they had appeared in the witness box, non-pleading of their names in the plaint would have come in their way and would have caused impediment in recording their depositions as P.Ws.

4. So far as the execution of Ex.P1 i.e. acknowledgment deed is concerned, the witnesses of the same were also Ishaque and Molvi Umar Din, so when they have not been produced in the witness box along with the revenue officer, who allegedly recorded statement of defendant No.1/C.M. Latif, a serious dent with regards to authenticity of the document Ex.P1 has been caused, because when a person pleads a specific plea, he would have to prove the same by producing cogent, plausible and confidence inspiring evidence, which is lacking in the present case. Furthermore, submission of contesting written statement on behalf of the deceased defendant No.1/C.M.Latif along with the present appellants negating the making of alleged oral gift as well as execution of acknowledgment deed Ex.P1 put a heavy burden upon the respondent to prove the same by producing strong and unimpeachable evidence but he miserably failed to do so as has been observed above. In addition to this, the alleged oral gift was with regards to 8-Kanals 12-Sq.Ft. of the land but the Ex.P1 finds mentioned only 8-Kanals. Moreover, the possession of the disputed property was also not with the respondent. When the requirements of Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984 have not been fulfilled with regards to the document Ex.P1 and prior to this germane to transaction of oral gift, it cannot be said that the respondent has successfully proved his case.

5. It is observed that when the validity and correctness of a gift transaction is challenged, it becomes mandatory and essential for the beneficiary to prove the valid execution of the same, but when the evidence produced by the parties is gone through, it appears that the

respondent has failed to prove the making of valid oral gift and subsequent acknowledgment deed Ex.P1, rather it has surfaced that fraud has been committed, as the respondent has failed to bring on record any reliable evidence. Even, evidence led to show and prove how, when and where offer was made and the same was accepted, where-after possession was delivered, was not trustworthy and confidence inspiring and even the respondent could not mention the names of witnesses in the plaint, as has been highlighted above, which was essential and necessary to be pleaded and proved; reliance is placed on Mst. Kulsoom Bibi and another v. Muhammad Arif and others (2005 SCMR 135), Peer Bakhsh through LRs and others v. Mst. Khanzadi and others (2016 SCMR 1417), Mst. Mughlani Bibi and others v. Muhammad Mansha and others (2012 CLC 1651 Lahore) and Allah Wassaya v. Mst. Halima Mai and 12 others 2016 MLD 1535 Lahore (Multan Bench).

6. The matter in hand pertains to inheritable property because admittedly the property in question was owned by C.M. Latif, father of the parties and the respondent was under heavy burden to prove valid execution of oral gift and subsequent acknowledgement deed (Ex.P1) because he cannot take benefits from the shortcomings in the evidence of appellants rather he has to stand on his own legs. In a judgment reported as Mushtaq Ul Aarifin and others v. Mumtaz Muhammad and others (2022 SCMR 55), the apex Court of the country has invariably held that:-

> 'As far as the contention of learned counsel for the respondents-plaintiffs that the appellants-defendants have not succeeded in proving their claim is concerned, it is a well settled principle of law that the plaintiffs cannot get benefit from the weaknesses of the defendants alone, rather they have to prove their case on their own strength. The initial burden of proof was upon the respondents-plaintiffs which they did not discharge, but the

learned High Court has burdened the appellants-defendants for proving their stance which is not a correct approach.'

Moreover, in judgment reported as Mst. Parveen (deceased) through LRs. v. Muhammad Pervaiz and others (2022 SCMR 64), the Hon'ble Supreme Court of Pakistan has invariably held that:

'---------- On the death of a Muslim his/her property devolves upon his/her legal heirs. However, if any heir seeks to exclude the other legal heirs, as in the instant case by relying on a purported gift the beneficiary of such gift must prove it.'

The same view was also affirmed in Mst. Hayat Bibi and others v. Alamzeb and others (2022 SCMR 13).

7. Pursuant to the discussion above it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to set aside concurrent findings as has been held in Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).

8. The crux of the discussion is that the appeal in hand is allowed, impugned judgments and decrees are set aside, consequent whereof the suit instituted by the respondent/ plaintiff for declaration and possession stands dismissed. No order as to the costs.

MWA/N-21/L **Appeal allowed.**

2023 C L C 1962

[Lahore]

Before Shahid Bilal Hassan, J

ASIF NAEEM----Petitioner

Versus

Mst. BILQEES FATIMA and 3 others----Respondents

Civil Revision No.60443 of 2022, decided on 4th October, 2022.

(a) Civil Procedure Code (V of 1908)---

----O.XXIII, R.3---Compromise of suit---Consent decree---Scope---Impugned order, judgment and decrees had been passed when the petitioner conceded the claim of the respondents; meaning thereby the same was a consent decree against which no appeal lies except certain exceptions which had not been agitated rather the petitioner contented before the appellate court that he was ready to transfer the same land in favour of the respondents while the whole corpus of land according to the gift mutation did not exist on the spot---Trial Court as well as appellate court had rightly adjudicated upon the matter in hand and had not committed any illegality or irregularity warranting interference by this court---Petition stood dismissed in limine.

(b) Civil Procedure Code (V of 1908)---

----O.XXIII, R.3---Consent decree---Appeal---Exceptions where consent decree is appealable listed.

Following are the exceptions where consent decree was appealable:

- An appeal by a person who was not a party to the compromise;
- Where it is alleged that decree is not a decree passed with the consent of parties;

- Where the consent decree is alleged to be invalid as for instance where court did not have jurisdiction over the subject matter;
- Where there is a dispute regarding the nature of compromise;
- Where the decree travels beyond the agreement;
- Where the consent is given under mistake of fact or obtained by practicing fraud upon the court;
- Where there was no compromise at all;
- Where the strict requirements of O.XXIII, Rule 3, Code of Civil Procedure, 1908 are not satisfied.

Muhammad Ahsan Hussain for Petitioner.

ORDER

SHAHID BILAL HASSAN, J.----Precisely, the respondents instituted a suit for declaration maintaining therein that predecessor in interest of the parties namely Muhammad Ismail was owner of the land measuring 197-Kanals 11-Marlas, situated in Mauza Lakoo, Tehsil and District Khushab, who passed away on 24.09.2016; that the petitioner/defendant No.1 in order to deprive them of their inheritance got attested a gift mutation No.4004 dated 31.07.2015 in his favour in collusion with the revenue officials; that their father neither made any offer of gift nor the same was accepted by the petitioner/defendant No.1. Moreover, father of the parties did not appear before any revenue officer for the sanction of mutation; therefore, the mutation in question is illegal and being ineffective upon their rights is liable to be cancelled. The suit was contested by the petitioner who controverted the averments of the plaint. The defendant No.2 was proceeded against ex parte. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the plaintiffs was recorded. On 24.07.2019, plaintiff No.3 namely Rehana Ishfaq appeared before the learned trial Court and

recorded her statement regarding withdrawal of the suit to her extent, so the suit to her extent was dismissed as withdrawn. However, on 02.06.2021, the present petitioner appeared before the learned trial court and recorded his statement on oath that respondents/defendants Nos.1 and 2 are his real sisters, therefore, he has no objection if the suit is decreed upto their extent. The learned trial Court vide impugned order and decree dated 15.12.2021 decreed the suit to their extent by observing that Revenue Officer is authorized to sanction mutation in favour of the plaintiffs to the extent of their respective shares from inheritance of Muhammad Ismail after cancellation of impugned mutation No.4004 and to pass a mutation of inheritance relating to inheritance of Muhammad Ismail deceased. Feeling aggrieved of the same, the petitioner preferred an appeal but it was dismissed vide impugned judgment and decree dated 04.07.2022; hence, the instant revision petition.

2. Heard.

3. Admittedly, the impugned order, judgment and decrees have been passed when the petitioner conceded the claim of the respondents Nos.1 and 2; meaning thereby the same is consent decree, where-against no appeal lies; however, there are following exceptions where consent decree is appealable:-

- An appeal by a person who was not a party to the compromise;
- Where it is alleged that decree is not a decree passed with the consent of parties;
- Where the consent decree is alleged to be invalid as for instance where court did not have jurisdiction over the subject matter;
- Where there is a dispute regarding the nature of compromise;
- Where the decree travels beyond the agreement;

- Where the consent is given under mistake of fact or obtained by practicing fraud upon the court;
- Where there was no compromise at all;
- Where the strict requirements of O.XXIII, Rule 3, Code of Civil Procedure, 1908 are not satisfied.

However, in the present case, no such plea has been agitated rather the present petitioner before the learned appellate Court contended that the petitioner is ready to transfer some land in favour of the respondents/plaintiffs while the whole corpus of land according to gift mutation does not exist on the spot. Therefore, the learned trial Court as well as learned appellate Court have rightly adjudicated upon the matter in hand and have not committed any illegality or irregularity warranting interference by this Court in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908. Resultantly, the revision petition in hand having no force and substance stands dismissed in limine.

IH/A-134/L **Revision Petition dismissed.**

2023 C L C 2025

[Lahore]

Before Shahid Bilal Hassan, J

Dr. HASSAN SHAHRYAR----Petitioner

Versus

SANA WAQAR through authorized attorney and 2 others----Respondents

Civil Revision No.13538 of 2020, decided on 25th October, 2022.

(a) Muslim Family Laws Ordinance (VIII of 1961)---

----Ss. 2 (b) & 7---Rules under the Muslim Family Laws Ordinance, 1961, R. 3 (b)---Notification S.R.O.No.1086(K)61, dated 09-11-1961---Specific Relief Act (I of 1877), Ss. 42 & 54---Suit for declaration and injunction---Divorce proceedings---Jurisdiction---Parties had settled in USA, after their marriage in Lahore but relations became strained and divorce proceedings were initiated before authorities in USA---Petitioner / defendant / husband initiated divorce proceedings under S.7 of Muslim Family Laws Ordinance, 1961, before Union Council concerned in Lahore, Pakistan---Respondent / plaintiff / wife invoked jurisdiction of Civil Court and got injunction against divorce proceedings before Union Council concerned---Suit filed by respondent / plaintiff was rejected---Lower Appellate Court allowed appeal and remanded the matter to Trial Court for decision afresh---Validity---Union Council and/or Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction respondent / plaintiff / wife was residing at the time of pronouncement of divorce---Wife was residing abroad during such time---As per notification S.R.O.No. 1086(K)61 dated 09-11-1961, officers of Pakistan Mission abroad were authorized to discharge functions of Chairman under Muslim

Family Laws Ordinance, 1961---Chairman, Union Council at Lahore had no authority to exercise such authority which he had exercised---High Court in exercise of revisional jurisdiction declined to interfere in the matter---Revision was dismissed, in circumstances.

Muhammad Akram Nadeem v. Chairman, Arbitration Council/ADLG, Islamabad and 2 others 2021 CLC 1947; A.M. Kamal through Legal Heirs and others v. Lahore Improvement Trust 1997 CLC 121; Messrs Sandal Dye Stuff Industries Ltd. v. Federation of Pakistan through Secretary Finance, Pakistan Secretariat, Islamabad and 5 others 2000 CLC 661; Shafqat Ullah and 2 others v. Land Acquisition Collector (D.C.), Haripur and 2 others 2006 CLC 1555; Allah Dad v. Mukhtar and another 1992 SCMR 1273; Mst. Shahida Shaheen and another v. The State and another 1994 SCMR 2098; Allah Rakha and others v. Federation of Pakistan and others PLD 2000 FSC 1; Farah Khan v. Tahir Hamid Khan and another 1998 MLD 85; Muhammad Talat Iqbal Khan through General Attorney v. Tanvir Batool through Wasim Iqbal and 2 others 2005 CLC 481; Sanya Saud v. Khawaja Saud Masud and others 2013 CLC 108; Mst. Lala Rukh Bukhari v. Syed Waqar Ul Hassan Shah Bokhari and others 2018 YLR 273; Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited PLD 2012 SC 247; Mst. Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97; Ahmad Nadeem v. Assia Bibi and another PLD 1993 Lah. 249; Mst. Khurshid Mai v. The Additional District Judge, Multan and 2 others 1994 MLD 1255; Muhammad Yaqoob v. Mst. Sardaran Bibi and others PLD 2020 SC 338 and Messrs Mardan Ways SNG Station v. General Manager SNGPL and others 2020 SCMR 584 ref.

(b) Muslim Family Laws Ordinance (VIII of 1961)---

----S.7---Notification S.R.O.No.1086(K)61, dated 09-11-1961---Constitution of Pakistan, Art. 201---Decision of High Court---Binding effect---Principle---Plea raised by petitioner was that Notification

S.R.O.No.1086(K)61, dated 09-11-1961 was not applicable as it had been struck down by Islamabad High Court---Validity---No verdict as such was passed by Lahore High Court, therefore, Notification S.R.O.No.1086(K)61, dated 09-11-1961, was fully in vogue in Punjab---Relief could not go beyond provincial boundary to affect any other province or Area or its people.

Hassan Shahjehan v. FPSC through Chairman and others PLD 2017 Lah. 665 rel.

Mustafa Ramday, Saad Sibghat-Ullah, Mahnoor Ahmed, Asfand Mir and Abdul Moiz Khan for Petitioner.

Muhammad Ahmed Qayyum (ASC), Shamil Arif and Zahir Abbas for Respondent No.1.

Date of hearing: 27th September, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Facts, in concision, are as such that the petitioner married with respondent No.1 as per Islamic rites and rituals on 15.05.2006 at Lahore (Pakistan) and Nikahanama was registered with Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore; that from this wedlock three children were born. The petitioner and respondent No.1 went to reside in the United States after their marriage. Allegedly, in the year 2015, the respondent No.1 instituted a suit for dissolution of marriage before the Common Pleas of Center Country, Pennsylvania Civil Action Law for dissolving marriage and physical custody of the children and also applied for maintenance allowance; that the petitioner tried his best efforts to salvage the relationship and continue the marriage for the sake of the children. The petitioner purportedly tried his best to reconcile with the respondent No.1 but she was adamant therefore, the petitioner gave his consent to the

Courts in Pennsylvania to dissolve the marriage; that the proceedings in the United States are still pending and have not been finally adjudicated upon and the petitioner has been, regularly, paying maintenance of his children. The petitioner shifted to Lahore and initiated divorce proceedings against the respondent No.1 under the provisions of the West Pakistan Muslims Family Laws Ordinance, 1961 and the rules framed thereunder by pronouncing divorce upon the respondent No.1 which was reduced into writing by way of deed of divorce dated 05.01.2017 and notices were also issued through the Union Council concerned in this regard; that the respondent No.1 was also put to notice of the divorce by way of Email dated 10.01.2017 in which the deed of divorce was contained as an attachment; that subsequently, a second deed of divorce dated 10.02.2017 was put into writing and notices were also issued to the respondent No.1 through the concerned Union Council and the same was further intimated to respondent No.1 through Email dated 14.03.2017 in which the deed of divorce was contained as an attachment; that in pursuance of the said notice, father of the respondent No.1 appeared in the Arbitration proceedings before the respondent No.2, in which he challenged the jurisdiction of the proceedings pending before the respondent No.2. Simultaneously, the father of respondent No.1 instituted a suit in his own name before the learned Civil Court at Lahore on 15.07.2017 seeking a declaration to the effect that the proceedings pending before the respondent No.2 may be declared null and void; that the said suit was contested by the present petitioner, consequently, the interim injunction dated 18.07.2017 was vacated vide order dated 18.09.2017 and the matter was fixed for arguments on the maintainability of the suit. However, while concealing pendency of earlier suit, the suit under discussion was filed on 20.09.2017 by the respondent No.1 through her father as an attorney seeking the same relief as claimed in the earlier suit and the earlier suit was withdrawn on 21.09.2017 with permission to

file afresh. The petitioner while submitting written statement controverted the averments of plaint and also filed an application under Order VII, Rule 11, Code of Civil Procedure, 1908 for rejection of plaint of the suit of respondent No.1 contending that the civil Court has no jurisdiction in the matter as only the Arbitration Council of a Union Council has jurisdiction and an injunction cannot be issued to stay proceedings before it; that the suit is not maintainable. The respondent No.1 filed her written reply. The learned trial Court vide order dated 09.05.2019 accepted the said application and rejected the plaint of the suit, instituted by the respondent No.1 through her father. The respondent No.1 impugned the said order by filing an appeal on 03.06.2019. The petitioner also filed an appeal against the said order specifically against two observations made therein i.e. the learned trial Court had observed that the petitioner and respondent No.1 were nationals of USA while they were only residents and not nationals and that since respondent No.1 had appeared in the proceedings before respondent No.2 through her father acting as her attorney, there was no need to issue fresh notices through the Pakistan Mission in the United States.

The learned appellate Court vide impugned consolidated judgment dated 01.02.2020 accepted the appeal of the respondent No. 1, order and decree dated 09.05.2019 passed by the learned trial Court was set aside and the matter was sent to the learned trial Court for deciding the same afresh after framing issues and recording evidence; however, appeal of the petitioner was dismissed. The learned appellate Court held that a previous case had been filed by the respondent No.1 in the United States of America (USA) and the petitioner had given his consent to the issuance of final decree in the matter; that the respondent No.2 was not empowered to issue certificate of Talaq in violation of law as it did not have the jurisdiction to proceed in the matter since respondent No.1 was residing in USA; that the petitioner was estopped from initiating proceedings before

the respondent No.2 after having submitted to the proceedings before the Common Pleas of Central Country, Pennsylvania Civil Action Law and that the Civil Court is competent to decide the legality of divorce proceedings initiated in Pakistan. Therefore, being aggrieved of the judgment dated 01.02.2020, the petitioner has filed the instant revision petition.

2. Mr. Mustafa Ramday (ASC), the learned counsel for the petitioner while opening the arguments has submitted that after acquiring a "permanent residency card" which is more commonly referred to as a 'Green Card', the card holder(s), the petitioner and respondent No.1 in this case, attained the status of US residents and not US citizens or US nationals; that Green Card is deemed to have been abandoned once the card holder travels outside of the USA and does not return back for more than six months; that the petitioner returned to Pakistan on 29.12.2016 and has not travelled back to the USA; therefore, the green card which is due to expire on 18.12.2022 has already become infructuous; that in case the petitioner intends to revive it, he will have to initiate the process for re-entry in the USA, which is known as an application Form I-131 and the petitioner has made no such application before the US Embassy; that the respondent No.1 attained Naturalization Status in the USA on 12.07.2019, prior to which she was merely a green card holder, which was issued to her on the basis of her marriage with the petitioner, however, she continues to remain a Pakistani National unless she categorically revokes the same by making an application to the Pakistan Embassy in the concerned country abroad for renunciation of her Pakistani Citizenship. He submits that in actual the petitioner and the respondent No.1 are Pakistani National and are governed by the provisions of Muslim Family Laws Ordinance, 1961; that right to dissolve marriage is a sacred and inalienable right granted to the husband and neither such a right can be taken away nor can the exercise of such a right be invalidated merely on

the basis of some alleged procedural deficiencies or irregularities/technicalities, as such, the petitioner has divorced the respondent No.1/Mst. Sana Waqar and talaq has become effective after expiry of 90 days from pronouncement of the same on 05.01.2017 i.e. on 05.04.2017, however, the learned appellate Court has committed material illegality in overlooking this fact while passing the impugned judgment dated 01.02.2020; that the learned appellate Court while passing the impugned judgment in para No. 17 has given finding on the merits of the case, therefore, the learned appellate Court has travelled beyond the scope of the matter before it and has exercised jurisdiction in an illegal manner; that the learned appellate Court has erred in law while applying the principle of estoppel to the facts and circumstances of the case in hand; that perusal of Nikahnama entered into by and between the parties reveals that the petitioner did not delegate his powers of divorce to the respondent No. 1, therefore, when the right of divorce was not available to the respondent No.1, the proceedings initiated before the Courts in the USA are in nature of Khula proceedings, whereas the proceedings initiated by the petitioner before the respondent No.2 were in the nature of talaq and even if both the proceedings work towards the same goal i.e. dissolution of marriage, they are different proceedings which can be initiated simultaneously; that the impugned judgment suffers from major inconsistencies which tantamount to patent irregularity when the learned appellate Court did not interfere in the finding of the learned trial Court that respondent No.1 was to be served notice in the divorce proceedings through the Pakistan Mission in the USA, while in the same breath holds that the petitioner was barred from invoking divorce proceedings in Pakistan; that the contents of SRO No.1086 (K) 61 dated 08.11.1961 are applicable to situations where the husband pronouncing the talaq as well as the wife are both residing abroad, despite being citizens of Pakistan, however, in the present case, the petitioner (husband) is residing in

Pakistan while the wife (respondent No. 1) is residing in USA, therefore, the case falls squarely within the ambit of (i) of Proviso to sub-rule (b) of Rule 3 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 and matter falls within the domain of respondent No.2, thus, the proceedings in the form of suit for declaration are clearly barred by law and liable to be rejected under Order VII, Rule 11, Code of Civil Procedure, 1908, even otherwise, the said SRO has been declared ultra vires by the Islamabad High Court in judgment reported as 2021 CLC 1947 and any judgment wherein question of law is decided would be a judgment in rem and thus binding with regard to the said question of law as has been held in 1997 CLC 121, 2000 CLC 661 and 2006 CLC 1555; that section 22 of the Family Court Act, 1964 bars issuing of injunction by the Family Court to or stay any proceedings pending before, a Chairman or an Arbitration Council; that the function of respondent No.2 is not to decide any issue or adjudicate upon the rights of the parties but is merely limited to bringing about reconciliation between the parties and in the event of failure the divorce ipso facto becomes effective upon lapse of 90 days of receipt of notice under section 7 of the Muslim Family Law Ordinance, 1961, hence, no vested right has accrued to the respondent No.1 and no right of respondent No.1 has been denied for which a declaration is sought for; that even the Hon'ble Federal Shariat Court in PLD 2000 FSC 1 has held the provisions of section 7(3) and (5) to be repugnant to the injunctions of Islam and talaq takes effects from the date of pronouncement of talaq by the husband and not from the day of delivery of notice to the Chairman, Union Council; that the impugned judgment has been passed in a whimsical manner and the same being devoid of any cogent reasoning is liable to be set aside. Therefore, the impugned judgment dated 01.02.2020 may be set aside by allowing the revision petition in hand and plaint of the suit filed by the respondent No.1 may be rejected by restoring the order and decree dated 09.05.2019

and a declaration to the effect may also be issued that the Talaq pronounced by the petitioner upon the respondent No.1 on 05.01.2017 took effect upon the expiry of 90 days i.e. on 05.04.2017. Relies on Allah Dad v. Mukhtar and another (1992 SCMR 1273), Mst. Shahida Shaheen and another v. The State and another (1994 SCMR 2098), Allah Rakha and others v. Federation of Pakistan and others (PLD 2000 Federation Shariat Court 1), Farah Khan v. Tahir Hamid Khan and another (1998 MLD 85), Muhammad Talat Iqbal Khan through General Attorney v. Tanvir Batool through Wasim Iqbal and 2 others (2005 CLC 481-Lahore), Sanya Saud v. Khawaja Saud Masud and others (2013 CLC 108-Islamabad), Mst. Lala Rukh Bukhari v. Syed Waqar Ul Hassan Shah Bokhari and others (2018 YLR 273-Lahore), Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 Supreme Court 247), Mst. Khurshid Bibi v. Baboo Muhammad Amin (PLD 1967 Supreme Court 97), Ahmad Nadeem v. Assia Bibi and another (PLD 1993 Lahore 249), Mst. Khurshid Mai v. The Additional District Judge, Multan and 2 others (1994 MLD 1255), Muhammad Yaqoob v. Mst. Sardaran Bibi and others (PLD 2020 Supreme Court 338), Muhammad Akram Nadeem v. Chairman, Arbitration Council/ADLG, Islamabad and 2 others (2021 CLC 1947 Islamabad), A.M. Kamal through Legal Heirs and others v. Lahore Improvement Trust (1997 CLC 121 Lahore), Messrs Sandal Dye Stuff Industries Ltd. v. Federation of Pakistan through Secretary Finance, Pakistan Secretariat, Islamabad and 5 others (2000 CLC 661 Lahore) and Shafqat Ullah and 2 others v. Land Acquisition Collector (D.C.), Haripur and 2 others (2006 CLC 1555-Peshawar).

3. On the contrary, Mr. Muhammad Ahmed Qayyum (ASC), the learned counsel for the respondent No.1 while responding to the above said submissions has avowed that the petitioner submitted to the jurisdiction of the Court in the USA and categorically consented to divorce through that Court only, stating in his affidavit that he will not be

divorced until decree is issued by that Court, therefore, he is, now, estopped bypassing his undertaking/sworn affidavit and the procedure and forum that he submitted to through affidavit and specific undertaking on oath; that even if the petitioner would invoke the jurisdiction under Pakistani Law (though the same is denied by the respondent No. 1), he has invoked the same before the wrong Chairman under the Muslim Family Law Ordinance, 1961, as the spouse is residing abroad, so under the Muslim Family Laws Ordinance, 1961 the proceedings shall be conducted before the appointed officer in the Pakistan Mission abroad and the Local Chairman of the Union Council has no authority to take up the proceedings, because it has been clearly mentioned in SRO No. 1086(K)61 dated 09.11.1961 that respective officers of the Pakistan Mission abroad shall be deemed as the Chairman under section 2(b) constituting the Arbitration Council under the Muslim Family Laws Ordinance, 1961; that it is trite law that when law provides for a particular mechanism for an act, then that act should be done in that manner as provided or not at all; that the petitioner is abusing the process of Court in Pakistan; that he has not appeared himself before the Court and reportedly he is not even in Pakistan, and has remarried without the permission of his wife and is carrying on proceedings through his father who ostensibly has no authorization and C.M.No.4/2021 clearly establishes this fact; that during arguments it was not denied that the petitioner has illegally remarried without permission from the respondent No.1 and only the counsel evasively stated that the second marriage was not on record; that principle of comity of courts holds a court having legally assumed jurisdiction should be allowed to continue and pass a final judgment; that the bar of section 22 of the Family Courts Act is available to the Chairman as defined under law, which in the present case is not the Chairman Union Council rather is the officer designated in the US High Commission; that the petitioner has renewed his NICOP on 02.06.2018

(set to be expired on 02.06.2028 address: 6496 Terrace Court, Harrisburg, Pennsylvania USA as has been referred in C.M.No.1 of 2021 at page No.5; that even if the Chairman Union Council was prima facie couched with jurisdiction (which is vehemently denied), the view of the Hon'ble Supreme Court of Pakistan as enunciated in Messrs Mardan Ways SNG Station v. General Manager SNGPL and others (2020 SCMR 584) is that the trial Court even if its jurisdiction is barred can look into the matters to see if any portion of the same fell outside its jurisdiction, therefore, the suit at present stage is maintainable; that so far as the argument of striking down of SRO by the Islamabad High Court is concerned, nothing turns on the fact that Islamabad High Court has struck down the SRO, as the same still survives outside the Capital Territory and in fact this Court has continually followed the SRO and this Court will follow its own line of precedents enforcing the SRO, until the same is brought under challenge before this Court and the same is struck down in Punjab. In this regard reliance has been placed on Hassan Shahjehan v. FPSC through Chairman and others (PLD 2017 Lahore 665); that the petitioner has consistently claimed to be resident of Pakistan whereby he is clearly to be classified as an overseas Pakistani in light of his NICOP, even during arguments it has been conceded by the petitioner's side that even if his residence lapses he can get the same restored. Submits that the petitioner's side is misreading the Muslim Family Laws Ordinance, 1961 because the said Rules would apply in instances where a mechanism is not available under the powers of the Act, because Rules cannot override the powers exercised under the Act, even otherwise the said rules are not applicable to international matters, rather on the face of it, it were applicable inside the then united Pakistan between East and West Pakistan; adds that Federal Notification overrides provincial rules in case of conflict. Lastly, prays that the revision petition in hand may be dismissed. Besides above referred judgment, further relies on Mst. Asma Bibi v. Chairman Reconciliation

Committee and others (PLD 2020 Lahore 679), Mian Irfan Latif through Special Attorney v. Nazim/Chairman Union Council No.100 and another (2009 YLR 1141-Lahore), Mst. Sana Asim Hafeez v. Administrator/Chairman, Arbitration and Conciliation Court (2016 MLD 1061-Lahore), Syeda Wajiha Haris v. Chairman, Union Council No. 7, Lahore (2010 MLD 989-Lahore), Saba Riaz v. Nazim/Chairman Arbitration Council, Gulberg, Lahore and another (2003 YLR 3189) and Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others (PLD 2019 Lahore 285).

4. Heard.

5. The only point in issue is the assumption of jurisdiction by the respondent No.2/Chairman, Union Council No. 129, Neelam Block, Allama Iqbal Town, Lahore, on the divorce notice issued by the present petitioner in presence of already initiated and consented proceedings before Common Pleas of Center Country, Pennsylvania Civil Action Law (USA) in this regard. The respondent No.1 in order to get (the proceedings before the respondent No.2) declared null and void instituted a suit for declaration with permanent injunction against the present petitioner, wherein the petitioner filed an application under Order VII, Rule 11, Code of Civil Procedure, 1908, which was accepted on 09.05.2019 and plaint of the suit was rejected, prompted the respondent No.1 to file an appeal and the learned appellate Court accepted the appeal, set aside the order and decree dated 09.05.2019 and remanded the case to the learned trial Court for decision afresh after framing of issues and recording of evidence on merits. In this regard, it is observed that Sections 2(b) and 7 of the Muslim Family Laws Ordinance, 1961 and Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 are necessary, in order to resolve the controversy in hand, which are to be reproduced infra:-

'Section 2(b):- "Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or by any officer authorized in that behalf by any such Government to discharge the functions of Chairman under this Ordinance.'

'7. "Talaq ". (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in subsection (5) a Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

In order to resolve the matter in hand, the respondent No.1 is permanently residing in the USA and petitioner is also there as is evident from his

Green Card, copy of which has been placed on record through C.M.No.1-C of 2021, even at the time of alleged Talaq he was not available in Lahore; meaning thereby as per S.R.O.No.1086(K)61 dated 09.11.1961 the jurisdiction for taking up the matter was with the designated officer in the Pakistan Consulate/Mission in USA. The said S.R.O. reads:-

'In exercise of the powers conferred by clause (b) of section 2 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration) Ministry of External Affairs to appoint officers of Pakistan Mission abroad to discharge the functions of Chairman under the aforesaid Ordinance.'

Rule 3(b) of the Rules provides:-

'Rule 3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of section 2 shall be as follows, namely:-

(a) ----------

(b) in the case of notice of talaq under subsection (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom talaq has been pronounced was residing, at the time of the pronouncement of talaq:

Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be -

(i) in case such wife was at any time residing with the person pronouncing the Talaq in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the talaq is permanently residing in West Pakistan;'

In view of the above said provisions of law, the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce and in this case the respondent No.1 was residing in the USA as has been admitted by the petitioner. Reliance is placed on Mt. Sharifan v. Abdul Khaliq and another (1983 CLC 1296) and Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others (PLD 2019 Lahore 285). When the position is as such, as observed above, as per Notification S.R.O.No. 1086(K)61 dated 09.11.1961, officers of Pakistan Mission abroad are authorized to discharge the functions of Chairman under the aforesaid Ordinance. Meaning thereby the Chairman, Union Council 129-Neelam Block, Allama Iqbal Town, Lahore had no authority to exercise that authority which he has exercised. This Court in judgment reported as Mian Irfan Latif through Special Attorney v. Nazim/Chair man Union Council No.100 and another (2009 YLR 1141-Lahore), has held:-

'Since both the parties are permanent resident of U.K. (sic) and as such as per Notification No. SRO No. 1086(K)/61 the function of Chairman Arbitration Council under the Muslim Family Laws Ordinance, 1961 are to be performed by an appointed offer of the Pakistan Mission abroad.'

The same view was reaffirmed and reiterated in judgments reported as Mst. Sana Asim Hafeez v. Adminstrator/ Chairman, Arbitration and Conciliation Court (2016 MLD 1061-Lahore), Syeda Wajiha Haris v. Chairman, Union Council No.7, Lahore (2010 MLD 989-Lahore) and Ms.

Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others (PLD 2019 Lahore 285).

In addition to the above, the petitioner did not disclose the factum of initiation of proceedings before the Common Pleas of Center Country, Pennsylvania Civil Action Law (USA) and consent given by him while approaching the Arbitration Council, Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore, meaning thereby he did not approach the Council with clean hands. Though the consent of parties does not confer vested jurisdiction upon any Court of law but as the proceedings were in progress the petitioner must have disclosed this factum.

6. So far the argument that the Family Court cannot issue an injunction to, or stay any proceedings pending before a Chairman or an Arbitration Council under section 22 of the Family Courts Act, 1964; in this regard it is observed that when an act is performed without any jurisdiction, as discussed above, the civil Court being a Court of plenary jurisdiction has authority and competence to look into the matter and proceed with the same in accordance with law as well as pass an appropriate order in this regard. Even if the Chairman/respondent No.2, for the sake of arguments, is considered to have jurisdiction, the trial Court, though its jurisdiction is barred, can look into the matter as has been held in Messrs Mardan Ways SNG Station v. General Manager SNGPL and others (2022 SCMR 584). The relevant para is reproduced as under:-

> '7. With regard to bar of jurisdiction contained in any statute we are clear in our mind and it is concurrently declared by this court that if in any statute there is a bar of plenary jurisdiction of civil court, the bar will be applicable if the authority acts in accordance with the said statute and its acts, orders do not violate the jurisdiction conferred upon that authority under the said statute then the bar of jurisdiction contained in the said statute applies and if the

authority acts or passes any order in violation of the jurisdiction vested in it under the said statute and transgresses jurisdiction or the order or action if scrutinized keeping in view the jurisdiction available under the said statute and the orders or action is found without jurisdiction then certainly the bar contained in the said statute on the plenary jurisdiction of civil court is not applicable and the suit would be competent.'

In this view of the matter, it is observed that the learned trial appellate Court has rightly appreciated law on the subject and observed that the learned trial Court has jurisdiction to look into the matter being a Court of plenary jurisdiction.

7. So far as the argument that the S.R.O. ibid has been struck down by the learned Islamabad High Court is concerned, it is observed that the said S.R.O. is fully in vogue in Punjab as no verdict as such has been passed by this Court, because a relief cannot go beyond the provincial boundary and affect any other province or Area or its people, as has already been held by this Court in a judgment reported as Hassan Shahjehan v. FPSC through Chairman and others (PLD 2017 Lahore 665) that:-

'As a corollary, the relief granted or the writ issued by the High Court also remains within the territorial jurisdiction of this Court and can only benefit or affect a person within the territorial jurisdiction of the Court. The relief cannot go beyond the Provincial boundary and affect any other Province or Area or its people. So for example, if a federal law or federal notification is struck down by Lahore High Court, it is struck down for the Province of Punjab or in other words the federal law or the federal notification is no more applicable to the Province of Punjab but otherwise remains valid for all the other Provinces or Area. Unless of course the Federation or the federal authority complying with the judgment of

the Lahore High Court, make necessary amends (sic) or withdraw the law or the notification.'

8. In view of the above, it is concluded as such that: -

- The proceedings initiated by the respondent No.1 before the Common Pleas of Center Country, Pennsylvania Civil Action Law (USA), though consented by the present petitioner, are not maintainable, because the Competent Authority, as provided under law and SRO No.1086(K)61 dated 09.11.1961 is respective officer of the Pakistan Mission abroad, in this case (USA) who shall be deemed as the Chairman under section 2(b) constituting the Arbitration Council under the Muslim Family Laws Ordinance, 1961.
- The proceedings before the Chairman, Union Council No.129, Neelam Block, Allama Iqbal Town, Lahore are without any jurisdiction.
- The civil Court can look into the matter, even though jurisdiction is barred under law/statute, being a Court of plenary jurisdiction.

9. So far as the case law relied upon by the learned counsel for the petitioner is concerned, with utmost respect, it is observed that the same has no relevance to the peculiar facts and circumstances of the case in hand, because in this case pure issue of jurisdiction was involved and not the merits of the case, as such the same is not helpful to the petitioner's cause.

10. The compendium of the discussion above is that the revision petition in hand comes to naught and hence, the same is dismissed. No order as to the costs.

MH/H-29/L **Revision Petition dismissed.**

2023 C L D 135

[Lahore]

Before Shahid Bilal Hassan and Muhammad Raza Qureshi, JJ

PREMIER INSURANCE LIMITED through Authorized Officer---Appellant

Versus

Messrs IHSAN YOUSAF TEXTILE PRIVATE LIMITED through Director and 3 others---Respondents

R.F.A. No. 1064 of 2011, decided on 27th October, 2022.

(a) Insurance Ordinance (XXXIX of 2000)---

----Ss. 75, 76, 121, 122 & 124---Insurance claim---Insurance Tribunal, constitution of---Word "shall"---Effect---Insurance company was aggrieved of acceptance of insurance claim of respondent company by Insurance Tribunal---Plea raised by Insurance company was that the Tribunal was not properly constituted---Validity---By using word "shall" Legislator made it mandatory and any deviation therefrom would make verdict of such Tribunal illegal and not sustainable in the eye of law---Tribunal was consisting of only one Judge (Addl. District and Sessions Judge) and no member having experience of life insurance, non-life insurance, actuarial science, finance, economics, accountancy, administration or other discipline was included as provided under S. 121(2) of Insurance Ordinance, 2000---Judgment in question was rendered by Tribunal, not constituted as per mandate of law and the same was not sustainable in the eye of law---Tribunal without bifurcating, assessing and giving details of damages as to machinery, building, articles, etc., caused to respondent company proceeded to pass judgment giving an accumulative policy proceed/claim, which otherwise was to be referred to Arbitrator under the Policies---Condition in the Policies

stipulated that matter as to quantum of alleged loss had to be referred to Arbitrator, which factum was ignored by Insurance Tribunal while accepting claim of respondent company---High Court set aside judgment passed by Insurance Tribunal and remanded the matter to lawfully constituted Insurance Tribunal for decision afresh---Appeal was allowed accordingly.

(b) Evidence---

----Admissibility---Objection, decision of--- Procedure--- Objection to admissibility of a document in evidence has to be decided then and there instead of deferring the same till the end of trial and even at the time of passing final judgment.

Hayatullah v. The State 2018 SCMR 2092 rel.

Syed Ali Zafar, Advocate Supreme Court, Talib Hussain, Jahanzeb Sukhera, Mehak Zafar and Ali Hur Jamal for Appellant.

Waqar A. Sheikh, Tassawar Sohail, Humaira Afzal, Faisal G. Meeran, Syed Ali Zakir, Mian Ijaz Latif and Ms. Hina Bandealy for Respondent No. 1.

Mushtaq Ahmad Khan, Advocate Supreme Court and Zahid Mehmood Arain for Respondent No. 3/HBL.

Date of hearing: 4th October, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the respondent No.1 filed an application under sections 75, 76 and 122 of the Insurance Ordinance, 2000 for the recovery of Rs.326,293,052/- against the appellant before the Insurance Tribunal, Lahore contending therein that the respondent No.1 is a Private Limited Company duly incorporated under the Companies Ordinance, 1984; that the respondent No.1 is a "Policies Holder" as defined in section 2(xiv) of the Ordinance and the present appellant is a

registered Insurer as enshrined in section 2(xxxi) of the Ordinance. It is alleged that the appellant has committed default and is not fulfilling its obligations with regards to the insurance supported by the statement of Insurance Claim Denial; that the respondent No.1 had been using the insurance facility of the appellant since 1992-93; that the respondent No.1 paid a total amount of Rs.13,000,000/- approximately as premium to the appellant/Insurance Company; that on 5th October, 2006 when fire broke out in the dyeing unit of the respondent No.1 and the machinery, building and stock of cloth lying therein was destroyed by fire, the respondent No.1 suffered huge loss of millions of rupees; that the incident of fire was immediately reported to the Fire Brigade Station and Town Municipal Administration, Faisalabad, who extinguished the fire; that the incident was also abruptly reported to the police on 05.10.2006, who incorporated the same against Rapt No.32 dated 13.10.2006. Allegedly, thereafter, the respondent No.1 lodged insurance claim with the present appellant on 10.10.2006; that as a result of fire incident, purportedly the machinery installed at the dyeing unit of the respondent No.1 including the machinery which was owned by the respondent No.1 as well as obtained on lease from Askari Leasing was damaged. It was further averred that after the fire incident, the survey team of the appellant visited the dyeing unit firstly on 16.10.2006 and secondly on 17.10.2006 and they demanded certain documents through letter dated 27.12.2006 which was duly replied by the respondent No.1 vide letter dated 28.12.2006, thereby provided all the relevant/necessary documents but despite that the present appellant unnecessarily delayed the matter and did not pay the insurance claim to the respondent No.1. It was further maintained that the respondent No.1 intimated the appellant about the loss occurred to the respondent No.1 due to stoppage of work but the appellant did not fulfill their obligation of making payment of insurance claim; that the appellant was intimated through letter dated 02.12.2006 that due to delay in claim the entire

process of export shipment has stopped, which has caused heavy operational losses to the respondent No.1 amounting to Rs.5 to 10 million per month; hence, the respondent No.1 made the following prayer:-

(i)	Insurance Claim	Rs.148,513,052/-
(ii)	Operational Losses	Rs.10.00 million p/m till date
(iii)	Loss suffered due to cancellation of agreements with C.I.CARCECO S.A. Textiles	= US $ 515,000
(iv)	Loss suffered due to cancellation of agreements with G.O. Traders	=US $448,000
	Total:	Rs.326,293,052/-

Therefore, it was prayed that the application of the respondent No.1/applicant may be accepted against the present appellant.

The appellant hotly contested the application by filing its written reply and raised certain preliminary and legal objections as well as resisted the same on facts and prayed for dismissal of the said application.

The divergence in pleadings of the parties was summed up into following issues:-

1. Whether the claim of applicant is not maintainable in its present form? OPR
2. Whether the petition is bad for mis-joinder and non-joinder of necessary parties and the HBL have any nexus with the plant and machinery lying in the dyeing unit and got damaged in the fire broke out on 05.10.2006? OP Parties

3. Whether the claim of applicant is in violation of Section 75 of Insurance Ordinance, 2000 and sections 51/52 of Contract Act, 1872? OPR

4. Whether the applicant has not fulfilled his part of the agreement with the respondent enabling him to file the claim? OPR

5. Whether survey report is biased, prejudiced and based on mala fide? OPA

6. Whether the applicant has no cause of action? OPR

7. Whether the respondent is not duly authorized to contest the application? OPA

8. Whether the fire occurrence took place in the premises of Ikram Fabrics (Pvt.) Ltd. and the machinery, building along with stocks burnt in fire was also in the name of Ikram Fabrics (Pvt.) Ltd.? OPR

9. Whether the assets of Ahsan Yousaf (Pvt.) Ltd. were transferred in the name of Ikram Fabrics which was not insured by the respondent and as such the respondent was justified in repudiating the whole claim? OPR

10. Whether extent of damage to machinery, building and stocks lying therein was destructed by fire which was neither accidental nor natural, rather the applicant deliberately set on fire the insured building, machinery and stocks? OPR

11. Whether the applicant is entitled to the decree along with liquidated damages as prayed for? OPA

12. Relief.

Both the parties adduced oral as well as documentary evidence in support of their respective stances. On conclusion of trial, the learned Judge,

Insurance Tribunal vide impugned judgment dated 11.11.2011 accepted the application filed by the respondent No.1 and held him entitled to Insurance Claim/Policy Proceed amounting to Rs.148,513,052/- along with liquidated damages from 10.10.2006 at the prevailing rate till its realization. Hence, the instant appeal has been preferred.

2. Syed Ali Zafar (ASC), the learned counsel for the appellant has argued that the impugned judgment is illegal and bad in the eyes of law; that the same is result of misreading and non-reading of evidence on record; that in actual no fire incident occurred in the premises, subject matter of the policies, rather it was a jumping fire incident in the premises owned by Ikram Fabrics (Pvt.) Limited; that despite demands of surveyors, the respondent No.1 failed to provide necessary documents, so non-provision of all information and documents disentitles the respondent No.1 to grant of any claim being in violation to sections 51 and 52 of the Contract Act, 1872 and Policies Conditions Nos.1, 4, 8, 11 and 13; that evidence of the appellant especially report of surveyors Ex.P7 has not been considered by the learned Insurance Tribunal while passing the impugned judgment; that the learned Insurance Tribunal has misinterpreted and misread the Policies Ex.A2 and Ex.A3 germane to keeping of any hazardous inside the insured building; that the impugned judgment is against law and facts, the same suffers from inherent defects; that the said is illegal, arbitrary and unjust as no consideration has been paid to the averments of the appellant; that the impugned judgment has been passed in a slip-shod manner without appreciating the proved facts on record; that the learned Insurance Tribunal has failed to consider that the application was not maintainable as the claim was not filed by the respondents Nos.2 and 3 who had a charge/lien on the insured properties/assets and even they had not assigned any right to the respondent No.1 for filing such claim, therefore, the same is not sustainable on this score; that a party has to stand on its own legs and

cannot take benefit of the shortfalls or shortcomings in the opposite party but this basic principle has been defiled by the learned Insurance Tribunal; that the entire proceedings are Coram non judice because Insurance Tribunal was not properly constituted as in such matters which involve insurance claims particularly whether fire was deliberate or accidental, require interpretation of insurance law which therefore provides that there must be insurance experts in the Insurance Tribunal; however, in this case learned Tribunal was based on Single Judge who did not have requisite expertise in the matter; that a huge amount has been awarded while passing the impugned judgment, that too, without any cogent and trustworthy evidence; that under condition No.18 of the Policies the matter has to be referred to arbitrator in case of any differences as to the amount of any loss or damage, so the learned Insurance Tribunal has wrongly assessed the quantum of alleged loss; that learned Insurance Tribunal has failed to appreciate that the machines, their value, quantity and conditions etc. were nowhere proved or established but even then the respondent No.1 was awarded such a huge amount while passing the impugned judgment; that the impugned judgment has been passed on the foundation of pick and choose methodology, which is not warranted under law, because at one hand the report of surveyors has been rejected but on the other some parts of the same have been relied upon; that the learned Insurance Tribunal has wrongly decided that the Habib Bank Limited and PICIC Commercial Bank Limited had no nexus with the dispute; that the evidence of A.W.1 has wrongly been accepted by the learned Insurance Tribunal because the same was beyond the claim forms as in evidence he deposed that fire was caused by a short circuit in the electric box but in claim form the reason was narrated as unknown; that the impugned judgment is based on surmises and conjectures; therefore, the same is not sustainable in the eye of law and liable to be set aside by allowing the appeal in hand.

3. Mr. Waqar A. Sheikh (ASC), Advocate while representing the respondent No.1 has controverted the above said submissions and further argued that in terms of section 112(3)(c) of the Insurance Ordinance, 2000 read with Rule 22(2) of the Insurance Rules, 2002, the survey report has to be prepared and signed by natural persons. However, the joint survey report under reference carried no name of the alleged surveyors, which is conspicuous from its absence and the same cannot be termed as a survey report in terms of the foregoing mandatory provisions of law and hence, it is inadmissible in evidence and non-mentioning of name of the surveyors under the report is admitted by R.W.3 during cross-examination; that Rule 22(4) of the Insurance Rules, 2002, demands that the report shall be finalized as early as possible but within the period of ninety days, however, in the present case, the fire incident took place on 05.10.2006 while the survey report was prepared on 10.08.2007, after considerable lapse of the mandatory period, especially when the technical expert hired by the surveyors i.e. Electro-Tech Engineers (Electrical, Mechanical, Air Conditioning Engineers and Contractors) on whose findings the surveyors have relied upon, gave its technical report on 24.11.2006; that the respondent No.1 provided required documents to the surveyors in time; that rule 22(2) of the Rules, 2002 is mandatory provision of law, consequence of non-compliance whereof are provided in section 118 of the Insurance Ordinance, 2000; that the alleged survey report blatantly violates the mandatory requirements of law/rules and the same can neither be termed as a survey report nor is admissible in evidence, hence, it has rightly been discarded by the learned Insurance Tribunal; that under section 118 of the Insurance Ordinance, 2000 statutory presumption of truth has been attached to the claim raised under the insurance policy by the legislature and consequences in the form of payment of liquidated damages have also been provided in case where the claim is not satisfied within the stipulated time; that the survey report has been presented in

evidence under objection by R.W.3 as neither the alleged surveyor for the Insurance Survey Company nor any other surveyor or expert hired by the surveyors has been produced in support of the survey report; that the survey report is biased, prejudiced and lacking in material; that the respondent No.1 by producing cogent, unimpeachable, trustworthy and confidence inspiring evidence, oral as well as documentary, has proved and established his claim. Lastly, prays for dismissal of the appeal in hand. Relies on Postal Life Insurance (PLI) and others v. Muhammad Ishaque Butt (2022 CLD 309-Lahore), Lasania Oil Mills v. Silver Star Insurance Company Limited and others (2021 CLD 659-Lahore), Mst. Riffat Asghar v. State Life Insurance Corporation of Pakistan and others (2010 CLD 1123-Lahore) and Ghulam Raza Sajid v. State Life Insurance Corporation of Pakistan and another (2010 CLD 792-Lahore).

4. Heard.

5. Section 121 of the Insurance Ordinance, 2000 deals with constitution of the Tribunal and it would be advantageous to reproduce the same here, which reads:-

'121. Constitution of the Tribunal.--- (1) The Federal Government shall constitute a Tribunal or Tribunals in consultation with the Commission and shall in respect of each Tribunal so constituted specify the territorial limits within which, or the class or classes of cases in respect of which each such Tribunal shall exercise jurisdiction under this Ordinance:

Provided that the Federal Government may by notification in the official Gazette confer all or any of the powers of the Tribunal on any District or Additional District and Sessions Judge of an area where for any reason it may not be expedient to constitute a separate Tribunal, and in doing so the Federal Government shall

also specify the composition and pecuniary and territorial limits of such a Tribunal.

(2) The Tribunal shall consist of a Chairperson who shall be serving or retired Judge of the High Court and not less than two members being persons of ability and integrity who have such knowledge or experience of life insurance, non-life insurance, actuarial science, finance, economics, law, accountancy, administration or other discipline as would, in the opinion of the Federal Government, enable them to discharge the duties and functions of members of the Tribunal.

(3) To constitute a sitting of a Tribunal the presence of the Chairperson and at least one other member shall be necessary.

(4) A Tribunal shall not merely by reason of a change in its composition, or the absence of any member from any sitting, be bound to recall and rehear any witness who has given evidence, and may act on the evidence already recorded by or produced before it.

(5) A Tribunal may hold its sitting at such places within its territorial jurisdiction as the Chairperson may decide from time to time.

(6) No act or proceeding of a Tribunal shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of the Tribunal.' (Emphasis supplied)

When the above provision of law is, accumulatively, gone through and interpreted, we observe that the Tribunal, in the peculiar facts and circumstances of the case in hand, has not been constituted as per mandate of law because subsection (2) of section 121, ibid, provides that, 'The Tribunal shall consist of a Chairperson who shall be serving or retired Judge of the High Court and not less than two members being

persons of ability and integrity who have such knowledge or experience of life insurance, non-life insurance, actuarial science, finance, economics, law, accountancy, administration or other discipline as would, in the opinion of the Federal Government, enable them to discharge the duties and functions of members of the Tribunal.' and subsection (3) ibid demands that, 'To constitute a sitting of a Tribunal the presence of the Chairperson and at least one other member shall be necessary.' By using word "shall" the legislators have made it mandatory and any deviation therefrom would make the verdict of such Tribunal illegal and not sustainable in the eye of law. However, in the present case, the Tribunal was consisting of only one Judge (Addl. District and Sessions Judge) and no member having experience of life insurance, non-life insurance, actuarial science, finance, economics, accountancy, administration or other discipline has been included as provided under subsection (2) of section 121 ibid; meaning thereby the impugned judgment has been rendered by Tribunal, not constituted as per mandate of law and hence, the same is not sustainable in the eye of law.

6. In addition to the above, section 111 of the Insurance Ordinance, 2000 provides that who will be permitted to act as Insurance Surveyors, which reads:-

'111. Persons permitted to act as insurance surveyors.---(1) Subject to subsection (2), it shall be unlawful for any person to act for remuneration as a surveyor, loss adjuster, or loss assessor (by whatever titled called) unless such person is:

(a) an adjuster of aviation or maritime losses; or

(b) a person licensed as a surveyor under this Ordinance.

(2) Nothing in this section shall prevent -

(a) the performance in the course of his employment by an employee of an insurer of activities of the nature of insurance surveying for that insure; or

(b) the expression in the course of his general professional practice of an expert opinion on the nature, cause or quantum of an insurance loss by an advocate, solicitor, accountant, actuary or other professional person engaged in a profession other than surveying.'

Section 112 of the Ordinance, 2000 provides:-

'112. Licensing of insurance surveyors.---(1) The Commission may, on application by a person, grant of that person a licence, having a term of not more than twelve months, to act as a surveyor where the Commission is satisfied that person is qualified under this section to be granted such a licence.

(2) A licence granted under the preceding subsection (or renewed under this subsection) may be renewed for a term of not more than twelve months on application made by the holder of the licence prior to expiry of the licence, where the Commission is satisfied that such person is qualified under this section to be granted such a licence.

(3) No person shall be entitled to apply for or to hold a licence as a surveyor under this Ordinance unless the following conditions are fulfilled at the date of the application and at all times during which the licence is held:

(a) the person is a company with a prescribed minimum share capital;

(b) the person carries professional indemnity insurance at such level as may be prescribed;

(c) reports issued in respect of surveys conducted by the person are signed by natural persons, registered under section 113 as authored surveying officer;

(d) reports issued in respect of surveys conducted by the person contained such information and comply with such conditions as may be prescribed;

(e) the person is a member of such approved professional association as may be prescribed; and

(f) the person complies with such other conditions as may be prescribed:

Provided ----------

Provided ----------

Provided ----------

Provided ----------

---

(4) ----------

---

(5) ----------

---

(6) ----------

---

(7) ----------

----------.'

Rules 22 of the Insurance Rules, 2022 deals with surveys and reports of insurance surveyors, which enunciates:-

'22. Surveys and reports of insurance surveyors.---(1) Pursuant to clause (d) of subsection (3) of section 112 the report of an insurance surveyor shall be subject to the conditions as laid down in sub-rule (2).

(2) Every report given by an insurance surveyor shall be signed by a natural person who is, at the date of the report, registered as an authorized surveying officer for the class of insurance surveyors to which the loss being surveyed relates, and shall include the following, namely: ---

(a) A description of the property or interest which constitutes the subject-matter of the survey report, sufficient to identify the property or interest;

(b) the terms of reference given to the insurance surveyor by the person engaging him;

(c) any instructions given to the insurance surveyor by the person engaging him, as to facts to be assumed or other assumptions to be made by the insurance surveyor;

(d) a description of the procedures carried out by the insurance surveyor in the conduct of the survey;

(e) the opinion of the insurance surveyor on the matters contained in the term of reference; and

(f) a declaration that neither the insurance surveyor, nor any director, employee, associate or partner of the insurance surveyor, nor any related party of any of those persons, has any interest directly or indirectly by way of insurance, ownership, agency commission,

repairs, disposal of salvage, or in any other way whatsoever, other than as an insurance surveyor in the property or interest which constitute the subject-matter of the survey report.

(3) Every survey conducted by, and report given by, an insurance surveyor shall comply with the relevant professional standards of any professional body of which the insurance surveyor is a member.

(4) Every survey conducted by, and report given by, an insurance surveyor shall be conducted and given with due diligence and skill, and in good faith and the report shall be finalized as early as possible but within the period of thirty days, after receipt of all related information/documents.

(5) If the Commission has reason to believe that a survey performed has not been performed with due diligence or skill, or in good faith, or that it otherwise does not comply with the conditions of this rule, such that the report does not present a fair opinion on the matters contained in the terms of reference, the Commission may direct that the insurer arrange for an additional survey of the subject matter of the survey report to be performed by one or more licensed insurance surveyors who shall be approved by the Commission.

(6) An additional survey under sub-rule (5) shall be performed at the expense of the insurer and a copy of the report on the additional survey shall be provided to the Federal Government.'

(Emphasis supplied)

In the present case, the respondent No.1 allowed the bringing of report Ex.R7 on record 'under objection'. The learned Tribunal did not ponder upon and decide the point of admissibility of the said report at the

relevant time, which otherwise ought to have been decided then and there instead of deferring the same till the end of trial and even at the time of passing the impugned judgment, the objection raised by the respondent No.1 was not decided. In a judgment reported as Hayatullah v. The State (2018 SCMR 2092), the apex Court of the country has pondered upon this legal issue and has invariably held:-

> 'We have also observed that although sometime objection was raised by either party regarding the inadmissibility of such piece of evidence but the court while admitting the evidence at that time reserves the question of law as to its admissibility till the end of the trial and while delivering the judgment no such question of admissibility is usually decided. It is the duty of the trial court to decide the objection then and there and not to defer the same till the end of the trial.'

Though the said judgment pertains to a criminal case, but the legal point decided by the apex Court, which has probative value and the ratio of the same can be applied in civil side, too. Moreover, when the respondent No.1 and the learned Tribunal were not satisfied with the survey report Ex.R7, the Tribunal must have adhered to proceedings provided under Sub-rule (5) of Rule 22, Insurance Rules, 2002, as has been referred above but no such proceedings have been carried out which otherwise must have been done in order to reach a just decision of the case especially when the appellant/Insurance Company has been denying the fire incident, allegedly occurred in 'Ehsan Yousaf Textile Private Limited/respondent No.1 and claims that such incident took place in 'Ikram Fabrics', which is not insurer with the appellant/Insurance Company.

Section 122 of the Insurance Ordinance, 2000, provides that in all matters with respect to which procedure has not been provided for in the

Ordinance, the Tribunal shall follow the procedure laid down in the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1898, as the case may be. For ready reference, the said provision is reproduced as under:-

'122. Powers of Tribunal.---(A) Tribunal shall:

(a) in the exercise of its civil jurisdiction, have in respect of claim filed by a policy-holder against an insurance company in respect of, or arising out of a policy if insurance, all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);

(b) in the exercise of its criminal jurisdiction, try the offences punishable under this Ordinance and shall, for this purpose, have the same powers as are vested in the Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898);

(c) exercise and perform such other powers and functions as are, or may be, conferred upon, or assigned to it, by or under this Ordinance; and

(d) in all matters with respect to which procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908) or the Code of Criminal Procedure, 1898 (Act V of 1898) as the case may be.

(2) ----------

(3) ----------

Provided that ----------.'

Moreover, the learned Tribunal without bifurcating, assessing and giving details of damages as to machinery, building, articles, etc., caused to the

respondent No.1, proceeded to pass the impugned judgment dated 11.11.2011, giving an accumulative policy proceed/claim, which otherwise ought to have been referred to the Arbitrator because condition No.18 of the Policies stipulates that the matter as to the quantum of the alleged loss has to be referred to the Arbitrator, which factum has also been ignored by the learned Tribunal, while accepting the application filed by the respondent No.1. For ready reference the condition No.18 is reproduced infra:-

> 'If any difference arises as to the amount of any loss or damage such different shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator----------.'

7. For the foregoing reasons, the appeal in hand is allowed, impugned judgment dated 11.11.2011 is set aside and matter is remanded to the Insurance Tribunal with the observation that Tribunal should be constituted as per mandate of law, where-after the proceedings should be carried out by adhering to the above said provisions of law keeping in view the above observations and case be decided afresh on merits in accordance with law. No order as to the costs.

MH/P-21/L **Case remanded.**

2023 M L D 115

[Lahore]

Before Shahid Bilal Hassan, J

AMJAD SAEED and another---Petitioners

Versus

MUHAMMAD SAEED and 2 others---Respondents

Civil Revision No. 2175 of 2012, decided on 24th May, 2022.

(a) Easements Act (V of 1882)---

----S. 15---Accrual of right of easement---Alternate way---Petitioners instituted suit for declaration with permanent and mandatory injunction claiming their easement right of usage of passage, allegedly in their use for last 30/35 years---Suit was resisted by respondents and Trial Court dismissed the suit---Appeal filed by petitioners before Appellate Court was also dismissed---Held, that the petitioners had failed to establish by leading cogent, trustworthy and confidence inspiring evidence that they had been using the path continuously and had been enjoying the right of easement over the same for the last 30/35 years, rather it had surfaced on record that the respondents/defendants demolished the said passage around 25-03-2006, meaning thereby the alleged use of passage by the petitioners /plaintiffs was near about 16 years ,so the petitioners could not claim the accrual of right of easement in their favour, because it was the pre-requisite of law, that the right of passage had to be enjoyed by a person continuously and without any interruption for a period of 20 years, there-after petitioners could claim such right of easement---Right of way through easement did not mature if the right of way was not used for a period of twenty years---One of the petitioners witnesses in the beginning of his deposition had deposed that there was a passage to his land from "M-S" road besides the disputed property---Petitioners had an alternate

way and they could not establish their continuous usage of passage for a period of 20 years--- Revision was dismissed, in circumstances.

Haji Abdul Sattar v. Haji Muhammad Bakhsh through Legal Heirs 2017 YLR Note 9; Abdul Khaliq alias Mithoo v. Moulvi Sher Jan and others 2007 SCMR 901 and Hafiz Riaz Ahmad and others v. Khurshed Ahmad and others 2013 MLD 947 rel.

(b) Easements Act (V of 1882)---

----S. 4---Easement, definition of---Essential qualities of easement---Dominant heritage---Dominant owner---Easement is a right which the owner or occupier of certain land possessed, as such for the beneficial enjoyment of that land ,to do so and continue to do something, or to prevent and continue to present something being done, in or upon or in respect of certain other land not his own---Land for the beneficial enjoyment of which the right exists is called the dominant heritage and the owner or occupier thereof the dominant owner, the land on which the liability is imposed is called the servient heritage and the owner or occupier of such land thereof the servient owner---Essential qualities of an easement generally were that (i) it is incorporeal; (ii) it is imposed on corporeal property and not on the owner of it; (iii) it confers no right of share in the profits from such property; (iv) it is imposed for the benefit of corporeal property; and (v) it involves two distinct tenements, the one which enjoys the easement, that is, to which the easement belongs or to which it is attached, called the 'dominant tenement' or 'dominant estate' and the other on which the easement rests or is imposed called 'the servient tenement' or 'servient estate'.

(c) Easements Act (V of 1882)---

----S. 15----Acquisition by prescription---Conditions precedents---Following conditions must be fulfilled for acquisition of a right of easement by prescription; i.e. the right claimed must not be uncertain; the

right claimed must have been enjoyed; and it must have been enjoyed (i) peaceably, (ii) openly, (iii) as of right, (iv) as an easement, (v) for twenty years or sixty years, if the right is claimed against government---Out of the last six sub-conditions, (ii) and (iii) are not necessary in the case of easement of the light and air or support---With this exception, all the conditions and sub-conditions must be fulfilled before the right of easement is acquired.

(d) Civil Procedure Code (V of 1908)---

----S. 115---Concurrent findings---Revisional jurisdiction of High Court---Concurrent finings of facts cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever.

Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679; Muhammad Sarwar and others v. Hashmal Khan and others PLD 2022 SC 13 and Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21 rel.

Azmat Ullah Chaudhry for Petitioners.

Salman Mansoor and Ahmed Raza Chattha for Respondents.

Date of hearing: 24th May, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Facts, in precision, are as such that the petitioners instituted a suit for declaration with permanent and mandatory injunction claiming their easement right of usage of passage passing through Square No.6, Killas Nos.1 and 10, allegedly to be in their use for the last 30/35 years, whereas the respondents Nos.1 and 2 have restrained them from using the said passage, for which they (respondents Nos.1 and 2) have no right to do so. The suit was resisted by the respondents Nos.1 and 2, who while submitting written statement have

controverted the averments of the plaint. The divergence in pleadings of the parties was summed up into issues and evidence of the parties was recorded. On conclusion of trial, the learned trial Court vide impugned judgment and decree dated 25.02.2011 dismissed suit of the petitioners, who being aggrieved of the same preferred an appeal there-against but it was dismissed vide impugned judgment and decree dated 30.03.2012 by the learned appellate Court; hence, the instant revision petition.

2. Heard.

3. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to present something being done, in or upon, or in respect of, certain other land not his own.

The land for the beneficial enjoyment of which the rights exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land, on which the liability is imposed, is called the servient heritage, and the owner or occupier thereof the servient owner.

The essential qualities of an easement generally are:

(1) it is incorporeal;

(2) it is imposed on corporeal property and not on the owner of it;

(3) it confers no right of share in the profits from such property;

(4) it is imposed for the benefit of corporeal property;

(5) it involves two distinct tenements, the one which enjoys the easement, that is, to which the easement belongs or to which it is attached, called the 'dominant tenement' or 'dominant estate' and the other on which the easement rests or is imposed, called 'the servient tenement' or 'servient estate'.

Moreover, the following conditions must be fulfilled for the acquisition of a right of easement by prescription:

(i) The right claimed must not be uncertain.

(ii) The right claimed must have been enjoyed.

(iii) It must have been enjoyed (a) peaceably, (b) openly, (c) as of right, (d) as an easement, (e) without interruption, (f) for twenty years or sixty years, if the right is claimed against Government.

Out of the last six sub-conditions, (b) and (c) are not necessary in the case of easement of light and air or support. With this exception, all the conditions and sub-conditions must be fulfilled before the right of easement is acquired.

In the present case, the petitioners, however, have failed to established by leading cogent, trustworthy and confidence inspiring evidence that they have been using the disputed path continuously and have been enjoying the right of easement over the same for the last 30/35 years rather it has surfaced on record that the respondents/defendants demolished the said passage around 25.03.2006, meaning thereby the alleged use of passage by the petitioners/plaintiffs is near about 16 years, so the petitioners cannot claim the accrual of right of easement in their favour, because it is the pre-requisite of law, as hinted above, that the right (passage in the present case) has to be enjoyed by a person continuously and without any interruption for a period of 20 years, there-after he can claim such right of easement. Right of way through easement does not mature if the right of way is not used for a period of twenty years as has been held by this Court in judgment reported as Haji Abdul Sattar v. Haji Muhammad Bakhsh through Legal Heirs (2017 YLR Note 9). Further reliance can safely be placed on Abdul Khaliq alias Mithoo v. Moulvi Sher Jan and others (2007 SCMR 901).

4. Apart from the above, the P.W.4-Ajmal Tahzeeb in the beginning of his deposition has deposed that there is a passage to his land from Muridke Sheikhupura Road bearing square No.3, Killa Nos. 10, 11, 20 and 21 beside the disputed passage. When the position is as such that the

petitioners have an alternate way and they could not establish their continuous usage of passage for a period of 20 years, they have rightly been non-suited by the learned Courts below concurrently. In Hafiz Riaz Ahmad and others v. Khurshed Ahmad and others (2013 MLD 947-Lahore), it has been held:-

'9. Under the Easement Act (V of 1882), to prove a right of easement by prescription mere user for innumerable years does not confer prescriptive right of easement. Under section 15 of the Easements Act (V of 1882) this right must be peaceably openly enjoined by any person claiming title thereto, as an easement and as of right without interruption for 20 years. In case in hand, it is evident that defendants remained in possession of land owned by the plaintiff-respondent No.1 as Mustajar/contractor, including the land in dispute. Even otherwise the Constitution of Islamic Republic of Pakistan gives a right to hold and enjoy the property to a person. These rights are sacrosanct which have to be protected as fundamental rights. No person including the neighbour could be allowed to diminish the rights in order to enjoy use of his property, as 'rights to assert the property have been protected under Articles 23 and 24 of the Constitution. If any person claims any right of easement, he is bound under the law to prove without any discrepancy his right in accordance with law. In case in hand, the petitioners-defendants miserably failed to prove their right of easement by prescription as well as the proof of right of easement as necessity. In case of necessity it is the duty of the plaintiff that he must prove that if this right of easement claimed by a claimant is not given to him his property will be ruined for which he is claiming right of easement. In case in hand, it is admitted on the record that there is also another road available which lead to the

property of petitioners-defendants, therefore, this right of necessity is also not available to the petitioners.' (underline for emphasis)

There appears no misreading and non-reading of evidence on record on the part of the learned Courts below alleged to have been committed while passing the impugned judgments and decrees, rather the evidence brought on record by the parties has minutely been scanned and flicked through.

5. In view of the above, the learned Courts below have rightly non-suited the petitioners, concurrently and as such concurrent findings on facts cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever, erroneous in exercise of revisional jurisdiction; reliance is placed on Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Muhammad Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and Mst. Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21) wherein it has been held:-

'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity

effecting the merits of the case are not open to question at the revisional stage.'

6. Pursuant to the above, when there appears no illegality and irregularity as well as wrong exercise of jurisdiction, the revision petition in hand being without any force and substance, stands dismissed. No order as to the costs.

MHS/A-100/L **Revision dismissed.**

2023 M L D 339

[Lahore]

Before Shahid Bilal Hassan, J

DEFENCE HOUSING AUTHORITY through Secretary---Petitioner

Versus

DISTRICT AND SESSIONS JUDGE, LAHORE and 7 others---Respondents

Writ Petition No. 17688 of 2021, decided on 24th December, 2021.

(a) Civil Procedure Code (V of 1908)---

----S. 47 & O. XXI---Question whether decree was executable---Ex-parte decree to transfer plots in view of 13 files---Objection petition on ground of calling the record and dismissal of execution petition---Objection petition was dismissed by Executing Court and appeal thereagainst was also dismissed by the District Court---Petitioner/ judgment debtor (Defence Housing Society) contended that no details of files were not given in the decree, so the same could not be implemented; that Executing Court, instead of providing details of alleged 13 files, issued direction to the State Bank and decree holders to provide the details of bank accounts of the present petitioner for attachment and submit Fard Taliqa---Held, that in agreement to sell of the predecessor in interest of the respondents/decree-holders, only 13 files had been mentioned without any detail---Details of the subject plots were neither mentioned in the agreement to sell nor in the plaint---Details had also not been furnished by the decree holders along with the execution petition or submitted thereafter---Forcing the present petitioner only on the basis of anonymous specification of plots to transfer in favour of the decree holder, would not appeal to prudent mind---Executing Court had to consider/determine that which plots were agreed to be transferred in favour of the decree holder(s) and whether the decree was executable or not, in the given circumstances--- Constitutional petition was allowed and Executing Court was directed to decide ancillary questions and determine whether the decree was executable or not.

(b) Civil Procedure Code (V of 1908)---

----S. 47---Objection petition---Details of the plots in question not mentioned in plaint/decree---Scope---Executing Court could not go behind/beyond the decree, but at the same time all ancillary questions arising out of the decree had to be decided by the Executing Court.

Muhammad Sohail Dar for the Petitioner.

Kamran ur Rasheed Mayo and Muhammad Saeed Sheikh for Respondents Nos. 3 to 6.

ORDER

SHAHID BILAL HASSAN, J.---During pendency of an execution petition filed by the respondents Nos.3 to 6 (decree holders) for satisfaction of decree dated 20.03.2008 passed in favour of their predecessor namely Zafar Abbas, the present petitioner filed an objection petition/application under section 47 read with Order XXI, Code of Civil Procedure, 1908 (the Code, 1908) for calling of record and dismissal of the execution petition (Annexure-K) and the respondents Nos.3 to 6 (decree holders) submitted its reply (Annexure-K/1). The learned Executing Court vide impugned order dated 01.12.2020 dismissed the said objection petition with the direction to implement the judgment and decree dated 20.03.2008 by way of transfer in the office of the present petitioner (DHA) in favour of the decree holders/respondents Nos.3 to 6. The present petitioner being aggrieved preferred an appeal against the said order. In the meantime, on 16.12.2020, the court representative visited the office of the petitioner and presented a Robkar and copy of the judgment and decree dated 20.03.2008 for its implementation. After perusal of the Robkar as well as judgment and decree, the relevant officials of the present petitioner submitted the report to the Court representative that no detail of file is given in the decree concerned, so the same cannot be implemented without such detail. Instead of providing details of 13 files to the transfer branch of the petitioner, on 06.01.2021, the learned Executing Court issued direction to the State Bank of Pakistan and the decree holders to provide the details of bank accounts of the present petitioner for attachment and also directed the decree holders to

submit Fard Taliqa. The petitioner being aggrieved filed revision petition against the same but the learned Addl. District Judge vide impugned order dated 15.02.2021 dismissed the revision petition; hence, the instant constitutional petition.

2. Heard.

3. Considering the arguments and going through the record, it is observed that in agreement to sell, reached at between the predecessor in interest of the respondents Nos.3 to 6 and the respondent No.7, only 13 files have been mentioned without any detail. The petitioner is not reluctant to implement the decree, but time and again the petitioner is supplicating the executing Court to ask the decree holders to provide the details of the 13 files allegedly agreed to be transferred in their favour, because no detail of the said plot is either mentioned in the agreement to sell nor in the plaint and the same has not been furnished by the decree holders along with the execution petition or submitted thereafter. In this scenario, the objection raised by the petitioner is plausible especially when 19 files/plot have already been further transferred and details of the subsequent owners has already been submitted by the petitioner before the learned executing Court and has also been narrated in paragraph No.11 of the instant constitutional petition. In this view of the matter, before specifying and identifying the plots agreed to be sold to the decree holder(s) by the respondent No.7, forcing the present petitioner only on the basis of anonymous specification of plots to transfer in favour of the decree holder, does not appeal to prudent mind. All these aspects have not been considered by the learned Courts below while passing the impugned orders.

No doubt the executing Court cannot go behind or beyond the decree, but at the same time all ancillary questions arising out of the decree have to be decided by the learned executing Court as has been enunciated under section 47 of the Code, 1908, which reads:-

> '47. Questions to be determined by the Court executing decree.--(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the

execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under the section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.'

In the present case, as stated above, no detail of the plots with specification except 13 plots has been incorporated in the agreement to sell, on the basis of which the ex parte decree dated 20.03.2008 was passed; thus, before proceeding further, the learned executing Court should have considered and determined that which plots were agreed to be transferred in favour of the decree holder(s) and whether the decree is executable or not, in the given circumstances.

4. Pursuant to the above discussion, it is held the learned subordinate Courts while passing the impugned orders have failed to exercised vested jurisdiction as per mandate of law and have erred in declining the plausible supplication of the petitioner oozing in application filed under section 47 read with Order XXI, Code of Civil Procedure, 1908; thus, the impugned orders are not sustainable in the eye of law.

5. In view of the above, the constitutional petition in hand is allowed, impugned orders dated 06.01.2021 and 15.02.2021, passed by the learned Executing Court and learned Revisional Court, respectively, are set aside and the learned Executing Court is directed to firstly decide all ancillary questions submitted before it by the petitioner or the decree holder(s) as well as consider whether the decree is executable or not and then proceed further in accordance with law.

ZH/D-1/L **Petition allowed.**

2023 M L D 761

[Lahore]

Before Shahid Bilal Hassan, J

IJAZ AHMAD and others---Appellants

Versus

KHIZAR HAYAT and others---Respondents

R.S.A. No. 123 of 2012, heard on 3rd November, 2021.

Specific Relief Act (I of 1877)---

----Ss. 42 & 54---Oral gift (Hibba)---Proof---Pleadings---Scope---Suit for declaration and injunction assailing mutations based upon oral gift---Suit and appeal filed by appellants/plaintiffs were dismissed by two Courts below---Validity---Recitals of plaint and written statement had no value in the eyes of law until and unless those were proved by trustworthy, reliable, cogent and confidence inspiring evidence---Mere admission in written statement by owner of land that too in a joint written statement was not sufficient to prove that he gifted out land through mutations in question to respondent/defendant, especially when possession of land was with appellants/plaintiffs and ingredients of Hibba (Gift) were not fulfilled---It was not proved on record as to when, where and in whose presence such offer of making oral Hibba (Gift) was made and was accepted and thereafter possession was delivered to respondent/defendant---It had come on record through Record of Rights that land in possession of tenant was not in pursuance of alleged oral Hibba (Gift)---Respondent/defendant failed to discharge his onus with regard to alleged oral Hibba (Gift) in favour of his predecessor-in-interest, as claimed by him---High Court set aside judgments and decrees passed by two Courts below as the same were contrary to law and failed to determine pivotal issue while applying independent judicious mind and considering law on the subject in the right way---Second appeal was allowed accordingly.

Hakim-Ud-Din through L.Rs. and others v. Faiz Bakhsh and others 2007 SCMR 870 rel.

Sheikh Usman Karim Ud Din for Appellants.

Malik Noor Muhammad Awan for Respondents Nos. 1 and 2.

Date of hearing: 3rd November, 2011.

JUDGMENT

SHAHID BILAL HASSAN, J.---In a few words, the facts of the case bringing the case to this stage, are that the appellants instituted a suit for declaration with permanent injunction against the respondents challenging the vires of mutations Nos.1695 and 1696 sanctioned in favour of respondents Nos.1 and 2 on 14.02.1994 with regards to land measuring 349-kanals 18-marlas out of property measuring 462-kanals 15-marlas as allegedly the defendant No.3 was not competent to transfer the disputed property because he had already gifted out the same to the predecessor in interest appellants namely Umer Hayat and all the requisites of Hibba were also fulfilled. The suit was resisted by the respondents/defendants jointly including the defendant No.3/donor and denied the gifting of disputed property by defendant No.3 to the plaintiff Umer Hayat. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties, oral as well as documentary, in pro and contra was recorded. The learned trial Court vide impugned judgment and decree dated 30.09.2009 dismissed suit of the appellants/plaintiffs, who being aggrieved of the same preferred an appeal but it was also dismissed vide impugned judgment and decree dated 24.05.2012 by the learned appellate Court; hence, the instant regular second appeal.

2. Heard.

3. Recitals of plaint and written statement have no value in the eye of law until and unless the same are proved by trustworthy, reliable, cogent and confidence inspiring evidence. Mere admission in the written

statement by deceased defendant No.3 Muhammad Bakhsh, that too, in joint written statement is not sufficient to prove that he gifted out the land through mutations in question to the respondents Nos.1 and 2, especially when admittedly the possession of the same was with the appellants, so the ingredients of the Hibba were not fulfilled. Therefore, after submission of the written statement jointly by the defendants, either the learned trial Court ought to have recorded the statement of the defendant No.3 at its own or the respondents would have filed an application in this regard, because said Muhammad Bakhsh remained alive for a period of five years after institution of the suit and submission of written statement, because mere submission of written statement does not equate the evidence. So neither the learned trial Court nor the respondents tried to get the better statement of the defendant No.3 Muhammad Bakhsh (deceased) in support of his stance, recorded as contemplated under Order X, rules 1, 2 and 3 of the Code of Civil Procedure, 1908, which is reproduced as under:-

'1. Ascertainment whether allegations in pleadings are admitted or denied.---At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite-party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

2. Oral examination of the party or companion of party.-At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, shall be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

3. Substance of the examination to be written.- The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.'

No such procedure has been adopted by the learned trial Court during proceedings and even after death of the defendant No.3/Muhammad Bakhsh, the appellants did not move an application so as to ascertain whether the written statement was signed/thumb marked by said Muhammad Bakhsh through comparison with the admitted one. So the conclusion drawn by the learned Courts below mere on the admission in the written statement, that too a joint one, in order to benefit the defendants Nos.1 and 2, has no value in the eye of law unless the defendant No.3 had recorded his statement by appearing in person but from the date of filing of the written statement till his death he did not appear before the learned trial Court so as to own the stance mentioned in the written statement. Here, the case is not admission of the recitals of plaint but the stance taken up by the respondents Nos.1 and 2, therefore, such like admission is required to be proved and in this case the principle "admitted facts need not be proved" does not apply, because position in this case is with regards to admission of claim of the respondents Nos.1 and 2 and not of averments of plaint. In Hakim-Ud-Din through L.Rs. and others v. Faiz Bakhsh and others (2007 SCMR 870), the Apex Court of the country has unequivocally and invariably held that:-

'It is a settled law that pleadings of the parties are not substitute of evidence and it being not a substitute evidence, the averments made in the pleadings would carry no weight unless proved from the evidence in Court or admitted by the other party. It is a settled law that written statement/plaint is not substitute of evidence. The aforesaid principles are supported by the following judgments:--

(i) Mst. Khair-un-Nisa's case PLD 1972 SC 25, (ii) Mst. Zarina's case PLD 1995 Kar. 388, (iii) Noor Muhammad's case PLD 1989 Lah.

31, (iv) Mst. Sakina's case 1986 CLC 288, (v) Falak Sher's case 1992 MLD 1879, (vi)(sic.) Mst. Sakina's case 1986 CLC 288, (vii) Nizam-ud-Din's case 1991 CLC 1937 and (viii) Faqir Muhammad's case PLD 2003 SC 594.'

In this case, the learned trial Court could have resorted to the provisions of Rule 5 of Order VIII, Code of Civil Procedure, 1908, the proviso of which enunciates that, 'Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.', which discretion was not exercised and even as discussed above, the respondents Nos.1 and 2 could not produce the respondent No.3/defendant No.3 so as to get his statement recorded in respect of alleged admission and filing of written statement with his consent as well as verifying the thumb impression on the written statement. When the position remained as such, the respondents Nos.1 and 2 were under burden to prove as to when, where and in whose presence the alleged offer of making Hibba was made, which was accepted by them and Hibba was made; even otherwise, when the possession of the suit property was not delivered to the respondents Nos.1 and 2, being with the appellants, the ingredients of Hibba were not fulfilled, rather fraud has been committed and in such scenario limitation does not run against such transaction especially when question of deprivation of some legal heirs from the inheritance is involved, because fraud vitiates the most solemn transaction; thus the suit was well within limitation after knowledge. All these factors have not been considered and taken into account by the learned Courts below while handing down the impugned judgments and decrees, which are result of non-construing law on the subject in its true perspective.

4. Now, I advert to the claim of the appellants with regards to alleged oral Hibba in favour of their predecessor in interest. It is observed that the neither the appellants nor their predecessor in interest could plead as to when, where and in whose presence such offer of making oral Hibba was

made, which was accepted by him and there-after possession was delivered to him, rather it has come on record through Ex.P1 (copy of record of rights) that the possession of Umar Hayat was as tenant and nothing has been brought on record to show that possession was in pursuance of alleged oral Hibba. In such scenario, they have failed to discharge the onus with regards to alleged oral Hibba in favour of their predecessor in interest as claimed by him.

5. The crux of the discussion above is that the impugned judgments and decrees are contrary to law and the learned Courts below have failed to determine pivotal issues as referred above while applying independent judicious mind and construing law on the subject in a right way. Resultantly, the impugned judgments and decrees passed by the learned Courts below cannot be allowed to sustain further; as such, the appeal in hand is allowed, impugned judgments and decrees are set aside, in the terms that the appellants could not prove their case and same remained the situation of the respondents, so the disputed mutations Nos.1695 and 1696 sanctioned in favour of respondents Nos.1 and 2 on 14.02.1994 with regards to land measuring 349-kanals 18-marlas out of property measuring 462-kanals 15-marlas are cancelled. All the property will revert to the deceased propositus/defendant No.3/Muhammad Bakhsh and will devolve upon the legal heirs as per their respective shares. No order as to the costs.

MH/I-1/L **Appeal allowed.**

2023 M L D 838

[Lahore]

Before Shahid Bilal Hassan, J

Messrs PREMIUM DEVELOPERS through Chief Executive---Petitioner

Versus

MUHAMMAD TARIQ---Respondent

Civil Revision No. 74574 of 2019, decided on 11th March, 2022.

(a) Specific Relief Act (I of 1877)---

----Ss. 12 & 54---Civil Procedure Code (V of 1908), S. 115---Suit for specific performance of agreement to sell and injunction---Balance consideration amount--- Determination--- Respondent/defendant/seller entered into agreement to sell his land with petitioner/plaintiff/buyer and after receiving earnest money did not conclude the sale---Petitioner/plaintiff/buyer claimed to have complied with all conditions of agreement---Validity---Agreement inter se the parties was a bilateral agreement and in a bilateral agreement, participating parties promised each other that they would perform or refrain from performing an act---Remaining amount of 1st installment of 25% of agreed sale consideration was to be paid by petitioner/plaintiff/buyer to the respondent/defendant/seller after finalization of actual recovery of the seller as it was remaining sale amount of already sold residential and commercial units of the Scheme upon providence of sales record along with and that of actual measurement of remaining available immovable assets of the Scheme---Nothing was on record to suggest that respondent/defendant/seller fulfilled his part of the agreement in such regard by providing detail of already sold units, residential and commercial, by providing sale records as well as actual measurement of remaining available immovable assets of the scheme---Without calculation of already sold units and received amount there-against actual sale price could not be determined and petitioner/plaintiff/buyer could not

be directed to deposit entire agreed sale price as agreement in question was bilateral in nature, binding the parties to perform their parts step by step---High Court set aside order of Trial Court as the Court while passing order in question was not sure whether ordered amount was balance amount or not---Revision was allowed accordingly.

2017 SCMR 2022; Ijaz Ahmad Chaudhry v. Learned Civil Judge and others 2020 CLC 291 and Muhammad Asif Awan v. Dawood Khan and others 2021 SCMR 1270 ref.

(b) Interpretation of document---

----Agreement to sell---Scope---Agreement to sell as a whole has to be considered and read.

Shazib Masud and Mirza Nasar Ahmad for Petitioner.

Mian Muhammad Hussain Chotiya and Adnan Naseer Chohan for Respondent.

Date of hearing: 1st February, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Tersely, the respondent was the exclusive owner in possession of a duly approved housing scheme from the TMA, Ferozwala under the name and style of Messrs Lahore Garden and New Lahore Phase-I, Housing Scheme, Situated in Mauza Chahar and Rana Bhatti, opposite Government Primary School, Kot Noor Shah, Shahdara, Sharaqpur Road, Tehsil Ferozwala, District Sheikhupura with total land measuring 1100 Kanals approximately inclusive of developed, underdeveloped land along with immovable assets of all sort of public utilities with standing construction. Allegedly, the respondent agreed to sell the said property to the petitioner in February, 2018 in presence of the witnesses against a total consideration of Rs.940,000,000/- and in acknowledgment of the said bargain the respondent received Rs.1,000,000/- as earnest money from the petitioner through cheque No.18854127, drawn on Meezan Bank, Zahoor Elahi Road, Lahore and a formal agreement of sale was reduced into writing on 01.03.2018 to the

effect that the respondent was already dealing in sale of plots of the suit property in the market, therefore, the above said agreed sale consideration of the suit property would include an approximate amount of Rs.405,300,000/- as remaining sale consideration of the already sold residential and commercial units of the property by the respondent, subject to its finalization upon providing of sale records of the suit property, was due against their respective purchasers for their respective purchase of different portions of the residential and commercial units and recovery of the same would be the liability and responsibility of the respondent, hence, after its final determination would be excluded from the agreed sale consideration of Rs.940,000,000/-, where-after the said remaining amount would be the actual sale consideration for the purpose of agreement to sell in question; that as per agreed terms, the petitioner was bound to pay 1/4th amount as earnest money being first installment of the sale consideration of the total agreed sale consideration after deduction of actual recovery of respondent due against its already sold residential and commercial units of the suit property upon providing of sale records and that of the actual measurement of the remaining available immovable assets of the suit property; similarly upon finalization of the said calculation, the remaining amount of sale consideration would be paid in twelve months wherein initial six months would be the grace period where-after, monthly installments be made by the petitioner to the respondent but at any cost, the full and final payment of the bargain would be made positively on or before March, 2019; that it was agreed between the parties that whenever any agreed payment of the sale consideration is made by the petitioner/plaintiff, the respondent at his instance in acknowledgment of receipt of the said part of sale consideration would be liable to execute the transfer deed of the immovable assets of the suit property in favour of the petitioner or any of his assignee or nominee upon providing Fard Bai to the extent of received amount at his cost and expense; that in furtherance of their bargain, the respondent also provided his CNIC, copies of approval letters of the Scheme along with NOCs of various authorities, revenue record and that

of copies of his agreement for the purchase of 32 acres of undeveloped land as being part of the agreement as proof of his ownership of the suit property and the petitioner got published this fact of purchase of suit property in the daily newspaper for his sole satisfaction. However, allegedly the respondent did not provide the records of his already sold units of the suit property and amount of actual recovery on lame excuses besides providing of Fard Bai of the land to the extent of 1/4th earnest money of the bargain. The respondent was approached time and again for the said purpose but all in vain, rather it came to the knowledge of the petitioner that the respondent malafidely negotiated further sale of the suit property with some other person against an enhanced price, so the respondent was contacted with a request to honour his commitment but he refused to accede to the request of the petitioner; therefore, the petitioner instituted suit for possession through specific performance of agreement with mandatory and permanent injunction.

After filing of the suit, the parties arrived at an interim compromise arrangement and filed the same before the Court through application under Order XXIII, Rule 3, Code of Civil Procedure, 1908. Allegedly, the petitioner complied with the terms of the said compromise and paid the initial amount fixed under the said arrangement to the respondent but the respondent failed to comply with clauses 1(d), (e) and (f) of the application despite an order of the Court dated 08.06.2018. Again, the parties entered into a negotiation and on 09.10.2018, the respondent made a statement before the Court that he had received another amount of Rs.90,000,000/- and the respondent also agreed to transfer another area of 30 acres after receipt of the said amount. However, despite passage of more than one year, the respondent failed to do the needful, so the petitioner moved an application for enforcement of the said order against the respondent. On 16.11.2019, after arguments on the said application, the learned trial Court ordered the petitioner to pay an amount of Rs.619,486,272/- which was agreed between the parties as sale consideration within a period of one month. Being aggrieved of the said order, the petitioner has filed the instant revision petition.

2. Learned counsel for the petitioner has argued that the impugned order is against law and facts of the case; that the agreement to sell is not a simple agreement to sell of immovable property, rather it places mutual obligations on the parties, thus, the ratio of judgment reported as 2017 SCMR 2022 has wrongly been appreciated and applied in the case in hand; that the respondent has not fulfilled his part of agreement and even the arrangements made subsequently between the parties but even then the learned trial Court passed the impugned order; that the respondent has not handed over the documents showing his ownership over the disputed property as agreed by the parties; thus, the impugned order is not sustainable in the eye of law and liable to be set aside by allowing the revision petition in hand.

3. On the contrary, learned counsel for the respondent while supporting the impugned order, has argued that the petitioner has not fulfilled his part of agreement as well as arrangements made in the shape of compromise subsequently; therefore, the learned trial Court has rightly passed the impugned order giving an opportunity to the petitioner to show his bona fide and willingness to purchase the property in dispute.

4. Heard.

5. Terms and conditions Nos.1 to 8 of the alleged agreement to sell are essential for determination of the fact that the same falls in what type of the agreement/contract, which are reproduced as under:-

1. That the total sale consideration for the sale and purchase of the scheme along with standing construction and other attached lying articles, movables and immovable of all sort, detailed in the annexed schedule-I subject to the actual measurement of the immovable land inclusive of raised construction thereupon, residential and commercial, against agreed rates being detailed in the annexed schedule-I, is agreed at Rs.940,000,000/-.

2. That the above said agreed sale consideration of the Scheme does include an approximate amount of Rs.405,300,000/- as remaining sale consideration/installments of the already sold residential and

commercial units of the Scheme by the Seller (subject to finalization upon providence of sales record of the Scheme) due against their respective purchasers for the purchase of different portions of residential or commercial units of the Scheme, recovery of which will be the sole liability and responsibility of the Seller, therefore, the said amount after final determination will be excluded from the agreed sale consideration of Rs.940,000,000/-. Hence, after its execution, the total payable sale consideration of the bargain will be the actual sale consideration of this agreement of sale.

3. That as the above deducted amount is being made from the entire sold Scheme, therefore, upon execution of this agreement of sale, the proprietary rights of the sold units of the Scheme shall be transferred to the Purchaser, who will be responsible to transfer the ownership of the said sold units in favour of their respective buyers after receipt of outstanding dues from them subject to the final planning of development work by the purchaser. The Purchaser shall be liable to transfer/register the units in the names of respective buyers upon the request of Seller. If the respective buyer fails to make payment to Seller and Seller cancels the unit for the respective buyer, Seller shall be responsible to pay any amount due to respective buyer, and such cancelled unit shall be added in the land sold to Purchaser for rate per marla agreed in this agreement.

4. That the target date of the completion of the bargain is agreed upon 12 months from the date of signing of this agreement of sale i.e. March 1st, 2019 with specific agreed mode of payment. Any records of income tax and sales tax upto 01 March 2018 shall be handed over to the Purchaser within three (3) months from the date of payment of 25% as first installment.

5. That under the greed terms of the payment of the sale consideration, the purchaser shall pay a sum of 25% of the total agreed sale

consideration after deduction of actual recovery of the Seller as being remaining sale amount of his already sold residential and commercial units of the Scheme upon providence of sales record and that of the actual measurement of the remaining available immovable assets of the Scheme as earnest money as being first installment of the sale consideration whereas upon finalization of the above calculation, the remaining amount of sale consideration will be paid in twelve months wherein initial six months will be the grace period whereafter monthly payments be made by the purchaser to the Seller but the final payment of the bargain be made positively on or before 01 March 2019. It is clarified that remaining sale price of 75% shall be paid in six equal installments starting from six months after the date of agreement with last payment till 01 March 2019.

6. That it has been agreed between the parties that prior to the receipt of payment of last installment of the remaining sale consideration, the Seller will be responsible to provide at his cost and expense not only the fresh Fard Bai(s) of the entire/remaining sold land of the Scheme for the completion of transfer of the proprietary rights of ownership of any of the remaining sold land of the scheme, but will also provide the transfer letters of the movable assets of the articles for the transfer of their ownership in the name of the purchaser at his cost and expense.

7. That further it has been agreed upon between the parties that whenever any agreed payment of the sale consideration has been made by the purchaser, the Seller at his instance in acknowledge of the receipt of said part of the sale consideration, will be liable to execute the transfer deed of the immovable assets of the scheme to the proportionate of the received amount of part of sale consideration in favour of purchaser or any of his assignee or nominee upon providence of Fard Bai to the extent of the received amount.

8. That as per agreed terms of the bargain, at the time of signing of this agreement, the seller acknowledges the receipt of already paid amount of token earnest money of Rs.1,000,000/- through cheque No.3-18854127 dated 10 February 2018, in the presence of witnesses whereas the remaining amount of 1st installment of 25% of the agreed sale consideration will be paid by the Purchaser to the Seller after finalization of actual recovery of the Seller as being remaining sale amount of the already sold residential and commercial units of the Scheme upon providence of sales record along with and that of actual measurement of the remaining available immovable assets of the Scheme. The possession of the scheme shall be considered handed over after the payment of 1st installment of 25% of the actual calculated sale price for smooth business operations of the purchaser.' (underline for emphasis)

The above terms and conditions as well as others go to divulge that the agreement inter se the parties is a bilateral agreement and in a bilateral agreement, participating parties promise each other that they will perform or refrain from performing an act. It is clear from the above terms and conditions especially condition No.8 that the remaining amount of 1st installment of 25% of the agreed sale consideration will be paid by the Purchaser to the Seller after finalization of actual recovery of the Seller as being remaining sale amount of the already sold residential and commercial units of the Scheme upon providence of sales record along with and that of actual measurement of the remaining available immovable assets of the Scheme; however, there is nothing on record to suggest that the respondent fulfilled his part of the agreement in this regard by providing detail of already sold units, residential and commercial, by providing sale records as well as actual measurement of the remaining available immovable assets of the scheme. This Court while dealing with such a matter in Ijaz Ahmad Chaudhry v. Learned Civil Judge and others (2020 CLC 291-Lahore), which has been presented and relied upon by both the sides, has already held:-

'6. Here, in this case, the perusal of Property Sale Agreement/Settlement Agreement goes to evince that it is bilateral agreement/contract/ settlement agreement and in a bilateral contract, participating parties promise each other that they will perform or refrain from performing an act. This type of contract is also known as a two-sides contract, as stated above; thus, when the petitioner has already performed his first part of agreement, it is the respondents who have to perform their part as agreed between them and the petitioner and when they refused to perform their part of agreement/settlement agreement, this thing prompted the petitioner to approach the Court so as to force them to perform their part. Thus, in this eventuality, the petitioner cannot be forced to deposit the whole sale consideration, especially when the agreement is bilateral as well as under certain terms and conditions and both the parties have to perform their parts step by step. As such, the case law relied upon by the learned trial Court reported as Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022) does not attract and is not applicable to the facts of the case in hand being on different premises.'

6. In the present case, in agreement to sell in question, it has not been agreed that the entire sale consideration will be paid in lump-sum rather it has been agreed that the respondent will be liable to transfer deed of the immovable assets of the scheme to the proportionate of the received amount of part of sale consideration in favour of purchaser or any of his assignee or nominee upon providence of Fard Bai to the extent of the received amount. Meaning thereby it is a commercial type bilateral agreement in between the parties. The agreement to sell as a whole is to be considered and read; however, the learned trial Court has failed to dilate upon the said issue by construing law on the subject in a judicious manner and without appreciating the ratio of judgment reported as Hamood Mehmood v. Mst. Shabana Ishaque and others (2017 SCMR 2022) has passed the impugned order regarding deposit of the remaining sale consideration, because in the said case the vendee/plaintiff despite

decree had failed to deposit the balance sale price and even the same is a leave refusing order and cannot be held to be an enunciation of law by the Apex Court of country, having binding effect as per Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, because in number of judgments the Hon'ble Supreme Court has held that an order granting and/or refusing leave is not a judgment which decides a question of law and therefore, it should not be followed necessarily and imperatively as has been held in Muhammad Asif Awan v. Dawood Khan and others (2021 SCMR 1270).

7. Pursuant to the above, without calculation of the already sold units and received amount thereagainst the actual sale price cannot be determined and the petitioner cannot be directed to deposit the entire agreed sale price as the agreement in question is bilateral in nature, binding the parties to perform their parts step by step. Moreover, the learned trial Court while passing the impugned order dated 16.11.2019 was not sure whether the ordered amount is the balance amount or not as is evident from the last paragraph, which reads:-

> 'Before parting the order, it would be pertinent to mention that the amount herein above has been calculated while making an assessment in the peculiar circumstances and shall be adjustable at the time of final adjudication.'

8. In view of the above, the impugned order being not sustainable in the eye of law cannot be allowed to hold field; the same is, resultantly, set aside by accepting the revision petition in hand. No order as to the costs.

MH/P-9/L **Revision petition allowed.**

2023 M L D 1405

[Lahore]

Before Shahid Bilal Hassan, J

Mst. LIAQAT SULTANA and others---Petitioners

Versus

Mst. MUMTAZ TAHAWAR and others---Respondents

Civil Revision No. 64976 of 2020, decided on 26th October, 2022.

Specific Relief Act (I of 1877)---

----Ss. 42 & 54---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 120---Civil Procedure Code (V of 1908), S. 115---Suit for declaration and injunction---Gift---Proof---Onus to prove---Not party to proceedings---Effect---Concurrent findings of two Courts below---Dispute was with regard to gift regarding suit property allegedly made on the basis of fraud and misrepresentation---Validity---Ingredients for a valid gift were offer, acceptance and delivery of possession---When sanctity of gift was challenged or called into question, especially on the basis of fraud and misrepresentation, beneficiary not only had to prove valid execution of gift deed or mutation but also the original transaction---Owner of a portion of suit property was not impleaded as party to the suit and was not provided with an opportunity to defend himself---No adverse order could be passed against such owner as it would amount to condemning him unheard---Free and fair opportunity of defending and presenting one's case was to be provided---High Court declined to interfere in judgments and decrees passed by two Courts below as no illegality and irregularity was committed---High Court in exercise of revisional jurisdiction under S. 115, C.P.C. could not disturb concurrent findings of facts by two Court below when the same did not suffer from any misreading or non-reading of evidence---Revision was dismissed, in circumstances.

Peer Baksh through LRs and others v. Mst. Khanzadi and others 2016 SCMR 1417 ref.

Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679; Muhammad Sarwar and others v. Hashmal Khan and others PLD 2022 SC 13 and Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21 rel.

Sheikh Naveed Shehryar, Sh. Usman Karim-Ud-Din and Humaira Bashir Chaudhry for Petitioners.

Tahir Nasrullah Warraich, Rizwan Khalid and Zahir Abbas for Petitioners (in C.R. No.64972 of 2020).

Muhammad Azam Chughtai for Petitioner (in C.R. No.9062 of 2021).

Muhammad Naveed Khan for Petitioner (in C.R. No.4430 of 2021)

Farooq Amjad Meer, Zulfiqar Ali Khan and Mian Ijaz Latif for Respondents Nos.1 to 3 (in C.R. No.64976 of 2020).

Muhammad Naveed Khan for Respondent No. 5 (in C.Rs. Nos.64972 and 64976 of 2020).

Rana Zia Abdul Rehman, M. Shakeel Gondal, Rana Fahad Zia, Rana Muhammad Usman and Rana Shahzad for Respondents Nos.7 and 8 (in C.R. No.64976 of 2020).

Ms. Farzana Abbas for LDA (in C.R. No.64972 of 2020).

Date of hearing: 26th October, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---This single judgment will decide the captioned revision petition as well as connected C.Rs. bearing Nos.64972 of 2020, 9062 of 2021 and 4430 of 2021, as one and the same judgments and decrees have been called into question in all the revision petitions.

2. Succinctly, the present respondents Nos. 1 to 4 instituted a suit for declaration and partition on 05.07.1997. The present respondents Nos.7 to 10 also instituted another suit for declaration and partition on 13.05.1998 with regards to the suit property. In both the suits, the

respondents/plaintiffs have sought declaratory decree with partition of the suit property: movable and immovable of late Tahawar Ali Khan and also sought revocation of succession certificate dated 12.12.1997 regarding movable property of the said Tahawar Ali Khan. The petitioners in all revision petitions contested the suits and prayed for dismissal of the same. Both the suits and application for revocation of succession certificate were consolidated by the learned trial Court and out of divergent pleadings of the parties consolidated issues were framed. Both the parties led their oral as well as documentary evidence in pro and contra. On conclusion of trial, the learned Trial Court vide impugned judgment and decree dated 19.06.2007 decreed the suits as such:-

'In view of the facts discussed above, suit of the plaintiffs as well as defendants Nos.9 to 12 are hereby decreed in their favour to the effect that all of the gift deeds allegedly executed by Tahawar Ali Khan deceased in favour of Karman Tahawar, Sohail Nasir and Jamal Nasir, Sultan Tahawar and Aalam Tahawar are false and baseless documents as the same have been fabricated by them by way of fraud, forgery and misrepresentation with the active assistance of Shaiq Siddiquee Advocate, who acted as local commissioner without proof or any justification for his appointment as such. Therefore, all of the aforementioned documents are hereby cancelled. Moreover the registered gift deed in favour of Azam Tahawar too has been proved to be false and baseless as the aforesaid Azam Tahawar has failed to prove its execution in accordance with law. However, no evidence has been produced to prove that the document was prepared by way of forgery or fraud; and the aforesaid Azam Tahawar cannot be made criminally liable for fabricating a false gift deed merely on the ground of his failure to prove the document because proof of involvement in fabricating a document is one thing while failure to prove the execution of a document is another. Therefore, criminal proceedings against the defendants Nos.2 to 5 and 7 and the aforesaid Shqiq Siddiqui Advocate may be initiated under relevant

provisions of Pakistan Penal Code as it has become evident that all of them got false and fabricated gift deed executed by way of fraud and forgery and used the document to get monetary gains as well as to deprive the plaintiffs and defendants Nos.9 to 12 of their due share in the suit-property. Therefore, all of the gift deeds in favour of defendants Nos.2 to 7 are hereby cancelled and they will have no legal effect upon the rights of the plaintiffs and defendants Nos.9 to 12.

However, the plaintiffs' claim on the basis of legal status of Mst. Akbari Khanum as one of the Directors of International Publishers is not tenable in view of the evidence on the record, therefore, the part of the plaintiffs' suit relating to their claim regarding ownership of a share of the suit-land as one of the Directors is hereby dismissed.

While deciding issue No.9 it was proved that the succession certificate issued on 12.12.1997 was based on fraud and misrepresentation, therefore, the application filed by defendants Nos.9 to 12 for revocation of the aforementioned succession certificate under section 383 of Succession Act, 1925 is hereby accepted and the impugned succession certificate is hereby revoked and the defendants Nos.9 to 12 are entitled to get the share of the movable assets bequeathed by the deceased. Therefore, both Sohail Nasir and Jamal Nasir defendants Nos.3 and 4 are hereby required to deposit the remaining sum of the amount drawn by them from the account of Tahawar Ali Khan at Grindlays Bank and the amount drawn from the court which was deposited by Sohail Shafique as arrears of rent, after deducting their share as one of the heirs of Tahawar Ali Khan. Since all of the gift deeds in favour of defendants Nos.2 to 7 are hereby declared as null and void and in-operative upon the rights of the plaintiffs as well as defendants Nos.9 to 12, and in the course of determination of issue No.10 it was proved that Late Tahawar Ali Khan was owner of movable as well as immovable property which included the residential portion

of the suit-property comprised in plot No.129-E.1 Gulberg III Lahore, commercial portion of the suit-property known as Tahawar Plaza comprised in plot No.129-B/E.1 Gulberg III Lahore, an amount of Rs.85,715/- deposited by the deceased in his account No.1161638556 at Grind Lays Bank Gulberg Lahore, a sum of Rs.300,000/- deposited by Sohail Shafique as arrears of rent during the proceedings of ejectment petition titled Tahawar Ali Khan v. Sohail Shafique, the royalty of books Biographical Encyclopedia of Pakistan and Man eaters of Sunder bens, therefore, the plaintiffs as well as the defendants Nos.9 to 12 are entitled to get their share in the movable as well as immovable assets left by the deceased according to law of inheritance.

Since the suit-property of the buildings comprised in plots No.129/E.1 (residential portion) and plot No.129-B/E.1 (commercial portion-Tahawar Plaza), therefore, a preliminary decree of the partition is hereby issued in favour of the parties holding them entitled to the ownership as well as possession of their share of the suit property as prescribed by law of inheritance.

The record shows that the defendants have produced Ex./P.W.8/D.1 and Ex./P.W.8/D.2 which is copy of an agreement to sell executed by Tahawar Ali Khan in favour of Mian Ahmad Irfan and a registered sale deed in favour of Raziq International through its Chief Executive namely Mr. Nadeem Khan. Both of the documents shall have no legal effect upon the rights of the parties as discussed while deciding issue No.10. However, Mian Ahmad Irfan will have an option of filing a suit for specific performance of an agreement to sell, while Nadeem Khan Chief Executive of Raziq International is hereby directed to get his right declared by filing a suit for declaration on the basis of the alleged sale deed. Moreover, the money deposited by Tradex Private Limited as rent shall be distributed among the parties according to their lawful shares while the amount deposited by Mian Ahmad Irfan or Tradex are hereby entitled to get the amount deposited by him in

pursuance of the alleged agreement to sell, refunded, in accordance with law. While all of transfers of different portion of the suit property made after filing of the main suit titled Mst. Mumtaz Tahawar and others v. Liaqat Sultan and others on 05.07.1997 shall be considered as null and void and in-operative upon the rights of the plaintiffs as well as defendants Nos.9 to 12 by virtue of the doctrine of lis-pendence as envisaged in section 52 of Transfer of Property Act.

Therefore Mr. Sajjad Aslam Virrak Advocate, Butar Law Chambers, 105-Al-falah Building, The Mall, Lahore is hereby appointed as local commissioner. He is hereby directed to conduct a local inspection of both residential as well as commercial part of the suit-property and to prepare a detailed report regarding his proposals as to the partition of both of the portions of the suit-property. The report must include the site-plans enumerating the separate schemes of partition of both residential as well as commercial areas. His fees is hereby fixed as Rs.48,000/- which shall be paid by all the parties at the rate of Rs.3000/- each. The record shows that the plaintiffs as well as defendants Nos.9 to 12 were kept deprived of their due share of the suit-property by the malicious acts of defendants Nos.1 to 8 and the latter had been receiving rent of different portions of the suit-property, even in excess to the area mentioned in the aforementioned forged gift deeds. The record shows that the aforesaid defendants were directed to deposit the rents of different portions of the suit-property received by them individually, in the court and in this regard specific directions were issued by the Civil as well as District Courts but no such order was complied with. Moreover, the court appointed Receiver for the said purpose on 10.10.2000 but the Receiver prayed for the revocation of his appointment vide his statement dated 17.04.2001 and once again the matter was ignored. Therefore, the aforesaid Sajjad Aslam Virrak Butar Law Chambers 105 Al-falah Building, The Mall, Lahore shall also act

as a receiver of commercial part of the suit-property under Order XL of C.P.C. and whole of the building of the Tahawar Plaza is hereby committed to the possession, control as well as management of the Receiver. Learned Receiver shall be entitled to collect rentals of different portions of Tahawar Plaza by 5th of each month and shall be bound to deposit the same in the Court along with Statement of accounts by 10th of every month and all of the shareholders shall be entitled to draw their share of the monthly rent of the suit-property in accordance with law and the Receiver shall be entitled to the monthly remuneration which shall be equal to 2 per cent of the amount of rent recovered each month. Robkar be issued to the local commissioner requiring him to do the needful. Receiver shall exercise the same powers and perform the same functions as may be performed or exercised by a landlord appointed for collection of rent under the Punjab Urban Rent Restriction Ordinance. The arrangement shall remain till the issuance of final decree of partition of the suit property .'

3. Being aggrieved of the said judgment and decree, the defendants/petitioners and other defendants preferred nine (9) appeals. The learned appellate Court vide impugned consolidated judgment and decree dated 16.09.2020 modified the judgment and decree passed by the learned trial Court to the extent that sale deed in favour of Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan cannot be cancelled without impleading him as party to the suit, therefore, judgment of learned trial Court to this extent was set aside. One appeal titled "Liaquat Sultana and others v. Mst. Mumtaz Tahawar and others", two appeals titled "Kamran Tahawar and others v. Akbari Khanum and others", two appeals titled "International Publishers and others v. Kamran Tahawar and others" were dismissed whereas appeals titled "Messrs Raaziq International and others v. Naushaba Akhtarand others" and "Raaziq International and others v. Mumtaz Tahawar and others" were accepted.

4. Feeling aggrieved by the said judgments and decrees, the revision petition in hand as well as connected C.Rs. Nos.64972 of 2020, 9062 of 2021 and 4430 of 2021 have been filed by the petitioners.

5. Heard.

6. Status of the defendants Nos.9 to 12 being legal heirs of the late Tahawar Ali Khan is an undisputed right now because the same has been established from the orders of this Court dated 02.03.2001, available on the record as Ex.D10, which divulges that all the parties have admitted and accepted the status of the said defendants Nos.9 to 12 as legal heirs of late Tahawar Ali Khan in C.R. No.261 of 2001; therefore, keeping in view the said factum as well as other evidence in the shape of admission of the P.W.8 and D.W.1, the learned Courts below have judiciously and rightly adjudicated upon the matter on this issue, so the findings on this score are upheld and maintained.

7. So far as the second question that Mst. Akbari Khanum was one of the Director of International Publishers is concerned, it is observed that when evidence of the parties has been pondered upon, it has surfaced that Tahawar Ali Khan (late), during his life time, used the letter head pad of the said company for the purpose of correspondence with various department and he used to run the same solely. No documentary proof has been brought on record depicting or showing that any portion of the suit property was in the name of the said company i.e. International Publishers and Mst. Akbari Khanum with Maqsood Ali Khan were Directors whereas the late Tahawar Ali Khan was Managing Director, because the documents Ex.P3/3 and Ex.P.W.8/D-1 do not support the said stance, rather it has emerged that the said documents were executed by late Tahawar Ali Khan in his personal capacity and not as a Managing Director of the said company. Moreover, no rules of business or any resolution, appointing the said Akbari Khanum and Maqsood Ali Khan as Directors has been brought on record. In this regard, the learned Courts below have rightly appreciated the document Ex.D12, certified copy of order dated 23.12.2000 passed by the learned Addl. District Judge, Lahore during proceedings of an appeal, wherein one of the alleged Director

appeared and recorded his statement that he had no concern and interest with the suit property, so his name was deleted as one of the promoter of the International Publishers by the said Court. Apart from this, not an iota of evidence has been brought on record showing that said Akbari Khanum and Maqood Ali Khan ever made any investment in the said alleged Company and nothing has been brought to show that the said persons ever performed their duties as Directors of the said alleged company. In this view of the matter, the learned Courts below have rightly reached to a conclusion that the said company was only in papers and was used as a reference during correspondence with the third parties and no portion of the disputed property i.e. Tahawar Plaza was in the name of the said Company/International Publishers (Pvt.) Limited. In this view of the matter, the findings recorded by the learned Courts below after evaluating evidence of the parties in a minute manner on this issue are upheld and maintained.

8. The question with regards to gifting of some portions of the disputed property i.e. Tahawar Plaza is concerned, it is observed that ingredients for a valid gift are: offer, acceptance and delivery of possession. When sanctity of a gift is challenged or called into question especially on the basis of fraud and misrepresentation, the beneficiary has not only to prove the valid execution of gift deed or mutation but also the original transaction. Reliance is placed on judgment reported as Peer Baksh through LRs and others v. Mst. Khanzadi and others (2016 SCMR 1417). The gift deeds Ex.D2 dated 18.01.1997 and Ex.D3 dated 17.09.1996, allegedly executed in favour of Kamran Tahawar and Sohail Nasir, though are registered documents and presumption of correctness are attached to them, but it is a settled principle of law, as observed above, that when sanctity of such a document is challenged, the beneficiary has not only to prove the said document but also the original transaction. However, in the present case, it is observed that the beneficiaries i.e. Karman Tahawar, Sohail Nasir, Jamal Nasir, Sultan Tahawar and Aalam Tahawar have not only miserably failed to prove the original transaction of gift but also the subsequent transaction of registered gift deeds because

late Tahawar Ali Khan admittedly died on 06.01.1997 (Ex.D.W.8/4, whereas alleged gift deed in favour of Kamran Tahawar was executed on 13.01.1997 through Muhammad Shaiq Siddiqui Advocate as local commission and the said document has signatures and thumb impressions of late Tahawar Ali Khan, which cannot be said anything but a fraud and misrepresentation because when a person has died on 06.01.1997, how he can make his signatures and put his thumb impressions on 13.01.1997. Ex.D3 is the alleged gift deed in favour of Sohail Nasir but he also could not prove the original transaction as well as the execution of registered gift deed by producing the marginal witnesses and the revenue officer. Same remained the position with documents Ex.D19 and Ex.D27 to Ex.D29, gift deeds in favour of Jamal Nasir, Sultan Tahawar, Azam Tahawar and Aalam Tahawar. Only one marginal witness namely Khursheed Alam with regards to gift deed in favour of Azam Tahawar and Haroon Shafique marginal witness germane to gift deed in favour of Aalam Tahawar besides Muhammad Shaiq Siddiqui, Advocate, local commission have been produced, whereas law requires that in order to prove valid execution of a document, at least two truthful witnesses are to be produced, as has been enunciated under Article 79 of the Qanun-e-Shahadat Order, 1984. Even, Azam Tahawar, alleged donee of Ex.D16 did not enter into the witness box so as to corroborate his stance and also did not produce the local commission in whose presence the document was executed and the marginal witnesses signed it. The alleged marginal witness of Ex.D16 namely Khursheed Alam D.W.5 deposed that the alleged gift deed was not written down in his presence. Same remained the situation with Ex.D17 and Ex.D18, gift deeds in favour of Jamal Nasir and Sultan Tahawar, because M. Shaiq Siddiqui Advocate not only purchased the stamp papers for execution of gift deeds but also was an identifier and one of the marginal witness of the said documents. The other marginal witness was clerk of the said M. Shaiq Siddiqui Advocate, meaning thereby the documents have been executed with active collusion of the said M. Shaiq Siddiqui Advocate in order to deprive of other legal heirs of Tahawar Ali Khan (late), for some worldly gains. In this view of

the matter, the learned Courts below after evaluating and discussing evidence of the parties, oral as well as documentary, in a minute manner have reached to a just conclusion that the gift deeds in favour of Kamran Tahawar, Sohail Nasir, Jamal Nasir, Sultan Tahawar, Azam Tahawar and Alam Tahawar were based on fraud and have rightly been declared as illegal, forged and fabricated documents. The findings on this point, being upto the dexterity, are also upheld and maintained.

9. Question with regards to alienation of a portion of his property measuring 2456' 11" Sq.feet of the commercial building for a consideration of Rs.800,000/- in favour of Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan in the year 1994 by late Tahawar Ali Khan vide Ex.D.W.8/D-2, has rightly been adjudicated upon by the learned appellate Court vide impugned judgment and decree dated 16.09.2020, because when the said Raaziq International (Pvt.) Limited through its Chief Executive Mr. Muhammad Nadeem Khan has not been impleaded as party to the suit and has not been provided with an opportunity to defend himself, no adverse order can be passed against him, as it would amount to condemn him unheard, which is not requirement of law, rather free and fair opportunity of defending and presenting one's case has to be provided.

10. Matter germane to revocation of succession certificate issued on 12.12.1997, keeping in view the factum that defendants Nos.9 to 12 are also legal heirs of late Tahawar Ali Khan, has also rightly been adjudged by the learned Courts below, because the said succession certificate was obtained by concealing true facts from the Court, seized of the matter. In this view of the matter, no illegality and irregularity has been committed by the learned Courts below while passing the impugned judgments and decrees.

11. In addition to the above, the concurrent findings on facts cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908; reliance is placed on Mst. Zaitoon Begum v. Nazar Hussain and another (2014

SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Muhammad Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and Mst. Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21) wherein it has been held:-

> 'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.'

12. Pursuant to the above, when there appears no illegality and irregularity as well as wrong exercise of jurisdiction, the revision petition in hand as well as connected C.Rs. bearing Nos. 64972 of 2020, 9062 of 2021 and 4430 of 2021 being without any force and substance, are dismissed. No order as to the costs.

MH/S-12/L **Revision Petition dismissed.**

P L D 2023 Lahore 275

Before Shahid Bilal Hassan, J

Mian ABDUL GHAFFAR---Petitioner

Versus

MUHAMMAD ANWAR SAEED (deceased) through L.Rs. and others---Respondents

Writ Petition No. 211205 of 2018, decided on 18th November, 2022.

Civil Procedure Code (V of 1908)---

----Ss. 12(2) & 151---Challenging the validity of judgment or order on the basis of fraud and misrepresentation---Conversion of application under S. 12(2), C.P.C. into application under S. 151, C.P.C.--- Inherent powers of court---Exercise of---Petitioner withdrew his suit on the basis of compromise but the cheque on the basis of which the compromise was affected was dishonoured with remarks "payment was stopped by the drawer"---Petitioner's application under S.12(2) read with S.151, C.P.C. was accepted by Trial Court restoring the suit of the petitioner but revisional court set aside the judgment of the Trial Court---Validity--- Trial Court had rightly exercised inherent jurisdiction under S. 151, Code of Civil Procedure, 1908 because valuable rights of the petitioner were involved and he could not be knocked out of the arena of litigation merely on the basis of technicalities---Courts are to protect the valuable rights of the parties, that is why the inherent powers under S. 151, Code of Civil Procedure, 1908 have been conferred upon the Courts---Revisional Court, without keeping in view the peculiar facts and circumstances of the case in hand had roamed in oblivion, because an application under S. 12(2), C.P.C. could be converted into application under S. 151, C.P.C. in order to administer safer justice to the litigant public, whose interest were being infringed on the basis of order obtained by fraud---Impugned order was set aside and petition was allowed, in circumstances.

Wazir Khan and 8 others v. Sardar Ali and 25 others 2001 SCMR 750 rel.

Mian Khalid Habib Elahi for Petitioner.

Khawaja Muhammad Saeed for Respondents.

Nemo for Applicant (in C.M. No.1 of 2019)

ORDER

C.M.No.1 of 2019

SHAHID BILAL HASSAN, J.---None has entered appearance on behalf of the applicant; therefore, the application in hand stands dismissed for non-prosecution.

Main Petition

Succinctly, the petitioner instituted a suit for possession on the basis of specific performance of agreement to sell against the predecessor in interest of the respondents Nos.1 to 7 and 10 others. The predecessor in interest of the respondents Nos.1 to 7 entered appearance in the learned trial Court and subsequently filed his written statement on 15.03.2011. On 24.12.2011, the petitioner withdrew the suit due to some formal defects with permission to file afresh, which was dismissed as withdrawn subject to cost of Rs.500/- with permission to file afresh. The petitioner filed fresh suit for specific performance with possession against the predecessor in interest of the respondents Nos.1 to 7 and 2 others. However, during pendency of the suit, with the help of respectables of the locality the dispute inter se the parties was settled in the term that the agreement to sell was cancelled/withdrawn and predecessor in interest of the respondents Nos.1 to 7 issued cheque bearing No.10348398 dated 28.01.2012 valuing Rs.3,700,000/- drawn on Soneri Bank Branch Chiniot Bazar, Faisalabad and accordingly the petitioner handed over the original agreement to one Dr. Irshad Ul Haq, brother in law of the predecessor in interest of the respondents Nos.1 to 7 and it was further settled that after withdrawal of the suit, the petitioner would be entitled to get encashed the cheque ibid. In pursuance of agreement/compromise dated 12.01.2012, the present petitioner along with his counsel recorded their statements before the learned trial Court and withdrew the suit on 16.01.2012. However, when the petitioner presented the cheque for its encashment, the same was dishonoured with remarks "payment stopped by the drawer". The petitioner contacted the predecessor in interest of the respondents Nos.1 to 7 and Dr. Muhammad Irshad Ul Haq who promised

and assured that they will pay the amount within a period one and half year but despite that the amount was

not paid, so the petitioner got lodged FIR No.955 of 2013 under section 489-F, P.P.C. at Police Station Peoples Colony, Faisalabad and also filed an application under section 12(2) read with section 151, Code of Civil Procedure, 1908. The learned trial Court accepted the said application by exercising inherent powers under section 151, C.P.C. and set aside the order dated 16.01.2012 and restored the suit instituted by the present petitioner. The respondents Nos. 1 to 7 being dissatisfied filed revision petition, which was accepted vide impugned judgment dated 15.02.2018 and order dated 03.02.2015 was set aside; hence, the instant constitutional petition.

2. Heard.

3. Order dated 16.01.2012 has much relevance for disposal of the instant constitutional petition, which reads:-

Present; Plaintiff along with his counsel

Plaintiff Abdul Ghaffar and his counsel want to record their statement. Let it be recorded:--

Statement of Abdul Ghaffar, plaintiff and his counsel Mehmood ul Hassan, Advocate

Stated that they have effected compromise with the defendant No.3 who has handed over cheque of Rs.37,00,000/- and due to compromise they do not want to press the suit in hand and have no objection on dismissal of the suit as withdrawn.

RO&AC:

16.01.2022 (Ijaz Ahmad Bosal)

Civil Judge 1st Class

Faisalabad

ORDER:

In the light of statement of plaintiff and his counsel suit in hand is hereby dismissed as withdrawn. File be consigned to the record room.'

The above said order fully supports the stance of the petitioner that the suit was withdrawn due to an out of court settlement inter se the parties. The said facts are also evident from the copy of FIR, got lodged by the present petitioner, after bounce of the cheque, given to him in lieu of Rs.37,00,000/-. In such scenario, the learned trial Court has rightly exercised inherent jurisdiction under section 151, Code of Civil Procedure, 1908 because valuable rights of the petitioner are involved and he cannot be knocked out of the arena of litigation mere on the basis of technicalities, rather the Courts are to protect the valuable rights of the parties, that is why the inherent powers under section 151, Code of Civil Procedure, 1908 have been conferred upon the Courts. As against this, the learned revisional Court, without keeping in view the peculiar facts and circumstances of the case in hand has roamed in oblivion, because an application under section 12(2), C.P.C. can be converted into application under section 151, C.P.C. in order to administer safer justice to the litigant public, whose interest are being infringed on the basis of order obtained by defrauding him/her. Reliance is placed on Wazir Khan and 8 others v. Sardar Ali and 25 others (2001 SCMR 750), wherein the Apex Court of the country has held that:-

> 6. As far as application of section 151, C.P.C. to the present case is concerned, the same has been correctly applied as this section empowers the Court to make such orders as may be necessary for the ends of justice. This section begins with non obstante clause that "nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court" which empowers the Court to make any order which may be necessary in the ends of justice or to prevent the abuse of the process of the Court notwithstanding the codal procedure.'

4. In view of the above, the constitutional petition in hand is allowed, impugned judgment dated 15.02.2018 passed by the learned Addl. District Judge is set aside and that of the learned trial Court dated 03.02.2015 is restored. No order as to the costs.

IH/A-11/L **Petition allowed.**

P L D 2023 Lahore 699

Before Shahid Bilal Hassan, J

BASHARAT ALI and another---Petitioners

Versus

MUHAMMAD ARIF and others---Respondents

Writ Petition No. 22235 of 2020, heard on 4th October, 2022.

(a) Civil Procedure Code (V of 1908)---

----O. III, R. 1 & O. XXIII, Rr. 1, 2---Counsel engaged by the party, authority of---Wakalatnama (Power of Attorney), singing of---Scope and effect---Proceedings conducted by the counsel---Withdrawal of suit---Suit was withdrawn on the statement recorded by the counsel of the plaintiffs, however, the plaintiffs later moved application for restoration of the suit which was dismissed by the Trial Court---Appellate Court partly allowed revision moved by the plaintiffs against which order the defendants invoked constitutional jurisdiction of the High Court---Validity---Engagement of counsel and conduct of proceedings by him on the behalf of respondents/plaintiffs under O. III, R. 1 of the Civil Procedure Code, 1908, was admitted one---Respondents had appointed the said advocate as their counsel and had signed the power of attorney on their behalf which authorized conducting of suit including recording of any kind of statement---Record revealed that the statement of the counsel was recorded after having moved application while one of the respondents/plaintiffs was also present---Trial Court recorded the statement and ordered to produce the case next day (which date was already fixed for hearing); and on next date/day order with regard to withdrawal of the suit was passed---By signing Wakalatnama, all the

powers including withdrawal of suit or to take any step and conduct proceedings had been delegated upon the counsel---Party is always bound by the statement of his counsel unless there is anything contrary in the power of attorney placing restriction on the authority delegated upon the counsel to compromise or abandon the claim on behalf of client(s)---High Court set aside the order passed by the Appellate Court; and consequently order passed by the Trial Court dismissing the application for restoration of suit filed by the respondents/plaintiffs, stood maintained---Constitutional petition was allowed, in circumstances.

Fateh Khan v. Manzoor and 5 others PLD 1993 Lah. 76; Noor Muhammad and others v. Muhammad Siddique and others 1994 SCMR 1248; Hassan Akhtar and others v. Azhar Hameed and others PLD 2010 SC 657 and Afzal and others v. Abdul Ghani 2005 SCMR 946 ref.

(b) Civil Procedure Code (V of 1908)---

----O. III, R. 1 & O. XXIII, Rr. 1, 2---Constitution of Pakistan, Art. 199---Counsel engaged by the party, authority of---Wakalatnama (Power of Attorney), singing of---Scope and effect---Suit was withdrawn on the statement recorded by the counsel of the plaintiffs, however, the plaintiffs later moved application for restoration of the suit, which application was dismissed by the Trial Court---Appellate Court partly allowed revision petition moved by the plaintiffs against which order the defendants invoked constitutional jurisdiction of the High Court---Validity---Appellate Court had incorrectly construed law on the subject and had failed to exercise vested jurisdiction as per mandate of law---High Court in exercise of its constitutional jurisdiction under Art. 199 of the Constitution was not denuded of correcting the wrong committed by the Court below---High Court set aside the order passed by the Appellate

Court and consequently order passed by the Trial Court dismissing an application for restoration of suit filed by the respondents/plaintiffs stood maintained---Constitutional petition was allowed, in circumstances.

Muhammad Mehmood Chaudhry for Petitioners.

Mubeen Arif and Ihsan Ullah Ranjha for Respondents.

Date of hearing: 4th October, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Facts, in concision, are as such that respondents instituted a suit for malicious prosecution against the petitioners on 27.07.2017. During pendency of the suit, learned counsel for the respondents namely Ch. Hasnain Sadiq Sahi, Advocate appeared before the learned trial Court along with one of the plaintiffs Muhammad Akram and recorded his statement, by virtue of which the suit was withdrawn on 09.01.2019 and the impugned order dated 10.01.2019 was passed. After 30 days of the said withdrawal of the suit, an application was filed by the respondents for restoration of the suit. The learned trial Court after hearing both the parties dismissed the said application vide order dated 04.03.2019, against which they filed a revision petition which was partially allowed vide impugned order dated 26.02.2020; hence, the instant constitutional petition.

2. Heard.

3. Engagement of counsel namely Hasnain Sadiq Sahi, Advocate and conducting of proceedings by him on behalf of the respondents, under Order III, Rule 1, Code of Civil Procedure, 1908, is admitted one. The respondents have appointed the said learned Advocate as their counsel for conducting of suit on their behalf and signed the power of attorney, which

authorizes the said learned Advocate to conduct the suit on their behalf including recording of any kind of statement. Record reveals that the statement was recorded on 09.01.2019 on the application of the learned counsel and one of the plaintiffs/respondents namely Muhammad Akram and after recording statement, the case was ordered to be produced on the date already fixed i.e. 10.01.2019, when order with regards to withdrawal of the suit was passed. By signing Wakalatnama all the powers including withdrawal of suit or to take any step and conduct proceedings have been delegated upon the counsel. In Fateh Khan v. Manzoor and 5 others (PLD 1993 Lahore 76), this Court held:-

> 'It is inconceivable that elements of fraud and misrepresentation may anywise be involved in the exercise of lawful authority conferred on a counsel by means of Wakalatnama. This appointment is made as per the contemplation of Rule 1 of Order III, C.P.C. and is essentially an authority conferred on an agent, exercisable under the ordinary rules governing the relationship of Principal and Agent, in quite a subtle and refined form, exercisable in the field determined by the terms of Wakalatnama itself. Effectiveness of such delegated authorisation and the use thereof stand provided for by section 2 of the Powers of Attorney Act (VII of 1882) as also in Chapter X of the Contract Act (IX of 1872). Authority to withdraw or compromise a, litigation has been held to also be inherent in the engagement of a counsel.'

Further reliance is placed on Noor Muhammad and others v. Muhammad Siddique and others (1994 SCMR 1248) wherein the Apex Court of country has invariably held that:-

'It will be seen that the terms of Vakalatnama amply demonstrate that the counsel was empowered to take any step and conduct proceedings in the suit as considered proper by him, and that the same were acceptable to the respondents, who put their signatures on the Deed in token of their approval.'

A party is always bound by the statement of his counsel unless there is anything contrary in the power of attorney places restriction on the authority, delegated upon the counsel, to compromise or abandon the claim on behalf of his client(s). Reliance is placed on Hassan Akhtar and others v. Azhar Hameed and others (PLD 2010 Supreme Court 657) and Afzal and others v. Abdul Ghani (2005 SCMR 946). In Hassan Akhtar case ibid, the Hon'ble Supreme Court has held:--

'13. It is by now well-settled that an Advocate has authority to make statement on behalf of his client, which is binding upon the client, unless there is any thing contrary in the Vakalatnama putting restriction on the authority of the Advocate to compromise or abandon claim on behalf of the client. The Advocate's power in the conduct of a suit allows him to abandon the issue, which in his discretion, advisable in the general interest of his client.'

4. For the foregoing discussion, the learned revisional Court has wrongly construed law on the subject and has failed to exercise vested jurisdiction as per mandate of law and this Court in exercise of constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is not denuded of correcting the wrong committed by the learned Court below. As such, the impugned order dated 26.02.2020 passed by the learned Addl. District Judge, Wazirabad being illegal is set aside by allowing the constitutional petition in hand

and consequent whereof the order dated 04.03.2019 passed by the learned trial Court is restored. No order as to the costs.

MQ/B-23/L **Petition allowed.**

2023 Y L R 452

[Lahore]

Before Shahid Bilal Hassan, J

ZAHOOR AHMED---Appellant

Versus

ZAFAR ABBAS and another---Respondents

Civil Revision No. 232332 of 2018, decided on 31st January, 2022.

(a) Civil Procedure Code (V of 1908)---

----S. 12(2)---Qanun-e-Shahadat (10 of 1984), Art. 114---Promissory estoppel---Suit for specific performance and permanent injunction---Suit was dismissed as withdrawn on the basis of statement recorded by the petitioner/ plaintiff---Petitioner filed application under S.12(2), C.P.C., for setting side said dismissal/withdrawal order and restoration of the suit for deciding the same on merits---Application was contested by the respondent and consequently dismissed by the Trial Court---Petitioner contended that compromise was effected inter se the parties and in pursuance of the same, the petitioner had withdrawn the suit, but the respondents stepped back of the said alleged compromise---Validity---Petitioner filed appeal against dismissal of application under S. 12(2) of Civil Procedure Code, 1908, which was treated as revision petition and was converted into Constitutional petition---Petitioner had appended with his application affidavits of the witnesses in order to show that fact of alleged compromise---Such was a factual controversy which could not be decided summarily without framing issues and recording evidence, especially when the petitioner's application was adorned with affidavits of the witnesses---After the alleged out of Court settlement, the parties could not go aside and the petitioner could only prove the allegation of respondent's stepping back from compromise by leading evidence---

Constitutional petition was allowed, application was deemed to be pending before the Trial Court and the Trial Court was directed to decide the application after framing issues and recording evidence.

Pakistan through Ministry of Finance Economic Affairs and another v. Fecto Belarus Tractors Limited PLD 2002 SC 208 and Azra Riffat Rana v. Secretary, Ministry of Housing and Works, Islamabad and others PLD 2008 SC 476 rel.

(b) Constitution of Pakistan---

----Art. 10A---Opportunity to prove case through evidence---Each party should be provided with open field to prove his stance by leading evidence, obviously, by adhering to the procedural law i.e. Qanun-e-Shahadat, 1984 and Civil Procedure Code, 1908, in civil nature cases.

Ms. Kiran Bashir for Petitioner.

Sheikh Usman Karim Ud Din for Respondents.

ORDER

SHAHID BILAL HASSAN, J.---Succinctly, the petitioner/plaintiff instituted a suit for specific performance of agreement to sell dated 21.09.2013 with permanent injunction against the respondents/defendants. On 13.11.2014, the suit of the petitioner/plaintiff was dismissed as withdrawn on the basis of statement recorded by the petitioner. Later on, the petitioner filed an application under section 12(2) along with an application under Order XXXIX, Rules 1 and 2, Code of Civil Procedure, 1908 seeking setting aside of withdrawal order dated 13.11.2014 and restoration of the suit for deciding the same on merits. The respondents contested the said applications. The learned trial Court vide impugned order dated 06.12.2017 dismissed the said application under section 12(2), C.P.C. The petitioner being aggrieved preferred an appeal but the same was also dismissed on 19.05.2018; hence, the instant revision petition.

2. Heard.

3. First of all it is observed that the order dated 06.12.2017, passed by the learned trial Court, dismissing the application under section 12(2), C.P.C. was revisable but an appeal was preferred by the present petitioner. The learned appellate Court was vested with jurisdiction to convert the appeal into revision petition but this fact has escaped the attention of the learned appellate Court and without adverting to the said legal point, the learned appellate Court decided the appeal; therefore, the said appeal is treated as revision petition and the instant revision petition is converted into constitutional petition under Article 199, Constitution of Islamic Republic of Pakistan, 1973. Office shall number it in the relevant register as Constitutional Petition.

4. Now, I advert to the merits of the case, perusal of the statement recorded on 13.11.2014 by the present petitioner being plaintiff divulges that certain compromise was effected inter se the parties and in pursuance of the same, the petitioner withdrew the suit. However, allegedly, later on, the respondents stepped back of the said alleged compromise which constrained the petitioner to file application under section 12(2), Code of Civil Procedure, 1908 with specific allegations of fraud. In support of his stance, the petitioner appended affidavits of the witnesses namely Maher Ghulam Hussain Patwari Halqa, Ajmal Khan son of Inayat Hussain and Aslam Khan son of Shahbaz, in order to show that before withdrawal of suit the parties entered into compromise with regards to the disputed property and Maher Ghulam Hussain Patwari settled the dispute inter se the parties in presence of the witnesses, named above. The respondents demanded withdrawal of suit till 27.11.2014 and agreed to abide by the agreement to sell dated 21.09.2013. However, when the petitioner withdrew his suit as per compromise, the respondents stepped back of the said compromise. Such factual controversy cannot be decided summarily

without framing issues and recording evidence, especially when the application filed by the petitioner for setting aside the order dated 13.11.2014 has been adorned with affidavits of the witnesses. It is the requirement of law that each and every party should be provided with open field to prove his stance by leading evidence, obviously, by adhering to the procedural law i.e. Qanun-e-Shahadat, 1984 and Code of Civil Procedure, 1908, in civil nature cases, because it is desired by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 that for determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process. Besides, in this case, the doctrine of promissory estoppel also plays a significant role, as after alleged out of Court settlement, the parties cannot go aside and if anything such happened in between the parties and the respondents have stepped back, the petitioner can only prove the same by leading evidence. The doctrine of promissory estoppel was discussed in the judgment reported as Pakistan through Ministry of Finance Economic Affairs and another v. Fecto Belarus Tractors Limited (PLD 2002 Supreme Court 208), as under:-

'23. It will be necessary to touch the true concept of the realm of doctrine of promissory estoppel. Before proceeding further this doctrine has been variously called 'promissory estoppel' 'requisite estoppel', 'quasi estoppel' and 'new estoppel'. It is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel', it is neither in the realm of contract nor in the estoppel. The true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon

> by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existing relationship between the parties or not. The doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reasons why it should be given only a limited application by way of defence. There is no reasons in logic or principle why promissory estoppel should also not be available as a cause of action.'

The said doctrine was further reiterated by the Apex Court of the country in judgment reported as Azra Riffat Rana v. Secretary, Ministry of Housing and Works, Islamabad and others (PLD 2008 Supreme Court 476).

5. In this view of the matter, when the petitioner is knocked out of the arena on the basis of technicality, how will he be able to establish that some promise was made by the respondents in presence of the witnesses knowingly and showed their intentions that they would act upon the same if the petitioner withdrew the suit and when he performed his part of such promise, the respondents took somersault, in this way they (respondents) allegedly defrauded the petitioner by making him believe that they would act upon their part of promise. In such scenario, the learned Courts below while passing the impugned order and judgment have failed to exercise vested jurisdiction as per mandate of law, keeping in view the peculiar facts and circumstances of the case in hand, the impugned order and judgment are not upto the dexterity.

6. The crux of the above discussion is that the constitutional petition in hand succeeds, which is allowed accordingly and the case is remanded to the learned trial Court with a direction to decide the application under section 12(2) of the Code of Civil Procedure, 1908 after framing issues and recording evidence afresh on merits, which shall be deemed to be pending before it. The adversaries are directed to appear before the learned trial Court on 10.03.2022.

ZH/Z-7/L **Case remanded.**

2023 Y L R 687

[Lahore]

Before Shahid Bilal Hassan, J

AHMAD and another---Petitioners

Versus

MANZOOR AHMAD---Respondent

Civil Revision No. 1611 of 2015, heard on 31st May, 2022.

(a) Specific Relief Act (I of 1877)---

----S.42---Declaration, issuance of---Precondition---Declaratory decree can only be passed to the effect of a pre-existing right which is being denied by some person.

(b) Specific Relief Act (I of 1877)---

----Ss. 12, 21 (c), 42 & 54---Contract Act (IX of 1872), S.29---Suit for specific performance of agreement to sell and declaration and injunction---Void agreement---Uncertainty of terms---Concurrent findings of two Courts below---Respondent/plaintiff filed suit for specific performance of oral agreement of sale allegedly in year 1970---Both the Courts below concurrently decided suit and appeal in favour of respondent/plaintiff---Validity---Claimwas on oral agreement allegedly reached at between parties as back as in year 1970---Particulars of land and of alleged oral agreement were not detailed in plaint, which had to be pleaded and proved---When subject agreement was void for uncertainty in terms of S. 29 of Contract Act, 1872, it could not be specifically enforced as enunciated in S.21(c) of Specific Relief Act, 1877---When respondent/plaintiff was yet to establish his right on the basis of alleged oral agreement, he could not claim a declaratory decree---Respondent/plaintiff did not lead any evidence showing that he was put in

possession of suit property pursuant to alleged oral agreement between him and petitioner/defendant---Not a single word was uttered about payment of consideration amount by witnesses produced by respondent/ plaintiff---Ownership of petitioner/ defendant over disputed property was proved through unimpeachable and cogent evidence which was an admitted fact---High Court was vested with authority to undo concurrent findings of two Courts below when both the Courts below had failed to adjudicate upon the matter by appreciating law on the subject in a judicious manner and had misread evidence of parties---High Court set aside judgments and decree passed by two Courts below---Revision was allowed in circumstances.

Muhammad Riaz and others v. Mst. Badshah Begum and others 2021 SCMR 605; Muhammad Wali Khan and another v. Gul Sarwar Khan and another PLD 2010 SC 965; Mubarak Ali and others v. Khushi Muhammad and others PLD 2011 SC 155; Combined Investment (Pvt.) Ltd. v. Wali Bhai and others PLD 2016 SC 730; Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Muhammad Nawaz (deceased) through LRs. v. Haji Muhammad Baran Khan (deceased) through L.Rs. and others 2013 PSC 1683 and Ali Muhammad v. Muhammad Hassan and others 2021 CLC 1111 rel.

Usman Lateef for Petitioners.

Hafiz Mushtaq Ahmad Naeemi for Respondent.

Date of hearing: 31st May, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Tersely, the respondent instituted a suit for declaration along with specific performance of contract and perpetual injunction against the petitioners by maintaining that respondent

and petitioners are relatives and belong to same caste; that allegedly in the year 1970, the respondent purchased land measuring 01-kanal bearing Khasra No.2326/2-0 against consideration of Rs.6,000/- from the petitioner No.1 and the respondent constructed rooms and got installed electricity meter; that since then the respondent has been in possession of the disputed land. He further asserted that the petitioner No.2 filed a false and frivolous application in connivance with petitioner No.1 against the son of respondent namely Imran before the General Assistant Revenue, Hafizabad with the allegations that the son of the respondent has illegally possessed over the land of the petitioners, upon which the Revenue Department submitted the report on 22.06.2011 that the son of the respondent had not illegally possessed over the land of the petitioners and respondent had purchased the land in the year 1970 and since then he had been in possession of the disputed land but due to mutual trust the respondent did not incorporate his name in the revenue record by sanctioning the mutation in his favour; that the disputed land has become valuable and the petitioner No.1 has alienated the same to the petitioner No.2 through mutation No.696 dated 06.09.2005 and the said mutation to the extent of disputed land is against law and facts, void and inoperative upon the rights of the respondent. The respondent prayed for cancellation of the said mutation with further prayer that the petitioners may be directed to execute the sale deed in favour of the respondent in pursuance of alleged oral agreement and a decree for perpetual injunction be also passed in favour of the respondent.

The petitioners by filing written statement contested the suit and controverted the averments of the plaint. The divergence in pleadings of the parties was summed up into issues and evidence of the parties was recorded. On conclusion, the learned trial Court vide impugned judgment and decree dated 06.03.2015 decreed the suit in favour of the respondent. The petitioners being aggrieved preferred an appeal but the same was

dismissed vide impugned judgment and decree dated 15.05.2015; hence, the instant revision petition has been filed.

2. Heard.

3. Section 42 of the Specific Relief Act, 1877 postulates that:-

'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit seek for any further relief:

Bar to such declaration. Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.'

Bare reading of above said section makes it vivid that declaratory decree can only be passed to the effect of a pre-existing right which is being denied by some person. In the present case, admittedly the respondent based his claim on an oral agreement allegedly reached at between the respondent and present petitioner No.1 as back as in the year 1970 but perusal of the plaint shows that particulars of the land and of the alleged oral agreement are not detailed in the plaint, which otherwise ought to have been pleaded and proved and when the position is as such the subject agreement is void for uncertainty in terms of section 29 of the Contract Act, 1872 and consequently it cannot be specifically enforced as enunciated in section 21(c) of the Specific Relief Act, 1877. Therefore, when the respondent has yet to establish his right on the basis of alleged oral agreement, how can he claim a declaratory decree, because the petitioners have not denied his pre-existing right, which is pre-requisite for seeking a declaratory decree. In Muhammad Riaz and others v. Mst.

Badshah Begum and others (2021 SCMR 605), the Apex Court of the country has invariably held:-

> '6. The plaintiffs in the instant case relied upon an oral agreement. However, the plaintiffs did not set out the particulars of such oral agreement as per either of the prescribed forms (above) or as nearly as may be thereto and also did not describe the land which was the subject matter of the agreement. Therefore, the agree-ment would be void for uncertainty in terms of section 29 of the Contract Act, and consequently, it could not be specifically enforced as stipulated by section 21(c) of the Specific Relief Act.'

4. In view of the above, when the respondent has not pleaded the particulars of alleged oral agreement and even the names of the witnesses in whose presence such agreement was reached at, the evidence produced by him would be considered beyond the pleadings and it is a settled and cardinal principle of law that no one can be allowed to prove his case beyond the scope of pleadings as enunciated by the August Court of country in a case reported as Muhammad Wali Khan and another v. Gul Sarwar Khan and another (PLD 2010 Supreme Court 965). In another case reported as Mubarak Ali and others v. Khushi Muhammad and others (PLD 2011 Supreme Court 155), it has been held that no one can be allowed to plead and seek relief from the Courts on a plea not founded and embedded in his pleadings. Another judgment reported as Combined Investment (Pvt.) Ltd. v. Wali Bhai and others (PLD 2016 Supreme Court 730), can also be referred, which pronounces that none of the parties to a judicial proceeding can be allowed to adduce evidence in support of a contention not pleaded by it and the decision of a case cannot rest on such evidence.

5. In addition to the above, the respondent has not led any evidence showing that he was put in possession of the suit pursuant to the alleged

oral agreement between him and the petitioner No.1. Not a single word has been uttered about the payment of the consideration amount by the P.Ws. produced by the respondent. Ownership of the petitioners over the disputed property has been proved through unimpeachable and cogent evidence rather the same is an admitted fact.

6. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject in a judicious manner; therefore, the Courts below have misread evidence of the parties and when the position is as such, this Court is vested with authority to undo the concurrent findings as has been held in Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) and Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001).

7. For the foregoing reasons and discussion while placing reliance on the judgments supra as well as judgments reported as Muhammad Nawaz (deceased) through LRs. v. Haji Muhammad Baran Khan (deceased) through L.Rs. and others (2013 PSC 1683) and Ali Muhammad v. Muhammad Hassan and others (2021 CLC 1111 Lahore), the revision petition in hand is allowed, impugned judgments and decrees passed by the learned Courts below are set aside and in consequence thereof the suit, instituted by the respondent/plaintiff is dismissed. No order as to the costs.

MH/A-86/L **Revision allowed.**

2023 Y L R 1150

[Lahore]

Before Shahid Bilal Hassan, J

HARMOOZ KHAN and 5 others---Appellants

Versus

ABDUL AZEEM KHAN and 12 others---Respondents

Civil Revision No. 115692 of 2017 heard on 27th September, 2022.

Punjab Undesirable Cooperative Societies (Dissolution) Act (I of 1993)---

----S.17---Civil Procedure Code (V of 1908), S.9---Jurisdiction of Civil Court---Scope---Allegations mentioned in the plaint were regarding fraud and forgery which would only be decided after recording of evidence of the parties---In such secenario, the alleged bar contained in S. 17 of the Punjab Undesirable Cooperative Societies (Dissolution), Act, 1993, cannot take away the plenary jurisdiction enjoyed upon the civil Court under S. 9, C.P.C, in a situation where the aggrieved person finds himself remediless, particularly, when a dispute requires detailed evidence in order to resolve a factual controversy, as in the present case, because a specific plea fraud and forgery had been pleaded---Petitioners alleged fraud and forgery in their plaint, committed by respondents to transfer the land---Main grievance of the petitioner was against the other respondents and not the Cooperative body---In the matter in hand, the civil Court had jurisdiction to entertain the suit---Impugned order and decrees were set aside and case was remanded to the trial court to decide afresh after obtaining written statements, framing of issues and recording of evidence.

Messrs Sui Northern Gas Pipelines Limited (SNGPL) v. Messrs Noor CNG Filling Station 2022 SCMR 1501 ref.

Syed Moazzam Ali Shah for Petitioner.

Jawad Tariq Naseem for Respondent No. 13.

Date of hearing: 27th September, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Facts, in precision, are as such that the petitioners instituted a suit for declaration maintaining that their father Mallu Khan was owner of the land measuring 1017-Kanals 06-Marlas falling in Khewat No.33 situated at Malkhoke as per Misl-e-Haqiat Consolidation 1963- 64 District Lahore; that the land measuring 553 Kanals was allegedly shown to be transferred in favour of respondents Nos.1 and 2 vide mutation No. 259 dated 05.11.1965; that land measuring 250-Kanals was allegedly shown to be transferred in favour of respondents Nos.1 and 2 vide sale deed No.15965, thereafter mutation No.261 dated 04.11.1964 was incorporated in the revenue record; that total land measuring 803-kanals 14- Marlas was, purportedly, illegally and fraudulently transferred in favour of the respondents Nos. 1 and 2, however, the petitioners are allegedly still enjoying the possession of the suit property; that the respondent No. 2 made many alleged illegal transactions and finally the property was transferred in favour of the respondent No. 13 illegally and unlawfully.

The respondent No.13 appeared in the suit and orally prayed for

rejection of the plaint by taking a stance that the suit of the petitioner(s) is barred under sections 12, 13 and 17 of the Undesirable Cooperative Society Act, 1993. The learned trial Court vide impugned order dated 04.07.2017 rejected the plaint. The petitioners being aggrieved of the same preferred an appeal but it was dismissed in limine vide impugned judgment and decree dated 20.09.2017; hence, the instant revision petition.

2. Heard.

3. Section 9 of the Code of Civil Procedure, 1908 reads:-

'9. Courts to try all Civil Suits unless barred. - The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

In the present case, the respondent No. 13 asserted before the learned Courts below as well as before this Court that section 17 of the Undesirable Cooperative Society Act, 1993 bars the jurisdiction of civil Court to try the suit. For ready reference the same is reproduced as under:-

> 'Save as otherwise provided in this Act, no court shall have jurisdiction in respect of any matter, which a co-operatives board and the co-operative judge are empowered by or under this Act to determine and no injunction or process or order shall be granted by any court or authority in respect of any action taken or to be taken in exercise of any power conferred by or under this Act. '

However, when the contents of the plaint are gone through it appears that the petitioners have alleged fraud and forgery, mainly committed by the respondents Nos. 1 and 2 and action of the respondent No.13 has been challenged, rather it has been pleaded that the land measuring 553 Kanals was allegedly shown to be transferred in favour of respondents Nos. 1 and 2 vide mutation No.259 dated 05.11.1965 and the patch of land measuring 250-Kanals was allegedly shown to be transferred in favour of respondents Nos. 1 and 2 vide sale deed No.15965, thereafter mutation No.261 dated 04.11.1964 was incorporated in the revenue record, which was illegally and fraudulently transferred in favour of the respondents Nos. 1 and 2 as contended by the petitioners and the petitioners are purportedly still enjoying the possession of the suit property. It was further pleaded that the respondent No.2 made many alleged illegal transactions and finally the property was transferred in favour of the respondent No.13 illegally and unlawfully. In such scenario, the alleged bar contained in section 17 of the Act, 1993 ibid cannot take away the plenary jurisdiction enjoined upon the civil Court under section 9, C.P.C. in a situation where the aggrieved person finds himself remediless, particularly, when a dispute requires detailed evidence in order to resolve a factual controversy, as in the present case, because a specific plea of fraud and forgery has been pleaded. In the present case, at the cost of

repetition, the main grievance of the petitioners is against the respondents Nos. 1 and 2 and not against the respondent No.13, therefore, the barring section of the Act, 1993 does not debar the suit of the petitioners. In Messrs Sui Northern Gas Pipelines Limited (SNGPL) v. Messrs Noor CNG Filling Station (2022 SCMR 1501), the Apex Court of the country has invariably held that:-

> '10. The question of implied bar has been raised in this Court for the first time and nothing was pleaded in the Trial Court, Appellate Court and the High Court. Under Section 9 of C.P.C., the Civil Courts have the jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The congregated in a routine, save as the conditions laid down are fulfilled. The presumption of lack of jurisdiction may not be gathered until the specific law enacted by the legislation debars Court from exercising its jurisdiction with specific remedy within the hierarchy which may attain the finality of order or the controversy involved.'

4. Pursuant to the above discussion, it is observed that in the matter in hand, the civil Court has jurisdiction to entertain the suit. The learned Courts below have failed to rightly construe law on the subject and have to appreciate the law on a true perspective. Therefore, the impugned orders and decrees cannot be allowed to hold field further. Resultantly, by allowing the revision petition in hand, the impugned orders and decrees are set aside and case is remanded to the learned trial Court to decide the same afresh after obtaining written statement(s), framing of issues and recording evidence of the parties, on merits, in accordance with law. No order as to the costs.

5. The adversaries are directed to appear before the learned trial Court on 20.10.2022, positively.

KI/H-27/L **Revision Petition allowed.**

2023 Y L R 1329

[Lahore]

Before Shahid Bilal Hassan, J

Mst. SHAHNAZ SHAFIQ and 2 others---Petitioners

Versus

Mst. GULNAR KHALID and 4 others---Respondents

Civil Revision No. 19610 of 2021, decided on 6th July, 2022.

(a) Civil Procedure Code (V of 1908)---

---O. XII, R. 6---Mental Health Ordinance (VIII of 2007), Preamble---Gift---Proof---Judgment on admission---Respondents instituted suit for declaration against the petitioner and remaining respondents before Trial Court---Petitioner also filed a suit for declaration with permanent injunction against the respondents and sought cancellation of gift deed alleging that same was obtained through fraud---One of the respondents made an application under O.XII, R. 6, C.P.C. before Trial Court for passing a judgment and decree in her favour---Trial Court dismissed the said application---Appellate Court directed the Trial Court to decide the contention of respondent---Trial Court decreed the suit of respondents---Held, that in case in hand there was no denial to the factum that the disputed house was owned by "S.A.", deceased father of the parties, who gifted out the same to the respondent through gift deed---When respondent instituted a suit for declaration, on refusal of her entitlement, father of respondent i.e. "S.A.", the donor ,appeared before Trial Court and in a categorical and unambiguous way recorded his detailed statement on oath in favour of respondent and the Trial Court had reproduced the said statement of deceased "S.A." in the impugned judgment in verbatim---In case in hand "S.A.", father of the parties appeared before the Trial Court and after recording his categorical detailed statement, he again

appeared in presence of counsel for the parties and the Trial Court, on the said date, cross questioned him in order to ascertain his mental condition and soundness of his mind---Observation regarding the mental soundness of "S.A." recorded by Trial Court had not been challenged before any forum at the relevant time and even the petitioners did not move any application before the competent forum under Mental Health Ordinance, 2001, seeking declaration of unsoundness or soundness of "S.A.", because oral substance had no value, especially when the said person while appearing before the Trial Court twice on different dates with a gap of almost two years, did not seem to be of unsound mind---Statement of "S.A." in a categorical manner stated that he was affectionate and kind father towards his children and he had already transferred valuable properties in the names of his sons and daughters and had gifted out the disputed house in lieu of services to his widowed daughter "G.A."/plaintiff---Such part of statement of the deceased "S.A." had not been denied by the present petitioners or other respondents---Civil revision was dismissed, in circumstances.

(b) Gift---

----Proof---Gift deed written on non-stamp paper---Effect---In case in hand, objection regarding the registered gift deed having been written on a non-stamp paper and adhesive stamps were pasted was concerned, after admission on the part of the donor deceased "S.A." by appearing before the Trial Court, the said objection losts its significance---Civil revision was dismissed, in circumstances.

G. R. Syed v. Muhammad Afzal 2007 SCMR 433 and PLD 2007 Lah. 93 rel.

Zafar Abbas Khan for Petitioners (as well as in connected C.R. No. 24020 of 2021).

Qasim Hassan Buttar for Respondent No.1/Plaintiff and (in C.R. No.10730 of 2021).

Zawar Ahmad Sheikh for Respondent No.2/Petitioner (in connected C.R. No. 10730 of 2021 and C.R. No. 12562 of 2021).

Sahabzada Muzaffar Ali, for Lahore Development Authority.

Date of hearing: 20th May, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---This single judgment will dispose of the captioned revision petition as well as connected C. R. No. 24020 of 2021, C.R. No. 10730 of 2021 and C.R. No. 12562 of 2021, as in all, common question of law and facts are involved as well as one and the same judgments and decrees have been called into question.

2. Facts, in precision, are as such that respondent No.1 instituted a suit for declaration against the present petitioners and remaining respondents Nos. 2 to 5 in the present revision petition. The petitioners also instituted a suit for declaration with permanent injunction against the respondents whereby the petitioner No.1 sought cancellation of gift deed bearing document No.1878, Book No.1, Volume No.2099 dated 02.04.2013 (on the basis of which the respondent No.1 instituted her suit), alleging therein that the same was obtained through fraud and misrepresentation by the respondent No.1 and others. The respondent No.2 also filed a separate suit in this regard. Rival parties contested each other's suit. On 05.11.2014, donor/father of the parties namely Shafique A. Siddiqui appeared before the learned trial Court and recorded his detailed and comprehensive statement wherein he categorically, unambiguously and unequivocally stated that he has executed gift deed of the suit property in favour of his daughter Gulnar Khalid, respondent No.1, with his free will and without any coercion and undue influence as well as in his complete

senses. After recording of the said statement, the respondent Gulnar Khalid made an application under Order XII, Rule 6, Code of Civil Procedure, 1908 for passing a judgment and decree in her favour but the learned trial Court dismissed the said application, who filed revision petition, which was allowed and the learned trial Court was directed to decide the contention of the respondent Gulnar Khalid in the light of the statement of her father/donor Shafique A. Siddiqui. On the other hand, the present respondent No.2 namely Rubina Amjad filed a Writ Petition bearing No.131333 of 2018 before this Court, which was dismissed. Therefore, in the light of the direction of the learned revisional Court and this Court, the learned trial Court decided the application under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908 and decreed the suit for declaration instituted by the respondent No.1 titled "Gulnar Khalid v. Shahnaz Shafique, etc.", whereas the plaints of suits instituted by the present petitioners Shahnaz Shafique, etc. and Mst. Rubina Amjad, were rejected under Order VII, Rule 11, Code of Civil Procedure, 1908 vide impugned orders/judgment and decrees dated 10.03.2020. Hence, the captioned revision petition as well as connected C.Rs. (detailed above) calling into question the validity and vires of impugned orders rejecting the plaints of suits instituted by the present petitioners and respondent No.2/Mst. Rubina Amjad and decreeing the suit of the respondent No.1/Mst. Gulnar Khalid.

2. Heard.

3. Rule 6 of Order XII, Code of Civil Procedure, 1908 provides:-

'6. Judgment on admissions. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the

Court may upon such application make such order, or give such judgment, as the Court may think just'.

Rule 1 of Order XV, Code of Civil Procedure, 1908 enunciates:-

'Parties not at issue. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment'.

In the present case there is no denial to the factum that the disputed house was owned by Shafique A. Siddiqui (deceased), father of the parties, who gifted out the same to respondent No.1 namely Gulnar Khalid, through gift deed bearing document No.1878, Book No.1, Volume No.2099 dated 02.04.2013 and when the respondent No.1 instituted a suit for declaration, obviously, on refusal of her entitlement, on the basis of said document, the said Shafique A. Siddiqui, the donor, appeared before the learned trial Court on 05.11.2014 and in a categorical, unambiguous and in a vivid way recorded his detailed statement on oath in favour of respondent No.1 and the learned Courts below have reproduced the said statement of the deceased Shafique A. Siddiqui in the impugned judgments in verbatim. When, the position remained as such, the learned trial Court, on moving an application under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908, in exercise of discretion, vested upon it, may pass a judgment or order, as it thinks fit, as has been referred above, but the learned trial Court declined the request of the respondent No.1 on 26.11.2016, who challenged the order by filing revision petition, which was accepted on 11.12.2017 and the matter was remanded to the learned trial Court with a direction to decide the request under Order XII, Rule 6 read with Order XV, Rule 1, Code of Civil Procedure, 1908 and W.P. No.131333 of 2018, filed by Mst. Robina Amjad against the said revisional order was dismissed by this Court with the observation that:-

'The father of the petitioner in his statement categorically stated that he gifted the suit property to his daughter while putting his signature and thumb impression on the order sheet. The presumption of truth is attached to the order sheet'.

4. It is not case, here, that Shafique A. Siddiqui appeared before the learned trial Court only once before the learned trial Court rather after recording his cate-gorycal detailed statement on 05.11.2014, he again appeared on 09.04.2016 in presence of learned counsel for the parties and the learned trial Court, on the said date, cross questioned him in order to ascertain mental condition and soundness of his mind and observed in the order that:-

"So, defendant No.5 was cross-examined by the court and he spoke about his name, parentage, correct address and profession as Electrical Engineering and still MD at ICC private, Limited. The mental condition of defendant No.5 has been found correct. He is a man of sound mind, hale and hearty up to the mark. Counsel for the defendant No.4 is hereby directed to clear position of Mst. Rubina Amjad on the next date of hearing".

The said observation recorded by the learned trial Court had not been challenged before any forum at the relevant time and even the petitioner(s) did not move any application before the competent forum under Mental Health Ordinance, 2001 seeking declaration of unsoundness or soundness of Shafique A. Siddiqui, because oral stance has no value, especially when the said person while appearing before the learned trial Court twice on different dates with a gap of almost two years i.e. firstly on 05.11.2014 and secondly on 09.04.2016, did not seem to be of unsound mind. Reliance is placed on Arshad Ehsan v. Sheikh Ahsan Ghani and 2 others (PLJ 2007 Lahore 144), wherein this Court has held:-

'6. There is no cavil to the proposition that the only forum competent to declare a person as "mentally disordered person" is one available under Mental Health Ordinance, 2001 and the same has overriding effect and no other Court could determine or for that matter grant any declaration, hence, the suit filed by the petitioners to this extent was barred by law'.

5. In addition to the above, it is worth mentioning here that in his statement dated 05.11.2014, Shafique A. Siddiqui in a categorical manner stated that he is affectionate and kind father towards his children and he has already transferred valuable properties in the names of his sons and daughters and has gifted out the disputed house in lieu of services of his widowed daughter Gulnar Khalid (plaintiff). This part of the statement of the deceased Shafique A. Siddiqui has not been denied by the present petitioners or other respondents.

6. So far as the objection that the registered gift deed was written on a non-stamp paper and adhesive stamps were pasted is concerned, after admission on the part of the deceased Shafique A. Siddiqui by appearing before the learned trial Court, the said objection loses its significance. In judgment reported as G.R. Syed v. Muhammad Afzal (2007 SCMR 433), the Apex Court of the country while upholding the judgment rendered by a Division Bench of this Court reported as (PLD 2007 Lahore 93) has held:-

'7. It is a settled proposition of law that under Order XII, Rule 6 of C.P.C. the Court is empowered to pass a judgment on the basis of admission of facts by the addressee made by the parties to their pleadings, at any stage of the proceedings. The learned High Court to adjudge the controversy between the parties placed reliance upon the judgment of this Court in case of Amir Bibi v. Muhammad Khushid and others 2003 SCMR 1261, and applying the rules laid

down therein concluded that as the admission of the petitioner was specific, clear, unambiguous, categorical and definite, therefore, the trial Court had rightly granted decree under Order XII, rule 6 of C.P.C. As such under the circumstances, reiterating the principle laid down in the reported judgment we are of the opinion that the impugned judg-ment admits of no interference'.

7. In view of the above discussion, it can safely be held that the learned Courts below have proceeded with the case as per mandate of law and have not committed any material illegality and irregularity while passing the impugned orders, judgments and decrees warranting interference by this Court in exercise of supervisory revisional jurisdiction under section 115, Code of Civil Procedure, 1908, rather after passing a decree in favour of the respondent No.1, in her suit for declaration on the basis of registered gift deed, after categorical admission by Shafique A. Siddique (deceased), the suits instituted by the petitioners in the present revision petition and connected petitions, lacks locus standi and cause of action, so the plaints in the said suits have rightly been rejected by invoking powers under Order VII, Rule 11, Code of Civil Procedure, 1908. The findings recorded by the learned Courts below, being well reasoned and up to the dexterity as well as proper and judicious appreciation of law on the subject, are upheld and maintained.

8. For the foregoing reasons and while placing reliance on the judgments (supra), the revision petition in hand as well as connected C.R.No.24020 of 2021, C.R. No. 10730 of 2021 and C.R. No.12562 of 2021, having come to naught and devoid of any force stand dismissed. No order as to the costs.

MHS/S-83/L **Petitions dismissed.**

PLJ 2023 Lahore 436

***Present*: SHAHID BILAL HASSAN, J.**

MUBASHAR AHMAD AYAZ--Appellant

versus

***Late (Moulana)* MANZOOR AHMAD CHINIOTI through L.Rs. etc.--Respondents**

R.S.A. No. 46 of 2009, heard on 24.1.2023.

Defamation of Ordinance, 2002 (LVI of 2002)--

----S. 9--Civil Procedure Code, (V of 1908), O.XX R. 5--Suit for recovery of damages--Publication of article--Application for framing of additional issues--No findings of trial Court on additional issues--Suit was decreed--Challenge to--Trial Court framed additional issues 1-A and 1-B on application of appellant but while reducing judgment into writing trial Court totally ignored issues, which otherwise go to root of case and without deciding same, fate of case cannot be decided finally--Appeal accepted. [P. 438] A

1982 SCMR 816 *ref.*

Sh. Usman Karim-ud-Din, Advocate for Appellants.

Mr. Muhammad Javid-ur-Rehman Rana & Mr. Naseem Noor, Advocates for Respondents.

Nemo for Respondent No. 2.

Date of hearing: 24.1.2023.

JUDGMENT

Succinctly, Manzoor Ahmad Chinioti, late plaintiff instituted a suit for recovery of Rs. 50,000,000/-as damages against the present appellant and

Respondent No. 2, which was duly contested by the present appellant and Respondent No. 2. Out of the divergent pleadings of the parties the learned trial Court framed following issues:-

a. Whether the suit is barred by limitation? OPD

b. Whether the impugned publication is privileged and was in the public interest welfare? OPD-2

c. Whether the Defendant No. 2 published the impugned article, after its publication by Defendant No. 1. If so, is he not liable to pay damages? OPD-2

d. Whether the impugned publication falls within the purview of libel and the plaintiff has been defamed, if so, is the plaintiff entitled to damages as prayed for? OPP

On moving an application by the appellant, the learned trial Court framed two following additional issues on 06.06.1996:-

1-A. Whether the suit is not maintainable in its present form? OPD

1-B. Whether the plaintiff has got no cause of action? OPD

Both the parties adduced their evidence. However, the learned trial Court without giving any findings on issues No. 1-A and 1-B passed the impugned judgment and decree dated 08.12.2000 holding the late Respondent No. 1 entitled to Rs. 500,000/-, to be paid by the present appellant and Respondent No. 2 jointly and severally. The appellant challenged the said judgment and decree; however, the learned appellate Court dismissed the appeal on 04.12.2008; hence, the instant regular second appeal.

2. Heard.

3. Rule 5 of Order XX, Code of Civil Procedure, 1908 reads:-

> *"In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."*

In the instant case, the learned trial Court framed additional issues 1-A and 1-B on the application of the appellant but while reducing the judgment into writing the learned trial Court totally ignored the said issues, which otherwise go to the root of the case and without deciding the same, the fate of the case cannot be decided finally, because by using word "Shall" the said provision has been made mandatory unless the issues are interlinked and interconnected; however, in the instant case the position is otherwise. In judgment reported as *Ali Muhammad v. Muhammad Hayat and others* (1982 SCMR 816), the Apex Court of the country held:

> *"---it was observed that the trial Judge was bound to give reasons for his decision on each separate issue and the disposal of issues Nos. 1-5 by simply observing that "all these issues have no substantive force in view of findings given under issues No. 6" was not a proper decision in accordance with law."*

It was further observed that:

> *"3. We do not agree. The learned trial Court had disregarded the mandatory provisions of Order XX, Rule 5, C.P.C. and, therefore, had acted in exercise of his jurisdiction with material irregularity. The High Court in exercise of its revisional jurisdiction was competent to make such order in the case as it thought fit."*

4. In this view of the matter, without commenting further on merits of the case, may it prejudice case of either side, the appeal in hand is accepted, impugned judgments and decrees are set aside and the matter is remanded to the learned trial Court with a direction to decide the same afresh after hearing

the learned counsel for the parties. The adversaries are directed to appear before the learned trial Court on 14.02.2023, positively.

(Y.A.) **Appeal accepted.**

PLJ 2023 Lahore 705

Present: **SHAHID BILAL HASSAN, J.**

MUHAMMAD NADIR KHAN (deceased) through L.Rs.--Petitioner

versus

MUHAMMAD USAMA and others--Respondents

C.R. No. 42577 of 2023, decided on 22.6.2023.

Specific Relief Act, 1877 (I of 1877)--

----Ss. 9 & 12--Suit for specific performance filed by petitioners was dismissed--Suit for possession filed by Respondents No.1, 2 was decreed--Consolidated judgment--Appeals--Dismissed--Disputed property was owned by respondent--At time of proported sale agreements Respondents No. 1, 2 were minors and their father was not appointed as their guardian--Father of Respondents No. 1 & 2 was not competent to enter into sale agreements--Witnesses produced by petitioners were not disclosed any time, day mentioned in sale agreements--Challenge to--Minor disqualifies from entering into any contract, for disposal of his property, without appointment of a guardian by a Court of competent jurisdiction and if any such contract is entered said transaction is void ab initio and does not have any binding force--Appellate Court has rightly recorded findings that law debars filing of suits against minors without next friend or guardian appointed by Court and in situation even suit of petitioners is not maintainable--W itnesses produced by petitioners have not disclosed and deposed that time, day and mode of payment alongwith description of amount as mentioned in disputed agreements to sell--Courts below have rightly adjudicated upon matter in hand and have not committed any illegality or irregularity warranting interference by this Court in exercise of revisional jurisdiction--Courts below has appreciated and construed law on subject in a judicious manner and have not committed any error,

rather order and judgment are upto dexterity; thus, same are upheld--Revision petition dismissed.

[Pp. 707, 708 & 709] A, B, C, D & E

2011 SCMR 837, 2021 SCMR 1401, PLD 2022 SC 13 &
PLD 2022 SC 21 *ref.*

Mian Muhammad Habib, Advocate for Petitioners.

Date of hearing: 22.6.2023.

ORDER

Precisely, the petitioners instituted a suit for specific performance on the basis of purported agreements to sell dated 28.10.2010 and 10.01.2011 against the Respondents No. 1 to 3/defendants with regards to the suit property. On the other hand, the Respondents No. 1 and 2 instituted suit for possession with permanent injunction and recovery of rent against the present petitioners and Respondent No. 4. Both the parties contested the suit filed against them by submitting written statements. The learned trial Court consolidated both the suits and out of the divergent pleadings of the parties the consolidated issues were framed. Both the parties adduced their oral as well as documentary evidence. On conclusion of trial, the learned trial Court dismissed suit for specific performance of the petitioners and decreed suit for possession of the Respondents No. 1 and 2 *vide* impugned consolidated judgment and decree dated 18.06.2022. The petitioners being aggrieved preferred two separate appeals. The learned appellate Court *vide* impugned consolidated judgment and decree dated 24.05.2023 dismissed both the appeals; hence, the instant revision petition.

2. Heard.

3. There is no denial to the fact that disputed property is owned by the Respondents No. 1 and 2 who at the relevant time of purported agreements to sell were minors and Respondent No. 4 though was father but was not

appointed as guardian of the said minors and no permission was accorded to him to sell out the property of the minors or enter into any kind of agreement on behalf of the minors by the Court of competent jurisdiction; therefore, he was not competent to enter into alleged agreements to sell on behalf of the minors. Section 11 of the Contract Act, 1872 enunciates that who may enter into contract, which reads:-

> *"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."*

Meaning thereby, the minor disqualifies from entering into any contract, for disposal of his property, without appointment of a guardian by a Court of competent jurisdiction and if any such contract is entered the said transaction is void ab initio and does not have any binding force. In this regard reliance has rightly been placed on *Abdul Ghani and others v. Mst. Yasmeen Khan and others* (2011 SCMR 837), wherein the Apex Court of country invariably held that:

> *"It is well settled by now that "any contract or transaction entered into with minor was void ab initio for minor could not give consent to create any binding contract. Principle of estoppel was also inapplicable in minor's case. Transaction reflected in specified mutation sanctioned during minority of minor female was void ab initio for being unauthorized, therefore, on basis thereof vendees named in such mutation did not acquire any right or title in land in question."*

In the said judgment it has further been held:

> *"The provisions as enumerated in Section 11 of the Contract Act, 1872 would make minor incompetent to enter into any contract, therefore, contract by minor was void ab initio and not merely*

voidable. Such contract would have no existence in the eye of law and was incapable of satisfaction or confirmation. Law forbids enforcement of such transaction even if minor were to ratify the same after attaining majority."

The said ratio has been reiterated by the Hon'ble Supreme Court in judgment reported as *Yar Muhammad Khan and others v. Sajjad Abbas and others* (2021 SCMR 1401) and it has further been held that:

"To protect minors and their interests a minor cannot enter into an agreement nor grant a power of attorney to do so. Section 11 of the Contract Act, 1872 explicitly stipulates that only those who are "of the age of majority according to the law to which he is subject" are "competent to contract"; the law is the Majority Act, 1875 Section 3 whereof stipulates eighteen years as the age of majority."

In this view of the matter, when the alleged agreements were entered into the Respondents No. 1 and 2 were minors and the Respondent No. 4 was not competent to enter into any such agreement on their behalf; therefore, the said agreements are void ab initio and on the basis of the same, no suit can be instituted as no right or title has been created in favour of the petitioners.

4. In addition to the above, the petitioners instituted the suit against the minors/Respondents No. 1 and 2 by mentioning the name of Muhammad Bashir being guardian but the said Muhammad Bashir was not arrayed as party despite the fact that purportedly he entered into agreements to sell in question with the petitioners on behalf of the minors and even the said person was not produced as witness by the petitioners so as to establish the factum of entering into alleged agreements to sell. Therefore, the learned appellate Court has rightly recorded findings that law debars filing of suits against the minors without next friend or guardian appointed by the Court and in the situation even suit of the plaintiffs/petitioners is not maintainable.

5. Apart from the above, the witnesses produced by the petitioners have not disclosed and deposed that time, day and mode of payment alongwith description of the amount as mentioned in the disputed agreements to sell (Ex.P1) and (Ex.P3).

6. Pursuant to above discussion, learned Courts below have rightly adjudicated upon the matter in hand and have not committed any illegality or irregularity warranting interference by this Court in exercise of revisional jurisdiction under Section 115, Code of Civil Procedure, 1908. In judgments reported as *Muhammad Sarwar and others v. Hashmal Khan and others* (PLD 2022 Supreme Court 13) and *Mst. Zarsheda v. Nobat Khan* (PLD 2022 Supreme Court 21), the Apex Court of the country has candidly held:

> *"There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law."*

However, in the present case, as observed above, the learned Courts below has appreciated and construed law on the subject in a judicious manner and have not committed any error, rather the order and judgment are upto the dexterity; thus, the same are upheld.

Further in judgment reported as *Salamat Ali and others v. Muhammad Din and others* (PLJ 2023 SC 8), it has invariably been held that:

> *"Needless to mention that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding*

of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below."

7. As a sequel of above discussion and while placing reliance on the judgments supra, the instant civil revision being devoid of any force and substance stand dismissed *in limine.*

(Y.A.) **Petition dismissed.**

PLJ 2023 Lahore 896

***Present*: SHAHID BILAL HASSAN, J.**

MUHAMMAD YASIN--Petitioner

versus

MUHAMMAD ISMAIL, etc.--Respondents

C.R. No. 62703 of 2023, decided on 26.9.2023.

Civil Procedure Code, 1908 (V of 1908)--

----O.VII, R. 11(d)--Specific Relief Act, (I of 1877), Ss. 39, 42 & 54--Rejection of plaint--Appeal--Dismissed--Suit for declaration, cancellation of documents and perpetual injunction--Application before revenue authorities regarding disputed mutation--Inquiry report--Date of knowledge and source of information was not disclosed regarding fraud--Limitation--Challenge to--The matter remained sub-judice before competent forum and petitioner was well aware of all proceedings but he kept mum after report of inquiry because adverse remarks were passed against him and he did not challenge same before any forum further--The petitioner did not disclose date of knowledge and source of information of alleged fraud, which were essential and necessary to be pleaded in plaint--The suit of petitioner was badly barred by limitation which has rightly been adjudged and petitioner has rightly been non-suited--Both Courts below have accurately rejected plaint--The petitioner did not associate proceedings before revenue hierarchy, he was bound to explicitly plead date of his knowledge of alleged fraud, which is lacking in this case, so it cannot be said that here in this case limitation is a mixed question of law and facts--Reasoning recorded by both Courts below is just in accordance with spirit of law on subject and does not require any interference by High Court, as no illegality and irregularity has been committed--Civil revision dismissed. [Pp. 897, 898, 899 & 900] A, B, C, D, F & G

2016 SCMR 910, 2000 SCMR 305, 2002 SCMR 338 and

2021 SCMR 1158 *ref.*

Duty of Court--

----It is duty of Court to thoroughly examine plaint at very inception so that parties could be saved from agony of frivolous litigation in order to save precious time of Court because a Court should not behave like a silent observer that a party can capture whole system of justice for an indefinite time in order to rescue prevailing judicial system which is already at prime of criticism. [P. 899] E

1994 CLC 1248 *ref.*

Mian Shah Abbas, Advocate for Petitioner.

Date of hearing: 26.9.2023.

ORDER

Precise facts of the case are that the petitioner herein instituted a suit for declaration cum cancellation of documents and perpetual injunction against respondents/defendants. Respondents/ Defendants No. 1 to 4, 6, 8 and 9 appeared before the learned trial Court and contested the suit by filing written statement. The learned trial Court *vide* impugned order and decree dated 17.12.2022 rejected the plaint of suit under Order VII, Rule 11(d), Code of Civil Procedure, 1908. Appeal preferred by the petitioner against the same was dismissed *vide* impugned judgment and decree dated 13.07.2023; hence, the instant revision petition.

2. Heard.

3. In this case, admittedly the dispute regarding the disputed mutation has already been raised before the competent forum in 2002 by way of application for inquiry which was concluded in 2003 *vide* inquiry report dated 01.12.003, wherein it was determined that the disputed mutation was genuinely entered into and executed by the concerned parties; it was further determined in the said inquiry that the present petitioner is a fake person and has no concern with the disputed property. Meaning thereby the matter remained sub-judice before the competent forum and the petitioner was well aware of all the proceedings but he kept mum after report of the above said

inquiry because adverse remarks were passed against him and he did not challenge the same before any forum further. Moreover, the petitioner did not disclose the date of knowledge and source of information of alleged fraud, which were essential and necessary to be pleaded in the plaint as required by Order VI, Rule 4, Code of Civil Procedure, 1908. The suit ought to have been filed within six years from the date of arising of cause of action or from the date of knowledge, but it has been instituted after about 21 years of above said inquiry proceedings, which ended in the year 2003. In such scenario, the suit of the petitioner was badly barred by limitation which has rightly been adjudged and the petitioner has rightly been non-suited. A three members Bench of the Apex Court of country while dealing with a case reported as *Agha Syed Mushtaque Ali Shah v. Mst. Bibi Gul Jan and others* (2016 SCMR 910), has invariably held:

> *'22. -------- that the question of limitation being a mixed question of law and facts ought to have been decided after recording evidence, we may observe that it is only in cases where determination as to when the cause of action for the suit arose, is dependent upon a certain factor, situation, happening or occurrence, existence, extent and the nature whereof could only be ascertained after recording evidence, that the question of limitation needs to be determined after such evidence. However, where on the plain reading of the plaint, as in the present case, it can be clearly seen that the suit is patently barred by limitation, no evidence is required. In fact to plead that a plaint cannot be rejected, for the suit being barred by limitation/law, without recording evidence, is to plead against the mandate of law as contained in Order VII, Rule 11 of the Code of Civil Procedure, which essentially requires the Court to reject the plaint which appears from its contents to be barred by limitation.'*

Furthermore, in judgment reported as *Maulana Nur-ul-Haq Ibrahim Khalil* (2000 SCMR 305), the Apex Court of the country held:

'6. The first point for determination is whether the plaint can be rejected under Order VII, rule 11(d), C.P.C. if the suit is time-barred. The answer is in the affirmative. The contention raised by the learned counsel for the petitioner is too naïve to prevail. The bar of limitation is traceable to the Limitation Act, therefore, it goes without saying that the expression 'barred by any law' includes the law of limitation. However, there is no need to discuss this point any further as it stands resolved by the judgment of this Court reported as Mumtaz Khan v. Nawab Khan and 5 others 2000 SCMR 33, wherein it has been held that clause (d) of Order VII, rule 11, C.P.C. is applicable where the suit is time-barred, and Hakim Muhammad Buta and another v. Habib Ahmed and others (PLD 1985 SC 153) wherein it has been observed that if from the statement in the plaint the suit appears to be barred by limitation the plaint shall have to be rejected under Order VII, rule 11, C.P.C.'

4. In this view of the matter, both the Courts below have accurately rejected the plaint under Order VII, Rule 11, C.P.C. The relevant facts need to be looked into for deciding an application under Order VII, Rule 11, C.P.C. are the averments in the plaint, however, besides averments made in the plaint other material available on record which on its own strength is legally sufficient to completely refute the claim of plaintiff can also be pondered into for the purpose of rejection of the plaint. Reliance may be placed on judgment reported as *S.M. Sham Ahmad Zaidi through Legal Heirs v. Malik Hassan Ali Khan (Moin) through Legal Heirs* (2002 SCMR 338). Moreover, if a party who approaches the Court, with mala fide intention by concealing material facts, which if brought before the Court, the plaintiff would have been out of Court for having no cause of action and also in a situation that defendants brought any such fact in the notice of the Court the same can also be judiciously pondered upon while deciding an application under Order VII, Rule 11, C.P.C. because a plaintiff should not be allowed to

grind the other party into a false and frivolous litigation. The basic objective and aim of Order VII, Rule 11, C.P.C. is that an incompetent suit should be laid to rest at its inception so that no further time is allowed to be wasted over what is bound to collapse. A suit may be specifically barred by law and in such an event, the matter would come under the vivid terms of clause (d) of Rule 11, Order VII of the Code of Civil Procedure, 1908 but even in a case where a suit is not permitted by necessary implication of law in the sense that a positive prohibition can be spelt out of legal provisions, the Court has got an inherent jurisdiction to reject the plaint at any stage of trial and in such a situation formalities should be avoided to reject it, thus, Order VII, Rule 11, C.P.C. is not exhaustive. The Court in exercise of inherent jurisdiction can nip the frivolous litigation in the bud. It is the duty of the Court to thoroughly examine the plaint at the very inception so that the parties could be saved from the agony of frivolous litigation in order to save the precious time of the Court because a Court should not behave like a silent observer that a party can capture the whole system of justice for an indefinite time in order to rescue the prevailing judicial system which is already at the prime of criticism. Reliance in this regard is placed on judgment reported as Haji *Muhammad and another v. Government of the Punjab through Collector, District Kasur and another* (1994 CLC 1248).

5. Besides, it is now settled principle that limitation runs even against a void order and if for the sake of arguments, it is admitted that the petitioner did not associate the proceedings before the revenue hierarchy, he was bound to explicitly plead the date of his knowledge of alleged fraud, which is lacking in this case, so it cannot be said that here in this case the limitation is a mixed question of law and facts. Reliance is placed on judgment reported as *Muhammad Sharif and others v. MCB Bank Limited and others* (2021 SCMR 1158), wherein it has been held that:

> *'5. The law is by now settled that limitation against a void order would run from the date of knowledge which has to be explicitly*

pleaded. In the instant case, in all the objection petitions that were filed, the petitioners did not state the date when they obtained knowledge of the alleged void order. In these circumstances, the petitioners cannot legally take this stance and that too at this belated stage.'

6. In addition to the above, the learned appellate Court has rightly appreciated the ratio of judgments reported as PLD 2016 Supreme Court 872, PLD 2015 Supreme Court 212, 2011 SCMR 8, 2022 CLC 178-Lahore, PLD 2019 Lahore 717, 2019 CLC 497 and 2018 Law Notes 1256, on the subject because if the limitation is reckoned as mere a technicality, it would amount to deprive the opposite party of a favour which the law has unequivocally extended to it due to prevailing of certain circumstances.

7. The crux of the above discussion is, the reasoning recorded by both the Courts below is just in accordance with the spirit of the law on the subject and does not require any interference by this Court, as no illegality and irregularity has been committed; therefore, finding no adverse occasion in the impugned judgments and decrees, the same are maintainable, consequent whereof the instant revision petition being without any force and substance stands dismissed ***in limine***.

(Y.A.) **Civil revision dismissed.**

PLJ 2023 Lahore (Note) 4

***Present*: SHAHID BILAL HASSAN AND MUHAMMAD RAZA QURESHI, JJ.**

DEFENCE HOUSING AUTHORITY, LAHORE through Secretary Lahore--Appellant

versus

NAVEED AKRAM and others--Respondents

R.F.A. No. 1215 of 2022, heard on 10.10.2022.

Civil Procedure Code, 1908 (V of 1908)--

----O.XII R. 6--Specific Relief Act, (I of 1877), S. 42--Suit for declaration--Rectification of record--Recording of statement of defendant for decreeing suit in absence of appellant--Filing of application for decision of suit on basis of statement--Acceptance of application and suit was decreed--Unheard condemnation--Mandate of law--Challenge to--Trial Court without adhering to facts and objections raised by appellant Authority proceeded to get rid of lis sunmarily without giving right of hearing to appellant which is not mandate of law because law demands providing of fair opportunity to each and every litigant--Appellant has been condemned unheard despite the fact that many factual as well as legal objections have been raised in the written statement and written reply to the application under Order XII, Rule 6, C.P.C.--Appeal allowed.

[Para 3] A

M/s. Tariq Masood, Saad Tariq and Hassan Tariq, Advocates for Appellants.

Mian Muhammad Kashif, Advocate for Respondents No. 1, 2 & 4.

Mr. Muhammad Sarfraz Nawaz, Advocate for Respondent No. 3.

Date of hearing: 10.10.2022.

JUDGMENT

Shahid Bilal Hassan, J.--Succinctly, a suit titled *"Naveed Akram and another v. Defence Housing Authority Lahore Cantt. and others"* was instituted by a special attorney purportedly acting on behalf of the plaintiffs while claiming a declaratory decree to the effect that the plaintiffs and pro-forma defendant were the exclusive and absolute owners of 94-C with a direction to the DHA to rectify its records reflecting the plaintiffs and pro-forma defendant as exclusive and absolute owners of the suit property. The suit was contested by the present appellant/defendant, who submitted written statement by raising legal and factual objections. Allegedly, on 18.09.2018, conceding written statement signed by Naeem Akhtar (Defendant No. 4) statedly residing in Portugal at the relevant time was placed on record, signatures whereof allegedly put by him, however, were not countersigned or attested by the counselor or by any other officer officially authorized in this regard in the concerned Embassy. Subsequently the written statement dated 22.11.2018 purportedly signed by Defendants No. 2(i) and 2(ii) was also submitted with the prayer that the suit might be decreed as prayed for. On 28.01.2019, a number of issues were framed by the learned trial Court and suit was fixed for evidence of the plaintiffs. On 2.04.2019, statement on oath of Defendant No. 2(i) in absence of the appellant Authority was recorded while pacing on record certain documents stating therein that he had no objection in case the suit was decreed in favour of the plaintiffs and Defendant No. 4 as prayed for. The suit adjourned for cross- examination as well as for production of plaintiffs' evidence for 04.05.2019. On 04.05.2019, the appellant Authority filed an application under Section 151, 153 of CPC for disregarding and overlooking the above said statement got recorded by Defendant No. 2(2) but the same application was dismissed on 13.01.2020. On 09.10.2020, absolute last opportunity was granted to the plaintiffs for production of their evidence on 27.10.2010. On the said date, an application under Order XII, Rule 6, Code of Civil Procedure, 1908 was filed by the

special attorney of the plaintiffs. The appellant submitted written reply of the said application while raising a number of legal and factual objections. On 13.10.2021, the learned trial Court by accepting the said application under Order XII, Rule 6, CPC decreed the suit with the observation that the plaintiffs and Defendant No. 4 are owners of Plot No. 94-C DHA Phase-1, Lahore while directing the appellant Authority to correct its record about the said Plot, accordingly. Hence, the instant appeal.

2. Heard.

3. We have minutely scanned and gone through the record especially the written statement and written reply to the application under Order XII, Rule 6, Code of Civil Procedure, 1908, submitted by the appellant Authority and have reached to a conclusion that many legal as well as factual objections including maintainability of suit, limitation, principle of acquiescence, estoppel, waiver and laches, have been raised by the appellant/Authority. Moreover, objection of collusion inter se the plaintiffs and the Defendant No. 4 has also been agitated while submitting written reply to the application filed under Order XII, Rule 6, Code of Civil Procedure, 1908. However, the learned trial Court without adhering to the said facts and objections raised by the appellant Authority proceeded to get rid of the lis summarily without giving right of hearing to the appellant/Authority, which is not the mandate of law because law demands providing of fair opportunity to each and every litigant. The appellant/Authority has been condemned unheard despite the fact that many factual as well as legal objections have been raised in the written statement and written reply to the application under Order XII, Rule 6, C.P.C. The learned trial Court has wrongly construed the provisions of Rule 6 of Order XII, CPC, because the appellant/Authority was contesting party and it did not make any admission germane to claim of the plaintiffs. Therefore, the impugned order and decree cannot be allowed to hold field being not

sustainable in the eye of law. As such, the appeal in hand is allowed, impugned order is set aside and case is remanded to the learned trial Court with a direction to decide the application under Order XII, Rule 6, Code of Civil Procedure, 1908 after hearing the appellant/Authority and considering the objections raised in the written reply to the said application submitted by the appellant. The adversaries are directed to appear before the learned trial Court on 24.10.2022, positively.

(Y.A.) **Appeal allowed.**

PLJ 2023 Lahore (Note) 17

***Present*: SHAHID BILAL HASSAN, J.**

***Syeda* UZMA SHAHZADI--Petitioner**

versus

IJAZ ALI SHAH, etc.--Respondents

C.R. No. 55617 of 2021, decided on 15.9.2021.

Evidence--

----Even, evidence led to show and prove how, when and where offer was made and same was accepted, where-after possession was delivered, was shaky and contradictory and even petitioner could not mention date, time, place and names of witnesses in written statement which was essential and necessary to be pleaded and proved. [Para 3] B

2005 SCMR 135, 2016 SCMR 1417 & 2012 CLC 1651 *ref.*

Specific Relief Act, 1877 (I of 1877)--

----Ss. 42 & 54--Suit for declaration was decreed--Concurrent findings--Correctness of gift-deed or mutation in dispute--Validity of--Petitioner has failed to prove valid execution of gift-deed and subsequent mutation, rather it has surfaced that fraud has been committed with Respondent No. 1--Plaintiff, as petitioner has failed to bring on record any reliable evidence--Concurrent findings on facts recorded by Courts below when do not suffer from any misreading and non-reading of evidence are not open to scrutiny in revisional jurisdictions. [Para 3 & 5] A & C

2005 SCMR 135, 2016 SCMR 1417, 2012 CLC 1651, 2016 MLD 1535, 2017 SCMR 679, 2014 SCMR 1469 & 2014 SCMR 161.

Mr. Abdul Rauf, Advocate for Petitioner.

Date of hearing: 15.9.2021.

ORDER

Succinctly, the Respondent No. 1/plaintiff instituted a suit for declaration with permanent injunction against the petitioner and Respondent No. 2 for challenging the vires of registered gift-deed No. 1178/1 dated 07.05.2004 in favour of the petitioner and mutation No. 10969 dated 31.07.2007, which suit was duly contested by the petitioner and other defendant. Out of divergent pleadings of the parties, the learned trial Court framed' issues. Evidence of the parties, oral as well as documentary was recorded and the learned trial Court *vide* impugned judgment and decree dated 21.05.2018 decreed the suit in favour of the Respondent No. 1/plaintiff. The petitioner being aggrieved of the same preferred an appeal against it but the same was dismissed *vide* impugned judgment and decree dated 30.06.2021; hence, the instant revision petition. ;

2. Heard.

3. Suffice is to observe that when the validity and correctness of gift-deed or mutation in dispute was challenged, it was mandatory and essential for the petitioner, being beneficiary of the said document, to prove the valid execution of the same in her favour, but when the evidence produced by the parties is seen, it appears that the petitioner has failed to prove the valid execution of gift-deed and subsequent mutation, rather it has surfaced that fraud has been committed with the Respondent No. 1-plaintiff, as the petitioner has failed to bring on record any reliable evidence. Even, evidence led to show and prove how, when and where offer was made and the same was accepted, where-after possession was delivered, was shaky and contradictory and even the petitioner could not mention the date, time, place and names of witnesses in the written statement which was essential and necessary to be pleaded and proved; reliance is placed on *Mst. Kulsoom Bibi*

and another v. Muhammad Arif and others (2005 SCMR 135), *Peer Bakhsh through LRs and others v. Mst. Khanzadi and others* (2016 SCMR 1417), *Mst. Mughlani Bibi and others v. Muhammad Mansha and others* (2012 CLC 1651-Lahore) and *Allah Wassaya v. Mst. Halima Mai and 12 others* 2016 MLD 1535-Lahore (Multan Bench). Even the sub-registrar, scribe and registry moharrir and attesting witnesses-of alleged gift-deed were not produced, rather the same were produced by the Respondent No. 1 as P.Ws. who have negated the making of offer, acceptance and delivery, of possession in their presence, so the requirement of Article 17 and 79 of the Qanun-e-Shahadat Order, 1984 were also not fulfilled and best available evidence has been withheld, so the adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order 1984 goes against the petitioner. All these facts go to evince that the Respondent No. 1-plaintiff has been deprived of his right, which factura has been discussed by the learned Courts below in an elaborative way while keeping in view the evidence on record as well as judgments of Apex Court and same does not need any further deliberation and discussion.

4. In view of the above, when impugned judgment and evidence of the parties are put in juxtaposition, it gleans out that evidence of the parties has minutely been scanned and appraised/appreciated while recording the judgments and decrees by the learned Courts below; no misreading and non-reading of evidence has surfaced.

5. For the foregoing reasons, while placing reliance on the judgment *supra* as well as judgments reported as *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (2017 SCMR 679), *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469) and *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), wherein it has been held that concurrent findings on facts

recorded by the learned Courts below when do not suffer from any misreading and non-reading of evidence are not open to scrutiny in revisional jurisdictions, the instant civil revision being devoid of any force and substance stands dismissed ***in limine***.

(A.A.K.) **Revision dismissed.**

PLJ 2023 Lahore (Note) 20

***Present*: SHAHID BILAL HASSAN, J.**

***Chaudhry* SHAUKAT ALI through Special Attorney--Appellant**

versus

IRSHAD AHMAD--Respondent

R.F.A. No. 1544 of 2014, heard on 3.10.2022.

Civil Procedure Code, 1908 (V of 1908)--

----O.XXXVII--Suit for recovery was dismissed--Receiving of tele cards--Non-deposit of payment of tele cards by respondent--Issuance of cheques in name of attorney instead of appellant--Suit was filed by attorney who was no nexus with cheque—Cheques were dishonoured—No *locus standi*--No cause of action--Challenge to--Trial Court has appreciated and construed law on subject in an apt and judicious manner because cheque in dispute was issued in name of attorney and not in name of appellant and suit has been instituted by appellant through attorney who has no nexus with cheque--No evidence with regards to alleged liability of the respondent, in lieu of which the cheque in dispute was issued, has been brought on record--Appellant has no *locus standi* and cause of action to institute suit and same has rightly been dismissed by trial Court--Appeal dismissed.

[Para 3] A, B & D

Civil Procedure Code, 1908 (V of 1908)--

----O.XXXVII, Rr. 1 & 2--Filing of suit--A suit under Order XXXVII, Rules 1 & 2, Code of Civil Procedure, 1908 can only be brought by a person in whose favour a negotiable instrument is executed or issued. [Para 3] C

Mr. Muhammad Ahsan Hussain, Advocate for Appellants.

M/s. Rana Zia Abdul Rehman, Rana Muhammad Usman, Rana Fahad Zia, Nayab Karim Gondal and Shakeel Gondal, Advocates for Respondents.

Date of hearing: 3.10.2022.

JUDGMENT

Brief facts, giving rise to the instant appeal are as such that the present appellant namely Chaudhry Shaukat Ali is dealing in business of sale and purchase of Tele Cards in France; that the respondent used to deal in the business of the appellant but in the month of January, 2007, the respondent

along with his friend Muhammad Aslam received Tele Cards from the appellant and promised to make the payment amounting to 712,000 Euros but failed to deposit the amount and only paid 15,000 Euros in France out of total amount *qua* the liability upon him; that the respondent assured and promised to pay the amount according to his liability. Then the respondents proceeded to Pakistan and promised to pay the amount to Ch. Muhammad Ali (real brother of the appellant and to one Farooq Khalid Tabassum (friend of appellant) on behalf of the appellant. The respondent returned to Pakistan and issued the cheques to Ch. Muhammad Ali and Farooq Khalid Tabassum on 06.06.2007 to be drawn from the account of the respondent. The cheque in question, subject matter of the instant case, Rs. 15,000,000/- was deposited by Farooq Khalid Tabassum in his account but was dishonoured, therefore, an FIR was got lodged against the respondent, who was arrested but later on absconded. The respondent after seeking leave to appear and defend the suit contested the suit by submitting written statement. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned trial Court, on conclusion of the trial, *vide* impugned judgment and decree dated 11.09.2014 dismissed suit of the appellant; hence, the instant appeal.

2. Heard.

3. When the impugned judgment and evidence brought on record are considered and appreciated, it appears that the learned trial Court has appreciated and construed law on the subject in an apt and judicious manner because the cheque in dispute was issued in the name of Farooq Khalid Tabassum and not in the name of Ch. Shaukat Ali and the suit has been instituted by Ch. Shaukat Ali through attorney Farooq Khalid Tabassum, who has no nexus with the cheque in question, as no evidence with regards to alleged liability of the respondent, in lieu of which the cheque in dispute was issued, has been brought on record. A suit under Order XXXVII, Rules 1 & 2, Code of Civil Procedure, 1908 can only be brought by a person in whose favour a negotiable instrument is executed or issued but in the present case the position is not as such, as discussed above. Therefore, the plaintiff/ appellant has no *locus standi* and cause of action to institute the suit and the same has rightly been dismissed by the learned trial Court.

4. For the foregoing reasons, the appeal in hand comes to naught and the same is hereby dismissed. No order as to the costs.

(Y.A.) **Appeal dismissed.**

PLJ 2023 Lahore (Note) 52

***Present*: SHAHID BILAL HASSAN, J.**

MUHAMMAD RAMZAN--Petitioner

versus

PROVINCE OF PUNJAB through DOR, Toba Tek Singh, etc.--Respondents

C.R. No. 3184 of 2011, decided on 27.1.2022.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Suit for declaration--Dismissed--Concurrent findings--Application for demarcation of *ihata* was not produced on record--Allotment of *ihata*--Mutation of *ihata*--Petitioner was failed to fulfilled conditions of allotment order--Challenge to--Oral assertion--Pivotal document for disposal of instant case was application allegedly moved by petitioner for demarcation of his portion of *ihata*, which has not been produced on record and petitioner even did not move any application seeking production of said application from concerned quarters--Oral assertion is not sufficient to prove stance of petitioner--There is nothing on record to prove that petitioner fulfilled conditions of allotment order as nothing as such has been brought on record--Concurrent findings on facts cannot be disturbed when same do not suffer from misreading and non-reading of evidence, howsoever erroneous in exercise of revisional--Petition dismissed. [Para 3] A, B & C

2017 SCMR 679, 2014 SCMR 1469 & 2014 SCMR 161 *ref.*

Malik Saleem Iqbal Awan, Advocate for Petitioner.

Mr. Tahrim Iqbal Butt, Assistant Advocate General Punjab.

Mian Tariq Hussain, Advocate for Respondent No. 5.

Respondent No. 4 ex-parte.

Date of hearing: 27.1.2022.

ORDER

C.M. No. 1-C of 2017

Through this application, the applicant seeks restoration of the captioned revision petition, dismissed for non-prosecution on 18.05.2017. Relying upon the contents of the application supported by an affidavit the same is allowed subject to all just and legal exceptions. Office is directed to fix the revision petition for today.

Main Petition

Tersely, the petitioner instituted a suit for declaration challenging the vires of Mutation No. 39 dated 28.02.1990 regarding allotment of disputed Ihata No. 21 measuring 10 marlas situated in Chak No. 668/9 GB, Tehsil Kamalia, District Toba Tek Singh. The suit was contested by the respondents while submitting written statement. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. The learned trial Court *vide* impugned judgment and decree dated 22.02.2011 dismissed suit of the petitioner, who preferred an appeal but the

same was also dismissed *vide* impugned judgment and decree dated 02.07.2011; hence, the instant revision petition.

2. Heard.

3. Considering the arguments and perusing the record, made available, as well as going through the impugned judgments and decrees, it is observed that the pivotal document for disposal of the instant case was application dated 17.08.1985 allegedly moved by the petitioner for demarcation of his portion of *Ihata* a, which has not been produced on record and the petitioner even did not move any application seeking production of the said application from the concerned quarters. In this view of the matter, mere oral assertion is not sufficient to prove the stance of the petitioner. Moreover, there is nothing on record to prove that the petitioner fulfilled the conditions of allotment order as nothing as such has been brought on record. In this view of the matter, the learned Courts below have rightly adjudicated upon the matter in hand by appreciating evidence in a minute manner and have reached to a just conclusion No illegality and irregularity is apparent on record warranting interference by this Court in exercise of revisional jurisdiction. As such concurrent findings on facts cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction; reliance is placed on *Muhammad Farid Khan v, Muhammad Ibrahim, etc.* (2017 SCMR 679), *Mst. Zaitoon Begum vs. Nazar Hussain and another* (2014 SCMR 1469) and *Cantonment Board through Executive Officer, Cantt. Board, Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161).

4. For the foregoing reasons and while placing reliance on the judgments supra the civil revision in hand being devoid of any force and substance stands dismissed.

(Y.A.) **Petition dismissed.**

PLJ 2023 Lahore (Note) 56

***Present*: SHAHID BILAL HASSAN, J.**

***Haji* MUHAMMAD AKRAM (deceased) through legal heirs--Appellants/Plaintiffs**

versus

YASMEEN ANWAR and others—Respondents/Defendants

R.S.A. No. 106 of 2014, decided on 27.9.2022.

Specific Relief Act, 1877 (I of 1877)--

----S. 12--Suit for specific performance--Dismissed--Appeal--Partially allowed--Sale agreement--Inconsistency between findings of trial and appellate Courts--No evidence regarding payment of remaining sale consideration--Entitlement for recovery--Challenge to--Appellant has not showed his readiness and willingness as well as *bona fide* to perform his part of agreement by depositing balance amount with Court at time of institution of suit or even during pendency of suit--It is a settled principle by now that in case of inconsistency between findings of trial Court and Appellate Court, findings of latter must be given preference in absence of any cogent reason to contrary--Appellate Court has rightly exercised vested jurisdiction and has not committed any illegality and irregularity while passing impugned judgment and decree--Appeal dismissed.

[Para 4, 5 & 6] B, C & D

2015 SCMR 1, PLD 1969 SC 617 and 2013 SCMR 1300 *ref.*

Qanun-e-Shahadat Order, 1984 (10 of 1984)--

----Art. 17(2)(a)--Attestation of document--When two persons enter into any agreement pertaining to financial or future obligations, instrument should be attested by two men or one man and two women, so that one may remind the other. [Para 4] A

Mr. Hamid Iftikhar Pannu, Advocate for Appellants.

Mian Tariq Hussain, Advocate for Respondents.

Date of hearing: 27.9.2022.

ORDER

Through this single order, the captioned appeal and connected C.R. No. 1210 of 2017, wherein one and the same judgment and decree passed by the learned appellate Court has been called into question, are being disposed of.

2. Nub of the litigation coming to this stage is that the appellant instituted a suit for specific performance of agreement to sell alongwith permanent injunction against the present respondents. The respondents contested the suit by filing written statement. Out of divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties, in pro and contra, was recorded; The learned trial Court, on conclusion of trial, dismissed the suit *vide* impugned judgment and decree dated 20.06.2011. The appellant being aggrieved of the said judgment and decree preferred an appeal and the learned appellate Court *vide* impugned judgment and decree dated 03.10.2013 partly allowed the appeal and while setting aside the judgment and decree passed by learned trial Court, decreed the suit in favour of the appellant-plaintiff to the extent of Rs. 260,000/-; hence, the instant appeal as well as connected C.R.No. 1210of2017.

3. Heard.

4. Article 17(2)(a) of the Qanun-e-Shahadat Order, 1984 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;* meaning thereby when two persons enter into any agreement pertaining to financial or future obligations, the instrument should be attested by two men or one man and two women, so that one may remind the other.

Article 79 of the Qanun-e-Shahadat Order, 1984 enumerates the procedure of proof of execution of document required by law to be attested; for ready reference the said provision of law is reproduced here:

> *'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.'*

Now, when the present case is considered, it appears that the appellant has produced the marginal witnesses of the agreement to sell Ex. P1 and receipt Ex.P2, so as to prove their valid, execution. All the P.Ws. produced by the appellant have corroborated and supported the stance of the appellant with regards to agreement to sell and receipt of Rs. 260,000/-whereby no evidence has been led by the appellant germane to payment of remaining sale consideration Rs. 1,005,000/-. As against this, the respondents have not pleaded the elements of fraud and have not produced any evidence in support of their stance rather D.W. 1, the solitary witness, deposed that she was not accompanying her husband at the time of execution of alleged agreement to sell. In this view of the matter, the learned appellate Court after evaluating evidence on record in a minute manner has reached to a just conclusion that the appellant is entitled to recover Rs. 260,000/-, paid by him, because the appellant has not showed his readiness and willingness as well as *bona fide* to perform his part of agreement by depositing the balance amount with the Court at the time of institution of the suit or even during pendency of the suit.

5. Apart from the above, it is a settled principle by now that in case of inconsistency between the findings of the learned trial Court and the learned Appellate Court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary. Reliance is placed on *Amjad Ikram v. Mst. Asiya Kausar and 2 others* (2015 SCMR 1), -*Madan Gopal*

and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) and *Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others* (2013 SCMR 1300).

6. In view of the above, the learned appellate Court has rightly exercised vested jurisdiction and has not committed any illegality and irregularity while passing the impugned judgment and decree, warranting interference by this Court at this stage. Resultantly, while placing reliance on the judgments supra, the appeal in hand as well as connected civil revision bearing No. 1210 of 2012 having no force and substance stand dismissed. No order as to the costs.

(Y.A.) **Appeal dismissed.**

PLJ 2023 Lahore (Note) 60

***Present*: SHAHID BILAL HASSAN, J.**

FAYYAZ HUSSAIN BUTT--Appellant

versus

SONY CORPORATION and others--Respondents

F.A.O. No. 107 of 2015, decided on 27.10.2015.

Punjab Consumer Protection Act, 2005 (II of 2005)--

----Ss. 25 & 35--Filing of complaint--Dismissed for non-prosecution--Complaint was fixed for written reply of application submitted by respondent's side--Application for restoration of complaint was declined--Interlocutory matter--Main case was not fixed for hearing when complaint was dismissed--Case was being adjourned for submission of reply of an application which is an interlocutory matter and it can safely be said that on date when impugned order was passed, dismissing complaint of appellant, main case was not fixed for hearing, rather case was fixed for hearing of an interlocutory application--It is by now a settled principle of law that main case of a person cannot be dismissed on account of non prosecution, if main case is not fixed for hearing--Courts have always encouraged and vigilantly safeguarded verdicts between parties on merits except in exceptional cases--Impugned orders of Court below being arbitrary and against mandate of law cannot hold field, as same suffer from material illegality and irregularity--Appeal allowed. [Para 6, 8] A, B, C & D

1992 SCMR 707, 2012 SCMR 656, PLD 1991 SC 1104 &
1997 CLC 1080 *ref.*

M/s. Sheikh Muhammad Umar & Fayyaz Haleem Butt, Advocates for Appellants.

Syed Adeel Abbas, Advocate for Respondents.

Date of hearing: 27.10.2015.

JUDGMENT

Orders dated 22.01.2014 and 06.02.2015 passed by the learned Presiding Officer District Consumer Court, Lahore have been called into question by the appellant through the instant appeal, whereby the complaint of the appellant under Section 25 of the Punjab Consumer Protection Act, 2005 was dismissed for non prosecution and application for restoration of the said complaint was also declined through the impugned orders respectively.

2. Factually speaking, the appellant filed a complaint under Section 25 of the Punjab Consumer Protection Act, 2005 against the respondents before the learned Judge Consumer Court at Lahore on 20.09.2012. While entertaining the said complaint, notices were issued to the respondents, who appeared and defended the complaint. During the course of proceedings, an application under Section 35 of the Punjab Consumer Protection Act, 2005 was filed by the respondents' side on 03.10.2013. While entertaining the said application, the appellant was directed to file written reply to the same. On 16.12.2013, the complaint was adjourned for filing of reply to the application by the appellant side for 22.01.2014, on which date the appellant's complaint was dismissed for non prosecution. On 21.02.2014, an application for restoration was filed by the appellant before the said learned Court, which was dismissed on 06.02.2015. Both the orders have been called into question through the instant appeal.

3. Learned counsel for the appellant has submitted that both the impugned orders passed by the learned consumer Court are against law and facts of the appellant's case; that the impugned orders have been passed against the appellant without perusal of the record and are totally contrary to the settled provision of law on the subject; that the case was fixed for submission of reply to the application filed by the respondents' side and resultantly proceedings in this regard cannot be termed as date of hearing, therefore, the impugned order dismissing the complaint of the appellant is

without jurisdiction; that the order of the dismissal of the appellant's application is also nullity in the eyes of law. Lastly prays for acceptance of this appeal and restoration of appellant's complaint for a verdict on merits.

4. On the contrary, learned counsel for the respondents while supporting the impugned orders, has prayed for dismissal of this application. Relies on *"Muhammad Siddique and 2 others vs. Khan Amir and another"* (2010 MLD 674).

5. Heard.

6. Admittedly, on 22.01.2014, the complaint of the appellant was fixed for submission of written reply to the application under Section 35 of the Punjab Consumer Protection Act 2005, filed by the respondents' side. On the said date, since no body appeared from the appellant's side, so, the complaint was dismissed for non prosecution. According to the record made available, application under Section 35 of the Punjab Consumer Protection Act, 2005 was filed by the respondents' side on 03.10.2013 and the case was adjourned for reply to the said application for 24.10.2013. On 24.10.2013, the complaint was adjourned to 27.11.2013, on which date lawyers were on strike and the case was adjourned to 16.12.2013. On 16.12.2013, on the request of clerk of the counsel of appellant, the complaint was adjourned for submission of written reply on behalf of the appellant complainant for 22.01.2014, on which date the complaint of the appellant was dismissed for non prosecution. A perusal of the order sheet made available shows that the case was being adjourned for submission of reply of an application which is an interlocutory matter and it can safely be said that on the date when the impugned order was passed, dismissing the complaint of the appellant, the main case was not fixed for hearing, rather the case was fixed for hearing of an interlocutory application *i.e.* application under Section 35 of the Punjab Consumer Protection Act, 2005. It is by now a settled principle of law that the main suit/case of a person cannot be dismissed on account of non

prosecution, if the main case is not fixed for hearing. Hearing of a case does not include an interlocutory application and even otherwise for the sake of arguments filing of written statement/written reply, as well. In addition to this, findings arrived at by the learned Court on the application cannot find support from this Court, as the application of the appellant was within limitation and a sufficient ground was taken up by the appellant, which was not considered by the learned Court within the parameters of settled law on the subject. The Courts have always encouraged and vigilantly safeguarded verdicts between the parties on merits except in exceptional cases. Guidance in this regard is taken from *"Hashim Khan. vs. National Bank of Pakistan"* (1992 SCMR 707), *"Mst. Suraya Parveen. vs. Mst. Rukhsana Hanif and others"* (2012 SCMR 656), *"Muhammad Hussain. vs. Allah Dad and 13 others"* (PLD 1991 Supreme Court 1104) and *"Muhammad Afzal vs. Small Business Finance Corporation and 4 others"* (1997 CLC 1080).

7. With utmost respect, the case law referred to by the learned counsel for the respondents is of no help to him in the peculiar and given circumstances of this case.

8. In light of what has been stated above, the impugned orders of the learned Court below being arbitrary and against the mandate of law cannot hold field, as the same suffer from material illegality and irregularity. Resultantly, this appeal is allowed and the orders dated 22.01.2014 & 06.02.2015 passed by the learned Court are set aside and reversed and complaint of the appellant shall be deemed to be pending, which shall be decided by the learned consumer Court strictly in accordance with law on merits. No order as to costs.

(Y.A.) **Appeal allowed.**

PLJ 2023 Lahore (Note) 75

Present: **SHAHID BILAL HASSAN, J.**

SALABAT (deceased) through L.Rs. and others--Appellants

versus

HALEEMA and others--Respondents

C.R. No. 778 of 2014, heard on 10.1.2023.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Suit for declaration--Dismissed--Concurrent findings--Alienation of land--Element of fraud was not proved by petitioners--Disputed mutation was not challenged--Limitation--Challenge to--No element of fraud could have been proved by petitioners, which otherwise was necessary to be pleaded and proved specifically, because mere assertion of fraud and misrepresentation is not sufficient but same has to be proved by person who asserts as such--It has been admitted by petitioner's witnesses that since attestation of disputed mutation in favour of Taja, he was in possession of disputed land and after Taja, respondents are in possession of suit land as owners--Suit has rightly been adjudged to be barred by limitation by Courts below--Concurrent findings on facts cannot be disturbed when same do not suffer from misreading and non-reading of evidence--Revision petition dismissed. [Para 3 & 4] A, B, C & D

2002 SCMR 1330, 2010 SCMR 1630, 2014 SCMR 1469, 2017 SCMR 679 & PLD 2022 SC 13 *ref.*

Malik Amiad Pervez. Advocate for Petitioners.

Miss Gulzar Butt, Advocate for Respondents No. 1 (a,b,c), 2, 3, 6, 7, 8, 17 to 22, 27 to 30 and 32.

Nemo for Respondents No. 1 (d, e), 4, 5, 9 to 16, 23 to 26, 31, 33 to 46 ex parte on 24.11.2022.

Date of hearing: 10.1.2023.

JUDGMENT

Precisely, predecessor in interest of the present petitioners namely Doli and others instituted a suit for declaration alleging therein that plaintiffs

are legal heirs of Muhammad Ramzan and defendants are legal heirs of Taja. Muhammad Ramzan died issueless in the year 1918 while leaving his sisters *Mst.* Sultan and *Mst.* Ayesha as heirs and Mutation No. 93 dated 25.07.1918 was sanctioned in their favour. Afterwards *Mst.* Sulhan married and land of her share was transferred in favour of her sister namely *Mst.* Ayesha *vide* Mutation No. 98 dated 01.08.1922. After that, *Mst.* Ayesha married and the entire land was alienated/reverted in favour of Taja *vide* Mutation No. 110 dated 17.11.1925 and subsequently the same was procured by the defendants, which have been challenged claiming the same to be illegal, against law and facts, null, void and inoperative upon the rights of the plaintiffs/petitioners. The suit was contested vehemently by the respondents/defendants while submitting written statement. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties was recorded. On conclusion of trial, the learned trial Court *vide* impugned judgment and decree dated 28.04.2010 dismissed suit of the petitioners/plaintiffs. The petitioners being aggrieved preferred an appeal and the learned appellate Court *vide* impugned judgment and decree dated 07.02.2014 dismissed the appeal; hence, the instant revision petition.

2. Heard.

3. No element of fraud could have been proved by the petitioners, which otherwise was necessary to be pleaded and proved specifically, because mere assertion of fraud and misrepresentation is not sufficient but the same has to be proved by the person who asserts as such. Order VI, Rule 4 of the Code of Civil Procedure, 1908 provides that, *'in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items necessary) shall be stated in the pleadings.*' It has been admitted by the petitioners' witnesses that since the attestation of disputed mutation in favour of Taja, he was in possession of the disputed land and after Taja, the respondents/defendants are in possession of the suit

land as owners. Apart from the above, the immediate effectees namely *Mst.* Sulhan and *Mst.* Ayesha, during their life time did not challenge the disputed mutation, sanctioned in favour of Taja, predecessor in interest of the petitioners rather P.W.3 namely Ashiq Ali deposed that it is correct that mutations in dispute in favour of Taja were sanctioned by the then Revenue Officers after personal attendance/appearance of Sulhan and Ayesha. When the position is as such, the petitioners being successors have no locus standi to do so as has been held in *Abdul Haq and another v. Mst. Surrya Besum and others* (2002 SCMR 1330), wherein it was held:

> *"Atta Muhammad was deprived of right to inherit the property as a consequence of mutation in dispute but he did not challenge the same during his lifetime. The petitioners claimed the property through Atta Muhammad as his heirs who filed the suit as late in 1979 about nine years after sanction of mutation which had already been given effect to in the record of rights. The petitioners, therefore, had no locus standi to challenge the mutation independently, for Atta Muhammad through whom they claimed inheritance himself had not challenged the same during his lifetime."*

The said judgment was affirmed and followed in *Muhammad Rustam and another v. Mst. Makhan Jan and others* (2013 SCMR 299) and was relied by this Court in *Ghulam Sarwar and others v. Habib Bukhsh and others* (PLJ 2016 Lahore 124). Moreover, keeping in view the peculiar facts and circumstances of the case in hand, the suit has rightly been adjudged to be barred by limitation by the learned Courts below.

4. In addition to the above, the concurrent findings on facts cannot be disturbed when the same do not suffer from misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction; reliance is placed on *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469), *Cantonment Board throueh Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (2017 SCMR 679), *Muhammad*

Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and *Mst. Zarsheda v. Nobat Khan* (PLD 2022 Supreme Court 21) wherein it has been held:

> *"There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This Court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage."*

5. Pursuant to the above, the revision petition in hand being without any force and substance, stands dismissed. No order as to the costs.

(Y.A.) **Revision Petition dismissed.**

PLJ 2023 Lahore (Note) 90

***Present*: SHAHID BILAL HASSAN, J.**

***Mst.* KAUSAR PERVEEN--Petitioner**

versus

ADDITIONAL DISTRICT JUDGE, etc.--Respondents

W.P. No. 28598 of 2017, heard on 1.11.2022.

Family Court Act, 1964 (XXXV of 1964)--

----S. 14--Constitution of Pakistan, 1973, Art. 199--Suit for recovery of dowry articles, gold ornaments and buffalo--Partially decreed to extent of dowry articles--Appeal--Dismissed--Principle of depreciation--No cogent and convincing evidence was produced by petitioner--Challenge to--Applying principle of depreciation, Courts below have rightly fixed alternate price of dowry articles--Findings of Courts below to this extent do not need any interference, thus same are upheld--To prove her claim, petitioner could not produce any cogent and convincing evidence by producing receipt of gold ornaments--Moreover, giving of buffalo by parents of petitioner at time of her marriage was also not proved--The Courts below have rightly discarded these claims of present petitioner--No jurisdictional defect or legal infirmity in impugned judgments and decrees passed by Courts below warranting interference by this Court, in exercise of extraordinary constitutional jurisdiction--Petition dismissed. [Para 4, 5 & 6] A, B & C

Mr. Mushtaq Ahmad Dhoon, Advocate for Petitioner.

Ex parte against the Respondents No. 3 to 6 vide order dated, 23.11.2021.

Date of hearing: 1.11.2022.

JUDGMENT

Precisely, the present petitioner instituted a suit for recovery of dowry articles, gold ornaments and buffalo against the Respondents No. 3 to 6, which was duly contested by them while submitting written statement. Pre-trial reconciliation between the parties ended in smoke. Divergence in pleadings of the parties was summed up into issues. Thereafter, the Respondents No. 3 to 6 were proceeded against exparte *vide* order dated 28.06.2016. The present petitioner produced her oral as well as documentary evidence. The learned Judge Family Court *vide* impugned judgment and decrees dated 27.09.2016 partially decreed the suit of present petitioner and she was held entitled to get recover amount of Rs. 1,50,000/-as alternate value of the dowry articles from the Respondent No. 3 only. The claim of petitioner regarding recovery of gold ornaments and buffalo was dismissed. Being aggrieved of the said judgment and decree, the present petitioner preferred an appeal before the learned Appellate Court but the same was dismissed *vide* impugned judgment and decree dated 20.03.2017 passed by the learned Addl. District Judge, Depalpur. Hence, the instant constitutional petition.

2. Respondents No. 3 to 6 did not put in appearance to defend the instant constitutional petition despite publication of Court notice in the newspaper, therefore, *vide* order dated 23.11.2021, they were proceeded against exparte.

3. Arguments of learned counsel for the petitioner have been heard. Record perused.

4. After hearing arguments and going through the impugned judgments and decrees as well as evidence led by the petitioner, it appears

that the learned Courts below have rightly adjudicated upon the matter. The stance of the present petitioner is that she was given dowry articles along with gold ornaments etc total valuing Rs. 7,02510/- at the time of her marriage, whereas in written statement the Respondents No. 3 to 6 has taken the stance that marriage between the parties was a simple marriage and only ordinary clothes etc. were given to the petitioner at the time of marriage. It was further contended that Respondent No. 3 remained settled in the house of parents of petitioner, where she took all the household articles. It is custom in our society that parents give dowry articles to their daughters at the time of their marriages according to their financial status. Admittedly marital bond between the parties came into existence on 15.12.2002, which ended in the year 2014. Keeping in view the span of living of the petitioner in the house of Respondent No. 3 and utilization of the articles etc. which are of daily use and perishable while applying principle of depreciation, the learned Courts below have rightly fixed the alternate price of dowry articles at the rate of Rs. 1,50,000/-. Findings of learned Courts below to this extent do not need any interference, thus the same are upheld.

5. So far as the claim of present petitioner for recovery of gold ornaments and buffalo is concerned, it is observed that in our society gold ornaments are usually kept by women folk, which are with the petitioner being personal belongings. However, to prove her claim, she could not produce any cogent and convincing evidence by producing receipt of gold ornaments. Moreover, giving of buffalo by the parents of petitioner at the time of her marriage was also not proved. The learned Courts below have rightly discarded these claims of the present petitioner.

6. For the foregoing reasons, there appears no jurisdictional defect or legal infirmity in the impugned judgments and decrees passed by the learned

Courts below warranting interference by this Court, in exercise of extraordinary constitutional jurisdiction. Resultantly, the writ petition in hand being devoid of any force and substance stands **dismissed.**

(Y.A.) **Petition dismissed.**

PLJ 2023 Lahore (Note) 110

***Present*: SHAHID BILAL HASSAN AND SAFDAR SALEEM SHAHID, JJ.**

***Ch.* FIAZ-UR-REHMAN GOHITA--Appellant**

versus

AHMAD AWAIS, ADVOCATE GENERAL, PUNJAB etc.--Respondents

I.C.A. No. 30133 of 2023, decided on 23.5.2023.

Contempt of Court Ordinance, 2003--

----S. 3--Petition for initiation of contempt proceedings--Disposed of--Appellant was contesting elections of DBA--Writ petition for verification of degrees--Disposed of with direction to A.G. for redressal of grievance of appellant--Order was complied with by Respondent No. 1--Direction to appellant for deposit of degree verification fee--Order of Respondent No. 1 was not challengable--Maintainability--It is, evident from order of Respondent No. 1 had complied with order dated 22.12.2022, thus there was no justification of moving contempt petition by appellant against Respondent No. 1--Instant Intra Court Appeal is not maintainable because bare reading of order does not indicate that it was an adverse order *qua* appellant--Even otherwise, order of Respondent No. 1 was not challengeable through contempt petition--The superior Courts of country have also depreciated tendency of challenging every order being not adverse to a person challenging same in order to minimize trend of multiplicity of litigation--Order impugned was not an adverse order to appellant, as such that order was not assailable in appeal--Appeal dismissed. [Para 5] A, B & C

PLD 2022 Sindh 135, PLD 1979 SC 912 & AIR 2006 SC 2190 *ref.*

Appellant in Person.

Mr. Tahrim Iqbal Butt, Assistant Advocate General, Punjab.

Mr. Javed Imran Ranjha, Legal Advisor Punjab Bar Council.

Date of hearing: 23.5.2023.

ORDER

The appellant has filed the instant Intra Court Appeal against the order dated 12.4.2023 passed by learned Single Judge in Chambers whereby the Crl. Org. No. 999/2023 filed by the appellant for initiation of contempt proceedings for non-compliance of order dated 22.12.2022 passed by this Court in Writ Petition No. 81768 of 2022, has been disposed of.

2. Heard.

3. Brief facts of the case are that initially the appellant filed Writ Petition No. 81768 of 2022 contending therein that he was desirous of contesting election for District Bar Association, Kasur for the Year 2023-24. He, therefore, has the anxiety that several candidates have not got their degrees verified to which he sought to be verified before acceptance of nomination papers, therefore, in this regard, he sought direction to Respondent No. 1-Advocate General, Punjab, Lahore being Chairman Punjab Bar Council to get the degrees of the candidates verified. The said writ petition was, however, disposed of by the learned Single Judge in Chambers, *vide* order dated 22.12.2022, with a direction to Respondent No. 1 to look into the grievance of the appellant and decide the matter in accordance with law. Afterwards, the appellant filed a contempt petition (Crl. Org. No. 999/2023) on 9.1.2023 with the prayer that proceedings may be initiated against Respondent No. 1 for not implementing the order dated 22.12.2022 in Writ Petition No. 81768 of 2022 which was disposed of, *vide* order dated 12.4.2023 with the observation that the order of the Court had been complied with, hence there was no need to further proceed with the contempt petition.

4. Heard.

5. It is evident from the record that after the matter was referred to Respondent No. 1 by this Court, he decided the same, *vide* order date 31.12.2022, allowing the application of the appellant with a direction to the appellant to deposit the verification fee of testimonials of all the contesting candidates in election of District Bar Association, Kasur for the Year 2023-24 and directed the concerned office to do the needful after receiving testimonial verification fee from the appellant, strictly in accordance with law. This all was done by Respondent No. 1 because of paucity of funds with the Punjab Bar Council under the said head. It reveals from the record that the order dated 22.12.2022 only passes on a direction to Respondent No. 1 to look into the grievance of the appellant and decide the matter in accordance with law. It is, therefore, evident from the order of Respondent No. 1 had complied with the order dated 22.12.2022, thus there was no justification of moving the contempt petition by the appellant against Respondent No. 1 alleging therein that Respondent No. 1 did not implement the said order. In addition to this, it is suffice to say that the instant Intra Court Appeal is also not maintainable because bare reading of order dated 12.4.2023 does not indicate that it was an adverse order *qua* the appellant. Even otherwise, the order of Respondent No. 1 dated 31.12.2022 was not challengeable through contempt petition and more particularly the order dated 12.4.2023 passed by learned Single Judge in Chambers in contempt petition was also not appealable through the instant Intra Court Appeal, as it only contained that the order of learned Single Judge had been complied with and that there was no need to further proceed with the contempt petition. Besides, the Court itself had to see if its order was implemented or not. The superior Courts of the country have also depreciated the tendency of challenging every order being not adverse to a person challenging the same in order to minimize the trend of multiplicity of litigation. Since the order impugned was not an adverse order to the appellant, as such that order was not assailable in appeal. Reliance is placed on the case reported as *Khan and*

Brothers (ZKB) vs. Province Of Sindh through Secretary Investment Department. Karachi and 3 others (PLD 2022 Sindh 135), *West Pakistan Water & Power Development Authority through its Chairman vs Chairman, National Industrial Relations Commission* (PLD 1979 SC 912), *Midnapore Peoples Co-op Bank Ltd and others vs. Chunilal Nanda and others* (AIR 2006 SC 2190).

6. In view of what has been stated above, the instant Intra Court Appeal is not maintainable, thus the same having no merit and substance is dismissed accordingly.

(Y.A.) **ICA dismissed.**

PLJ 2023 Lahore (Note) 105

***Present*: SHAHID BILAL HASSAN, J.**

***Dr.* MUHAMMAD AKRAM--Applicant**

versus

PRESIDING OFFICER, DISTRICT CONSUMER COURT, GUJRANWALA, etc.--Respondents

F.A.O. No. 473 of 2013, decided on 8.2.2023.

Civil Procedure Code, 1908 (V of 1908)--

----S. 96--Limitation Act, 1908 (IX of 1908), Art. 5--Appeal--Dismissed for non-prosecution--Application for restoration fixation of appeal--Explanation of each & every day delay--Delay should be condoned on plausible reasons--Valuable rights of rival party--Delay of each and every day has to, be explained by putting forward plausible and sound justification which is lacking in this case, because after passage of prescribed period of limitation provided under law for challenging any order, decree or judgment, valuable rights accrue in favour of rival party and same cannot be undone mere on basis of bald and ambiguous pleas and assert as well as grounds--Law favours vigilant and not indolent; even otherwise delay creates rights in favour of opponent party--Delay of each day was to be explained by defaulting party to satisfaction of Court, which could not be condoned lightly or as of routine, as such arbitrary exercise of discretion would cause prejudice to interest of opposite party"--Therefore, this Court is not inclined to condone delay on such a flimsy grounds--Disposed of accordingly. [Para 2] A, B & C

Ref. 2010 SCMR 1899, 2012 SCMR 136, 2013 SCMR 1419.

Mr. Muhammad Tahir Younis, Advocate for Applicant.

Mr. Javaid Iqbal Malik, Advocate for the Respondent No. 2.

Date of hearing: 8.2.2023.

ORDER

The applicant through the instant applications seeks restoration and re-admission of captioned appeal, dismissed for non-prosecution on 28.09.2020 by condoning delay in filing the application for restoration, on the ground that the applicant did not receive any message or intimation regarding fixation of the captioned appeal from the office of this Court in the year 2020; therefore, the non-appearance of the applicant and his counsel was neither intentional nor willful; therefore, the applications in hand may be allowed and the appeal may be restored for its disposal on merits in accordance with law.

2. Heard.

3. When a thing is to be done in a manner provided under law, the same should be done in that manner and not otherwise. Admittedly, the appeal was dismissed for want of prosecution on 28.09.2020 and the applicant filed the instant application seeking its restoration on 09.03.2021, with a plea that no notice was received either by the applicant or his counsel in the year 2020; such an ambiguous stance has been taken by the applicant. The impugned order dated-28.09.2020 reads:

> *'It has been noted that learned counsel for the appellant was present on 25.09.2013. Ever since the said date, he has not put in appearance. In addition to this, on 08.06.2017, 22.11.2017,*

03.06.2020 and 17.06.2020 none has put in appearance from appellant's side. Even today despite repeated calls and reflection of name of learned counsel for the appellant in today's cause list, none has put in appearance from-appellant's side. It seems that the appellant is not interested I pursuing this appeal.

2. Dismissed for non-prosecution.

In such scenario, delay of each and every day has to be explained by putting forward plausible and sound justification which is lacking in this case, because after passage of prescribed period of limitation provided under law for challenging any order, decree or judgment, valuable rights accrue in favour of the rival party and the same cannot be undone mere on the basis of bald and ambiguous pleas and assertion as well as grounds. Reliance is placed on *Food Department Guiranwala's* case (2010 SCMR 1899) and *Gul Muhammad's* case (2012 SCMR 136). As has been stated above, law favours the vigilant and not the indolent; even otherwise delay creates rights in favour of opponent party, in which regards reliance can be placed on case of *Lavin Traders, Karachi* (2013 SCMR 1419), wherein it has been held that, *"Invoking of remedy by some aggrieved party beyond the prescribed period of limitation created valuable legal rights in favour of the opposite party, therefore, in such cases delay of each day was to be explained by the defaulting party to the satisfaction of the Court, which could not be condoned lightly or as of routine, as such arbitrary exercise of discretion would cause prejudice to the interest of opposite party"*. Therefore, this Court is not inclined to condone delay on such a flimsy grounds; resultantly, the C.M. No. 2-C of 2021 seeking condonation of delay is declined, consequent whereof the C.M. No. 1-C of 2021 for restoration fails being

barred by limitation. The C.M. No. 3-C of 2021 is for interim relief, the same becomes infructuous and disposed of, accordingly.

(JK) **Disposed of.**

2024 C L C 49

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD YAQOOB and others----Petitioners

Versus

RAHEELA YOUSAF and others----Respondents

Civil Revision No.18764 of 2022, heard on 11th October, 2022.

(a) High Court (Lahore) Rules and Orders---

----Vol. I ,Chap. XIII, Para. 6---Civil Procedure Code (V of 1908), S. 24-A(2) & O. XVII, R. 3---Transfer of case under administrative order---Scope---Civil Court dismissed suit of the petitioners for want of evidence under O. XVII, R. 3, Code of Civil Procedure, 1908, which judgment and decree was maintained by the Appellate Court---Validity---Record (order-sheet)revealed that the case was transferred from one Court to the other Court under administrative order passed by the concerned District Judge, however, no notice 'parvee' was issued by the Transferee Court to the parties or their counsel, whereas on said date (of being transferred)the Advocates were observing strike, but the Trial Court adjourned the case by giving absolute last opportunity for evidence of the plaintiffs---Instead of passing an order of giving absolute last opportunity, the Trial Court ought to have issued notices 'parvee' to the parties, because the case was transferred under administrative order and not under S. 24-A(2) of the Code of Civil Procedure, 1908, where the parties would have been directed to appear before the Transferee Court, failing which penal order could be passed against such party; however, in the present case, none of the requirements enunciated in the Para 6 of the Chapter XIII, Volume I of the High Court (Lahore) Rules and Orders had been adhered to because nothing was on record to suggest that the Court from which the case was

transferred ever informed the parties to appear before the Transferee Court on such and such date---Thus, a penal order could not be passed without putting the petitioners/plaintiffs on caution---Impugned order/judgment and decree, dismissing the suit for want of evidence, was harsh in nature---Cases should be decided on merits and technicalities should not be allowed to hinder the administration of justice---High Court set-aside the judgments and decrees passed by both the Courts below and case was remanded to the Trial Court with a direction to afford two clear opportunities to the petitioners for production of their complete set of evidence---Revision was allowed, in circumstances.

(b) Civil Procedure Code (V of 1908)---

----Ss. 115, 24-A(2) & O. XVII, R. 3---High Court (Lahore) Rules and Orders, Vol.I, Chap. XIII, Para. 6---Revisional jurisdiction of the High Court---Civil suit was transferred to another Civil Court under an administrative order---Notice 'parvee' was not issued to the party/plaintiff by the Transferee Court---Civil Court dismissed suit of the petitioners for want of evidence under Order XVII, Rule 3, Code of Civil Procedure, 1908, which judgment and decree was maintained by the Appellate Court---Validity---High Court while exercising revisional jurisdiction under S. 115 of the Code of Civil Procedure, 1908, had ample power to correct the illegality and irregularity committed by the Courts below---High Court set-aside the judgments and decrees passed by both the Courts below and case was remanded to the Trial Court with a direction to afford two clear opportunities to the petitioners for production of their complete set of evidence---Revision filed by the plaintiffs was allowed, in circumstances.

Mian Zaffar Iqbal Kalanauri for Petitioner.

Basharat Ali Gill, Additional Advocate General Punjab for Respondents Nos.2 and 3.

Respondents Nos.1 to 4 ex parte.

Date of hearing: 11th October, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.----Succinctly, the petitioners instituted a suit for declaration with permanent and mandatory injunction against the respondents, which was duly contested by them. Out of the divergent pleadings of the parties, the learned trial Court framed issues and fixed the suit for evidence of the petitioners/plaintiffs but they failed to adduce their evidence; therefore, the learned trial Court vide impugned judgment and decree dated 14.12.2020 dismissed suit of the petitioners for want of evidence under Order XVII, Rule 3, Code of Civil Procedure, 1908. The petitioners being aggrieved preferred an appeal but it was dismissed in limine vide impugned judgment and decree dated 14.01.2022 by the learned Addl. District Judge, Gujranwala; hence, the instant revision petition.

2. Heard.

3. It is an established and admitted fact on record that when under administrative order the case was transferred from one Court to the other Court, no notice parvee was issued by the transferee Court to the parties or their counsel, as is evident from the order dated 05.11.2020, which divulges that the case was received through transfer under administrative order passed by the learned District Judge, Gujranwala and the Advocates were observing strike and the learned trial Court adjourned the case by giving absolute last opportunity for evidence of the plaintiffs. It is observed that instead of passing such an order, giving absolute last opportunity, the learned trial Court ought to have issued notices parvee to the parties, because the case was transferred under administrative order and not under section 24-A(2) of the Code of Civil Procedure, 1908 where the parties are directed to appear before the learned transferee Court and if party fails to appear then penal order can be passed against such party;

however, here the case is not as such, rather otherwise, as highlighted above. Para. 6, Chapter XIII, Volume I of High Court Rules and Orders provides:-

> "6 When a case is transferred by administrative order from one Court to another, the Presiding Officer of the Court from which it has been transferred shall be responsible for informing the parties regarding the transfer, and of the date on which they should appear before the Court to which case has been transferred. The District Judge passing the order of transfer shall see that the records are sent to the Court concerned and parties informed of the date fixed with the least possible delay. When a case is transferred by judicial order the Court passing the order should fix a date on which the parties should attend the Court to which the case is transferred.'

However, in the present case, none of the requirements enunciated in the above para 6 of the Chapter XIII, Volume I of the High Court Rules and Orders has been adhered to because nothing is on record to suggest that the Court from which the case was transferred ever informed the parties to appear before the transferee Court on such and such date, rather it has manifested from the record that the case was transferred under administrative order without fixing a date to appear before the transferee Court and no information in this regard was imparted to the parties; thus, it was required by the learned transferee Court to issue notice parvee to the parties and their counsel, fixing a date to appear before it. In such scenario, what to speak of passing of a penal order without putting the petitioners on caution as has been held by the Apex Court of the country in a judgment reported as Moon Enterprises CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another (2020 SCMR 300); thus, the said precedent being

on different facts is not attracted in the instant case and the ratio of the same has wrongly been appreciated by the learned subordinate Courts.

This Court while dilating upon a case of almost identical facts, wherein the defendant was proceeded against ex parte by the Court where the suit was pending and was transferred to some other Court under administrative order and without issuing notice to him he was proceeded against ex parte, reported as Azizullah Khan and 4 others v. Arshad Hussain and 2 others (PLD 1975 Lahore 879) has held:-

'According to section 24-A(2), C.P.C. and the relevant rule of High Court Rules and Orders, as referred to above, if the order of the learned District Judge transferring the case had been passed in the presence of the absentee defendants or they had been intimated in accordance with that order, then in case of their absence before the transferee Court they could be lawfully proceeded against ex parte. If the absentee defendant can join the proceedings at the subsequent stage even after ex parte order has been passed against him, as also held in Messrs Landhi Industrial Trading Estages Ltd., Karachi v. Government of West Pakistan through Excise & Taxation Officer 1970 SCMR 251, then how it can be presumed that in the absence of any intimation duly furnished to him with regard to transfer of the case from one Court to another he can be proceeded against ex parte simply on the basis of ex parte order already passed against him. His right to join future proceedings implies that after the transfer of the case from the Court where such proceedings are pending if the same have not been transferred in his presence or without intimation to him, then he cannot be proceeded against ex parte unless duly served upon with regard to transfer of the case to the successor Court. In this view of the matter the contention of the learned counsel for the respondents,

that since there is no clear provision in the amended law to issue notice to the parties after the case has been received on transfer, therefore, said notice cannot be issued, has no substance. As laid down in 1970 SCMR 251, the rules of procedure as laid down in the Code are principally intended for advancing justice and not for retarding it on bare technicalities.'

4. Pursuant to the above discussion it can safely be held that the impugned order/judgment and decree, dismissing the suit for want of evidence, is harsh in nature, especially when after transfer of the case from one Court to the other Court, the petitioners were not informed, so as to enable them to produce their evidence and even they were not warned to face the consequences in case of their failure to produce complete set of evidence; thus, the impugned order, judgments and decrees cannot be allowed to hold field further, because it is requirement of law that cases should be decided on merits and technicalities should not be allowed to hinder the administration of justice. Moreover, this Court while exercising revisional jurisdiction under section 115 of the Code of Civil Procedure, 1908, has ample power to correct the illegality and irregularity committed by the learned Courts below.

5. The crux of the discussion above is that the revision petition in hand is allowed, impugned order 14.12.2020, judgments and decrees passed by the learned Courts below are set aside and case is remanded to the learned trial Court which will be deemed to be pending at the stage when the impugned order dated 14.12.2020 was passed with a direction to afford two clear opportunities to the petitioners for production of their complete set of evidence. The parties are directed to appear before the learned trial Court on 27.10.2022, positively. No order as to the costs.

MQ/M-212/L **Revision allowed.**

2024 C L C 524

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD NAWAZ and others----Petitioners

Versus

PROVINCE OF PUNJAB through Additional Collector and others----Respondents

Civil Revision No.176407 of 2018, heard on 24th October, 2023.

(a) Civil Procedure Code (V of 1908)---

----O.VI, R.17---Amendment of pleadings---Principle---Where defect can be remedied by allowing amendments, Court should liberally exercise such powers but within the parameters prescribed by O.VI, R.17, C.P.C.---While exercising such powers Court must identify defect and record its satisfaction that the defect is formal and does not go to root of the case.

(b) Civil Procedure Code (V of 1908)---

----O.XXIII, Rr. 1 & 2---Limitation Act (IX of 1908), S. 3---Specific Relief Act (I of 1877), Ss. 42 & 54---Suit for declaration and injunction---Withdrawal of suit---Filing of fresh suit---Principle---Limitation, principle of---Applicability---Suit filed earlier by petitioner / plaintiff was withdrawn with permission to file fresh suit---Subsequent suit filed by petitioner / plaintiff was rejected by Trial Court as well as by Lower Appellate Court as the same was barred by limitation---Validity---If permission was granted for filing a fresh suit under O. XXIII, R.1, C.P.C., then, pursuant to O. XXIII, R. 2, petitioner / plaintiff was bound by law of limitation in the same manner as if the first suit had not been filed---No fresh cause of action would accrue from the date when such permission was granted by the Court---Language used in S. 3 of Limitation Act, 1908 was mandatory in nature and had imposed duty upon Court to dismiss suit instituted after expiry of period provided unless plaintiff seeked exclusion

of time by pleading in plaint one of the grounds provided in Ss. 4 to 25 of Limitation Act, 1908---High Court in exercise of revisional jurisdiction declined to interfere in judgments and decrees passed by two Courts below---Revision was dismissed, in circumstances.

Muhammad Saeed Bacha and another v. Late Badshah Amir and others 2011 SCMR 345; Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited PLD 2012 SC 247; Hakim Muhammad Buta and another v. Habib Ahmad and others PLD 1985 SC 153; Ahsan Ali and others v. District Judge and others PLD 1969 SC 167; Asad Ali v. Bank of Punjab PLD 2020 SC 736; Ghulam Qadir v. Abdul Wadood PLD 2016 SC 712; Abdul Sattar v. Federation of Pakistan 2013 SCMR 911; Muhammad Islam v. Inspector-General of Police 2011 SCMR 8 and Muhammad Anwar (deceased) through L.Rs. and others v. Essa and others PLD 2022 SC 716 rel.

(c) Limitation Act (IX of 1908)---

----S.5---Limitation---Delay, condoning of---Principle---Provision of S.5 of Limitation Act, 1908 vests Court with vast discretion of condoning delay in cases where Court is satisfied that application seeking condonation of delay discloses "sufficient cause" by accounting for each day of delay occasioned in filing application, appeal, review or revision.

Rana Muhammad Naeem Khan for Petitioners.

Muhammad Imran Bhatti for Respondents Nos.2(i) to 2(vi), 3 and 6.

Ansar Mehdi Qureshi for Respondent No.4.

Qamar Zaman Qureshi, Additional Advocate General Punjab.

Date of hearing: 24th October, 2023.

JUDGMENT

SHAHID BILAL HASSAN, J.----Tersely, the petitioners instituted a suit for declaration regarding land measuring 1- Kanal 19-Marlas falling in Khata No.66/61 Min, Khatuni No.93, Khasra No.4/4/1, situated at Chak No.12-A, TDA, Tehsil Darya Khan, District Bhakkar, alleging therein

that the petitioners may be declared owner in possession of the suit property and gift mutation No.103 dated 16.07.1999 and exchange mutation No.105 may be declared null and void, result of fraud, misrepresentation and result of connivance inter se the respondents and revenue officials. The suit was filed on 01.09.2001, however, the same was withdrawn on 29.01.2004 due to some technical defects with permission to file a fresh suit. Then, fresh suit was filed in the year 2006, which was also withdrawn on 30.11.2010 with permission to file a fresh suit. Again, the petitioners instituted suit on 07.04.2012. The respondents appeared and contested the suit. They filed an application under Order VII, Rule 11, Code of Civil Procedure, 1908 seeking rejection of the plaint being barred by law of limitation. The petitioners submitted reply to the said application. The learned trial Court accepted the application and rejected the plaint vide impugned order and decree dated 17.10.2015. The petitioners being aggrieved preferred an appeal but the same was dismissed vide impugned judgment and decree dated 07.12.2017; hence, the instant revision petition.

2. Heard.

3. Perusal of Rule 11 of Order VII, Code of Civil Procedure, 1908, divulges that it envisions four categories where the Court could reject a plaint and the first three are where the deficiencies in the plaint could be redressed. For instance, under clause (a) where the plaint is rejected on the ground that it does not disclose a cause of action, subject to law of limitation, a fresh plaint could be presented by overcoming the defect and disclosing the cause of action. Likewise, under clause (b) where the plaint is rejected on failure(s) of plaintiff to correct the valuation, again subject to law of limitation, the defect could be removed and a fresh plaint could be presented. In the same manner, under clause (c) if the plaint is rejected on failure of the plaintiff to supply the requisite stamp paper, subject to law of limitation, such defect could be remedied by supplying the court fees. However, where the plaint under clause (d) of Rule 11 is rejected on the ground that the suit is barred by any law, the filing of fresh plaint is

not envisaged unless the findings declaring the suit to be barred by any law are reversed and, therefore, the withdrawal of the suit could not be allowed with the permission to file a fresh. It would, of course, be unlawful to revive a dead cause without bringing back the suit to life. In the like manner, Order XXIII, Rule 1, C.P.C., which allows the plaintiff to withdraw his suit or abandon part of his claim, empowers the Court to allow such withdrawal with permission to file a fresh suit. However, such permission is to be granted by the Court after satisfying itself and recording reasons that unless such permission is allowed, the suit would fail by reason of some formal defect. The Court can also allow such withdrawal with permission to file a fresh suit in case where the Court is of the view that there are other sufficient grounds for allowing plaintiff to withdraw his suit with the permission to file a fresh suit. A case law study shows that the suit may be allowed to be withdrawn in a case where the plaintiff fails to implead necessary party or where the suit as framed does not lie or the suit would fail on account of misjoinder of parties or causes of action or where the material document is not stamped or where prayer for necessary relief has been omitted or where the suit has been erroneously valued and cases of like nature. It is always to be kept in mind that where such defect could be remedied by allowing amendments, the Court should liberally exercise such powers but within the parameters prescribed by Order VI, Rule 17, C.P.C. Besides while exercising powers under this provision the Court must identify the defect and record its satisfaction that the defect is formal and does not go to the root of the case. It is also to be kept in mind that such withdrawal would not automatically set-aside the judgment and decree which has come against the plaintiff unless such judgment and decree is set-aside by the Court after due application of mind. If the permission is granted for filing a fresh suit under Order XXIII, Rule 1, C.P.C., then, pursuant to Order XXIII, Rule 2, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been filed, therefore, no fresh cause of action would accrue from the date when such permission was granted by

the Court. Reference is made to the cases of Muhammad Saeed Bacha and another v. Late Badshah Amir and others (2011 SCMR 345).

4. Cases falling in the first category; Section 5 of the Limitation Act, 1908 is applicable which vests the Court with vast discretion of condoning delay in cases where the Court is satisfied that the application seeking condonation of delay discloses "sufficient cause" by accounting for each day of delay occasioned in filing the application, appeal, review or revision. On the other hand, the Courts on the original side while trying a suit as required under section 3 of the Limitation Act, 1908 are bound to dismiss the suit if it is found to be barred by time notwithstanding that limitation has not been set up as defense. The Court has no power to condone the delay in filing the suit but could exclude time, the concession whereof is provided in sections 4 to 25 of the Limitation Act, 1908, only in cases where the plaintiff has set up in the plaint one of such grounds available in the Act such as disability, minority, insanity, proceedings bona fide before a Court without jurisdiction etc. and not otherwise. In fact, the language used in Section 3 of the Act ibid is mandatory in nature and imposes a duty upon the Court to dismiss the suit instituted after the expiry of period provided unless the plaintiff seeks exclusion of time by pleading in the plaint one of the grounds provided in Sections 4 to 25 of the Limitation Act. Reference can be made to the cases of Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247) and Hakim Muhammad Buta and another v. Habib Ahmad and others (PLD 1985 SC 153). In cases where limitation is not set up in defense and consequently a waiver is pleaded, the Courts notwithstanding such waiver are bound to decide the question of limitation in accordance with law. Reference can readily be made to the case of Ahsan Ali and others v. District Judge and others (PLD 1969 SC 167).

5. It has been held in number of judgments by apex Court of the country that the Law of Limitation is not a mere technicality and that once limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away. Reference can be made to the

judgments of this Court in the case of Asad Ali v. Bank of Punjab (PLD 2020 SC 736), Ghulam Qadir v. Abdul Wadood (PLD 2016 SC 712), Abdul Sattar v. Federation of Pakistan (2013 SCMR 911) and Muhammad Islam v. Inspector-General of Police (2011 SCMR 8).

6. The present petitioners alleged that fraud revealed upon them in the year 2001 but they subsequently did not avail the remedy of filing suit after withdrawing the earlier suits within period of limitation and the argument that the fresh cause of action would accrue from the date of withdrawal of second suit has no force rather the same is based on miscomprehension of law. As such, the learned Courts below have rightly appreciated law on the subject and have reached to a just conclusion that the suit of the petitioners is barred by limitation. No illegality and irregularity has been committed while passing the impugned judgments and decrees, warranting interference by this Court in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908, which otherwise has a limited scope.

7. For the foregoing reasons and while placing reliance on the judgments supra as well as judgment reported as Muhammad Anwar (deceased) through L.Rs. and others v. Essa and others (PLD 2022 SC 716), the revision petition in hand fails and the same stands dismissed. No order as to the costs.

MH/M-124/L **Revision dismissed.**

2024 M L D 467

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD SARWAR alias BABAR---Petitioner

Versus

MUHAMMAD YASIN (DECEASED) through L.Rs. and others---Respondents

Civil Revision No.66655 of 2023, decided on 11th October, 2023.

Specific Relief Act (I of 1877)---

----S. 12---Suit for specific performance of agreement to sell---Counter claims---Non-appearance before Sub-Registrar---Two suits for specific performance of two agreements to sell were filed by petitioner / plaintiff and respondent / defendant---Suit filed by respondent / defendant was decreed by Trial Court and the one by petitioner / plaintiff was allowed to get his earnest money returned with profit at bank rate---Judgment and decree passed by Trial Court was maintained by Lower Appellate Court---Validity---Petitioner / plaintiff failed to prove his case as well as stance that on the target date he appeared before Sub-Registrar and got his attendance marked by submitting written application---Petitioner / plaintiff did not produce Sub-Registrar or any staff member of his office and he did not even mention in his application that he had brought remaining sale consideration or pay order or draft---Both the Courts evaluated evidence in true perspective and reached to a just conclusion, concurrently---High Court in exercise of revisional jurisdiction declined to disturb concurrent findings on facts, as the same did not suffer from any misreading and non-reading of evidence---Both the Courts below committed no illegality and irregularity, rather vested jurisdiction was

aptly and justly exercised---Revision petition was dismissed, in circumstances.

Ijaz Ul Haq v. Mrs. Maroof Begum Ahmed and others PLD 2023 SC 653; Muhammad Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Muhammad Sarwar and others v. Hashmal Khan and others PLD 2022 SC 13; Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21 and Salamat Ali and others v. Muhammad Din and others PLD 2022 SC 353 rel.

Muhammad Umar Maqsood for Petitioners.

ORDER

SHAHID BILAL HASSAN, J.----Tersely, the respondent/defendant No.1 namely Muhammad Yasin (deceased) being owner of land measuring 14-Kanals 12-Marlas situated at Behar Sodan, Tehsil Chunian entered into an agreement to sell dated 22.04.2003 with the present petitioner/plaintiff for sale of the said land and received Rs.50,000/- as earnest money, whereas it was settled that the said deceased would transfer the suit property till 30.06.2003 and the remaining consideration amount would be paid at the time of transfer of the suit property in the name of the petitioner; however, allegedly the deceased respondent No.1 with mala fide intention did not fulfill his part of the agreement rather he illegally and unlawfully transferred the suit property and his other land i.e. 19-Kanals in the name of his wife/respondent No.2 through gift mutation No.1811 dated 29.08.2003 by committing fraud with the petitioner. The respondent No.2 further transferred the land measuring 5-Kanals through mutation No.1816 dated 17.10.2003 in the name of respondents No.3 and 4 and she also entered into an agreement to sell dated 11.12.2003 with the defendant No.5 regarding the land measuring 13-Kanals; hence, the petitioner instituted suit challenging the above said

gift mutation in favour of respondent No.2 and subsequent mutation in favour of respondents Nos.3 and 4 as well as agreement to sell with the defendant No.5. The respondents/defendants contested the suit. The respondent No.5, on 29.06.2005, instituted suit for possession through specific performance titled "Sardar Muhammad Sadiq v. Surraya Bibi" on the basis of an agreement to sell dated 11.12.2003 germane to land measuring 13-Kanals. The respondent No.2 herein submitted consenting written statement in the said suit. Both the suits were consolidated by the learned trial Court and consolidated issues were framed. Both the parties produced their oral as well as documentary evidence in support of their respective contentions. On conclusion of trial, the learned trial Court vide impugned consolidated judgment and decree dated 27.02.2023 decreed the suit of the petitioner/plaintiff in the terms that Muhammad Sarwar, the plaintiff is entitled to recover amount of earnest money Rs.50,000/- including present KIBOR bank rate as damages since 22.04.2003 till realization of payment where the suit for specific performance etc. filed by the respondent No.5 Sardar Muhammad Sadiq (deceased) was decreed as prayed for. The petitioner being aggrieved preferred two appeals against the said consolidated judgment and decree. However, the learned appellate Court vide impugned consolidated judgment and decree dated 11.09.2023 dismissed both the appeals; hence, the instant revision petition.

2. Heard.

3. The purported agreement to sell Ex.P1 is time stricken as cut-off date for completion of agreement to sell after payment of remaining sale consideration was fixed as 30.06.2003. The petitioner Muhammad Sarwar (P.W.1) deposed that before the target date he contacted Muhammad Yasin (deceased) and asked him to transfer the land after receiving the remaining sale consideration but the said deceased dilly dallied the matter and sought further time. He further added that on the target date he went

to Muhammad Yasin with the remaining consideration amount and asked him to perform his part of the agreement by executing sale deed in his favour. However, the petitioner, in witness box, could not mention the date, time and place regarding the said two transactions when he contacted the deceased defendant Muhammad Yasin. The petitioner did not plead the names of witnesses in plaint nor got them examined on oath. Moreover, after cut-off date, the petitioner did not send any written notice to the deceased respondent Muhammad Yasin showing his readiness to pay the remaining amount and asking him to perform his part of the agreement. Furthermore, the suit was filed by him after nine month of the cut-off date but he did not deposit the remaining sale consideration with the Court by moving an application in this regard, which was necessary to show his bona fide and readiness to perform his part of agreement. In a judgment passed in (PLD 2023 SC 653) "Ijaz Ul Haq v. Mrs. Maroof Begum Ahmed and others" decided on 16.08.2023, the apex Court of the country has invariably held that:

'7. It would be appropriate first to examine how the plaintiff discharged his pleading burden. The law governing this aspect of the matter is provided in Form Nos.47 and 48 of Appendix-A of the First Schedule to the Code of Civil Procedure, 1908. According to para-2 of Form 47, the plaintiff was to state in the plaint that he had applied to the defendants specifically to perform the contract on their part, but the defendants had not done so. Similarly, per para-2 of Form 48, the plaintiff was required to state in his plaint that on such and such date, he tendered an amount to the defendants and demanded a transfer of the property. Thus, in his suit for specific performance, the plaintiff ought to have pleaded and proved his readiness and willingness to perform his obligations under the contract (Ex.P.3). There is no denying that according to contract condition, the plaintiff was to pay the balance of Rs.6,850,000/- to

the defendants on or before 18th March, 2023, subject to the registration/completion of property transfer documents by the defendants in his favour. The plaintiff did not pay this amount. The plaintiff's stance was that he had been ready to pay the balance, but, defendant No.1 procrastinated the matter and delayed the completion of the transfer documents, which led him to institute the suit. A perusal of the evidence suggests that the plaintiff could not prove his narrative.'

In the present case, the facts of the case are identical to the above referred judgment of the apex Court, because in the present case, the petitioner failed to prove his case as well as stance that on the target date he appeared before the Sub-Registrar Chunian and got marked his attendance by submitting written application because he did not produce the said Sub-Registrar or any staff member of his office and even he did not mention in the said application Ex.P2 that he had brought the remaining sale consideration or pay order or draft.

4. Pursuant to above, both the learned Courts have evaluated evidence in true perspective and have reached to a just conclusion, concurrently; as such the concurrent findings, on facts, cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous, in exercise of revisional jurisdiction; reliance is placed on Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Muhammad Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and Mst. Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21), wherein it has been held:-

'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the

appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and conclusion drawn is contrary to law.'

Further in judgment reported as Salamat Ali and others v. Muhammad Din and others (PLD 2022 SC 353), it has invariably been held that:-

'Needless to mention that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, nonreading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below.'

However, in the present case, no such occasion has arisen showing any jurisdictional error or defect rather the findings recorded by the learned Courts below are upto the dexterity after minute discussion of the evidence, oral as well as documentary. Thus, the impugned judgments and decrees do not call for any interference in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908.

5. For the foregoing reasons, no illegality and irregularity has been committed, rather vested jurisdiction has aptly and justly been exercised by the learned Courts below; therefore, while placing reliance on the judgments supra the civil revision in hand being devoid of any force and substance stands dismissed in limine.

MH/M-123/L **Revision dismissed.**

2024 M L D 534

[Lahore]

Before Shahid Bilal Hassan, J

Mst. BADAMI and others---Appellants

Versus

Mst. BUDHEE and others---Respondents

R.S.A. No.141 of 1987, decided on 21st March, 2022.

Specific Relief Act (I of 1877)---

----Ss. 8 & 42---Qanun-e-Shahadat (10 of 1984), Arts.89(5) & 129(g)---Suit for declaration and possession of immoveable property---Inheritance, right of---Pedigreetable not proved---Appellants filed suit for declaration and possession alleging that they being collateral of the issueless deceased/original owner of the suit property were entitled to get his bequest but his widow got the suit property transferred in her favour---Respondent contested the suit on the ground that she being widow of the deceased was the only legal heir and as such was entitled to the entire estate, however she denied that appellants were collateral of the deceased---Suit was dismissed by the Trial Court and the appeal was also dismissed---Validity---Record showed that at trial stage and before the appellate Court appellants could not substantiate their stance by leading cogent and confidence inspiring evidence because the pedigree table produced by them did not establish their relationship to the propositus making them residuary---Pedigree table was produced later---Evidently, the pedigree tables were issued from the concerned authorities in India in the year 1985 and the same was in Indian language, so it was translated by Mr. "A"; meaning thereby that the said person was an important witness so as to substantiate the stance of the appellants but he was not produced in the witness box, for reasons best known to them, so adverse presumption arose against the appellants in view of Art. 129(g) of the

Qanun-e-Shahadat, 1984, that had he appeared in the witness box, he would not have supported the stance of the appellants---Even, the appellant did not produce the passport or any other documentary evidence of said Mr. "A" to show and prove that he travelled from Pakistan to Indian from such and such date in the year 1985 despite the fact that allegedly he travelled twice to India; firstly for obtaining pedigree tables and secondly for getting the same translated---Furthermore, the pedigree tables produced by the appellants were different from one another, because pedigree table in plaint showed deceased owner as single son of Mr. "D"; the pedigree table attached with the suit disclosed Mr. "J" as brother of deceased owner besides widow and the pedigree table allegedly obtained from India showed four sons of Mr. "D" thus, the same could not be relied upon, because it casted aspersions about their authenticity---In the present case, the pedigree tables were not part of judicial record and even the same did not bear any certificate as required under Art. 89(5) of Qanun-e-Shahadat, 1984---In that view of the matter, the documents brought on record could not be said to have been duly obtained in accordance with law and could not be relied upon for decision of a matter with regard to inheritance---Appellants had failed to establish their relationship with deceased, thus, they had no locus standi---Appeal being meritless failed and same was dismissed, in circumstances.

Haji Sultan Ahmad through Leal Heirs v. Naeem Raza and 6 others 1996 SCMR 1729; Ahmad and others v. Allah Diwaya and others 1998 SCMR 386; Muhammad Naeem and others v. Ghulam Muhammad and others 1994 SCMR 559 and Mst. Mangti v. Mst. Noori and others 1995 CLC 210 rel.

Chaudhry Iqbal Ahmad Khan, Zeeshan Munawar and Jamil Asif for Appellants.

Muhammad Atif Amin, Chaudhry Rizwan Sarwar and Ayaz Munawar for Respondents.

Date of hearing: 22nd February, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, on 27.11.1979, the present appellants instituted a suit for possession against the respondents with the assertion that suit land, mentioned in Para No.1 of the plaint, was transferred to one Malooka son of Dalmeer, who died issueless in the year 1969. Inheritance mutation No.469 was attested on 29.06.1971 in favour of his widow namely Mst. Budhi/respondent No.1; the said mutation was stated to be illegal as the appellants and respondents Nos.2 and 3 were stated to be collaterals of the said Malooka and entitled to the residue after settling the share of the said widow. A pedigree table was drawn in Para No.2 of the plaint. The mutation was stated to have been taken up and decided in the absence and without notice to the said collaterals; hence, a declaratory decree with possession was sought for.

2. The suit was only contested by the respondent No.1 who admitted that Malooka was the last male owner of the suit land and that he died issueless in the year 1969; however, it was pleaded that the respondent No.1 being the widow was the only legal heir and as such was entitled to the entire estate. It was denied that the appellants and other respondents were the collaterals of the said Malooka; moreover, the pedigree table was denied.

The divergence in pleadings of the parties was summed up into issues as follows:-

1. Whether the present suit is not maintainable in its present form? OPD
2. Whether the suit is not competent? OPD
3. Whether Civil Court had no jurisdiction to try this suit? OPD
4. Whether the suit is not properly valued. If so, its effect? OPD
5. Whether plaintiffs are estopped to file the suit? OPD

6. Whether Mutation No.469 dated 29.06.1971 sanctioned by AC-II Lahore is void, inoperative, illegal. If so, to what effect? OPD

7. Whether suit is within limitation? OPP

8. Relief.

Evidence of the parties was recorded and on conclusion, the learned trial Court vide judgment and decree dated 18.02.1983 dismissed suit of the appellants. The first appeal preferred by the appellants was dismissed on 05.12.1985. It is pertinent to note here that during pendency of the appeal before the first appellate Court, the appellants filed an application seeking permission to produce additional evidence but the same was dismissed for the reasons rendered in the said judgment. The appellants being aggrieved preferred R.S.A. in question and on 06.07.2001 this Court set aside the judgment and decree dated 05.12.1985 ibid and ordered to remand the case to the first appellate Court with direction:-

'Learned first appellate court shall then proceed to take the document accompanying the application for evidence subject to any objection to be raised by the respondent-party and thereafter provide an opportunity to the respondent party to lead evidence in rebuttal and then to decide the matter taking the entire evidence on record in consideration.'

3. The respondents being dissatisfied filed C.P.No.2435-L/01 before the Hon'ble Supreme Court of Pakistan, which was converted into an appeal and allowed on 23.11.2001 and R.S.A. was directed to be decided by this Court in the light of the said judgment dated 23.11.2001. On 12.02.2007, this Court again heard the appeal and allowed the same while announcing the judgment on 01.03.2007 whereby set aside the impugned judgments and decrees passed by the learned Courts below, consequent whereof the suit filed by the appellants was decreed as prayed for.

4. The respondents feeling aggrieved of the said judgment and decree agitated the matter before the apex Court of the country through Civil Appeal No.1071 of 2007, which was accepted on 27.02.2014 and case was remanded again to this Court with the following observation:-

> '2. After hearing the learned counsel for the appellants and the respondents we noted that the High Court had examined and given effect to the pedigree-table without the same being formally introduced in evidence through a witness. The learned counsel for the parties agreed to the remand of the case to the High Court so that the said document may be duly exhibited in evidence through a witness, with an opportunity to the appellants to cross examine the witness. The learned counsel for the respondents, however, submitted that since the respondents have been deprived of their share in property for the last 40 years the appeal be decided by the High Court expeditiously.
>
> 3. Thus the appeal is allowed. The impugned judgment and decree are set aside and Regular Second Appeal No.141 of 1987 shall be deemed to be pending; the same be decided by the High Court within a period of three months in the light of above direction.'

5. After remand, on 09.09.2015, in view of the provisions of

Order XLI, Rule 28, C.P.C., the matter was remitted to the learned Senior Civil Judge, Lahore by keeping this appeal pending here for a sole purpose to provide the parties an opportunity to bring on record the said document in accordance with the law through a witness if still it is required and to cross-examine the said witness by the other side. It was further observed that if the party, who had earlier brought on record such document, does not want to enter into such exercise, the statement of some competent person to that effect be recorded. This exercise was ordered to be completed within sixty days from the appearance of the parties before the learned Senior Civil Judge, Lahore, who (the parties)

were directed to appear before the said court on 21.09.2015. In pursuance thereof, the learned Senior Civil Judge, Lahore recorded additional evidence led by the appellants and forwarded the proceedings to this Court on 21.04.2016. On 19.02.2018, learned counsel for the respondents/defendants submitted that his clients have a right to lead rebuttal evidence against the additional evidence, which has already been recorded. Thus, in view of the said submission, this Court ordered:-

> 'In view of the above development, the office will refer the relevant record immediately to the learned Senior Civil Judge (Judicial), Lahore, who will record rebuttal evidence of the respondents/defendants on 14.03.2018 and if on account of any unavoidable circumstance, the evidence could not be completed/recorded, then the case would be adjourned to 21.03.2018 when no further opportunity would be provided to them. It is, however, clarified that if the learned Presiding Officer is found to be on leave on the said dates, in that eventuality, such proceedings will be completed on the very next day of his availability. The parties are directed to appear before the learned Senior Civil Judge (Judicial), Lahore on 14.03.2018, who after completion of proceedings will remit the file to this Court before the next date of hearing. Adjourned to 04.04.2018.'

After recording evidence in rebuttal i.e. evidence of D.W.6, the learned Senior Civil Judge (Judicial), Lahore transmitted the proceedings, which have been made part of the file.

6. Heard.

7. It is stance of the appellants that inheritance mutation No.469 attested on 29.06.1971 in favour of widow of Malooka namely Mst. Budhi/respondent No.1 is illegal as the appellants and respondents Nos.2 and 3 are collaterals of the said Malooka and are entitled to the residue after settling the share of the said widow; however at trial stage and

before the learned appellate Court they could not substantiate their stance by leading cogent and confidence inspiring evidence because the pedigree table produced by them was not establishing their relationship to the propositus making them residuary.

However, after remand by the apex Court, the pedigree tables sought to be produced as additional evidence was brought on record as Ex.P8, Ex.P9 and Ex.P10 through statements of witnesses P.W.1 and P.W.2 in the shape of affidavits (Ex.P7 and Ex.P11) and P.W.2 was cross examined whereas the P.W.1 namely Muhammad Rafique did not appear before the Court concerned for facing the cross examination after recording his examination in chief on 12.03.2016. In rebuttal, the statement of D.W.6 was recorded by the respondents. It has emerged on record, during cross examination on P.W.2, recorded after remand from the apex Court of the country, that the pedigree tables were got issued from the concerned authorities in India in the year 1985 through brother of Muhammad Rafique namely Abdul Rehman and as the same was in Indian language, so it was got translated by the said Abdul Rehman; meaning thereby the said person namely Abdul Rehman was an important witness so as to substantiate the stance of the appellants but he was not produced in the witness box, for the reasons best known to them, so adverse presumption arises against the appellant in view of Article 129(g) of the Qanun-e-Shahadat, 1984 that had he appeared in the witness box, he would not have supported the stance of the appellants. Even, the appellant did not produce the passport or any other documentary evidence of said Abdul Rehman to show and prove that he travelled from Pakistan to Indian from such and such date in the year 1985 despite the fact that allegedly he travelled twice to India: firstly for obtaining pedigree tables and secondly for getting the same translated. Moreover, P.W.2 namely Fazal Din is not party to the lis rather one Fajroo has been arrayed and no exertion has been made by the said Fazal Din that if his alias was Fajroo, he should have got the same corrected/incorporated in the plaint as such.

The deposition of P.W.1 cannot be considered and appreciated because he disassociated the proceedings and did not face the cross examination. Furthermore, the pedigree tables adduced by the appellants are different from one another, because pedigree table in plaint shows Malooka as single son of Dalmeer, the pedigree table attached with the suit discloses Jasmal as brother of Malooka besides Budhi as widow and the pedigree table allegedly obtained from India through Abdul Rehman, brother of Muhammad Rafique, shows four sons of Dalmeer namely Malooka, Jasmal, Mazari and Ameer; thus, the same cannot be relied upon, because it casts aspersions about their authenticity especially when Abdul Rehman, who purportedly went to India for obtaining pedigree table and its translation was not produced in the witness box and even P.W.1 appeared before the trial Court deposed that he has no knowledge of facts and circumstances of this case and statement of P.W.2 before the learned trial Court also remained the same.

8. In addition to the above, Article 96, Qanun-e-Shahadat, 1984 deals with presumption as to certified copies of foreign judicial records, which reads:-

'Presumption as to certified copies of foreign judicial record.-(1) The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Pakistan is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Federal Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

(2) An officer who, with respect to any territory or place not forming part of Pakistan, is a Political Agent therefore, as defined in section 3, Clause (4), of the General Clauses Act, 1897 (X of 1897), shall for the purposes of clause (1), be deemed to be a

representative of the Federal Government in or for the country comprising that territory or place.'

However, in the present case, the documents Ex.P8 and Ex.P9 are not of judicial record and even the same do not bear any certificate as required under Article 89(5) of the Qanun-e-Shahadat, 1984, which provides:-

'(5) public document of any other class in a foreign country, -- by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.'

In this view of the matter, the documents brought on record as Ex.P8 and Ex.P9 cannot be said to have been duly obtained in accordance with law and cannot be relied upon for decision of a matter with regards to inheritance. In judgment reported as Haji Sultan Ahmad through Leal Heirs v. Naeem Raza and 6 others (1996 SCMR 1729), the apex Court of the country held:-

'5. From the above discussed legal position, it is quite obvious that the concurrent finding recorded by the Courts below cannot be interfered with by the High Court while exercising jurisdiction under section 100, C.P.C. how so erroneous that finding may be, unless such finding has been arrived at by the Courts below either by misreading of evidence on record, by ignoring a material piece of evidence on record or through perverse appreciation of evidence.'

Moreover, in judgment reported as Ahmad and others v. Allah Diwaya and others (1998 SCMR 386), it has categorically been held that:-

'2. In support of the above petition Mr. Shaukat Ali Mehr, learned Advocate Supreme Court for the petitioners, has contended that the Court below have relied upon pedigree-table, Exh.P10 and Exh.D4, without examining any witness in support thereof to explain the same. To reinforce the above submission he has relied upon the case of Muhammad Hussain and others v. Muhammad Khan (1989 SCMR 1026) and the case of Muhammad Naeem and others v. Ghulam Muhammad and others (1994 SCMR 559), in which been held that the contents of a pedigree-table are to be proved and mere exhibition of the same as a document is not sufficient.'

Further reliance in this regard is placed on Mst. Mangti v. Mst. Noori and others (1995 CLC 210-Lahore).

9. Pursuant to the above, when the appellants have failed to establish their relationship with Malooka, it has rightly been concluded by the learned Courts below that they have no locus standi. The question of making up deficiency of court fee, while construing law on the subject, has also rightly been adjudicated upon.

10. The crux of the discussion above is that the appeal in hand, being meritless, fails and the same is hereby dismissed with no order as to the costs.

JK/B-11/L **Appeal dismissed.**

2024 M L D 728

[Lahore]

Before Shahid Bilal Hassan, J

MUHAMMAD YOUNIS and others---Appellants

Versus

Mst. DOLAT BIBI and others---Respondents

C.R. No. 620 of 2014, heard on 22nd July, 2022.

(a) Punjab Land Revenue Act (XVII of 1967) ---

----S. 42 (7)---Specific Relief Act (I of 1877) , Ss. 42 & 54---Suit for declaration and permanent injunction---Sale Mutations---Proof---Subsection (7) of S. 42 of Punjab Land Revenue Act, 1967, binds the Revenue Officer, who is going to attest the mutation, to ensure the presence of a person whose right is going to be acquired by such transaction---Said provision of law also requires the identification of such person by two respectable persons, however, in the present case, neither the disputed sale mutations carry signatures or thumb impressions of the vendors/petitioners nor the petitioners/vendors were identified at the time of attestation of the mutation and even concerned Lumberdar was not produced by the respondents/defendants---All said facts establish the non-appearance of the petitioners/plaintiffs and non-identification at the time of attestation of the disputed sale mutations; therefore, the disputed sale mutations were attested in violation of subsection (7) of S. 42 of the Punjab Land Revenue Act, 1967---High Court set-aside the impugned judgments and decrees passed by the both the Courts below , consequently the suit instituted by the petitioners stood decreed as prayed for---Revision filed by the plaintiffs was allowed, in circumstances .

(b) Punjab Land Revenue Act (XVII of 1967)

---S. 42---Specific Relief Act (I of 1877) , Ss. 42 & 54---Suit for declaration and permanent injunction---Mutation entry---Scope ---Sale transaction---Proof---Mutation entry is not a document of title, and of itself does not confer any right, title or interest, and the burden of proof lies upon the person, in whose favour it was attested to establish the validity and genuineness of transfer in his/her favour---If the foundation is illegal and defective then entire structure built on such foundation would have no value in the eyes of law---Once a mutation is challenged the party that relies on such mutation(s) is bound to revert to the original transaction and to prove such original transaction which resulted in the entry or attestation of such mutation(s) in dispute---However, in the present case, the respondents / defendants had failed to plead and prove the time, date, place and names of witnesses in whose presence such original transaction of sale took place inter se the petitioners/ plaintiffs and respondents / defendants because the written statement of the respondents was silent in said regard---Respondents failed to establish their case that the disputed mutations were sanctioned legally---High Court set-aside the impugned judgments and decrees passed by the both the Courts below , consequently the suit instituted by the petitioners stood decreed as prayed for---Revision filed by the plaintiffs was allowed, in circumstances .

Muhammad Akram and another v. Altaf Ahmad PLD 2003 SC 688 and Province of Sindh through Secretary and 2 other v. Rahim Bux and others 2022 CLC 2063 ref.

(c) Punjab Land Revenue Act (XVII of 1967)

----S. 42 (7)---Specific Relief Act (I of 1877) , Ss. 42 & 54---Suit for declaration and permanent injunction---Mutation entry, challenging of Possession of the party---Proof---Respondents / defendants failed to establish by leading unimpeachable and confidence inspiring evidence that the possession of the suit- property was delivered in pursuance of the

disputed sale mutations, rather it was admitted and established fact on record that the possession was with them in pursuance of purported pledge mutation and not being owner of the suit Land---Said fact was also an admitted one that one of the respondents (deceased) was a Patwari of the area, so if for the sake of arguments it was admitted that the respondents were in possession of the suit property, it could not be ruled out that the said respondent(Patwari) managed the entry of possession in Khasra Girdawri against the physical possession at spot---Thus, the disputed sale mutations in favour of the respondents could be result of collusion with the revenue staff---High Court set-aside the impugned judgments and decrees passed by the both the Courts below , consequently the suit instituted by the petitioners stood decreed as prayed for---Revision filed by the plaintiffs was allowed, in circumstances .

(d) Limitation Act (IX of 1908) ---

----Art. 95 ---Punjab Land Revenue Act (XVII of 1967) , S. 42 (7)---Specific Relief Act (I of 1877) , Ss. 42 & 54---Suit for declaration and permanent injunction---Fraud, alleging of ---Limitation---Evasive denial---Scope---Article 95 of the Limitation Act, 1908, provides that while seeking some relief, if fraud is alleged, the period of limitation will be three years which will commence to be computed from the date of knowledge ---Date of knowledge, in the present case, as per version of the petitioners/plaintiffs was three months prior to the institution of the suit, which could not be rebutted by the other side through solid and cogent evidence rather it was only evasively denied while submitting written statement and it was a settled principle of law that evasive denial was not a denial---Therefore, in the light of Article 95 of the Limitation Act 1908, the suit instituted by the petitioners was well within time---High Court set-aside the impugned judgments and decrees passed by the both the Courts below , consequently the suit instituted by the petitioners stood decreed as prayed for---Revision filed by the plaintiffs was allowed, in circumstances .

(e) Civil Procedure Code (V of 1908)

----S. 115---Punjab Land Revenue Act (XVII of 1967), S. 42 (7)---Specific Relief Act (I of 1877) , Ss. 42 & 54---Suit for declaration and permanent injunction---Revisional jurisdiction of the High Court---Scope ---Mis-reading /non-reading of evidence---Validity---Both the Courts below failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below misread and non-read evidence of the parties and when the position was as such, High Court was vested with ample jurisdiction and authority to undo the concurrent findings in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908---High Court set-aside the impugned judgments and decrees passed by the both the Courts below , consequently the suit instituted by the petitioners stood decreed as prayed for---Revision filed by the plaintiffs was allowed, in circumstances .

Mst. Nazir Begum v. Muhammad Ayyub and another 1993 SCMR 321; Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001; Muhammad Khubaib v. Ghulam Mustafa (deceased) through LRs 2020 CLC 1039- and Muhammad Ali v. Sohawa deceased through LRs. and others 2019 CLC 626 L. ref.

Sardar Muhammad Ramzan for Petitioners.

Sohail Shafique and Ambar Abid for Respondents Nos.1, 2(ii) to 2(vii).

Muhammad Farooq Ahsan, vice counsel for respondent Nos.2-vii(a)(b).

Mian Abdul Aziz and Fazal-ur-Rehman for respondent No.3.

Respondents Nos.2(i)(iv) ex parte.

JUDGMENT

SHAHID BILAL HASSAN, J:---Succinctly, the petitioners instituted a suit for declaration alongwith permanent injunction maintaining therein that about 20 years ago petitioners Nos. 1 and 2 borrowed some amount from Musawar Hussain respondent for their personal use who asked them to pledge their land measuring 14-kanals with his wife respondent No. 1. In this way pledge mutation No.234 was attested on 31.07.1986 in favour of respondent No.1. Muhammad Younis petitioner again borrowed some amount for which additional pledge mutation No.247 dated 07.02.1987 was attested. Later on, when the petitioners asked the respondents to receive amount on 10.11.1988 and get the land redeemed, respondent No.2 got attested one mutation for redemption and two mutations of sale in collusion with the revenue department in his favour and on 27.03.1990 respondent No.2 through another sale mutation transferred 2-kanals land in favour of Muhammad Iqbal respondent No.3 who alienated the same to respondent No.1 vide mutation No.415 dated 24.08.1995. It is maintained that respondents have committed fraud with the petitioners, therefore, all the mutations are against law and facts, ineffective upon the rights of petitioners and are liable to be cancelled. The petitioners came to know about the alleged fraud three months before filing of the suit upon checking the revenue record. The contents of plaint were controverted by respondents Nos.1 and 2 by filing of written statements and raised preliminary as well as legal objections. However respondent No.3 did not appear and he was proceeded ex-parte vide order dated 18.10.2006. The learned trial Court, out of the divergent pleadings of the parties, framed as many as eight (8) issues including "Relief". The petitioners produced Muhammad Younis (PW-1), Muhammad Sharif (PW-2), Abdul Ghafoor (PW-3), Abdul Ghafar (PW-4) and Zulfiqar (PW-5). The petitioners also produced documentary evidence in the shape of exhibits P-1 to P-15. The respondents produced Ghulam Sarwar (DW-1), Abdul Haque (DW-2), Ghulam Murtaza (DW-3), Nawab Din (DW-4), Khadim Hussain (DW-5),

Musawar Hussain (DW-6), Zafar Ali Girdawar (DW-7) and Muhammad Ishaque (DW-8). In documentary evidence they produced exhibits D-1 to D-12. The learned trial Court after giving issue-wise findings vide impugned judgment and decree dated 26.11.2009 dismissed the suit. The petitioners being aggrieved preferred an appeal but the same was dismissed vide impugned judgment and decree dated 26.06.2010; hence, the instant revision petition.

2. Heard.

3. Subsection (7) of section 42 of the Land Revenue Act, 1967 binds the Revenue Officer, who is going to attest the mutation, to ensure the presence of a person whose right is going to be acquired by such transaction. The said provision of law also requires the identification of such person by two respectable persons. However, in the instant case, neither the disputed sale mutations carry signatures or thumb impressions of the vendors/petitioners nor the petitioners/vendors were identified at the time of attestation of the mutation and even Sarfraz Lumberdar was not produced by the respondents. All these facts establish the non-appearance of the petitioners and non-identification at the time of attestation of the disputed sale mutations; therefore, it can safely be held that the disputed sale mutations were attested in violation of subsection (7) of Section 42 of the Act ibid.

4. In addition to the above, it is a settled principle of law that mutation entry is not a document of title, which by itself does not confer any right, title or interest, and the burden of proof lies upon the person, in whose favour it was attested to establish the validity and genuineness of transfer in his/her favour. It is also a well settled law that if the foundation is illegal and defective then entire structure built on such foundation would have no value in the eyes of law. It is a settled principle of law that once a mutation is challenged the party that relies on such mutation(s) is bound to revert to the original transaction and to prove such original transaction

which resulted in the entry or attestation of such mutation(s) in dispute. However, in the present case, the respondents have miserably failed to plead and prove the time, date, place and names of witnesses in whose presence such original transaction of sale took place inter se the petitioners and respondents because the written statement of the respondents is silent in this regard. When the position is as such, it can safely be held that the respondents have miserably failed to establish their case that the disputed mutations were sanctioned legally. Reliance in this regard is placed on Muhammad Akram and another v. Altaf Ahmad (PLD 2003 Supreme Court 688) and Province of Sindh through Secretary and 2 others v. Rahim Bux and others (2022 CLC 2063).

5. Apart from the above, the respondents have failed to establish by leading unimpeachable and confidence inspiring evidence that the possession of the suit property was delivered in pursuance of the disputed sale mutations, rather it is admitted and established fact on record that the possession was with them in pursuance of purported pledge mutation and not being owner of the suit land. This fact is also an admitted one that the respondent No.2 (deceased) was a Patwari of the area, so if for the sake of arguments it is admitted that the respondents are in possession of the suit property, it cannot be ruled out that the respondent No.2 managed the entry of possession in Khasra Girdawri against the physical possession at spot. In this view of the matter, it can be said the disputed sale mutations in favour of the respondents are result of collusion with the revenue staff.

6. Article 95 of the Limitation Act, 1908 provides that while seeking some relief, if fraud is alleged, the period of limitation will be three years which will commence to be computed from the date of knowledge. The date of knowledge in the present case, as per version of the petitioners/plaintiffs is three months prior to the institution of the suit, which could not be rebutted by the other side through solid and cogent evidence rather only evasively denied while submitting written statement and it is a settled principle of law that evasive denial is not a denial.

Therefore, in the light of Article 95 of the Act ibid, the suit instituted by the petitioners was well within time.

7. Pursuant to the above discussion it is observed that the learned Courts below have failed to adjudicate upon the matter in hand by appreciating law on the subject; thus, the Courts below have misread and non-read evidence of the parties and when the position is as such, this Court is vested with ample jurisdiction and authority to undo the concurrent findings in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908 as has been held in Mst. Nazir Begum v. Muhammad Ayyub and another (1993 SCMR 321), Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630), Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) and Muhammad Khubaib v. Ghulam Mustafa (deceased) through LRs (2020 CLC 1039-Lahore).

8. For the foregoing reasons and while placing reliance on the judgments supra as well as judgment reported as Muhammad Ali v. Sohawa (deceased) through L.Rs. and others (2019 CLC 626-Lahore), the revision petition in hand is allowed, impugned judgments and decrees passed by the learned Courts below are set aside, consequent whereof suit instituted by the petitioners is decreed as prayed for. No order as to the costs.

MQ/M-110/L **Revision allowed.**

2024 Y L R 251

[Lahore]

Before Shahid Bilal Hassan, J

Mian JAVED AKHTAR and another---Appellants

Versus

Rana MUHAMMAD ISMAIL and others---Respondents

R.S.A. No. 37 of 2017, decided on 23rd December, 2022.

Specific Relief Act (I of 1877)---

----Ss. 42, 8 & 54---Civil Procedure Code (V of 1908), O. I, R. 10---Suit for declaration, possession and permanent injunction--- Non-impleadment of defendant---Plaintiff filed suit for declaration, possession and permanent injunction contending therein that he being owner in possession of disputed land appointed respondent No.6 as his attorney but he committed fraud and transferred the land in favour of respondent No.2 through sale mutation---Suit of the plaintiff was decreed while the appeal was dismissed by the appellate Court---Validity---Admittedly, the present appellants became owner of the disputed property vide a sale mutation attested on 10.12.2005, whereas the suit was instituted, obviously, without impleading them as party and challenging the said mutation in their favour, by the respondent No.1 on 17.12.2005 and even during pendency of the suit, the respondent No.1/plaintiff did not bother to implead them in the array of defendants by moving an application under O. I, R. 10, C.P.C. and decree dated 06.03.2013 was passed---However, in that respect, it was observed that the appellants had remedies to file application under S. 12(2), C.P.C., or to assail the judgment and decree by preferring an appeal---Appellants, having been adversely affected, opted to challenge the decree by filing an appeal, which was maintainable---Pursuant to the above, the impugned judgments and decrees being contrary to law were open to examination in exercise of jurisdiction under S. 100 of the C.P.C.; therefore, the same could not be allowed to hold field further, because one should not be condemned unheard and every litigant should be provided with fair opportunity to present and defend

his/her case---Appeal was allowed by setting aside impugned judgment and decree and case was remanded to the Trial Court with the direction to implead the appellants in the array of the defendants by obtaining amended plaint from the plaintiff and after submission of written statements by them and to proceed with the case further accordingly.

H.M. Saya & Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another PLD 1969 SC 65; and Sahib Dad v. Province of Punjab and others 2009 SCMR 385 and Jamila Pirzada and 3 others v. Col. (R) Mansoor Akbar and 2 others 2011 CLC 1619 rel.

Mahmood Ahmad Bhatti for Appellants.

Malik Nasim Akhtar Awan for Respondents.

Date of hearing: 25th November, 2022.

JUDGMENT

SHAHID BILAL HASSAN, J.---Brief facts, giving rise to the instant appeal are as such that respondent No.1 instituted a suit for declaration and possession with perpetual injunction contending therein that he was owner in possession of the land measuring 12-Kanals 14-Marlas and 06-Sarsahi, situated at village Channu Mome, Tehsil and District Sialkot; that he appointed the late Chaudhry Zulfiqar Ahmad as his general attorney; however, he cancelled his power of attorney replacing him with Muhammad Akram, the respondent No.6; that his attorneys committed fraud and carried out deception upon him, who in collusion with the revenue authorities transferred the aforesaid land to Gulzar Butt, the respondent No.2 through a sale mutation No.836 attested on 26.05.2004; hence, the appellant sought annulment of the said mutation and prayed for possession of the suit land. The suit of the respondent No.1 was decreed vide judgment and decree dated 06.03.2013. The respondent No.2 being aggrieved preferred an appeal. The appellants were not arrayed as the defendants and respondents: both in suit and the appeal, despite the fact that the suit land stood mutated in favour of the appellants vide sale mutation No.952 attested on 10.12.2005 whereas the suit was instituted on 17.12.2005. When the appellants came to know about passing of the

aforesaid decree dated 06.03.2013, they being directly affected preferred an appeal and along with the appeal they also filed a miscellaneous application seeking leave to file an appeal as a matter of abundant caution. The learned appellate Court admitted the appeal of the appellants to regular hearing vide order dated 27.09.2013. However, vide impugned consolidated judgment and decree dated 18.10.2016, the learned appellate Court held the appeal of the appellants incompetent and dismissed the same; hence, the instant regular second appeal challenging the vires of impugned judgments and decrees passed by the learned Courts below.

2. Heard.

3. It is an admitted position on record that the present appellants became owner of the disputed property vide sale mutation No.952 attested on 10.12.2005, whereas the suit was instituted, obviously, without impleading them as party and challenging the said mutation in their favour, by the respondent No.1 on 17.12.2005 and even during pendency of the suit, the respondent No.1/plaintiff did not bother to implead them in the array of defendants by moving an application under Order I, Rule 10, Code of Civil Procedure, 1908 and decree dated 06.03.2013 was passed. The appeal preferred by the present appellants before the first learned appellate Court was dismissed by observing that:--

> 'As far as appeal filed by the appellants is concerned perusal of record reveals that they never appeared before learned trial court in proceedings of trial of the suit and they even did not make any effort to become a party to the suit or to challenge the impugned judgment and decree upon the basis of fraud and collusiveness in due course of law. It is undenied principle of law that a person who is not the party to the proceedings cannot assail the vires and result of the same in appeal. Therefore, this court is of the firm view that appeal filed by appellants is not maintainable.'

However, in this respect, it is observed that the appellants had remedies: to file application under section 12(2), Code of Civil Procedure, 1908 or to assail the judgment and decree by preferring an appeal. The appellants, having been adversely affected, opted to challenge the decree by filing an

appeal, which was maintainable. In this regard reliance is placed on H.M. Saya & Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another (PLD 1969 Supreme Court 65) and Sahib Dad v. Province of Punjab and others (2009 SCMR 385). The said principle was followed by learned Division Bench of Islamabad High Court in a judgment reported as Jamila Pirzada and 3 others v. Col. (R) Mansoor Akbar and 2 others (2011 CLC 1619-Islamabad) and it was held that:-

> '12. It is observed that as a general principle none can appeal from a decree unless he is a party, but a person, who is not a party to the trial proceedings in a civil suit can file an appeal if he/she is adversely affected by the order and the Appellate Court considers it necessary in the interest of justice, because in such cases right of appeal is a safety wall against the perpetuation of injustice as well as against useless appeals.'

4. Pursuant to the above, the impugned judgments and decrees being contrary to law are open to examination in exercise of jurisdiction under section 100 of the Code of Civil Procedure, 1908; therefore, the same cannot be allowed to hold field further, because it is trite law that one should not be condemned unheard and every litigant should be provided with fair opportunity to present and defend his/her case. Any further observations on merits of the case cannot be rendered, may it prejudice case of either side; therefore, this Court holds its hands from making any further dilation.

5. In view of the above, the appeal preferred by the appellants is accepted, consequent whereof the impugned judgments and decrees passed by the learned Courts below are set aside and case is remanded to the learned trial Court with a direction to implead the present appellants in the array of the defendants by obtaining amended plaint from the plaintiff and after submission of written statements by them (the present appellants) proceed with the case, which will be deemed to be pending, and decide the same afresh in accordance with law. The adversaries are directed to appear before the learned trial Court on 24.01.2023, positively.

JK/J-3/L **Appeal allowed.**

2024 Y L R 550

[Lahore]

Before Shahid Bilal Hassan, J

Mst. ROBINA SHEHNAZ and 10 others---Petitioners

Versus

MUKHTAR BEGUM and another---Respondents

Civil Revision No. 2701 of 2016, heard on 24th January, 2023.

Family Courts Act (XXXV of 1964)---

----S. 13---Enforcement of decrees---Recovery of decreetal amount of maintenance allowance--- Mutation transferring the property of the judgment-debtor, cancellation of---Executing Court, powers of---Scope--- Before institution of the execution application by the decree-holders, the judgment-debtor had transferred his property through mutations on the basis of gift---Decree-holders moved application before the Executing Court for cancellation of said mutations---Said application was allowed by the Executing Court, however, the Appellate Court dismissed the same (application) by allowing the appeal filed by the judgment-debtor--- Validity--- Record revealed that the deceased judgment debtor transferred the property owned by him through two disputed mutations on the basis of alleged gift after dismissal of his constitutional petition by the High Court, which seemed to be nothing but an attempt to frustrate the decree passed against him---Therefore, the Executing Court was vested with jurisdiction to undo the said illegal act committed by the deceased judgment debtor and had rightly cancelled the said mutations by allowing application filed by the petitioners/decree-holders in said regard---Thus, the Appellate Court had failed to exercise its vested jurisdiction as per mandate of law and had committed illegality while passing impugned judgment which could not be allowed to hold field further---High Court

set aside impugned judgment passed by the Appellate Court and restored the order of cancellation of gift-mutations passed by the Executing Court---Revision filed by the decree-holders was allowed, in circumstances.

Amjad Iqbal v. Mst. Nida Sohail and others 2015 SCMR 128 ref.

Malikzada Hameed Ur Rehman for Petitioners.

Nemo for Respondent No.1.

Muhammad Muzammil Qureshi for Respondent No.2.

Date of hearing: 24th January, 2023.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, a decree for recovery of maintenance allowance was passed against Aulad Hussain, deceased on 06.12.2008, which was upheld upto High Court as writ petition was dismissed on 29.06.2010. After dismissal of the writ petition, the judgment debtor transferred his property through mutations No. 1859 dated 27.09.2010 and 1871 dated 09.10.2010 on the basis of alleged gift; therefore, the petitioners moved an application before the learned Executing Court for cancellation of said mutations and recovery of decretal amount of maintenance allowance. The said application was resisted by the rival party; however, the learned Executing Court allowed the said application on 09.02.2016. The respondents being aggrieved preferred an appeal and the same was accepted vide impugned judgment dated 04.05.2016 and application ibid was dismissed; hence, the instant revision petition.

2. Heard.

3. The said question has been answered by the Apex Court of the country in a judgment reported as Amjad Iqbal v. Mst. Nida Sohail and others (2015 SCMR 128), by holding that: -

'The Executing Court through its order dated 14.05.2011 declared such Hiba to be unlawful and such order of the Executing Court appears to have been maintained by the revisional Court. Once the Hiba itself was declared to be unlawful, any further transaction on the basis of the said Hiba could only be a nullity in the eye of law for that the donee of the Hiba did not have legal title to the house to sell the same to the petitioner. Both Hiba as well as the purported sale in favour of the petitioner were nothing but sham transactions and its purpose was to ensure that the decree is not satisfied. The decree was nothing but for the maintenance of Resondent No.2's own minor daughter. Unfortunately, the Respondent No.2 in sheer disregard of his parental obligation has indulged in making all these unlawful transactions. What intent the Respondent No.2 had in his mind but to starve his own minor daughter of her basic needs for survival. The Court while exercising parental jurisdiction cannot just sit and be a spectator in this unholy and unlawful conduct of the Respondent No.2.'

In the present case, the deceased judgment debtor Aulad Hussain transferred the property, owned by him through disputed mutations Nos. 1859 dated 27.09.2010 and 1871 dated 09.10.2010 on the basis of alleged gift, after dismissal of his writ petition by this Court, which seems to be nothing but an attempt to frustrate the decree passed against him. Therefore, the learned Executing Court was vested with jurisdiction to undo the said illegal act committed by the deceased Aulad Hussain and rightly cancelled the said mutations by allowing application, filed by the petitioners in this regard. As such, the learned appellate Court has failed to exercise its vested jurisdiction as per mandate of law and has committed illegality while passing the impugned judgment dated 04.05.2016, which cannot be allowed to hold field further. Resultantly, the revision petition in hand is accepted, impugned judgment dated

04.05.2016 passed by the learned appellate Court is set aside and order dated 09.02.2016 passed by the learned Executing Court is restored. No order as to the costs.

MQ/R-21/L **Revision allowed.**

2024 Y L R 573

[Lahore]

Before Shahid Bilal Hassan, J

GHULAM HUSSAIN---Petitioner

Versus

PROVINCE OF PUNJAB and 2 others---Respondents

Civil Revision No. 69554 of 2023, decided on 23rd October, 2023.

Limitation Act (IX of 1908)---

----S. 3---Specific Relief Act (I of 1877), S. 12---Suit for specific performance of agreement to sell---Limitation---Question of law--- Petitioner / plaintiff sought specific performance of agreement to sell with a delay of 18 years---Trial Court as well as Lower Appellate Court dismissed the suit and appeal filed by petitioner/plaintiff---Validity---Limitation is not a mere technicality or a hyper technicality---Once limitation expires, a right accrues in favour of other side by operation of law and such right cannot lightly be taken away---Question of law, even if not taken or raised by opposite party, can be considered by the Courts even at appellate and revisional stage---Both the Courts evaluated evidence in true perspective and had reached to a just conclusion---High Court declined to disturb concurrent findings on facts as the same did not suffer from any misreading and non-reading of evidence, howsoever erroneous, in exercise of revisional jurisdiction---Revision was dismissed, in circumstances.

Asad Ali and 9 others v. The Bank of Punjab and others PLD 2020 SC 736; Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others PLD 2015 SC 212; United Bank Limited and others v. Noor-un-Nisa and others 2015 SCMR 380; Almas Ahmad Fiaz v. Secretary Government of Punjab and others 2006 SCMR 783; Lahore Development Authority v. Mst. Sharifan Bibi and another PLD 2010 SC 705; Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others 1992 SCMR 2435; Haji Abdul Karim and others v. Florida Builders (Pvt.) Limited PLD 2012 SC 247; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Hakim Muhammad Buta and another v. Habib Ahmed and others PLD 1985 SC 153; Muhammad

Farid Khan v. Muhammad Ibrahim and others 2017 SCMR 679; Mst. Zaitoon Begum v. Nazar Hussain and another 2014 SCMR 1469; Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others 2014 SCMR 161; Muhammad Sarwar and others v. Hashmal Khan and others PLD 2022 SC 13; Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21 and Salamat Ali and others v. Muhammad Din and others PLD 2022 SC 353 rel.

Moin Qaiser Chughtai for Petitioner.

ORDER

SHAHID BILAL HASSAN, J.---Precisely, the petitioner being plaintiff instituted a suit for specific performance of agreement to sell dated 07.05.1991 along with permanent injunction regarding the suit property against the respondents/ defendants, which was duly contested by the respondent No.3/defendant while submitting written statement. The respondent No.3 also instituted a suit for declaration, recovery of compensation and possession against the petitioner and others. Both the suits were consolidated and out of the divergent pleadings of the parties, the learned trial Court framed consolidated issues. Evidence of the parties in pro and contra was recorded. On conclusion of trial, the learned trial Court vide impugned consolidated judgment and decree dated 24.06.2022 dismissed both the suits. The petitioner and respondent No.3, being aggrieved and dissatisfied, preferred separate appeals against the said consolidated judgment and decree. The appeal preferred by the petitioner was dismissed vide impugned judgment and decree dated 13.05.2023; hence, the instant revision petition.

2. Heard.

3. It is a settled law that limitation is not a mere technicality or a hyper technicality rather once limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away as has been held in Asad Ali and 9 others v. The Bank of Punjab and others (PLD 2020 Supreme Court 736). Moreover, it is a settled principle of law that question of law even if not taken or raised by the opposite party, could be considered by the Courts even at appellate and revisional stage. In Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others (PLD 2015 Supreme Court 212), it was invariably held by the August Court of the country that:-

"..... From the various dicta/ pronouncements of the superior court, it can be deduced without any fear of contradiction that such law is founded upon public policy and State interest. This law is vital for an orderly and organized society and the people at large, who believe in being governed by systemized law. The obvious object of the law is that if no time constraints and limits are prescribed for pursuing a cause of action and for seeking reliefs/remedies relating to such cause of action, and a person is allowed to sue for the redressal of his grievance within an infinite and unlimited time period, it shall adversely affect the disciplined and structured judicial process and mechanism of the State, which is sine qua non for any State to perform its functions within the parameters of the Constitution and the rule of law. The object of the law of limitation and the law itself, prescribing time constraints for each cause or case or for seeking any relief or remedy has been examined by the courts in many a cases, and it has been held to be a valid piece of legislation, and law of the land. It is "THE LAW" which should be strictly construed and applied in its letter and spirit; and by no stretch of legal interpretation it can be held that such law (i.e. limitation law) is merely a technicality and that too of procedural in nature. Rather from the mandate of section 3 of the Limitation Act, it is obligatory upon the court to dismiss the cause/lis which is barred by time even though limitation has not been set out as a defence. And this shows the imperative adherence to and the mandatory application of such law by nature and is held to mean and serve as a major deterrent against the factors and the elements which would affect peace, tranquility and due order of the State and society. The law of limitation requires that a person must approach the Court and take recourse to legal remedies with due diligence, without dilatoriness and negligence and within the time provided by the law; as against choosing his own time for the purpose of bringing forth a legal action at his own whim and desire. Because if that is permitted to happen, it shall not only result in the misuse of the judicial process of the State, but shall also cause exploitation of the legal system and the society as a whole. This is not permissible in a State which is governed by law and Constitution. And it may be relevant to mention here that the law providing for limitation for various

causes/reliefs is not a matter of mere technicality but foundationally of the "LAW" itself. ..... "

In this regard, this Court is further fortified by a judgment reported as United Bank Limited and others v. Noor-Un-Nisa and others (2015 SCMR 380), wherein it was held:-

"Under section 3 of the Limitation Act, 1908, it is the bounden duty of every Court of law to take notice of the question of limitation even if not raised in defence by the other contesting party(s)."

Earlier to the above said celebrated judgments, the Apex Court of the country dealt with the same proposition in Almas Ahmad Fiaz v. Secretary Government of Punjab and others (2006 SCMR 783), Lahore Development Authority v. Mst. Sharifan Bibi and another (PLD 2010 Supreme Court 705) and Sardar Anwar Ali Khan and 10 others v. Sardar Baqir Ali through Legal Heirs and 4 others (1992 SCMR 2435).

4. Now, when on the touchstone of the above ratio, the present case is weighed, it appears that the alleged agreement to sell was reached at between the parties on 07.05.1991 (Ex.P1), even prior to deriving of ownership by Altaf Hussain as he became owner in possession of the suit property on 11.06.1991, but the suit was instituted on 08.07.2009, after about 18 years, which means the suit of the petitioner was barred by limitation because Article 113 of the Limitation Act, 1908 provides three years for filing such suit from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused; reliance is placed on judgments reported as Haji Abdul Karim and others v. Florida Builders (Pvt.) Limited (PLD 2012 Supreme Court 247) and Atta Muhammad v. Maula Bakhsh and others (2007 SCMR 1446).

5. In addition to the above, the entire property allotted to Mst. Shakoori Begum by the Provincial Government through registered deed No.938/1 dated 06.06.1991 under Gujranwala Cantt. Scheme was further transferred by her to respondent No.2 along with Ghulam Abbas, Ameer Ali, Ghulam Murtaza sons of Dost Muhammad on the basis of registered sale deed No.978/1 dated 11.06.1991, which was pre-empted by Muhammad Iqbal and the said suit was decreed in his favour on 07.02.1994; meaning thereby when the alleged agreement to sell Ex.P1 was entered into, the property in dispute was not in

ownership of respondent No.2-Altaf Hussain. As such, the learned Courts below while considering law on the subject and facts of the case have rightly concluded that the suit of the petitioner/ plaintiff was badly barred by limitation. In such scenario, if the suit is found to be barred by limitation, then plaint has to be rejected forthwith without resorting to the evidence or framing of any issue. Reliance is placed on Hakim Muhammad Buta and another v. Habib Ahmed and others (PLD 1985 SC 153); however, in the instant case, the learned Courts below have minutely dilated upon the evidence of the parties and have also rightly non-suited the petitioner on merits as well. There appears no legal infirmity or illegality in the impugned judgments and decrees warranting interference by this Court in exercise of revisional jurisdiction under section 115, Code of Civil Procedure, 1908. The findings recorded by the learned Courts below are upheld and maintained.

6. Pursuant to above, both the learned Courts have evaluated evidence in true perspective and have reached to a just conclusion, concurrently; as such the concurrent findings, on facts, cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous, in exercise of revisional jurisdiction; reliance is placed on Muhammad Farid Khan v. Muhammad Ibrahim and others (2017 SCMR 679), Mst. Zaitoon Begum v. Nazar Hussain and another (2014 SCMR 1469), Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others (2014 SCMR 161), Muhammad Sarwar and others v. Hashmal Khan and others (PLD 2022 Supreme Court 13) and Mst. Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21), wherein it has been held:-

> 'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and conclusion drawn is contrary to law.'

Further in judgment reported as Salamat Ali and others v. Muhammad Din and others (PLD 2022 SC 353), it has invariably been held that:-

'Needless to mention that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below.'

However, in the present case, no such occasion has arisen showing any jurisdictional error or defect rather the findings recorded by the learned Courts below are upto the dexterity after minute discussion of the evidence, oral as well as documentary.

7. For the foregoing reasons and while placing reliance on the judgments supra, the revision petition in hand being devoid of any force and substance stands dismissed in limine.

MH/G-11/L Revision dismissed.

2024 Y L R 789

[Lahore]

Before Shahid Bilal Hassan, J

GHULAM SHABBIR (deceased) through L.Rs. and others---Appellants

Versus

MUHAMMAD NAWAZ (deceased) through L.Rs. and others---Respondents

R.S.A. No. 208 of 2011, heard on 17th October, 2023.

Punjab Pre-emption Act (I of 1913) [since repealed]---

----S. 6---Suit for possession through pre-emption--- Thumb impression---Proof--- Non-holding of inquiry---Respondents / plaintiffs claimed their superior right of pre-emption on the basis of co-sharers of the estate in the village---Judgment and decree passed by Trial Court was maintained by Lower Appellate Court---Validity---No one could be held guilty without any proper inquiry, scrutiny and providing him/her fair opportunity to plead and defend his/her case---Without any such inquiry the appellants/defendants were held culprits of tampering with thumb impressions of respondents/plaintiffs on the plaint and Wakalat Nama---Such practice could not be stamped by endorsing the same and no one could be held responsible until and unless a thorough inquiry into the matter was carried out---Veracity of documents in question were disbelieved and discredited due to the observations with regards to super imposing of thumb impressions---Such observations were based on self-conceived and biased approach, without any backing i.e. findings on the basis of thorough inquiry into the matter---High Court declined to approve findings germane to the documents as Lower Appellate Court while passing judgment and decree failed to exercise vested jurisdiction as per mandate of law and had totally misread evidence on record and had committed illegalities---High Court set aside judgment and decree and remanded the appeal to Lower Appellate Court for its decision afresh---Second appeal was allowed accordingly.

Muhammad Mehmood Chaudhry for Appellants.

Sh. Naveed Shahryar, Sh. Usman Karim Ud Din, Barrister Faridoon Kamran and Safina Safdar Bhatti for Respondents Nos.3 and 4.

Zafar Iqbal Chohan and Sarosh Zafar for Respondents Nos.1, 2, 5 and 7.

Date of hearing: 17th October, 2023.

JUDGMENT

SHAHID BILAL HASSAN, J.---Succinctly, the respondents/plaintiffs instituted a suit for possession through pre-emption against the appellants regarding the land measuring 400-Kanals situated at Mauza Hyderabad, Tehsil Mankera, District Bhakkar, contending that the original owner of the suit land was one Muhammad Aslam, who vide registered sale deed dated 03.08.1976 had sold/alienated the suit land in consideration of Rs.8,000/- to the appellants but in order to defeat the valuable right of the respondents / plaintiffs, allegedly the ostensible sale price of Rs.80,000/- was shown. The respondents/plaintiffs claimed their superior right of pre-emption on the basis of being co-sharers in Khata and co-owner of the estate in Mauza. The appellants contested the suit by filing the written statement. Out of the divergent pleadings of the parties, as many as nine(9) issues were framed. The learned trial Court invited evidence of the parties. In oral evidence, Muhammad Yar (deceased) one of the respondents/plaintiffs appeared as P.W. 1 and Muhammad Nawaz (P.W.2). In documentary evidence they produced copies of Register Haqdaran Zameen for the year 1968-69 as Ex.P1 to Ex.P4. The appellants, in oral evidence, produced Muhammad Aslam (scriber) as D.W.1, Khan Haq Dad Khan, Advocate Bhakkar (D.W.2), Muhammad Nawaz (D.W.3), Zulfiqar Ali (D.W. 4), Muhammad Zaman (General Attorney) as D.W.5 and Bashir Ahmed Sub-Inspector, Finger Print Bureau (D.W.6) and in documentary evidence, the appellants produced Ex.D1 to Ex.D9. On conclusion of trial, the learned trial Court decreed the suit subject to payment of Rs.91,204/- and respondents were directed to deposit the decreed amount after deducting the amount of Zar-e-Panjum already deposited before 10.04.1984, failing which, the suit was required to be dismissed, vide judgment and decree dated 10.02.1982. The appellants being aggrieved preferred an appeal, which was accepted vide judgment and decree dated

13.12.1982 and while setting aside the judgment and decree dated 10.02.1982, the suit of the respondents was dismissed.

The respondents feeling aggrieved preferred Regular Second Appeal No.55/ 1983 before this Court, which was accepted vide judgment dated 25.01.2000, judgment and decree dated 13.12.1982 passed by the learned appellate Court was set aside with the result that the appeal would be deemed to be pending, to be decided afresh in accordance with law by the learned District Judge, either himself or by an Additional District Judge after its entrustment. In compliance with the said judgment dated 25.01.2000, the learned Addl. District Judge, Bhakkar, heard the appeal, accepted the same and while setting aside the judgment and decree dated 10.02.1982 remanded the case to the learned trial Court for deciding it afresh on issue No.3 and issue No.8-A, vide judgment and decree dated 27.11.2001. Aggrieved of it, the respondents preferred F.A.O. No.25/2001 before this Court, which was allowed and case was remanded to the learned appellate Court for rehearing of the appeal and to decide the same afresh vide judgment dated 18.09.2003. The appellant being dissatisfied filed Civil Petition No.2817-L/2003 before the Apex Court of the country but leave to appeal was refused and petition was dismissed vide order dated 28.02.006. On 08.03.2010, the appellants filed amended appeal before the learned Addl. District Judge, Bhakkar.

The learned appellate Court, after remand, heard the appeal and dismissed the same vide impugned judgment and decree dated 31.10.2011; hence, the instant regular second appeal, challenging the vires of impugned judgment and decree dated 31.10.2011 passed by the learned Addl. District Judge.

2. Heard.

3. On 13.12.2022, learned counsel for the respondents Nos. 3 and 4 raised objection on the competency of the regular second appeal in hand and submitted that this appeal is not competent under Order XLII read with Order XLI, Rule 1, Code of Civil Procedure, 1908 because the appellants did not submit the certified copies of the judgment and decree of the learned trial Court while filing

the instant appeal. In response to the said objection, the learned counsel for the appellants submitted that the appeal was filed within time, upon which office raised objection as to non-appending of certified copies of the judgment and decree dated 10.02.1982 of the learned trial Court and after removing the office objection, the appeal was re-filed on 15.12.2011 as is evident from the office receipt stamp, affixed on the urgent form and Index Form showing Sr. No.6-1 with connotation 'Judgment/decree of Civil Judge 10.02.82'. Meaning thereby, the mandate of Order XLII read with Order XLI, Rule 1, Code of Civil Procedure, 1908 has been adhered to and followed by the appellant. Therefore, it is ruled that the regular second appeal in hand is maintainable.

4. On merits, it is observed that a specific objection was taken by the present appellants that the suit was not competent as the same was not instituted and verified by all the plaintiffs rather only one Muhammad Nawaz (plaintiff) by affixing thumb impressions on behalf of the other plaintiffs instituted the same and the learned appellate Court while placing reliance on the depositions of the said Muhammad Nawaz as P.W. 2 and Muhammad Yar, plaintiff (P.W.1) discredited the said objection of the present appellants. However, Rule 15 of Order VI, Code of Civil Procedure, 1908 is relevant on the said subject, which provides that:-

> '15. Verification of pleadings. (1) Save as otherwise provide by any law for the time being in force, every pleading shall be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
>
> (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verified upon information received and believed to be true.
>
> (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.'
>
> Therefore, when a specific objection was raised, it was mandatory for

the learned trial Court to summon all the plaintiff(s) so as to verify the fact that whether the suit was instituted by them or not? because the said omission is curable in such way and the suit cannot be dismissed mere on this ground. However, such practice has not been undertaken rather, as observed above, mere on the depositions of Muhammad Nawaz (P.W.2) and Muhammad Yar (P.W.1) it was believed that all the plaintiffs thumb marked and signed the plaint.

5. In addition to the above, without conducting an inquiry into the matter, the learned appellate Court observed that it were the present appellants who super imposed the thumb impressions on the already affixed thumb impressions. It is settled principle of law that no one could be held guilty without any proper inquiry, scrutiny and providing him/her fair opportunity to plead and defend his/her case but in the present case, as observed above, without any such inquiry the appellants have been held culprits of tampering with the thumb impressions of the respondents on the plaint and Wakalat Nama. Such practice cannot be stamped by endorsing the same and no one can be held responsible until and unless a thorough inquiry into the matter is carried out.

6. Additionally, the veracity of the documents Ex.D1 to Ex. D3 have been disbelieved and discredited due to the observations with regards to super imposing of the thumb impressions, meaning thereby the same are based on self-conceived and biased approach, without any backing i.e. findings on the basis of thorough inquiry into the matter; therefore, the findings germane to the above said documents cannot be approved.

7. In view of the above, the learned appellate Court while passing the impugned judgment and decree dated 31.10.2011 has failed to exercise vested jurisdiction as per mandate of law and has totally misread evidence on record as well as has committed illegalities; therefore, the impugned judgment and decree cannot be allowed to hold field further. Resultantly, the regular second appeal in hand is allowed, impugned judgment and decree dated 31.10.2011 is set aside and case is remanded to the learned appellate Court, where the appeal will be deemed to be pending, for its decision afresh keeping in view the above said observations, within a period of three months from the date of receipt of

certified copy of this judgment and record. The adversaries are directed to appear before the learned appellate Court on 22.12.2023.

MH/G-12/L Case remanded.

PLJ 2024 Lahore 160

Present: **SHAHID BILAL HASSAN, J.**

Mst. **NAWAB BIBI (deceased) through L.Rs.--Petitioners**

versus

HAKIM ALI and others--Respondents

C.R. No. 2312 of 2014, heard on 4.10.2023.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Inheritance--Sole legal heir--Determination of faith--Hearsay evidence--Pedigree table--Concurrent findings—Suit for declaration--Entitlement for 1/2 share--Deprivation from lawful right--Challenge to--There is no principle of universal application to determine faith of a person except direct disclosure by words from mouth of deceased, circumstantial evidence of conduct of deceased and opinion of witnesses--When predecessor in interest of present petitioners had failed to prove that Shera was professing Shia faith during his life time, ultimate result would be that he was Sunni by faith and same had rightly been determined and declared as such by Courts below--Predecessor of petitioners in connected revision petition knowingly and deliberately did not disclose name of daughter of deceased Shera only to deprive her from her lawful right--Courts below have rightly adjudged that *Mst.* Nawab Bibi being daughter and legal heir of Shera was entitled to inherit 1/2 of disputed property, owned by Shera--The findings recorded on this score being based on proper appreciation of evidence were upheld and maintained--Courts below had committed no illegality, irregularity and wrong exercise of jurisdiction--Revision petition dismissed. [Pp.162 & 163] A, B, C, D & F

PLJ 2023 SC 8, 2014 SCMR 1469, 2014 SCMR 161, 2017 SCMR 679, PLD 2022 SC 13 and PLD 2022 SC 21 *ref.*

Limitation--

----When question of inheritance is involved limitation does not run--Moreover, when foundational transaction is based on fraud and *mala fide*,

subsequent superstructure built thereon cannot be allowed to stand and ultimately collapses. [P. 163] E

Mr. Ijaz Hussain, Advocate for Petitioners.

Syed Kaleem Ahmad Khurshid and Sultan Mehmood, Advocates for Respondents No. 4 to 9.

Respondents No. 1 to 3 *Ex parte* on 3.10.2016.

Date of hearing: 4.10.2023.

JUDGMENT

This single judgment shall decide the captioned revision petition and connected C.R.No. 1992 of 2014, as both are outcome of one and the same impugned judgments and decrees.

2. Purportedly, *Mst.* Nawab Bibi was the sole legal heir of her father namely Shera son of Allah Din and being his sole legal heir, she was entitled to inheritance of legacy of the said Shera but the predecessors in interest of the Respondents Namely Fazal Din, Elahi Bukhsh, Allah Dad, Roshan and Jhanda got incorporated a false, bogus and fraudulent Mutation No. 80/437 of inheritance of deceased Shera by showing therein that deceased Shera had one brother and one daughter but both had died prior to death of Shera and in the absence of other legal heirs, above said Fazal Din, etc. were entitled to inherit the property of deceased Shera; therefore, the above said inheritance mutation was sanctioned by the revenue officer on 03.12.1955. In 1993, the predecessor in interest of the petitioner(s) namely *Mst.* Nawab Bibi daughter of Shera came to know about the alleged fraudulent, forged and frivolous mutation of inheritance *ibid* and instituted suit for declaration by challenging the validity of the same. The Defendants Namely Azmat Bibi, Hakim Ali, Rajoo Bibi, Bashir Ahmad, Nazir Ahmad, Ghafoor and Manzoor submitted their conceding written statements, whereas the Defendants No. 5 to 9 and Defendants No. 3-A to 3-C contested the suit. The divergence in pleadings of the contesting parties was summed up into issues by the learned trial Court. Evidence of the parties in pro and contra was recorded. On conclusion of trial, the learned trial Court dismissed the suit *vide* judgment and decree dated 21.11.2000.

An appeal was preferred by the aggrieved party, which was allowed on 14.06.2001 and case was remanded to the learned trial Court for decision afresh. After remand, the learned trial Court *vide* judgment and decree dated 19.01.2002 decreed the suit in favour of *Mst.* Nawab Bibi. Bashir Ahmad, etc. being aggrieved preferred an appeal which was dismissed on 06.01.2003. Revision petition was filed, which was allowed *vide* order dated 12.03.2012 and the case was remanded to the learned trial Court for decision afresh. The learned trial Court framed additional Issue 1-A (Whether the deceased father of deceased plaintiff was Shia by faith? OPP). After this, evidence of the parties was recorded on additional issue. The learned trial Court *vide* impugned judgment and decree dated 21.02.2013 decreed the suit of the petitioner(s)/plaintiff(s) to the extent of 1/2 share as inheritance from the legacy of the deceased Shera. The petitioner(s)/ plaintiff(s) being aggrieved preferred an appeal but the same was dismissed *vide* impugned judgment and decree dated 02.05.2014; hence, the instant revision petition by *Mst.* Nawab Bibi through her legal heirs with the prayer that she is entitled to inherit half property of deceased Shera as sharer and half as return, whereas the petitioners in connected C.R.No. 1992 of 2014 have prayed for setting aside the impugned judgments and decree and dismissal of the suit of *Mst.* Nawab Bibi.

3. Heard.

4. Every Muslim in the sub-continent is presumed to belong to Sunni sect, unless 'good evidence' to the contrary is produced by the party contesting the same. The judicial determination of whether the said presumption of faith of a party, positively stands rebutted, would be adjudged by the Court on the principle of preponderance of evidence produced by the parties. No strict criteria can be set to determine the faith of a person and therefore to pass any finding thereon, the Courts are to consider the surrounding circumstances *i.e.* way of life, parental faith and faith of other close relatives. Reliance in this regard is placed on *Mst. Chanani Begum (Deceased) through LRs. v. Mst. Qamar Sultan* (2020 SCMR 254) and *Abdul Rehman and others v. Mst. Allah Wasai and others* (2022 SCMR 399). Further reliance in this regard can also be placed on judgment reported

as *Ghulam Shabbir and others v. Mst. Bakhat Khatoon and others* (2009 SCMR 644). A detailed analysis in this regard, by referring the least precedents rendered by the Privy Council and Courts, has been made by this Court in judgment reported as *Tahira Bibi v. Muhammad Khan, etc.* (PLJ 2019 Lahore 829), which does not need to re-discussed here again as the crux of the observation is that there is no principle of universal application to determine the faith of a person except direct disclosure by words from the mouth of deceased, circumstantial evidence of the conduct of deceased and opinion of witnesses.

In the present case, the Issue No. 1-A is pivotal which was framed with regards to faith of the deceased Shera. The deposition of P.W.1 is hearsay as he, during cross examination, deposed that daughter of Shera told him that Shera was Shia by faith, so his evidence has rightly been discarded. P.W.2 namely Haji Ejaz deposed that he did not know Shera and never saw him, so his evidence has also no value in the eye of law. Evidence of P.W.3 is not worthy of credence because admittedly Shera died in 1949 and at that time age of this P.W. has rightly been counted as seven(7) years because he mentioned his age as 71 years at time of recording his evidence. Moreover, his deposition is beyond the pleadings when he deposed that Shera died in the year 1956, whereas the same has been pleaded as 1949. P.W.4 deposed that he did not know Shera. It means that the depositions of all the P.Ws. is based on hearsay and is not based on personal knowledge; therefore, the same is rightly been discarded and disbelieved. When the predecessor in interest of the present petitioners namely *Mst.* Nawab Bibi has failed to prove that Shera was professing Shia faith during his life time, the ultimate result would be that he was Sunni by faith and the same has rightly been determined and declared as such by the learned Courts below while passing the impugned judgments and decrees.

5. So far as the claim of the petitioners in connected revision petition is concerned, it is observed that pedigree table prepared by the revenue authority during mutation proceedings, on the information provided by the predecessor in interest of the petitioners, in connected revision petition, which divulges that Shera had a daughter but she was shown to be dead and

her name was not disclosed. Meaning thereby the predecessor of the petitioners in connected revision petition knowingly and deliberately did not disclose name of *Mst.* Nawab Bibi, daughter of the deceased Shera only to deprive her from her lawful right. Therefore, in presence of admission of D.W.1 that Shera was original owner of the disputed property and *Mst.* Nawab Bibi was the only daughter and legal heir of the said Shera, the learned Courts below have rightly adjudged that *Mst.* Nawab Bibi being daughter and legal heir of Shera is entitled to inherit 1/2 of the disputed property, owned by Shera. The findings recorded on this score being based on proper appreciation of evidence are upheld and maintained.

6. Question of limitation has also rightly been adjudicated upon by the learned Courts below because fraud vitiates the most solemn transaction and in such like position, when question of inheritance is involved the limitation does not run. Moreover, when the foundational transaction is based on fraud and mala fide, the subsequent superstructure built thereon cannot be allowed to stand and ultimately collapses. Furthermore, the concurrent/coexisting possession of the deceased petitioner *Mst.* Nawab Bibi and after her demise, that of the present petitioners, her successors, would be considered.

7. Pursuant to the above, it is held that the learned Courts below have committed no illegality, irregularity and wrong exercise of jurisdiction, rather after evaluating evidence on record have reached to a just conclusion that the petitioners/defendants have miserably failed to prove their case through trustworthy and reliable evidence. The impugned judgments and decrees do not suffer from any infirmity rather law on the subject has rightly been construed and appreciated. As such, the concurrent findings on record cannot be disturbed in exercise of revisional jurisdiction under Section 115 of Code of Civil Procedure, 1908. Reliance is placed on judgments reported as *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469), *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), *Muhammad Farid Khan v. Muhammad Ibrahim, etc.* (2017 SCMR 679), *Muhammad Sarwar and others v. Hashmal Khan and others* (PLD 2022 Supreme Court 13) and *Mst.*

Zarsheda v. Nobat Khan (PLD 2022 Supreme Court 21) wherein it has been held that:

> *'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This Court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.'*

Further in judgment reported as *Salamat Ali and others v. Muhammad Din and others* (PLJ 2023 SC 8), it has invariably been held that:

> *'Needless to mention that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below.'*

8. For the foregoing reasons, the revision petition in hand and connected C.R. No. 1992 of 2014 come to naught and the same stand dismissed. No order as to the costs.

(Y.A.) **Revision petition dismissed.**

PLJ 2024 Lahore 165

Present: **SHAHID BILAL HASSAN, J.**

MUHAMMAD AWAIS--Petitioner

versus

ZAHIDA PARVEEN--Respondent

C.R. No. 44034 of 2019, heard on 5.10.2023.

Family Courts Act, 1964 (XXXV of 1964)--

----S. 14--Muslim Family Laws Ordinance, (VIII of 1961), Ss. 7(1) & 10--Civil Procedure Code, 1908, S. 115--Suit for recovery of gold ornaments and damages on account of divorce--Condition of divorce was mentioned in Nikahnama--Suit was dismissed--Appeal--Allowed--Writ petition--Accepted--Matter was remanded--Decreed--Nikahnama was not challenged by appellant--Entitlement for gold ornaments--Absolute right of divorce--Jurisdiction concurrent findings--Nikahnama was per se admissible in evidence and entries of same had not been challenged by petitioner before any forum at relevant time--The petitioner's side could not shake veracity of testimonies of P.Ws. rather witnesses remained firm and unscathed--It can safely be concluded that respondent had rightly been held entitled to recover 8-tolas gold ornaments from petitioner as agreed by him at time of Nikah--Findings of Courts below to this extent were upheld and maintained--A husband has an absolute right to divorce his wife--No condition is described in Shariah as well as in codified law--Courts below had failed to adjudicate upon matter in hand to extent of question of compensation in lieu of divorce by appreciating law on subject; High Court was vested with ample jurisdiction and authority to undo concurrent findings in exercise of revisional jurisdiction--Revision petition partially allowed. [Pp.167 & 168] A, B, C, D & E

2008 SCMR 186, 2012 CLC 837, 2018 CLC 1884 Lah., PLJ 2021 Lahore 485, 2022 CLC 24 Lah., 1993 SCMR 321, 2010 SCMR 1630, 2004 SCMR 1001, 2020 CLC 1039 Lah. *ref.*

Sardar Abdul Majeed Dogar, Advocate for Petitioner.

Mr. Sukrat Mir Basit, Advocate for Respondent.

Date of hearing: 5.10.2023.

JUDGMENT

Tersely, the respondent instituted a suit for recovery of gold ornaments weighing 8-tolas and Rs. 500,000/-as damages on account of divorce, against the present petitioner. It was maintained that her Nikah was solemnized on 25.11.2008 with the present petitioner and dower amount was fixed at Rs. 1,000/-. In Column No. 17 of the Nikahnama special condition was mentioned that the petitioner/ defendant would give 8-tolas gold ornaments to the respondent/ plaintiff which would be property of the respondent/plaintiff; that it was also mentioned in Nikahnama if that the petitioner/defendant divorces the respondent/plaintiff, he would pay Rs. 500,000/-as compensation. It was averred that the petitioner/defendant divorced the respondent on 15.01.2009; therefore, she instituted suit. The learned trial Court dismissed the suit on 12.02.2010. The respondent/plaintiff being aggrieved preferred an appeal, which was accepted on 02.06.2010 and case was remanded to the learned trial Court. The petitioner/defendant challenged the said remand order through writ petition which was accepted by this Court on 25.11.2011 and decision of the learned Judge Family Court was restored. Therefore, the respondent/plaintiff filed a suit for recovery of 8-tolas gold ornaments and Rs. 500,000/-before the Civil Court. The petitioner/defendant contested the suit by submitting written statement. Divergence in pleadings of the parties was summed up into issues and evidence of the respondent/plaintiff was recorded. The petitioner/defendant could not produce evidence so his right to lead evidence was closed and suit

of the respondent/plaintiff was decreed *vide* judgment and decree dated 09.01.2018. The petitioner/ defendant being aggrieved preferred an appeal but the same was dismissed *vide* impugned judgment and decree dated 11.06.2019; hence, the instant revision petition.

2. Heard.

3. It is claim of the respondent that Nikah inter se the parties was solemnized on 25.11.2008 and at the time of Nikah, the present petitioner agreed to give 8-tolas gold ornaments to the respondent/ plaintiff and a stipulation was imposed on the right of divorce of the present petitioner that if he divorces the respondent, he will pay Rs. 500,000/-in lieu thereof. Now, the petitioner has divorced the respondent and has not paid the above said gold ornaments and compensation in lieu of divorce therefore, the respondent is entitled to the same. The petitioner/ defendant denied the averments of the plaint and contended that he did not enter into nuptial tie with the respondent with his free will rather his thumb impression was obtained by force.

4. In order to substantiate her claim, the respondent produced Nikah Khawan, witnesses of marriage besides her own deposition in the witness box. All the witnesses have corroborated the stance of the respondent with regards to the entries made in the Nikahnama germane to gold ornaments and stipulation as well as restriction on right of divorce by the petitioner, which have been mentioned in columns No. 17 and 19 of the Nikahnama. The petitioner could not lead evidence as to obtaining of his thumb impression on the Nikahnama by force and under undue influence by the respondent and even the same does not appeal to prudent mind. The Nikahnama is per se admissible in evidence and entries of the same have not been challenged by the petitioner before any forum at the relevant time. Even otherwise, the entries of the Nikahnama have been proved by the respondent by producing oral as well as documentary evidence. As against this, the petitioner could not lead evidence in

rebuttal as his right to produce evidence was closed by the learned trial Court and he remained unsuccessful in getting the said order reversed by the higher Courts despite availing of the remedy provided under law. Meaning thereby the evidence of the respondent on this point is unrebutted and even during cross examination, conducted on the P.Ws. the petitioner's side could not shake the veracity of the testimonies of the P.Ws. rather the witnesses remained firm and unscathed. Therefore, it can safely be concluded that the respondent has rightly been held entitled to recover 8-tolas gold ornaments from the petitioner as agreed by him at the time of Nikah with the respondent, by the learned Courts below. As such, the findings of the learned Courts below to this extent are upheld and maintained.

5. So far as the claim of the respondent for recovery of Rs. 500,000/-as compensation in lieu of divorce is concerned, it is observed that in the Holy Quran in Surah Al-Baqra and Surah Talaq the delegation of right of divorce has been described in detail. Similary, section 7(1) of the Muslim Family Laws Ordinance, 1961 deals with the matter of Talaq. The provision of Section 105 of the Code of Muslim Personal Laws also caters this thing that a husband has an absolute right to divorce his wife. In this respect, no condition is described in Shariah as well as in the codified law. Reliance in this regard is placed on judgment reported as *Muhammad Bashir Ali Siddiqui v. Muhammad Sarwar Jahan Begum* (2008 SCMR 186), wherein it has been observed that no condition can be imposed on the husband if he desires to divorce his wife, because the right of divorce has been given by Almighty Allah to the husband and this proposition has been discussed in detail. The said view has been adopted in judgment reported as *Mst. Zeenat Bibi v. Muhammad Hayat and 2 others* (2012 CLC 837-Lahore) on this point and most recent this view has been reiterated in judgments reported as *Muhammad Asif v. Mst. Nazia Riasat and 2 others* (2018 CLC 1844-Lahore), *Muhammad Sajjad v. ADJ etc.* (PLJ 2021 Lahore 485) and

Mujahid Karman v. Mst. Saira Aziz and 2 others (2022 CLC 24-Lahore) by this Court. In *Muhammad Bashir Ali Siddiqui's case supra,* the Apex Court of the country has held that:-

> *'His only contention was that such condition was embodied in the Nikahnama by way of safety and for prolongation of marriage contract, as it would deter both the parties from bringing an end to the marriage contract. This contention to say, the least is absolutely frivolous as it is against the basic principle of law which require the parties to remained in marital ties in a peaceful and tranquil atmosphere and are not required to be bound by stringent conditions to remain in marriage bond.'*

The principles laid down by the Apex Court of the country in the judgment of Muhammad Bashir Ali Siddiqui *ibid* shall prevail in view of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. Therefore, it is observed without any hesitation that the learned Courts below have failed to adjudge the case on the point of compensation of Rs. 500,000/-in lieu of divorce as per settled principles and norms. Therefore, to this extent the impugned judgments and decrees are not sustainable in the eye of law.

6. For the foregoing reasons, it is observed that the learned Courts below have failed to adjudicate upon the matter in hand to the extent of question of compensation in lieu of divorce by appreciating law on the subject; therefore, this Court is vested with ample jurisdiction and authority to undo the concurrent findings in exercise of revisional jurisdiction under Section 115, Code of Civil Procedure, 1908 as has been held in *Mst. Nazir Begum v. Muhammad Ayyub and another* (1993 SCMR 321), *Sultan Muhammad and another v. Muhammad Qasim and others* (2010 SCMR 1630), *Ghulam Muhammad and 3 others v. Ghulam Ali* (2004 SCMR 1001) and *Muhammad Khubaib v. Ghulam Mustafa*

(deceased) through LRs (2020 CLC 1039-Lahore). Resultantly, the revision petition in hand is allowed partially and impugned judgments and decrees to the extent of awarding compensation in lieu of divorce is set aside, consequent whereof the suit of the respondent to this extent stands dismissed. No order as to the costs.

(Y.A.) **Revision partially allowed.**

PLJ 2024 Lahore 174

Present: **SHAHID BILAL HASSAN, J.**

CHAIRMAN, NATIONAL HIGHWAY AUTHORITY through G.M. and another--Appellants

versus

ABDUL HAMEED and another--Respondents

F.A.O. No. 5549 of 2023, heard on 13.2.2024.

Civil Procedure Code, 1908 (V of 1908)--

----O.V R. 20 & O.IX R. 13--Land Acquisition Act, (I of 1894), Ss. 4 & 18--Process fee and talbana was not deposited--Issuance of notices through publication--Ex-parte decree--Application for setting aside *ex-parte* decree--Dismissed--Violation of law--Substituted service was resorted by trial Court--Acquisition of land--Filing of reference--Award for acquisition of land--When position remained as such, act of Court for resorting to substituted service could not be said more than an illegality and nullity in eye of law--It is a settled principle of law that unless all efforts to effect service in ordinary manner are verified to have been failed, substitute service cannot be resorted to--Substituted service being in violation of law and rule laid down by Honourable Supreme Court could not be deemed to be valid service--When basic order for initiating ex parte proceedings against present appellants has no backing of law and had been passed without adopting due process of law, superstructure and edifice built thereon could not stand because if same is allowed to hold field, it would definitely infringe rights of appellants' inalienable right of defending case and would amount to condemn appellants without affording an opportunity of hearing--Appeal accepted. [P. 177] A, B & C

2001 SCMR 99 and 1996 SCMR 1703 *ref.*

M/s. Azmat Hayat Khan Lodhi and Hafiz Sohaib Raza, Advocates with Muhammad Ali, D.D. Legal NHA for Appellants.

Hafiz Shaukat Ali Wains, Advocate for Respondents.

Date of hearing: 13.2.2024.

JUDGMENT

Tersely, the facts of the case relevant for the disposal of this appeal are that a Notification under section 4 of the Land Acquisition Act, 1894 dated 26.05.2007 was issued for the construction of Habibabad Flyover Bridge, Tehsil Pattoki, District Kasur. Later on, Notification under Section 17(4) and 6 of the Act dated 3.10.2014 was also issued. After following all the procedural and codal formalities, the Award for the acquisition of the land measuring 285-Kanals was announced on 17.03.2015 whereby the acquired land of the respondents was evaluated at Rs. 75,000/- per marla alongwith 15% requisition costs and 8% compound interest. Additionally, Rs. 1,458,000/- was adjudicated as compensation for the building. Being dissatisfied with the quantum of the evaluation in the Award dated 17.03.2015, the Respondent No. 1 filed a reference under Section 18 of the Act, challenging the Award, on 23.04.2015. Alongwith the reference, the Respondent No. 1 also filed an application under Section 5 of the Limitation Act, 1908 for the condonation of delay. The reference was entrusted to the learned trial Court on 20.06.2015, wherein notices were issued to all the appellants initially *vide* order dated 20.06.2015. The Respondent No. 1 did not deposit the process fee and Talbana and the similar position remained till 16.06.2016. However, on 27.06.2016, ignoring the fact that the Respondent No. 1 did not deposit the process fee and Talbana, the learned trial Court resorted to issuance of notice through publication in newspaper and adjourned the case for 29.07.2016 and on the said date the present appellants were proceeded against ex parte. Eventually, the reference was decreed ex parte after recording evidence *vide* ex parte judgment and decree dated 09.11.2021.

The appellants on gaining knowledge on 20.11.2021 filed an application under Order IX, Rule 13, Code of Civil Procedure, 1908 for setting aside ex parte proceedings dated 29.07.2016 and decree dated 09.11.2021. The Respondent No. 1 contested the said application by filing its written reply. The learned trial Court *vide* impugned order dated 24.10.2022 dismissed the said application. The appellants earlier filed a writ petition

against the said order but the office raised objection which was sustained *vide* order dated 20.01.2023; hence, the instant appeal.

2. Heard.

3. Considering the arguments and going through the record, it is observed that the matter requires consideration with regard to the applicability of the provisions contained under Order V, Rule 20, C.P.C. Record divulges that the learned trial Court ordered to issue notices to the appellants subject to deposit of process fee and Talbana by the Respondent No. 1 but the same was not deposited despite grant of different dates and the learned trial Court without considering the same resorted to substituted service through publication of court notice in the newspaper. Even if for the sake of arguments it is presumed that the process purportedly issued for the service upon the present appellants was served or refused to be accepted, the learned trial Court, before resorting to substituted service under Rule 20 of Order V, Code of Civil Procedure, 1908, could not satisfy itself by recording statement of the process server as required under Rule 19 of the Order V of the Code, 190, which stipulates:

> '**19. Examination of serving officer.** Where a summons is returned under Rule 17, the Court shall, if the return under that rule had not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be examined by another Court, touching hi proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.'

When the position remained as such, the act of the Court for resorting to substituted service cannot be said more than an illegality and nullity in the eye of law. It is a settled principle of law that unless all efforts to effect the service in the ordinary manner are verified to have been failed, substitute service cannot be resorted to. There is a series of authorities on this proposition of law. However, the reference can be made to *Mrs. Nargis Latif v. Mrs. Feroz Afaq Ahmed Khan* (2001 SCMR 99) and *Haji Akbar and*

others v. Gul Baran and 7 others (1996 SCMR 1703). I have no, slightest doubt in holding that the orders for substitute service were passed in a mechanical fashion and without proper application of mind. Such orders were passed without ascertaining the reasons for non-service and without verifying the factum as to whether all other modes of service were exhausted and were rendered futile. In such circumstances the substituted service being in violation of the law and the rule laid down by the Honourable Supreme Court as referred above could not be deemed to be valid service. Therefore, when the basic order dated 29.07.2016 for initiating ex parte proceedings against the present appellants has no backing of law and has been passed without adopting due process of law, the superstructure and edifice built thereon *i.e.* subsequent ex parte decree dated 09.11.2021 cannot stand because if the same is allowed to hold field, it would definitely infringe the rights of the appellants' inalienable right of defending the case and would amount to condemn the appellants without affording an opportunity of hearing. The above fact is sufficient to condone the delay in filing the application under Order IX, Rule 13, Code of Civil Procedure, 1908.

4. In view of the above, the appeal in hand is accepted, impugned judgment and decree dated 09.11.2021 and order dated 29.07.2016 are set aside, consequent whereof the application under Order IX, Rule 13, Code of Civil Procedure, 1908 moved by the appellants stands allowed. The trial Court is directed to proceed with the reference after obtaining reply from the present appellant and conclude the same preferably within a period of three months, even if it has to fix the case on day to day basis.

(Y.A.) **Appeal accepted.**

PLJ 2024 Lahore 214

Present: **SHAHID BILAL HASSAN, J.**

MUHAMMAD ADIL NAWAZ BHATTI--Petitioner

versus

CHAIRMAN UNION COUNCIL and others--Respondents

W.P. No. 62590 of 2023, heard on 30.1.2024.

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----Ss. 2(b) & 7--West Pakistan Rules under Muslim Family Laws Ordinance, 1961, R. 3(b)--Three notices of talaq were served--Non-issuance of divorce effectiveness certificate--Petitioner and respondent were resides abroad--Territorial jurisdiction of union council and chairman--Proceedings in District Courts Germany were not disclosed by petitioner--Challenge to-- The petitioner was permanently residing in Germany and Respondent No. 3 was also there as is evident from her Resident Card and Health Card--Union Council, which would had jurisdiction in matter would be Union Council within whose territorial jurisdiction wife was residing at time of pronouncement of divorce and in this case Respondent No. 3 was residing in Germany as had been admitted by petitioner--The petitioner did not disclose factum of initiation of proceedings before District Courts in Germany with regards to complaint against physical assault, claim for separate accommodation and maintenance, petitioner had not approached High Court with clean hands--Stance SRO had been struck down by Islamabad High Court was concerned, it was observed that said S.R.O. is fully in vogue in Punjab as no verdict as such had been passed by High Court, because a relief cannot go beyond provincial boundary and affect any other province or Area or

its people--Order impugned passed by Respondent No. 1 had rightly been passed while construing law on subject, which did not need any interference by High Court--Petition dismissed. [Pp. 216, 217, 218 & 219] A, B, C, D & E

2009 YLR 1141 Lah., 2016 MLD 1061 Lah., 2010 MLD 989 Lah., PLD 2019 Lahore 285, PLD 2017 Lahore 665 *ref.*

Malik Muhammad Imtiaz Mahal, Advocate for Petitioner.

Ms. Yasrab Gulzar, Advocate for Respondent No. 3.

Mian Jaffer Hussain, Deputy Attorney General for Pakistan.

Mr. Qamar Zaman Qureshi, Additional Advocate General Punjab.

Date of hearing: 30.1.2024.

JUDGMENT

Facts, in concision, are as such that the petitioner is an Overseas Pakistani and living abroad/Germany, therefore, the instant petition has been filed through his attorney/real father; that the petitioner contracted marriage with Respondent No. 3 as per Islamic rites and rituals on 18.09.2020, however, the wedlock remained issueless. The petitioner and Respondent No. 3 went to reside in Germany after their marriage. Some family disputes occurred between the spouse and at the end the parties made a decision of separation. Allegedly, the petitioner sent first notice of divorce to the Respondent No. 1 on 03.01.2023, second notice on 03.02.2023 and third/last divorce notice on 06.03.2023 to the Respondent No. 1 through DHL which were received by the Respondent No. 1. However, the Respondent No. 1 wrote an advice letter dated 27.03.2023 to the petitioner to approach the concerned forum abroad. The petitioner through Gmail sent a request to the

concerned Authority/Consulate General Pakistan in Germany on 31.03.2023. The petitioner, thereafter, moved a detailed application dated 11.04.2023 with relevant documents to the Respondent No. 1 requesting him to issue divorce effectiveness certificate. The Respondent No. 1 *vide* order dated 19.04.2023 declined the said request of the petitioner. Thereafter the petitioner approached the Consulate General of Pakistan regarding issuance of divorce effectiveness certificate. However, the Consulate General of Pakistan issued letter No. CG-1/3/2023 dated 14.06.2023 with the following observation:

> *"The Islamabad High Court on the Writ Petition No. 21 of 2021 had set-aside the notification dated 08.11.1961 (SRO 1086/61), which means that Pakistan Mission abroad may no longer act as Arbitration Councils. The applicant would have to approach Arbitration Council in Pakistan, if so advised."*

After this, the petitioner again moved a detailed application to the ADLG City Lahore with the request of issuance of divorce effectiveness certificate dated 20.06.2023 but the same was refused by the Respondent No. 1 *vide* impugned order dated 27.07.2023; hence, the instant constitutional petition.

2. Heard.

3. Sections 2(b) and 7 of the Muslim Family Laws Ordinance, 1961 and Rule 3(b) of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961 are necessary, in order to resolve the controversy in hand, which are to be reproduced infra:

> *"Section 2(b): "Chairman" means the Chairman of the Union Council or a person appointed by the Federal Government in the Cantonment areas or by the Provincial Government in other areas or*

by any officer authorized in that behalf by any such Government to discharge the functions of Chairman under this Ordinance."

"7. "Talaq". (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever, contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save a provided in subsection (5) a Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

The petitioner is permanently residing in Germany and Respondent No. 3 is also there as is evident from her Resident Card and Health Card, effective till February 2025, copy of which has been placed on record, even at the time of alleged notices of Talaq the petitioner was not available in Lahore; meaning

thereby as per S.R.O. o. 1086(K)61 dated 09.11.1961 the jurisdiction for taking up the matter was with the designated officer in the Pakistan Consulate/Mission in Germany. The said S.R.O. reads:

> *"In exercise of the powers conferred by clause (b) of Section 2 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Central Government is pleased to authorize the Director General (Administration) Ministry of External Affairs to appoint officers of Pakistan Mission abroad to discharge the functions of Chairman under the aforesaid Ordinance."*

Rule 3(b) of the Rules provides:

> *"Rule 3. The Union Council which shall have jurisdiction in the matter for the purpose of clause (d) of Section 2 shall be as follows, namely:-*
>
> *(a)* ----------
>
> *(b) in the case of notice of talaq under subsection (1) of section 7, it shall be the Union Council of the Union or Town where the wife in relation to whom talaq has been pronounced was residing, at the time of the pronouncement of talaq:*
>
> *Provided that if at the time of pronouncement of talaq such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be--*
>
> *(i) in case such wife was at any time residing with the person pronouncing the Talaq in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and*

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the talaq is permanently residing in West Pakistan;"

In view of the above said provisions of law, the Union Council and/or the Chairman, which would have jurisdiction in the matter would be the Union Council and/or the Chairman within whose territorial jurisdiction the wife was residing at the time of pronouncement of divorce and in this case the Respondent No. 3 was residing in Germany as has been admitted by the petitioner. Reliance is placed on *Mt. Sharifan v. Abdul Khaliq and another* (1983 CLC 1296) and *Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others* (PLD 2019 Lahore 285). When the position is as such, as observed above, as per Notification S.R.O.No. 1086(K)61 dated 09.11.1961, officers of Pakistan Mission abroad are authorized to discharge the functions of Chairman under the aforesaid Ordinance. Meaning thereby the Chairman, Union Council No. 116-EME, DHA-12, ADLG Multan Road, Lahore has no authority to deal with the matter in hand in respect of divorce. This Court in judgment reported as *Mian Irfan Latif through Special Attorney v. Nazim/Chairman Union Council No. 100 and another* (2009 YLR 1141-Lahore), has held:

> *"Since both the parties are permanent resident of U.K. and as such as per Notification No. SRO No. 1086(K)/61 the function of Chairman Arbitration Council under the Muslim Family Laws Ordinance, 1961 are to be performed by an appointed offer of the Pakistan Mission abroad."*

The same view was reaffirmed and reiterated in judgments reported as *Mst. Sana Asim Hafeez v. Administrator/Chairman, Arbitration and Conciliation Court* (2016 MLD 1061-Lahore), *Syeda Wajiha Haris v. Chairman, Union*

Council No. 7, Lahore (2010 MLD 989-Lahore) and *Ms. Sadaf Munir Khan v. Chairman, Reconciliation Committee and 2 others* (PLD 2019 Lahore 285).

In addition to the above, the petitioner did not disclose the factum of initiation of proceedings before the District Courts in Germany with regards to complaint against physical assault, claim for separate accommodation and maintenance, meaning thereby the petitioner has not approached this Court with clean hands.

4. So far as the stance that the S.R.O. ibid has been struck down by the learned Islamabad High Court is concerned, it is observed that the said S.R.O. is fully in vogue in Punjab as no verdict as such has been passed by this Court, because a relief cannot go beyond the provincial boundary and affect any other province or Area or its people, as has already been held by this Court in a judgment reported as *Hassan Shahjehan v. FPSC through Chairman and others* (PLD 2017 Lahore 665) that:

> *"As a corollary, the relief granted or the writ issued by the High Court also remains within the territorial jurisdiction of this Court and can only benefit or affect a person within the territorial jurisdiction of the Court. The relief cannot go beyond the Provincial boundary and affect any other Province or Area or its people. So for example, if a federal law or federal notification is struck down by Lahore High Court, it is struck down for the Province of Punjab or in other words the federal law or the federal notification is no more applicable to the Province of Punjab but otherwise remains valid for all the other Provinces or Area. Unless of course the Federation or the federal authority complying with the judgment of the Lahore High*

Court, make necessary amends or withdraw the law or the notification."

5. In view of the above, it is concluded that the order impugned dated 27.07.2023 passed by the Respondent No. 1-Chairman Union Council No. 116-EME, DHA-12, ADLG, Multan Road, Lahore has rightly been passed while construing law on the subject, which does not need any interference by this Court. Resultantly, with the above said observations, the constitutional petition in hand having no force and substance stands dismissed.

(Y.A.) **Petition dismissed.**

PLJ 2024 Lahore 253 (DB)

Present: **SHAHID BILAL HASSAN AND MASUD ABID NAQVI, JJ.**

ABDUL RAHMAN and others--Appellants

versus

MUHAMMAD FAROOQ and others--Respondents

R.F.A. No. 14953 of 2022, heard on 20.02.2024.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Civil Procedure Code, (V of 1908), O.XIV R.1, O.XX Rr. 1, 2 & 5, O.XX R.5--Pleadings of parties were in juxta-position--Non-framing of issues as per real controversy--Suit for declaration--Dismissed--Suit property was leased out--Default in payment of rent--Refusal to returned possession of suit property--Direction to--When pleadings of parties had been gone through and had been put in juxtaposition with issues framed it had been found that proper issues, keeping in view real controversy between parties had not been framed and only stereotype issues had been formulated--Issues were not according to pleadings of parties-- The issues framed by trial Court did not covered real controversy--Appeal allowed.

[Pp. 257 & 260] A, G & H

PLD 2003 SC 184 and PLJ 2010 SC 530 *ref.*

Issue--

----Term "issue" in a civil case means a disputed question relating to rival contentions in a suit--For a correct and accurate decision in shortest possible time in a case, it is necessary to frame correct and accurate issues-- Issues mean a single material point of fact or law in litigation that is affirmed by one party and denied by other party to suit and that subject of final determination of proceedings.

[P. 257] B, C & D

Civil Procedure Code, 1908 (V of 1908)--

----O.XIV Rr. 1 to 6, O.XV R. 1, O.XVIII R. 2, O.XX R. 5, O.XLI R. 31--Duty of Court--Framing of issues--It is duty of Court to frame issues from material propositions--To frame issues, Court is to find out questions of fact, questions of law and mixed questions of fact and law from pleading of parties and other materials, which are produced with pleading and parties are to produce their evidence to prove or disprove framed issues. [P. 258] E

Discretionary power--

----Regarding amendment of framed issues, Court possesses discretionary power--Court can exercise this power when no injustice results from amendment of framed issue on that point, which is not present in pleading(s)--However, it cannot be exercised when it alters nature of suit, permits making of new case or alters stand of parties through rising of inconsistent pleas. [P. 259] F

Syed Muhammad Usman Tirmizi, Advocate for Appellants.

Mr. Asif Siddique Chaudhry, Advocate for Respondents.

Date of hearing: 20.02.2024.

JUDGMENT

Shahid Bilal Hassan, J.--Succinctly, the appellants instituted a suit for declaration with subsequent relief along with recovery of mesne profit against the respondents with respect of the suit property measuring 178-Kanals 15-Marlas, situated at Mauza Maryuin Kalan, Tehsil and District Gujranwala, as per Record of Rights for the year 2014-15 contending therein that due to the permanent residence of the plaintiffs in District Lahore, they leased out the suit property to Defendant No. 13 who was son-in-law of their sister namely Zubaida Bibi, brother-in-law of plaintiff No. 1, but Defendant No. 13 always remained reluctant in payment of rent and most of the time he failed to pay the amount of Thaika" but the appellants tolerated this conduct

of Defendant No. 13 due to the above said relationship. Ultimately on demand of plaintiffs, Defendant No. 13 refused to return the possession of suit property and this controversy led to registration of FIR No. 1/2016. Due to the above said litigation and the permanently living of appellants in Lahore, the appellants, on the offer of Defendant No. 1 became ready to enter into a fake and fictitious agreement with Defendant No. 1 who assured them that the said agreement would be merely to show the Defendant No. 13 and he being influential person would be in the better position than the appellants to litigate and deal with the Defendant No. 13 in the Courts and out of the Courts. Defendant No. 1 further persuaded the appellants that as soon as they would get the possession of suit property, they would settle all the matters with respect to their agreement and meanwhile preferred to write the agreement on the stamp paper valuing Rs. 100/-. Therefore, *vide* fictitious agreement dated 15.04.2016 with respect to suit property measuring 178-kanals 15-marlas in total consideration of Rs. 4 crores, 46-lacs, 87 thousand *i.e*. Rs. 2,000,000/- per acre on the stamp paper valuing Rs. 100/- penned down. At that time, it was also disclosed to the buyers that the appellants were in litigation with Zubaida Bibi with respect to her share in the suit property. The appellants claimed in the plaint that the price of land was much higher at that time but due to the dispute with Defendant No. 13, the appellants opted to show the low-price of their shares in the suit property. In the said agreement, fake payment of Rs. 2,500,000/- was also and to the extent of remaining payment, the target date was fixed as 15.01.2017. As a matter of fact, the payment was merely mentioned in the agreement to pressurize the Defendant No. 13 so that the possession of suit property could be restored to the appellants and it was orally settled down that the duration of agreement to sell and schedule for payment of consideration amount shall be settled down after taking the possession from Defendant No. 13. However, even after the attempt of sale agreement, Defendant No. 13 could not be refrained from his activities and continued to interfere into the suit property in one way or the other. Meanwhile, the appellants also moved an

application for the correction of entries in *"Khasra Girdawry"* with respect to suit property and Defendant No. 13 also filed a suit for specific performance against the appellants and their sister. As a result of mutual settlement between the appellants and Defendant No. 1, the Defendant No. 1 pursued the suit for specific performance and appellants used to ask him about the status of their cases, the reply of the Defendant No. 1 always satisfied the appellants. However, on the demand of Appellants No. 1 and 2, ultimately in March, 2017, the Defendant No. 1 paid an amount of Rs. 1.8 million through cheque to the Appellants No. 1 and 2 and likewise in April, 2017, further consideration amount Rs. 1.3 million was paid, so in this way the outstanding amount towards the Defendant No. 1 remained Rs. 41,587,500/-. Ultimately, the Defendant No. 1 showed his failure to compel the Defendant No. 13 and also showed his inability to spend upon the litigation and also to further pay the remaining consideration amount, therefore, he suggested the appellants to enter into the fresh agreement with the Defendant No. 2 while reiterating his promise to pursue the above said litigation to get restored the possession and forthwith payment of remaining consideration amount. Like past, the appellants again trusted the words of Defendant No. 1 and on 06.11.2017, Appellants No. 1 & 2 entered into a new agreement with respect to the suit property with Defendant No. 2 in consideration of Rs. 44,687,500/-. Defendant No. 2 also caused to get mentioned the earnest amount as Rs. 17,500,0000-/ while explaining that it was necessary to intimidate the Defendant No. 13. In November 2017, further amount of Rs. 4,500,000/- in the shape of cheques was paid to the Appellants No. 1 & 2 with the commitment that all the litigations/cases would be concluded and the possession would also be restored to the appellants. Therefore, in this way, only the amount of Rs. 7.6 million was paid by the Defendants No. l & 2 to Appellants No. 1 & 2 and still huge amount was outstanding towards the Defendants No. 1 & 2. Meanwhile redemption amount of Rs. 425,000/- was also paid by the Defendants No. l & 2. In April 2018, Defendant No. 2 informed the Appellants No. 1 & 2 about

the decision of their cases of ejectment and rent in their favour and assured them that soon they would be able to get the possession of suit property. As the Appellants No. 1 & 2 were weak persons, they opted to remain behind the scene to get the possession of the suit property. At that time there was great atmosphere of mutual trust between the parties to agreement after winning the litigation from the Defendant No. 13 and again appellants on the opinion of Defendant No. 2, signed the sale deed and also affixed their thumb impressions to further pressurize the Defendant No. 13. In April the amount of Rs. 2-million was paid to Defendant No. 2 and in this way, the amount of Rs. 346,500/ remained outstanding towards Defendant No. 2. After that, the Appellants No. l & 2 were informed by Defendants No. 1 & 2 that litigation before Anti-corruption has also been concluded in favour of Appellants No. 1 & 2 and as soon as they would get the possession of the suit property the remaining payment shall be made. Then appellants got the knowledge about the alienation of suit property in favour of Defendant No. 13, they forthwith contacted the Defendant No. 2 who became furious and thereafter Appellants No. 1 & 2 also came to know that in violation of impugned agreement, the suit property had been transferred in the name of Defendants No. 2 to 12 through misrepresentation and without knowledge and paying the remaining consideration amount. Since then, Appellants No. 1 & 2 have been asking for remaining consideration amount and for cancellation of impugned sale deed in favour of Defendants No. 2 to 12 along with mesne profits. They also alleged that due to the dishonesty on the part of Defendant No. 2, appellant No. 2 also passed away due to the cardiac arrest. Therefore, the appellants claimed Rs. 30,000,000/- too on account of general damages. The appellants also referred video recording as a proof of residual amount.

2. Written statement was submitted on behalf of Defendants No. 1 to 12 jointly. They raised certain preliminary and factual objections and termed the impugned transactions correct after fulfilling all the necessary ingredients of sale and ultimately prayed for dismissal of the suit.

3. The divergence in pleadings of the parties the learned trial Court framed following issues:-

1. *Whether the plaintiffs are entitled to the decree for declaration along with permanent injunction as prayed for? OPP*
2. *Whether plaintiffs have come to the Court with clean hands and they have locus standi to file the instant suit against the defendants? OPP*
3. *Whether the suit of the plaintiff is false, frivolous and vexatious and the same is liable to be dismissed? OPD*
4. *Relief.*

Both the parties adduced their oral as well as documentary evidence. On conclusion of trial, the learned trial Court *vide* impugned judgment and decree dated 11.01.2022 dismissed suit of the appellants; hence, the instant appeal.

4. Heard.

5. In this case, when the pleadings of the parties have been gone through and have been put in juxtaposition with the issues framed it has been found that the proper issues, keeping in view the real controversy between the parties have not been framed and only stereotype issues have been formulated. In this regard, it is observed that the term "issue" in a civil case means a disputed question relating to rival contentions in a suit. It is the crucial point of disagreement, argument or decision. It is the point on which a case itself is decided in favour of one side or the other, by the Court. Framing of issues is probably the most important part of the trail of a civil suit. For a correct and accurate decision in the shortest possible time in a case, it is necessary to frame the correct and accurate issues. Inaccurate and incorrect issues may kill the valuable time of the Court. According to the dictionary meanings, "issue" means a point in question; an important subject of debate, disagreement, discussion, argument or litigation. Issues mean a

single material point of fact or law in litigation that is affirmed by one party and denied by the other party to the suit and that subject of the final determination of the proceedings.

As per the Order XIV Rule 1(4) of the Code of Civil Procedure, 1908, issues are of two kinds: (1) Issues of fact, (2) Issues of Law. Issues, however, may be mixed issues of fact and law. Rule 2(1) of Order XIV provides that where issues: both of law and fact arise in the same suit, notwithstanding that a case may be disposed of on a preliminary issue, the Court should pronounce judgment on all issues, but if the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first, if that issue relates to: The jurisdiction of the Court; or A bar to the suit created by any law for the time being in force. For that purpose, the Court may, if it thinks fit, postpone the settlement of the other issues until the issues of law have been decided. The main object of framing of issues is to ascertain the real dispute between the parties by narrowing down the area of conflict and determine where the parties differ. An obligation is cast on the Court to read the plaint and the written statement and then determine with the assistance of the learned counsel for the parties, material propositions of fact or of law on which the parties are at variance. The issue shall be formed on which the decision of the case shall depend. The object of an "issue" is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment then proceeding issue-wise would be able to tell precisely how the dispute was decided.

It is duty of Court to frame issues from material propositions. To frame issues, Court is to find out questions of fact, questions of law and mixed questions of fact and law from pleading of parties and other materials, which are produced with pleading and parties are to produce their evidence to prove or disprove framed issues. Following are the relevant provisions in this regard:-

i. *Order XIV Rule 1 to 6 of CPC 1908*

ii. *Order XVIII Rule 2 of CPC 1908*

iii. *Order XX Rule 5 of CPC 1908*

iv. *Order XLI Rule 31 of CPC 1908*

v. *Order XV Rule 1 of CPC 1908*

Matters to be considered before framing of issues are:-

i. *Reading of the plaint and written statement, the Court shall read the plaint and written statement before framing an issue to see what the parties allege in it.*

ii. *Ascertainment whether allegations in Pleadings are admitted or denied, Order X Rule 1 permits the Court to examine the parties for the purpose of clarifying the pleadings, and the Court can record admissions and denials of parties in respect of an allegation of fact as are made in the plaint and written statement.*

iii. *Admission by any Party. If any party admitted any fact or document, than no issues are to be framed with regard to those matters and the Court will pronounce judgment respecting matters which are admitted.*

iv. *Examination of material proposition. The Court may ascertain, upon what material proposition of law or fact the parties are at variance.*

v. *Examination of witnesses. The Court may examine the witnesses for purpose of framing of issues.*

vi. *Consider the evidence. The Court may also in the framing of issues take into consideration the evidence led in the suit. Where a material point is not raised in the pleadings, comes to*

the notice of the Court during course of evidence the Court can frame an issue regarding it and try it.

vii. *Examination of any witnesses or documents under Order XIV Rule 4. Under this rule any person may be examined and any document summoned, for purposes of correctly framing issues by Court, not produced before the Court.*

The Court may frame the issues from all or any of the following materials.

i. *Allegations made on oath. Issues can be framed on the allegations made on oath by the parties or by any persons present on their behalf or made by the pleader of such parties.*

ii. *Allegations made in Pleadings. Issue can be framed on the basis of allegations made in the pleadings.*

iii. *Allegations made in interrogatories. Where the plaint or written statement does not sufficiently explain the nature of the party's case, interrogatories may be administered to the party, and allegations made in answer to interrogatories, delivered in the suit, may be the basis of framing of issues.*

iv. *Contents of documents. The Court may frame the issue on the contents of documents produced by either party.*

v. *Oral examination of Parties. Issues can be framed on the oral examination of the parties.*

vi. *Oral objection. Issues may be framed on the basis of oral objection.*

Furthermore, at any time before passing of decree, Court can amend framed issues on those terms, which it thinks fit. However, such amendment of framed issues should be necessary for determination of matters in controversy between parties. Moreover, at any time before passing of decree, Court can strike out framed issues especially when it appears to Court that such issues have been wrongly framed or introduced. Regarding amendment

of framed issues, Court possesses discretionary power. Court can exercise this power when no injustice results from amendment of framed issue on that point, which is not present in pleading(s). However, it cannot be exercised when it alters nature of suit, permits making of new case or alters stand of parties through rising of inconsistent pleas. Regarding amendment of framed issues, Court also has mandatory power. In fact, Court is bound to amend framed issues especially when such amendment is necessary for determination of matters in controversy, when framed issues of do not bring out point in controversy or when framed issues do not cover entire controversy. When the lower Court omitted to frame an issue before trying a matter in controversy, the appellate Court can frame the issue and refer it for trial to the lower Court. There is no need to remand the entire case. Then the lower Court should try such issues and return the evidence and its decision to the appellate Court.

6. However, in this case, the issues are not according to the pleadings of the parties. It seems that the learned trial Court was not acquainted with the real myth of framing of issues, because the parties have to lead evidence keeping in mind the burden of proof placed upon their shoulders while formulating issues. The issues framed by the learned trial Court do not cover the real controversy, meaning thereby the provisions of Order XIV, Rule 1 of the Code of Civil Procedure, 1908 have been defiled. Evidence is led after framing of issues. The stage of framing of issues is very important in trial of civil suit because at that stage the real controversy between the parties is summarized in the shape of issues and narrowing down the area of conflict and determination where the parties differ and then parties are required to lead evidence on said issues. The importance of framing correct issues can be seen from the fact that parties are required to prove issues and not pleadings as provided by Order XVIII, Rule 2, CPC. The Court is bound to give decision on each issue framed as required by Order XX, Rule 5, CPC. Therefore, the Courts while framing issues should pay special attention to Order XIV of CPC and give in depth consideration to the pleadings etc. for

the simple reason that if proper issues are not framed, then entire further process will be meaningless, which will be wastage of time, energy and would further delay the final decision of the suit. In the present case, as observed supra, the learned Trial Court did not ponder upon the pleadings of the parties while framing issues and could not sum up the real controversy into issues; thus, further proceedings are of no use. In this regard reliance is placed on *Muhammad Yousaf and others v. Haji Murad Muhammad and others* (PLD 2003 Supreme Court 184) wherein it has been held:

> *"The provisions as contained in Order XIV, Rule 5, C.P.C. were not kept in view and ignored completely by the learned trial Court while framing the issues as a result whereof controversy regarding removal of household articles could not be set as naught. There is no cavil to the proposition which was settled decades ago and still hold field "that where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main questions of fact, necessary to be decided, and the parties may have been prevented from adducing evidence, or fresh issue may be directed to try the principal question of fact". (Olagappa v. Arbuthnot (1875) 14 BLR 115-142, 14/268, 316. "The duty of raising issues rests under the Code of Civil Procedure on the Court and it would be unsafe to presume from the failure of the Court to raise the necessary issues an attention of the defendant to admit the fact, which the plaintiff was bound to prove." (Ganou v. Shri Devsidhes War, 1902 AIR 26 Bom. 360-361)."*

Further reliance in this regard is placed on *Mst. Rasheeda Bibi and others v. Mukhtar Ahmad and others* (PLJ 2010 SC 530), wherein it has been held that:

> *"It is the duty of the Court to frame issues correctly primarily on pleadings of the parties, because the issues framed by the Court correctly reflect the controversies arising from the pleadings of the*

parties and the Court thus can render an effective judgment on the disputed facts and the party also know on what fact the evidence should be led.----------, that framing of a particular issue was not pressed by party affected is no ground for condoning failure to frame necessary issue and the mandate of Order XIV, Rule 1, CPC reveals that it is incumbent upon the Court to frame issues in the light of the controversies raised in the pleadings and after examination of the parties, if necessary. Issues of law and facts are to be illustrated clearly, to enable the parties to understand the points at issue to support their respective claims by recording evidence on all material points. It is the settled principle of law that "action or inaction" on the part of the Court cannot prejudice a party to litigation and the failure of Courts below to determine material issue amounted to exercise of jurisdiction illegally or with material irregularity."

7. For the foregoing reasons, without touching the merits of the case, may it prejudice case of either of the side, the impugned judgment and decree dated 11.01.2022 handed down by the learned trial Court is set aside by allowing the appeal in hand and case is remanded to the learned trial Court with a direction to re-frame issues, keeping in view the above said observations by considering the pleadings of parties, record evidence and decide the case afresh on merits in accordance with law within a period of six months from the date of receipt of copy of this judgment. The adversaries are directed to appear before the learned trial Court on 07.03.2024.

(Y.A.) **Appeal allowed.**

PLJ 2024 Lahore (Note) 4

***Present*: SHAHID BILAL HASSAN, J.**

NASRULLAH KHAN BHALLI--Petitioner

versus

MUHAMMAD NAWAZ--Respondent

C.R. No. 42853 of 2023, decided on 2.8.2023.

Civil Procedure Code, 1908 (V of 1908)--

----O.VII R. 3--Right of defence was struck off--Disobedience and indifferent dimenour--Challenge to--Suit for recovery-- The petitioner was granted with absolute last opportunities many a time with warning as well as costs but even then he did not pay any heed to orders--How petitioner pursued his case and showed his disobedience and indifferent demeanour towards orders of Court; such like indolent person cannot seek favour of law, because law favours vigilant and not indolent--When impugned order has been passed with jurisdiction and is well within parameters of law, same cannot be interfered with--Petition dismissed.

[Para 3 & 4] A, B & C

2015 SCMR 1401 and 2020 SCMR 300 *ref.*

Mr. Muhammad Mushtaq Ahmed Dhoon, Advocate for Petitioner.

Date of hearing: 2.8.2023.

ORDER

C.M. No. 3 of 2023 and Main case

Precisely, the respondent/plaintiff instituted a suit for recovery of amount under Order XXXVII, Rules 1 and 2, Code of Civil Procedure, 1908, against the present petitioner. The petitioner after seeking leave to appear and defend the suit, contested the suit. Issues were framed and evidence of the respondent/plaintiff was recorded. The petitioner examined D.W.1 on 18.11.2022 and D.W.2 on 24.05.2023, however, cross examination upon the said D.Ws. was reserved, but despite availing of many opportunities

including last and final one with costs and with specific warnings, the petitioner neither appeared before the learned trial Court to face the cross examination nor produced D.W.2, therefore, the learned trial Court *vide* impugned order dated 13.06.2023 discarded/brushed aside the examination in chiefs of D.W.1 and D.W.2 and struck off right of petitioner/defendant to produce his evidence; hence, the instant revision petition.

2. Heard.

3. Considering the arguments and perusing the record, made available, as well as going through the impugned order passed by the learned trial Court, it becomes diaphanous that on different dates the petitioner/defendant was directed to produce his witnesses for facing the cross examination as the examination in chief of D.W.1 was recorded on 18.11.2022, however, despite affording many opportunities he failed to either appear himself before the learned trial Court or produce his remaining evidence. The petitioner was granted with absolute last opportunities many a time with warning as well as costs but even then he did not pay any heed to the orders and direction of the learned trial Court, which shows his adamant attitude towards the orders of the Court. Again by playing a trick, he examined D.W.2 on 24.05.2023 but again the petitioner failed to produce his D.Ws. for facing the cross-examination. The above picture of affairs makes it crystal clear that how the petitioner pursued his case and showed his disobedience and indifferent demeanour towards the orders of the Court; thus, such like indolent person cannot seek favour of law, because law favours the vigilant and not the indolent. In this regard reliance is placed on *Rana Tanveer Khan v. Naseer-ud-Din and others* (2015 SCMR 1401), wherein it has been unequivocally held:

> *'2. ... Be that as it may, once the case is fixed by the Court for recording the evidence of the party, it is the direction of the Court to do the needful, and the party has the obligation to adduce evidence without there being any fresh direction by the Court, however, where the party makes a request for adjourning the matter to a further date(s) for the purpose of adducing evidence and if it fails to do so, for such date(s), the provisions of Order XVII, Rule 3, C.P.C. can*

attract, especially in the circumstances when adequate opportunities on the request of the party has been availed and caution is also issued on one of such a date(s), as being the last opportunity(ies)."

While affirming the above said view, the Apex Court of country in a judgment reported as *Moon Enterpriser CNG Station, Rawalpindi v. Sui Northern Gas Pipelines Limited through General Manager, Rawalpindi and another* (2020 SCMR 300) has invariably and vividly further held that:

4. ..... It is unfortunate that the prevailing pattern in the conduct of litigation in the Lower Courts of Pakistan is heavily permeated with adjournments which stretch, what would otherwise be a quick trial, into a lengthy, expensive time-consuming and frustrating process both for the litigant and the judicial system. While some adjournments are the consequences of force majeure, most are not. To cater for the later and to discourage misuse, the C.P.C. through Order XVII, Rule 3 has provided the Court with a curse of action that checks such abuse."

In the said judgment, it was further held:

6. A bare reading of Order XVII, Rule 3, C.P.C. and case law cited above clearly shows that for Order XVII, Rule 3, C.P.C. to apply and the right of a party to produce evidence to be closed, the following conditions must have been met:-

i. at the request of a party to the suit for the purpose of adducing evidence, time must have been granted with a specific warning that such opportunity will be the last and failure to adduce evidence would lead to closure of the right to produce evidence; and

ii. the same party on the date which was fixed as last opportunity fails to produce its evidence.

In our view it is important for the purpose of maintaining the confidence of the litigants in the Court systems and the presiding officers that where last opportunity to produce evidence is granted and the party has been warned of consequences, the Court must

enforce its order unfailingly and unscrupulously without exception. Such order would in our opinion not only put the system back on track and reaffirm the majesty of the law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Where the Court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the parties to the lis that no further adjournments will be granted for any reason. The Court must enforce its order and honor its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last opportunity coupled with a warning. The trend of granting (Akhri Mouga) then (Qatai Akhri Mouga) and then (Qatai Qatai Akhri Mouqa) make a mockery of the provisions of law and those responsible to interpret and implement it. Such practices must be discontinued, forthwith."

4. In view of the above discussion and observations, when the impugned order has been passed with jurisdiction and is well within the parameters of law, the same cannot be interfered with at this stage; resultantly, the revision petition in hand comes to naught and stands dismissed ***in limine*.**

5. As the main petition has been decided, therefore, the C.M.No. 3 of 2023, having become infructuous, stands disposed of.

(Y.A.) **Petition dismissed.**

PLJ 2024 Lahore (Note) 26

Present: **SHAHID BILAL HASSAN, J.**

Mst. **HANIFAAN BIBI through Sajid Hussain (Special Attorney)--Petitioner**

versus

Mst. **BALQEES AKHTAR and others--Respondents**

C.R. No. 2098 of 2014, heard on 22.9.2022.

Specific Relief Act, 1877 (I of 1877)--

----Ss. 42 & 54--Civil Procedure Code, (V of 1908), S. 115--Legality of mutation was challenged--Suit for declaration and permanent injunction--Dismissed--Concurrent findings--Petitioner was well aware of disputed mutation--Petitioner was duly identified by lumberdar--Petitioner was remained silent for considerable period regarding disputed mutation--Challenge to--Revisional jurisdiction--Petitioner was well aware of disputed mutation as back as in year 1986 and it strengthens stance of respondents--Why petitioner remained silent for a considerable priod of time and even it seems that suit in hand has not been instituted by her rather same has been brought by special attorney--D.W. 1 Categorically deposed that petitioner was duly identified by Lumberdar and Irshad at time of attestation of mutation in dispute--Petitioner instituted suit on after about 23 years of its attestation, despite fact, established on record, that she was well aware of disputed mutation in year 1986, suit has rightly been adjudged to be barred by limitation--Concurrent findings on facts cannot be disturbed when same do not suffer from any misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction--Civil revision dismissed. [Para 3 & 4] A, B, C, D & E

2014 SCMR 1469, 2014 SCMR 161, 2017 SCMR 679, PLD 2022 SC 13 and PLD 2022 SC 21 *ref.*

Mr. Muhammad Muzammil Qureshi, Advocate for Petitioner.

M/s. Ch. Tanveer Ahmad Hanjra and Rana Muhammad Arif, Advocates for Respondents.

Date of hearing: 22.9.2022.

JUDGMENT

Facts, in concision, are as such that the petitioner instituted a suit for declaration with permanent injunction against the respondents challenging the vires and legality of Mutation No. 3422 dated 08.02.1984 attested in favour of Muhammad Hussain, predecessor in interest of the respondents (real brother of the present petitioner). The suit was contested by the respondents while submitting written statement, who controverted the averments of the plaint and prayed for dismissal of the suit. Out of the divergent pleadings of the parties, the learned trial Court framed issues and evidence of the parties, oral as well as documentary, was recorded. On conclusion of the trial, the learned trial Court *vide* impugned judgment and decree dated 19.09.2012 dismissed suit of the petitioner. The petitioner being aggrieved of the said judgment and decree preferred an appeal but the same was dismissed *vide* impugned judgment and decree dated 01.04.2014; hence, the instant revision petition.

2. Heard.

3. It remained stance of the petitioner that Muhammad Hussain (deceased), predecessor in interest of the Respondents, used to give her Hissa Batai but she could not bring on record any evidence in this regard. Moreover, earlier to institution of the suit under discussion, the special attorney alongwith his brothers instituted a suit Ex.D1 against their mother in the year 1986 wherein the Mutation No. 3422 dated 08.02.1984, subject

matter of the instant revision was challenged and sought to be cancelled; meaning thereby the petitioner was well aware of the disputed mutation as back as in the year 1986 and it strengthens the stance of the respondents that she herself got entered and attested the mutation in favour of Muhammad Hussain, predecessor-in-interest of the respondents, that is why she remained silent for a considerable priod of time and even it seems that the suit in hand has not been instituted by her rather the same has been brought by special attorney and this observation finds support from the fact that she did not jump into the witness box as her witness despite the fact that purportedly she was deprived of her valuable right. The above observation also finds support from the deposition of D.W.1 *i.e.* Mian Zulfiqar Ali, Revenue Officer, who is an independent witness and he categorically deposed that *Mst.* Hanifaan Bibi was duly identified by Haqnawaz Lumberdar and Irshad at the time of attestation of the mutation in dispute. In this view of the matter, the learned Courts below have rightly appreciated evidence on record and have reached to a just conclusion.

Keeping in view the peculiar facts and circumstances of the case in hand as the mutation was sanctioned on 08.02.1984 and the petitioner instituted suit on 16.02.2017, after about 23 years of its attestation, despite the fact, established on record, that she was well aware of the disputed mutation in the year 1986, the suit has rightly been adjudged to be barred by limitation.

4. In view of the above, the concurrent findings on facts cannot be disturbed when the same do not suffer from any misreading and non-reading of evidence, howsoever erroneous in exercise of revisional jurisdiction under Section 115, Code of Civil Procedure, 1908; reliance is placed on *Mst. Zaitoon Begum v. Nazar Hussain and another* (2014 SCMR 1469), *Cantonment Board through Executive Officer, Cantt. Board Rawalpindi v. Ikhlaq Ahmed and others* (2014 SCMR 161), *Muhammad Farid Khan v.*

Muhammad Ibrahim, etc. (2017 SCMR 679), *Muhammad Sarwar and others v. Hashmal Khan and others* (PLD 2022 Supreme Court 13) and *Mst. Zarsheda v. Nobat Khan* (PLD 2022 Supreme Court 21) wherein it has been held:

> *'There is a difference between the misreading, non-reading and misappreciation of the evidence therefore, the scope of the appellate and revisional jurisdiction must not be confused and care must be taken for interference in revisional jurisdiction only in the cases in which the order passed or a judgment rendered by a subordinate Court is found perverse or suffering from a jurisdictional error or the defect of misreading or non-reading of evidence and the conclusion drawn is contrary to law. This Court in the case of Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630) held that the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case are not open to question at the revisional stage.'*

5. Pursuant to the above, when there appears no illegality and irregularity as well as wrong exercise of jurisdiction, the revision petition in hand being without any force and substance, stands dismissed. No order as to the costs.

(Y.A.) **Revision petition dismissed.**

PLJ 2024 Lahore (Note) 37

Present: **SHAHID BILAL HASSAN AND SAFDAR SALEEM SHAHID, JJ.**

SHAISTA ASLAM--Appellant

versus

OMBUDSPERSON PUNJAB and 4 others--Respondents

I.C.A. No. 36582 of 2023, decided on 31.5.2023.

Punjab Enforcement of Women's Property Rights Act, 2021 (X of 2021)-

----S. 4--Complaint regarding illegal occupation of house--Disposed of--Writ petition--Dismissed--Pendency of civil suit regarding disputed property--Challenge to--Respondent No. 1 rightly disposed of complaint of appellant as there was a suit pending in Civil Court--Title of disputed property was under challenge between parties in presence of same, Respondent No. 1 was fully handicapped to proceed with matter any further, as best recourse of action was through recording of evidence of parties, which course of action, was available with civil Court and not Respondent No. 1-- Single Judge in Chambers also justifiably dismissed appellant's constitutional petition challenging said order of Respondent No. 1--Appeal dismissed.

[Para 3] A & B

Rana Naveed Ashiq, Advocate for Appellant.

Mr. Tahrim Iqbal Butt, Assistant Advocate General, Punjab for Respondent No. 1.

Date of hearing: 31.5.2023.

ORDER

In short, the facts of the case are that the appellant being an overseas Pakistani approached the Ombudsperson/ Respondent No. 1 with a complaint under Section 4 of the Punjab Enforcement of Women's Property Rights Act, 2021 alleging therein that Respondents No. 2 to 5 have illegally occupied the house, inherited to her and her children from her late husband being legal heirs. In the complaint, the respondents were summoned who took the stance that Respondent No. 2 had purchased the house in question against consideration of Rs. 38,00,000/-from the husband of the appellant on the basis of an agreement to sell. Out of the said amount Rs. 28,00,000/-was paid to the appellant's husband at the time of execution of agreement to sell dated 1.2.2016 and remaining sum of Rs. 10,00,000/-was settled to be paid within three months. Subsequently, an amount of Rs. 9,50,000/-was paid to the late husband of the appellant in presence of witnesses and remaining amount of Rs. 50,000/-was to be paid on return of husband of appellant to Pakistan from Germany. On 1.2.2020 the appellant's husband died and after his demise the appellant refused to transfer the property in favour of Respondent No. 2. The respondents further apprized Respondent No. 1 of the fact that there was a suit pending in the Civil Court and keeping this fact in view, Respondent No. 1 disposed of the complaint of the appellant through order dated 6.12.2022 which was challenged by the appellant through a constitutional petition which was dismissed by the learned Single Judge in Chambers, *vide* order dated 9.5.2023. Hence, this Intra Court Appeal.

2. Heard.

3. The main thrust of arguments of learned counsel for the appellant is that Respondent No. 1 had no justification to dispose of the

appellant's complaint on the basis of pendency of a civil suit, as it had, even otherwise, the authority to determine the controversy between the parties. In this regard, Section 4(1) of Punjab Enforcement of Women's Property Rights Act, 2021 has been perused which places embargo on the Ombudsperson to initiate action on any complaint in presence of pendency of proceedings in a Court of law, which reads as follows, for ready reference:

> **"Complaint to the Ombudsperson in case no proceedings in a Court of law are pending:**
>
> (1) Any woman deprived of ownership or possession of her property, by any means, may file a complaint to the Ombudsperson if no proceedings in a Court of law are pending regarding that property:
>
> Provided that the Ombudsperson, on its own motion or on a complaint filed by any person including a non-governmental organization, may also initiate action under sub-section (1) in relation to the ownership or possession of a woman's property, if no proceedings are pending in a Court in respect of that property."

It is, therefore, obvious that the Ombudsperson/Respondent No. 1 rightly disposed of the complaint of the appellant through order dated 6.12.2022, as there was a suit pending in the Civil Court. Since, title of the disputed property was under challenge between the parties through a suit, therefore, in presence of same, the Ombudsperson/ Respondent No. 1 was fully handicapped to proceed with the matter any further, as the best recourse of action was through recording of evidence of the parties, which course of action, obviously, was available with the Civil Court and not the Respondent No. 1. Keeping these facts in view, the learned Single Judge in Chambers also justifiably dismissed the appellant's constitutional petition

challenging the said order of Respondent No. 1, through impugned order dated 9.5.2023 which even otherwise does not suffer from any illegality or irregularity, thus the same is maintained.

4. In view of what has been stated above, the instant Intra Court Appeal having no merits is dismissed *in limine*.

(Y.A.) **Appeal dismissed.**