FOREWORD

Justice Safdar Saleem Shahid is one amongst those whose valiant efforts at every stage of his career are reflected by the presence of many who continue to follow his footsteps. He is truly a mentor for the judges of the District Judiciary. Mr. Justice Safdar Saleem Shahid had more than 3 decades standing at the judicial side and owing to his outstanding work ethic, conduct and intellect he was elevated as Judge of Lahore High Court Lahore on 06th of May 2021. He remained on the bench of the Lahore High Court till 31st July of 2023. His elevation speaks of his impressive credentials in the legal fraternity and was a sign of his impressive work. His courageous efforts at every stage of his career are an example to be followed by others. He performed all his tasks with excellence and his significant contributions have always been duly acclaimed by all the concerned. He had worked tirelessly, compassionately, bravely, humbly and patiently, in the face of daunting obstacles, and in the best traditions of service to the public and the legal profession. All the qualities of hard work, uprightness, patience, open mindedness, understanding, compassion, humility and courtesy are inseparable from his personality.

In his judicial career he delivered several landmark judgments and decisions in many areas of law. His one of the landmark judgments is on classes of heirs. In another judgment he explained the principles of remand of cases that it is not to be ordered lightly where the case could be decided by the appellate court itself. Furthermore, he also passed good judgments in area of Family law wherein he highlighted the concepts of modes of dissolution of marriage in Islam and dower etc. I have always found Justice Safdar Saleem Shahid to be an empathetic, respectful and hardworking. His retirement may be the end of his journey as the serving judge of the Lahore High Court but all of us are excited to see how it continues ahead in other avenues of life. It has been a remarkable journey you have had thus far. All the best of luck for the future.

Muhammad Ameer Bhatti
Chief Justice

PROFILE

Mr. Justice Safdar Saleem Shahid was born in District Khanewal, on 1st of August 1961. He did LL.B from Gillani Law College Bahauddin Zakariya University Multan in the year 1984. He also did D.L.L (Diploma in Labour Laws) from Bahauddin Zakariya University Multan in the year 1987. He was enrolled as an advocate and member of Khanewal Bar Association in the year 1985. He was further enrolled as an advocate of High Court in the year 1986. He appeared in the P.S.C (Judicial) examination and qualified for P.S.C (Judicial) in the year 1986. He served as a Civil Judge from 25.01.1987 to 03.09.2000 where after he was promoted as Senior Civil Judge and served as Senior Civil Judge from 03.09.2000 to 30.03.2001. He was promoted as Additional District and Sessions Judge in the year 2001 and as District and Sessions Judge in the year 2011. He served as District and Sessions Judge till his elevation to the Bench in May 2021. In District Judiciary, he performed his judicial tasks with extraordinary zeal and enthusiasm. He rendered remarkable judgments and decisions. He also has the honor and privilege to serve at important posts in the Lahore High Court, Lahore. He served as MIT from 02.11.2015 to 28.06.2016. He also served as Director Case Management, Lahore High Court, Lahore from 01.07.2020 to 03.11.2020. His outstanding legal acumen, exceptional abilities for comprehending the intricacies of law, thorough professionalism and unparalleled administrative skills stood to him in good stead to ensure his elevation as Additional Judge of Lahore High Court Lahore on 06th of May 2021. His elevation to the Bench endorsed all his positive attributes. During his career as a Judge of Lahore High Court he passed notable judgments. He was also nominated to grace the Second China-SCO Regional Court Justice Forum in the year 2018. His stunning inning in the field of law will always remain here for others to learn especially to the judges of District Judiciary. His attribution will always be present in golden words in the judicial history of Punjab.

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[Lahore]

Before Safdar Saleem Shahid, J

RUKHSANA AMBREEN----Petitioner

Versus

DISTRICT AND SESSIONS JUDGE, KHUSHAB and 2 others----Respondents

Writ Petition No.3462 of 2015, decided on 25th May, 2021.

(a) Family Courts Act (XXXV of 1964)---

----S.5,Sched.---Suit for recovery of amount mentioned in column No.19 of Nikahnama---Column No. 19 of Nikahnama ultra vires the Sharia law---Scope---Wife (petitioner) filed suit for recovery of certain amount of sum mentioned in column No. 19 of the Nikahnama---Husband (respondent) denied the said condition---Validity---High Court observed that such question could be answered by examining the evidence and the proceedings of the Trial Court---Trial Court had observed that as per Sharia and law of the land, the marriage between the parties was always known as a social contract which it could only be enforced with the mutual consent of the parties---Contract of marriage could not be enforced under the influence of such like terms and conditions---Even otherwise, a Muslim husband had always right to divorce his wife---Right of divorce of a Muslim husband was vested by the Almighty Allah and such right of husband could not be restricted on the monetary terms and conditions---Claim of petitioner was absolutely frivolous and against the basic principle of Sharia Law---Tie of marriage between the parties could only be maintained in peace and tranquil atmosphere and the parties were not required to be bound by the stringent condition to remain in marriage bond, hence the petitioner had failed to establish that she is entitled for the recovery of the amount mentioned in column No. 19 on the basis of the nikahnama---Findings of Trial Court did not suffer from any illegality on that point---Constitutional petition was partially allowed.

(b) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of maintenance allowance---Past maintenance---Entitlement---Scope---Petitioner filed suit for recovery of maintenance allowance---Contention of Wife (petitioner) was that the Husband (respondent) himself left the house, meant for the spouses to reside, whereas the respondent claimed that he was expelled from the house by the petitioner---Validity---Admission on the part of respondent reflected that he had not been maintaining the petitioner since then---No contact between the parties in any way was brought on record---Respondent had filed

the suit for restitution of conjugal rights after a lapse of four years---Petitioner was held entitled to the recovery of past maintenance allowance from the date of desertion till the date of filing of suit for restitution of conjugal rights by the respondent---Constitutional petition was partially allowed.

(c) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of maintenance allowance---Refusal of wife to perform matrimonial obligation---Scope---Muslim wife who wilfully refuses to perform the matrimonial obligation towards her husband is not entitled for any kind of maintenance allowance except the maintenance allowance for the period of iddat.

(d) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of maintenance allowance---Quantum of maintenance---Scope---No upper or lower limit of maintenance is fixed, rather, the Islam ties the issue with the means of men, i.e. if the person is well off he must maintain his wife according to his standard, at the same time, if the means of the husband are limited he is still not absolved of his responsibility of maintaining his wife.

The Quran further in verse 65:7 rel.

(e) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of maintenance allowance---Scope---Husband is legally and morally bound to maintain his wife whatsoever are the circumstances.
Muhammad Sharif v. Additional District Judge and others 2007 SCMR 49 rel.
Raja Faisal Hayat Janjua for Petitioner.
Nemo. for Respondent No.3.

ORDER

SAFDAR SALEEM SHAHID, J.----Through this constitutional petition the petitioner/plaintiff has challenged the judgment and decree dated 15.07.2013 passed by learned Judge Family Court Khushab, whereby her suit for recovery of maintenance was partially decreed and she was declared entitled to recover maintenance allowance only for the period of "Iddat" at the rate of Rs.9000/- per month (total Rs.27,000/) whereas her claim for recovery of Rs.3,00,000/- according to the condition mentioned in column No.19 of Nikah Nama was dismissed. Being aggrieved by the aforesaid

judgment and decree the petitioner/plaintiff filed an appeal which was dismissed by learned First Appellant Court vide judgment dated 16.01.2014.

2. Brief facts of the case are that petitioner/plaintiff filed two suits against Muhammad Irfan respondent No.3/defendant In the first suit the petitioner/plaintiff claimed past as well as future maintenance allowance at the rate of Rs. 4000/- per month whereas in the 2nd suit she sought recovery of Rs. 3,00,000/- as per condition mentioned in column No 19 of Nikah Nama between the parties. The petitioner got married with respondent No.3 in November 2005 and she started to reside with him as a wife. It was alleged in the suit that from the very beginning the behaviour of the respondent No.3 was very cruel towards the petitioner and he used to disgrace her without any reason. The respondent No.3/defendant after abusing the petitioner/plaintiff had left the house and did not return towards the plaintiff. He did not pay any maintenance allowance to her. He is serving in P.A.F and is getting salary Rs.25000/- per month besides his income from agricultural land, thus he is a man of means and can easily pay the maintenance allowance as claimed.

3. In the 2nd suit the petitioner/plaintiff took the stance that the respondent No.3/defendant divorced her on 15.10.2011 without any cause, therefore, as per condition No.19 mentioned In Nikah Nama, she is entitled to recover Rs.3,00,000/- from him.

4. The claim of the petitioner/plaintiff was controverted by respondent No.3/defendant through separate written statement. On divergent pleadings, issues were framed and evidence was led. On consideration of the matter the Trial Court through judgment dated 15.07.2013 passed a decree whereby claim of petitioner/plaintiff for recovery of past maintenance allowance was dismissed and she was held entitled to recover maintenance allowance only for the period of "Iddat" at the rate of Rs.9000/- per month (total Rs.27,000/) whereas her claim for recovery of Rs.3,00,000/- was dismissed. The petitioner/plaintiff challenged the aforesaid judgment and decree which was dismissed by learned First Appellate Court vide judgment dated 16.01.2014, which have been assailed through this petition.

5. The respondent No.3 has not entered appearance despite notices were served upon him, therefore, he is proceeded against ex-parte.

6. Arguments heard. Record perused.

7. The admitted facts of the case are that the present petitioner was married to respondent No.3 on 27.11.2005 whereas alleged desertion took place on 14.08.2006 and

on 15.10.2011 she was divorced by respondent No.3. It transpired from the record that respondent No.3 is serving as Airman in P.A.F whereas the lady petitioner is highly qualified and she is a teacher in a school of Atomic Energy Commission Girote. It is evident from the evidence that it was settled between the parties that the after marriage, spouses shall live at Jauharabad and in this regard a separate house was purchased for the purpose of their residence jointly by the petitioner and respondent No.3 and they started living there at Jauharabad in that very house after the marriage where rift started.
8. Learned counsel for the petitioner in support of his version relied upon cases reported as "Shamshad Bibi v. District Judge, Multan and 2 others (2012 YLR 277 Lahore), "Muhammad Zahid Khan v. Addl. District Judge Rajanpur and others" (2010 YLR 1120 Lahore), "Ghulam Dastageer v. Addl. District Judge, Gojra Toba Tek Singh and 5 others" (2010 YLR 1113), "Nasir Ahmed vs. Mst. Naseem Akhtar and 2 others" (2010 YLR 1746 Lahore), "Saeed Ahmad v. Shahzad Pervaiz and others" (2011 MLD 152 Lahore) and "Munir Ahmed v. Bashiran Bibi" (2011 YLR 424 Lahore).

9. The petitioner/plaintiff has claimed maintenance allowance for the past period and for the period of Iddat. She claimed that the respondent No.3/defendant has never paid any maintenance to her since 13.08.2006. The petitioner took stance that respondent No.3/defendant himself left the house whereas the respondent No.3 took the version that he was deserted from the house by the petitioner/plaintiff. Admittedly he filed suit for restitution of conjugal rights on 04.06.2010 prior to the filing of the suit of the petitioner/plaintiff wherein he stated that on 14.08.2006 he was expelled from the said house by the petitioner/plaintiff and her two brothers forcibly whereas the petitioner/plaintiff took the plea that she was deserted by the respondent No.3/defendant on 13.08.2006 and thereafter she was divorced by the respondent No.3/defendant on 15.10.2011.

It reflects that respondent No.3/defendant made efforts to reconcile the matter and patch-up the same but during the pendency of the suit, the respondent No.3 divorced the petitioner. Admittedly, the plaintiff/petitioner did not perform the matrimonial obligation towards respondent No.3/defendant since the year 2006. As per Sharia Law, a muslin wife who wilfully refused to perform the matrimonial obligation towards her husband, not entitled for any kind of maintenance allowance except the maintenance allowance for the period of "Iddat".

It is in the evidence, that petitioner herself has admitted that the house where they were living was joint owner of the spouses but the respondent No.3 left the house, meaning thereby he was forced to leave the house. Certainly the evidence of respondent No.3 on this point is more convincing but in all circumstances, the respondent No.3 was under obligation to pay the maintenance to the petitioner.

10. The guidance is drawn from the Holy Quran wherein it is stated that It includes, the dower, if any, other articles and the things under her use, and have something for future. Provision of Holy Qur'an regarding the maintenance is clear that " men are the protectors and maintainers of women, because God has given the one more (strength) Than the other, and because they support them From their means."

The Quran further in verse 65:7 takes up the issue in the following manner:-

"Let the man of means spend according to his means: and the man whose resources are restricted, Let him spend according to what God has given him. God puts no burden on any person beyond what he has given him. After a difficulty, God will soon grant relief"

From the above Quranic verses, guidance can be taken that there is no upper or lower limit of maintenance, rather, the Quran ties the issue with the means of men, i.e if the person is well off he must maintain his wife according to his standard. At the same time, if the means of the husband are limited he is still not absolved of his responsibility of maintaining his wife. He has to provide maintenance to his wife but according to his means. In the case of "Muhammad Sharif v. Additional District Judge and others" (2007 SCMR 49) wherein Hon'ble Supreme Court of Pakistan observed in para No.5 of order which is reproduced as under:-

"that a Muslim husband is under a legal obligation to maintain his wife and if she is forced to live away from him for no fault on her part, even then he has to provide maintenance allowance to her"

So in view of the above mentioned citation and Quranic verses the husband is legally and morally bound to maintain his wife what so ever are the circumstances. Although it has been stated in the evidence of respondent No.3 who appeared as D.W-1 that he was expelled from the house by the brothers of the petitioner and he had been trying to settle down the matter and in this regard he also filed suit for restitution of conjugal rights. The said suit was filed by him on 04.06.2010. In para No.3 of the said suit, respondent No.3 has admitted that on 14.08.2006 he was expelled from the house by the petitioner and her two brothers and since then he had been staying with his parents. This admission on the part of respondent No.3 reflects that he had not been maintaining the petitioner since the year 2006. Interestingly from years 2006 to June 2010 there was no contact between the parties in any way according to record and evidence. The respondent No.3 filed suit for restitution of conjugal rights on 04.06.2010 and on 12.06.2010 the petitioner filed suit for maintenance allowance.

This also shows the state of affairs between the parties but the question arises, if the lady was not performing conjugal rights and was not obeying the respondent No.3, then why he kept silent for a long time and even did not move any application in the concerned U.C for reconciliation or made any efforts in the Family or "Bradari" to settle down the matter between the spouses. Islam has given many rights to the spouses to care for each other but so-far-as the matter of maintenance is concerned as to pay the husband and only bar not to pay the maintenance is disobedience of the lady and refusal of the lady to perform the matrimonial obligation but in this proposition neither any evidence nor through any other document, the efforts have been shown by the respondent No.3 to reconcile the matter, therefore, the lady was entitled for the recovery of past maintenance allowance. Both the courts below have committed an error while refusing the past maintenance allowance to the lady.

So far as the quantum of the maintenance allowance is concerned, lady has demanded Rs. 4000/- per month mentioning that respondent No.3 is an employee in Pakistan Air Force and his monthly salary is Rs. 25,000/- but no such document has been tendered by the petitioner in this regard, even no pay slip has been produced to prove that his monthly income is Rs. 25,000/-.

The respondent No.3 in his written statement as such has not denied this fact. Another important document is 'Parat' of Nikah Nama annexed with the plaint where it has been written against the column No.17 that in case of dispute between the spouses, the husband will pay the maintenance allowance at the rate of Rs. 2000/- per month. The copy of Nikah Nama is available on the record but columns Nos.17 and 19 regarding the conditions have been denied by respondent No.3. The respondent No.3 has not challenged these entries of columns before any legal forum. It is observed that Nikah Nama was exhibited in evidence as Exh.P-1.

There was no objection regarding its execution and completion. Certain columns were challenged by respondent No.3, but no reliable evidence was produced to prove the version by respondent No.3. Oral evidence on these objections was not sufficient to prove the same. These were also not challenged through independent suit before any competent forum. On the other hand, Nikah Khawn, the other witness of the Nikah Nama has supported the petitioner.

So, there is nothing to dis-believe about the contents of the Nikah Parat Exh.P-1, so the version of the lady is correct. Keeping in view the financial condition of respondent No.3 and the evidence on record regarding establishing the financial status of respondent No.3, the petitioner/plaintiff is held entitled for maintenance allowance for the past period w.e.f. 14-8-2006 to 4-6-2010.

The findings of courts below on issue No.1 are modified to this extent. However, the maintenance allowance of the petitioner for the period of Iddat has rightly been fixed and to that extent the findings of both the Courts below are correct.

11. The other question which falls for determination in this petition is whether petitioner was entitled to claim amount of Rs.3,00,000/- according to condition mentioned in column No.19 of Nikah Nama. This question may be answered by examining the evidence of the parties in the proceedings before the Trial Court. The respondent No.3 denied the said condition allegedly mentioned in column No.19 of the Nikah Nama.

During the course of evidence, father of respondent No.3 appeared and stated that the column No.19 of the said Nikah Nama was filled at belated stage and nothing was settled between the parties at the time of Nikah. The petitioner/plaintiff's assertion, however, does not find support from the statements made by PW-1. PW-4 and P.W-5 before the Trial Court.

In this respect it will be pertinent to refer the observations recorded by the Trial Court in paragraphs Nos.22 and 24 of the impugned judgment which reads as under: -

"If we read the statement of PW-1, PW-4 and PW-5 in juxtaposition, there is a clear contradiction between the statement of the witnesses, because the Nikah Registrar PW-4 clearly admitted that he has written the Nikah Nama, whereas the witness PW-5 stated that the Nikah Nama was written by a person belongs to Wattu, therefore, the plaintiff has miserably failed to establish that the condition in column No.19 was written at the time of solemnization of Nikah.

24. "As per Sharia and Law of Land, the marriage between the parties is always known as a social contract. It can only be enforced with the mutual consent of the parties. The contract of marriage cannot be enforced under the influence of such like terms and conditions. Even otherwise, a muslin husband has always right to divorce his wife. The right of divorce of a muslin husband is vested by the Almighty Allah and the such right of husband cannot be restricted on the monetary terms and condition. The claim of plaintiff is absolute frivolous and against the basis principle of Sharia Law. The tie of marriage between the parties can only be maintained in peace and tranquil atmosphere and are not required to be bound by the stringent condition to remain in marriage bond, hence the plaintiff has failed to establish that she is entitled for the recovery of Rs. 3,00,000/- on the basis of document Ex.P1. However, she is at liberty to launch civil suit against the defendant for recovery of above mentioned amount, if required.

Hence this issue is decided in negative in favour of the defendant against the plaintiff, hence this issue is decided".

The observations made by the Court below are quite justified, legal, hence maintained.

12. In these attending circumstances, the impugned judgments of the trial Court as well as learned Ist Appellate Court are modified to the extent that petitioner-lady is held entitled to recover the past maintenance allowance at the rate of Rs.1500/- per month from the period commencing 14.08.2006 to 04.06.2010, whereas the findings of both the courts below to the extent of recovery of maintenance allowance for the period of Iddat (three months) at the rate of Rs.9000/- per month in toto Rs.27,000/- are maintained whereas the remaining claim of petitioner for recovery of Rs.3,00,000/ is declined. The findings of both the courts below do not suffer from any illegality on this point.

With these observations, instant petition is partially allowed. No order as to costs.

SA/R-10/L Order accordingly.

2021 C L C 2152

[Lahore]

Before Ch. Muhammad Masood Jahangir and Safdar Saleem Shahid, JJ

Dr. SARFRAZ DEPUTY DISTRICT OFFICER HEALTH and others----Appellants

Versus

Malik MUHAMMAD JAMIL and others----Respondents

R.F.A. No.33446 of 2019, heard on 20th May, 2021.

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

----S.79---West Pakistan Essential Services (Maintenance) Act, 1958, S.8---Suit for damages---Suit by or against the Government---Bar of legal proceedings---Scope---Appellants assailed judgement and decree passed by trial court whereby the plaintiff's suit for recovery of damages was partially decreed---Facts of the case were that the appellants inspected the premises of a workshop of which the plaintiff was an incharge; that the authorities had found a large potential of 'larva' and on the complaint of the competent authority a criminal case was registered against him as a result of which he lost his job---Main contention of the authorities was that the suit was barred by mandatory provision of S.79 of the Code of Civil Procedure and that under S.8 of the West Pakistan Essential Services (Maintenance) Act, 1958, no suit, prosecution or other legal proceedings could have been filed against any person for anything which he had done in good faith or had intended to do under the Act or rules laid therein---Validity---No suit could have been filed against the Provincial Government (authorities) without impleading the province as a party---Section 8 of the West Pakistan Essential Services (Maintenance) Act, 1958 clearly provided that no suit, prosecution or other legal proceedings could be filed against any person for anything which was done in good faith or intended to be done under the Act---Suit, being not maintainable, was dismissed---Appeal was allowed.

Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others v. Muhammad Hussain through Legal Heirs and others PLD 1993 SC 147; Haji Abdul Aziz v. Government of Balochistan through Deputy Commissioner Khuzdar 1999 SCMR 16; Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi and others 2010 SCMR 115; The State and others v. M. Idrees Ghauri and others 2008 SCMR 1118; Nadeem Raja v. Additional Sessions Judge and others 2016 MLD 1810 and Sardar Aman Khan and 2-others 2010 YLR 2219 rel.

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

----O.XIV, Rr.1 & 2---Framing of issues---Issues of law and fact---Scope---Issues are to be framed on the basis of material in the shape of pleadings presented---Court has to frame proper issues so that the parties may know the controversy, the disputed fact, on which evidence is to be led and to enable an effective judgment to be rendered.

Dr. Anjum Habib Vohra v. Waseem Ahmad Khan PLD 2006 Lah. 255 and Muhammad Nazir and others v. Muhammad Arif and others 2006 MLD 187 ref.

Raza Hussain v. Haji Qaisar Iqbal and 7 others 1996 MLD 55 rel.

(c) Jurisdiction---

----Where jurisdictional point or maintainability of the suit is in question the requirement is to first resolve said legal points so as to avoid further exercise of lengthy trial which certainly would consume the time and energy of the court as well as of litigants.

Ch. Bashir Hussain Khalid for Appellant.

Nemo. for Respondent.

Date of hearing: 20th May, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Against the judgment and decree dated 28.02.2019 passed by learned Civil Judge 1st Class, Lahore, whereby suit filed by respondent No.1/plaintiff for recovery of Rs.6,90,00,000/- as damages against the appellants and Performa respondents Nos.2 to 5 was decreed to the extent of Rs. 2,40,00,000/- , instant appeal has been preferred.

2. The brief facts of the case are that appellant No.3 along with Performa respondents Nos.3 to 5 under the directions of Senior Officers inspected the premises of workshop of Ozpak. The respondent No.1/plaintiff obstructed with the performance of official/public duties. The Inspection Team found a large potential "Larva" and on the complaint of competent authority a criminal case FIR No.817/2013 dated 03.07.2013 under sections 268, 269, 270 and 188, P.P.C. and section 3 of Dengue Act was registered against the respondent No.1/plaintiff who was workshop Incharge, at police

station Islampura, Lahore, the aforesaid case was duly investigated and thereafter challan was submitted before the Court of competent jurisdiction . The Health Team was constituted who visited the spot and found that FIR was rightly registered. Thereafter Ozpak Company, employer of respondent No.1 vide letter dated 26.09.2013 terminated the services of respondent No.1 w.e.f 31.08.2013 on the grounds that respondent No.1 was found guilty of causing damage to the reputation of Company by not requiring Dengue Squad to take the samples from the Workshop without prior permission of the head office; that respondent No.1 had misbehaved with high officials of the Company and he was not following the orders as well as instructions of the respective higher authorities of the Company; that respondent No.1 was not providing the services upto the desired standard of the Company. Another ground for his termination was of mishandling the lower staff and misbehaving with the person of similar rank. Similarly, writing letters directly to LWMC of returning back of the lower staff despite knowing that he was not authorized to use such a power. It was further alleged that after submission of challan in the Court, respondent No.1 filed an application under section 249-A, Cr.P.C for his acquittal. Learned Magistrate did not frame the charge being baseless or any possibility of conviction as required under section 249-A, Cr.P.C for acquittal but learned Magistrate on sympathetic ground held that respondent No.1 has been terminated from the services of company, his application was allowed.

3. The respondent No.1/plaintiff filed suit for recovery of Rs.6,90,00,000/- in the shape of damages which was contested by the appellants and Performa respondents Nos.2 to 5 and following issues were framed:-

ISSUES:

1. Whether the plaintiff has no cause of action to file this suit? OPD.

2. Whether the defendant No.1 is neither proper nor necessary party in this suit? OPD1.

3. Whether the suit is liable to be dismissed in view of preliminary objection No.1 of the written statements submitted by defendants Nos.2 to 7? OPD 2 to 7.

4. Whether the suit is not proceedable in its present form? OPD

5. Whether the plaintiff has not come to the Court with clean hands? OPD

6. Whether the plaintiff is entitled to the recovery of damages amounting to Rs.6,90,00,000/- as prayed for ?OPP

7. Whether the defendants are entitled to recover special cost from the plaintiff under section 35-A, C.P.C. for being the suit false, vexatious and frivolous ?OPD.

8. Relief.

4. After recording the evidence of the parties and hearing the arguments, the learned Civil Judge partially decreed the suit of respondent No.1 to the extent of Rs. 2,40,00,000/- vide judgment dated 28.02.2019 which has been assailed through this appeal.

5. Main grievance of the appellants is that suit was barred by law. Mandatory provisions of section 79, C.P.C. has been violated in the instant case. An application under Order VII, Rule 11, C.P.C. was filed on this ground that legally suit was not maintainable against Civil Servants for action done in good faith in their official capacity and sine the acquittal of respondent No.1 was without notice and without recording of evidence as to how registration of FIR was mala fide or without any probable cause. In the instant appeal the appellants took the stance that under section 8 of the West Pakistan Essential Services (Maintenance Act) 1958, no suit prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act or Rules laid therein. The learned Civil Judge did not appreciate the legal aspect of the case during proceedings specifically agitated by the appellants. While dismissing the application under Order VII, Rule 11, C.P.C., learned Civil Judge held that as Issue No.3 has been framed on the basis of preliminary objections, therefore, at this stage, when evidence is to be recorded, application was not maintainable but while deciding the issue No.3 this legal aspect of proposition was neither discussed in the head of issue nor learned Civil Judge passed any remarks that why these propositions are not being taken up in the decision that how these are not applicable to the present proposition. The request of the appellants was to set aside the impugned judgment and decree and to dismiss the suit with costs.

6. On 18.12.2019 respondent No.1/plaintiff appeared before this Court and sought time in order to engage his counsel, but thereafter neither he nor his counsel entered appearance, whereas proforma respondents Nos.2 to 5 have also not entered appearance despite notices were served upon them, therefore, they are proceeded against ex-parte.

7. Arguments heard. Record perused.

8. The only legal point involved in the proposition was that whether civil suit was proceedable in view of objections raised by the appellants that appellant No.1 acted in an official capacity and all his acts including the lodging of FIR against respondent

No.1 was under the official capacity with permission of the authority as required. Section 79 CPC specifically is regard to sue Government Officer/officials for act specifically done in an official capacity. The counsel for the appellants has relied upon case reported as "Province of the Punjab through Member Board of Revenue, (Residual Properties), Lahore and others v. Muhammad Hussain through Legal Heirs and others" (PLD 1993 SC 147). In para No.7 of the said judgment, it has been held by august Supreme Court of Pakistan that if requirements of section 79, C.P.C. read with Order XXVII, C.P.C. had been kept in view by the Court they would not have entertained the claim at all with the parties arrayed in the form in which they have arrayed. Section 79 of C.P.C. requires, and so does Article 174 of the Constitution of Pakistan that all suits against Central Government have to be filed in the name of Pakistan and against a Provincial Government in the name of Province. Learned counsel further relied upon case reported as "Haji Abdul Aziz v. Government of Baluchistan through Deputy Commissioner Khuzdar" (1999 SCMR 16) wherein it has been held that section 79, C.P.C. and Article 174 of the Constitution had not been complied with by the plaintiff and suit had been instituted through a wrong person. The authority to be named as defendant is to be the Province as Government officer/officials were working on behalf of the Provincial Government and in discharge of their duties they done all acts including the lodging of the FIR against respondent No.1. Further reliance has been placed on case reported as "Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi and others" (2010 SCMR 115). Similar proposition was discussed by august Supreme Court of Pakistan regarding maintainability of the suit filed against Government officer/officials without impleading the Federal Government or Provincial Government; that no suit can be filed against the Provincial Government without impleading the Province as a party and procedural condition is mandatory in nature and no relief can be sought without its strict compliance and suit would not be maintainable.

9. We have observed while deciding the application under Order VII, Rule 11, C.P.C., the learned Civil Judge dismissed the same while observing that since Issue No.3 has been framed on the basis of preliminary objections, therefore, at this moment when evidence is to be recorded application was not maintainable but while passing the judgment under the head of issue No.3 neither a single word regarding objections of appellants and Performa respondents Nos.2 to 5 is mentioned in the judgment nor has given any independent verdict regarding application under Order VII, Rule 11, C.P.C.

10. Order XIV, Rules 1 and 2, C.P.C. is clear regarding the framing of issues and issue on law and fact. Issues are to be framed on the basis of material in the shape of pleadings presented. It is the duty of the court to frame proper issues so that the parties

may know the controversy, the disputed fact, on which evidence is to be led and to enable an effective judgment to be rendered.

Here we will quote the exact language of Order XIV, Rule 2, C.P.C.:-

"Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".

Furthermore the spirit of Order XV, Rule 3, C.P.C. has not been satisfied by learned Civil Judge through the impugned judgment. Reliance in this regard is placed on cases reported as "Dr. Anjum Habib Vohra v. Waseem Ahmad Khan" (PLD 2006 Lahore 255), "Muhammad Nazir and others v. Muhammad Arif and others" (2006 MLD 187 Lahore) and "Raza Hussain v. Haji Qaisar Iqbal and 7 others" (1996 MLD 55). The relevant caption of latter citation is reproduced as under:-

"Issues of law should be tried first if they do not require lengthy and prolonged evidence and could be decided without any delay, and findings thereon were sufficient to decide the whole case without having recourse to issues on facts"

11. It is settled principle that where jurisdiction point or maintainability of the suit is in question the requirement is first to resolve these legal points so to avoid further exercise of lengthy trial which certainly would consume the time and energy of the Court, as well as of the litigants. Another aspect regarding judgment in hand is that provisions of Order XX, Rule 5, C.P.C. has not been legally satisfied. The spirit of above mentioned provision is that the judgment of the learned trial Court should contain the findings on all issues separately. Reliance in this regard is placed on case reported as "Qadir Baksh (deceased) through L.Rs v. Allah Dewaya and another" (2011 SCMR 1162). The relevant para No. 6 of the judgment is reproduced as under:-

"The first contention of the learned counsel that the judgments passed by the Courts below were violative of the provisions of Order XX, Rule 5, C.P.C. is based on misconception. The impugned judgments have dealt with all the points raised and fulfil the requirement of law. Such judgment cannot be called in question merely on the ground that it has not discussed each and every issue separately. We have examined the judgment of the first appellate Court, which has dealt with all the points raised before it and the same has been maintained by the learned High Court in second appeal by a reasoned judgment. The wisdom behind the Rule 5, Order XX, C.P.C. is that the trial Court and the first appellate Court should record findings on all the points and non-

recording of findings on each and every issue would not be fatal to the judgment on the strength of the Order XX, Rule 5, C.P.C. The contention of the learned counsel in this respect is without force."

Further reliance is placed on cases reported as "Ali Muhammad v. Muhammad Hayat and others" (1982 SCMR 816), "Rehmatullah Khan and another v. Ghulam Farid and others" (2009 SCMR 371) and "Asif Hussain and another v. Mst. Bakho alias Bakhto (deceased) through Legal Heirs" (2021 YLR 573).

12. Another legal aspect of the proposition is that section 8 of the West Pakistan Essential Services (Maintenance Act) 1958 clearly provides that no suit prosecution or other legal proceedings shall lie against any person which is done in good faith or intended to be done under this Act. In this regard reliance is placed on case reported as "The State and others v. M. Idrees Ghauri and others" (2008 SCMR 1118) wherein Hon'ble Supreme Court of Pakistan in para No.14 of the judgment observed as under:-

"If decision making level officials responsible for issuing order, S.R.O. etc, are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision making would be reluctant to take decisions and/ or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State-machinery. Such a course cannot be countenanced by this Court."

Reliance has also been placed on case of "Nadeem Raja v. Additional Sessions Judge and others (2016 MLD 1810 Lahore)" wherein Hon'ble Court in paras Nos.5 and 6 of the judgment observed as under:-

"Petitioner is the public functionary and he in the capacity as public functionary performed his official duty after fulfilling all the legal requirements, therefore, he has not committed any offence".

"Act done in good faith, which is not in violation of criminal law and also is not result of criminal motivation, he has no penal consequences-If a person is prosecuted for such an act, there is no repair to the loss caused to him in his body and mind"

Further reliance is placed on case reported as "Sardar Aman Khan and 2-others (2010 YLR 2219 (Peshawar)". The relevant Para No.7 of the judgment is reproduced as under:-

"In the present case, the petitioner was executing the warrant issued against respondent No.1 under section 3(1) MPO and the provisions of section 12(3) of the Maintenance of

public order clearly empower the petitioner to take step under subsection (1) or subsection (2) which includes the power to enter upon any land or other properties whatsoever"

"The rivalry between petitioner and respondents Nos.1 and 2 is not based on previous enmity but their differences and civil litigation appears to be the outcome of the acts and the conduct of petitioner in performance of his official duties. Under the law presumption of good faith is attached to official acts committed during discharge of official duties unless proved to the contrary. Thus, by stretch of no legal interpretation it could be held to be tainted with mala fide and in excess of authority/powers amounting to abuse and misuse of authority by the petitioner in the discharge of his legal duties and functions".

Learned Civil Judge failed to appreciate the legal aspect of the proposition regarding the maintainability of the suit. Without touching the other merits of the case we are of the considered view that suit was not maintainable. Thus, instant appeal is allowed, resultantly suit filed by respondent No.1/plaintiff is dismissed as being not maintainable. No order as to costs.

SA/S-52/L Appeal allowed.

2021 C L D 1388

[Lahore]

Before Ch. Muhammad Iqbal and Safdar Saleem Shahid, JJ

Mst. ZAKIA ILYAS RAJA---Applicant

Versus

STATE LIFE INSURANCE CORPORATION OF PAKISTAN and others---Respondents

Insurance Appeal No. 8608 of 2019, heard on 7th June, 2021.

Insurance Ordinance (XXXIX of 2000)---

----Ss. 118 & 124---Life insurance---Payment of liquidated damages on late settlement of claims---Repudiation of claim---Non-payment of profit/liquidated damages on late settlement of claims---Scope---Claimant impugned order of Insurance Tribunal whereby her claim for liquidated damages on payment of life insurance claim was denied, inter alia, on ground that claimant had made the claim late and had not annexed required documents with her claim, hence the delay was not attributable to respondent insurance company---Validity---Record revealed that neither inquiry report regarding authenticity of policy was brought on record by respondent insurance company, nor person who allegedly led inquiry and produced report on behalf of respondent insurance company was produced as witness which prima facie negated version of the respondent insurance company that policy was obtained by deceased via concealment of facts---No evidence existed to show that claimant had filed claim late or that she had not provided correct information / documents and it was established that the policy-holder deceased had paid the premium of said policy on time---Respondent insurance company made payment to claimant to extent of insured amount but with considerable delay and failed in its obligation to make payment within period of 90 days as mandated by S. 118 of Insurance Ordinance, 2000---Impugned order was set aside and it was held that claimant was entitled to liquidated damages along with profit as per Bank rates as required under S. 118 of Insurance Ordinance, 2000--- Appeal was allowed, accordingly.

Mst. Nusrat Malik Saleem v. Federations of Pakistan through Secretary Ministry of law, Justice and Human Rights Division, Islamabad and 3-others 2006 CLD 874; Jaffar Hussain vs Federations of Pakistan through Secretary Ministry of law, Justice and Human Rights Division, Islamabad and 3 others 2004 CLC 947; Mst. Nusrat Malik Saleem v. State Life Insurance Corporation of Pakistan through Chairman and another 2010 CLD 870; Messrs Adamjee Insurance Company Ltd. through authorized Representative v Zi Ullah and another 2019 CLD 526 and Universal Insurance Company Limited v. Hamayun Khan 2019 CLD 1216 ref.

Shafaatullah Qureshi v. Federation of Pakistan PLD 2001 SC 142; Dr. Syed Sibtain Raza Naqvi v Hydrocarbon Development and others 2012 SCMR 377; Wapda through Authorized Attorney and 4 others v. Messrs Crescent Group of Services through Authorized Person and others PLD 2013 Lah. 221 and Haji Muhammad Hanif v. State Life Insurance Corporation-of Pakistan through Chairman 2007 CLD 490 distinguished.

Ghulum Raza Sajid v. State Life Insurance Corporation of Pakistan and another 2010 CLD 792 rel.

Muhammad Rafique Shad, Nadia Iffat and Raja Khurram Shahzad for Applicant.

Waqar Hussain Naqvi for Respondents.

Date of hearing: 7th June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J:---Instant Insurance Appeal has been preferred by the applicant/appellant against the order dated 09.01.2019 passed by learned Additional District Judge/Special Judge Insurance Tribunal, Sialkot, whereby applicant's application under section 118 of Insurance Ordinance, 2000 for recovery of liquidated damages regarding policy No.604102460-0 was dismissed.

2. The brief facts of the case are that the applicant Mst. Zakia Ilyas Raja filed at; application before respondent No.1/State Life Insurance Corporation of Pakistan, alleging therein that he: husband Raja Muhammad Ilyas deceased obtained the facility of Insurance Policy No.604102460-0 from the respondents/State Life Insurance Corporation and after the death of her husband, she/applicant filed a claim No.L/1198/2007 for the recovery of insurance amount i.e Rs.5000.000/- which was decided in favour of the applicant on 22.10.2013 by Wafaqi Mohtasib', Lahore. Thereafter, the respondents filed a representation before the Hon'ble President of Islamic Republic of Pakistan on 02.06.2014 against the order dated 22.10.2013 which was dismissed vide order 01.07.2015. It is alleged by the applicant/appellant that State Life Insurance Corporation did not disburse the insurance amount to the applicant for a remarkable period and thereafter the respondents paid an amount of Rs. 52,40,000/- and did not pay the liquidated damages as per bank rate. The applicant requested the respondents to pay the liquidated damages under section 118 of Insurance Ordinance 2000 as per bank rate but the respondents did not consider the lawful and genuine request of the applicant and delayed the matter on lame excuses. As per section 118 of Insurance Ordinance, 2000, the applicant is entitled to get recover the liquidated

damages from the respondents and also to claim profit as per Dank rate but the respondents did not honour the claim of the applicant which was mandatory provisions of Insurance Ordinance. It was further alleged that the applicant filed an application before "Wafaqi Mohtasib", Lahore which was decided on 16.02.2016. On the basis of said order, the applicant filed an application before Insurance Tribunal.

3. The application of the applicant vas contested by the respondents while submitting written reply and prayed for its dismissal.

4. Out of pleadings of the parties, following issues were framed by the learned trial Court:-

ISSUES:

1. Whether the applicant is entitled to recover liquidated damages on late settlement of claim under section 118 of Insurance Ordinance on the facts stated in the amended application? OPA

2. Whether the application is not maintainable and not competent? OPR.

3. Whether the application is time barred? OPR

4. Whether, this Tribunal lacks jurisdiction to adjudicate upon the instant matter? OPR.

5. Relief.

The learned Special Judge Insurance Tribunal while deciding the Issue No.1 against the applicant/appellant observed that since there was no fault on the part of the respondents/Insurance Corporation for disbursing the amount of claim, therefore, the respondent/State Life Insurance Corporation was not under obligation to pay any liquidated damages as required under section 118 of Insurance Ordinance, 2000. The learned Special Judge, Insurance Tribunal gave his decision on issue No.1 on the basis of statement of A.W-1 who admitted in his statement that his claim was rejected due to filling of insufficient papers, therefore, it cannot be alleged that the delay was caused by the respondent/company and the applicant/appellant has miserably failed to discharge her onus upon her fatal issue and it was decided against the applicant. Issue No.3 was regarding the limitation. The objection was raised by the respondents and onus to prove this issue was upon the respondents but since the respondents did not produce any evidence on this point and also did not press this issue before the learned trial Court, therefore, this issue was decided against the respondents. The Tribunal dismissed the

application of applicant on the ground that delay for disbursement of insurance amount/claim of applicant was not caused by the respondents/ 'State Life Insurance Corporation, rather, it was on the part of the applicant who had not submitted the complete papers which was the basic requirement for disbursing of insurance amount.

5. The counsel for the applicant/appellant argued that there was no delay on the part of the applicant as the applicant filed the application immediately after the death of Policy Holder; that State Life Insurance Corporation/ respondent did not inform the applicant that her claim application was incomplete or defective in any way; that vide letter dated 31.05.2007 without commenting therein that claim forms submitted by the applicant were insufficient or that the claim was rejected on account of providing insufficient documents by the applicant. It was further argued that only reason mentioned in repudiation letter dated 31.05.2015 was that concealment of material facts were made by the deceased Policy Holder the time of getting the Insurance policy; that nothing was mentioned in the said letter regarding insufficient documents, if any, thereafter the Insurance accompany paid an amount of Rs. 52,40,000/- through cheque to applicant/appellant without liquidated damages on 09.10.2015; that the respondent/ State Life Insurance Corporation was bound to pay the liquidated damages in terms of section 118 of Insurance Ordinance 2000; that the order of learned Special Judge Insurance Tribunal is not in accordance with the record and evidence available on record; that no objection was raised in the first declining letter regarding insurance amount/claim of applicant qua any incomplete documentation, therefore, respondent/State Life Insurance Corporation was under obligation to pay the liquidated damages of late settlement of claim under section 118 of Insurance Ordinance, 2000. Reliance is placed on the cases reported as "Mst. Nusrat Malik Saleem v. Federations of Pakistan through Secretary Ministry of law, Justice and Human Rights Division, Islamabad and 3 others" (2006 CLD 874), Jaffar Hussain v. Federations of Pakistan through Secretary Ministry of Law, Justice and Human Rights Division, Islamabad and 3 others (2004 CLC 947, Lahore), Mst. Nusrat Malik Saleem v. State Life Insurance Corporation of Pakistan through Chairman and another (2010 CLD 870 Lahore), Mst. Nusrat Malik Saledn v. Federation of Pakistan through Secretary Ministry of Law, Justice and Human Rights Division, Islamabad and 03-others (2006 CLD 874 Lahore), Messrs Adamjee Insurance Company Ltd. through Authorized Representative v Zia Ullah and another (2019 CLD 526, Lahore) and Universal Insurance Company Limited v. Hamayun Khan (2019 CLD 1216 Lahore).

5. The learned counsel for the respondents on the other hand resisted the arguments advanced by learned counsel for the applicant. While relying on cases reported as "Shafaatullah Qureshi v. Federation of Pakistan" (PLD 2001 Supreme Court 142), "Dr. Syed Sibtain Raza Naqvi v. Hydrocarbon Development and others" (2012 SCMR 377),

"Wapda through Authorized Attorney and 4-others v. Messrs Crescent Group of Services through Authorized Person and others" (PLD 2013 Lahore 221), "Haji Muhammad Hanif v. State Life Insurance Corporation of Pakistan through Chairman" (2007 CLD 490 Lahore) learned counsel for the respondents argued that respondent No.1 is not responsible for causing any delay for the payment of Insurance amount/claim; that the application of applicant was incomplete because the required documents were not annexed with the application; that the State Life Insurance Corporation/respondents informed the applicant regarding the said defects and thereafter her application was rejected; that the appellant/applicant filed an application before Ombudsman and much time was consumed in the proceedings before' Ombudsman and thereafter the company approached the President of Pakistan but after rejection of said appeal, the company immediately deposited the insured amount of Rs. 52,40,000/- in the account of the applicant; that there was no deliberate delay on the part of the company for making the payment of insured amount; that infact the delay was caused by the applicant/appellant because she did not submit the document as required by the company at the relevant time; that learned Special Judge Insurance Tribunal has rightly passed the order after proper appreciation of evidence with cogent reason.

6. We have carefully examined the contentions as adduced on behalf 'of the parties in the light of relevant provisions of law and record of the case. We have scanned the entitle evidence and perused the impugned judgment of the learned trial court. The learned Special Judge Insurance Tribunal decided issue No.1 against the appellant/applicant, whereby, claim of the appellant/applicant was dismissed, and it was held that the respondents/State Life Insurance Corporation was not liable for causing delay in the payment of insurance amount and was not under obligation to pay the liquidate damages of late settlement of claim under section 118 of Insurance Ordinance, 2000. In support of issue No.1, Muhammad Iqbal, Special Attorney of appellant Mst. Zakia Ilyas Raja appeared as AW-1 and submitted his special attorney as Exh.A-1 and narrated all facts regarding the submission of the claim. According to AW-1 the husband of applicant/appellant, Raja Muhammad Ilyas purchased the policy on 01.07.2005 and also paid the premium of said policy. On 02.02.2006 Raja Muhammad Ilyas died and then the applicant/appellant approached the State Life Insurance Corporation/respondents and filed the claim. 'The claim was filed within the time. He (AW-1) tendered all the relevant documents in his evidence. It 'was further alleged that in the year 2007, Insurance Corporation rejected the claim of the applicant/appellant. Feeling aggrieved, the appellant approached Ombudsman where the matter remained under consideration for one year. On 22.10.2013 the Ombudsman decided the matter. A.W-1 submitted the copy of decision Exh.A-2. The respondents filed an appeal before President of Pakistan which was dismissed on 01.07.2015 and thereafter respondents on 10.10.2015 deposited an amount of Rs. 52,40,000/-in the account of applicant/appellant.

The grievance of the appellant was that respondent No.1/bank only deposited the insured amount whereas liquidated damages were not awarded to the applicant and for that the applicant/appellant again approached Ombudsman and on the direction of Ombudsman, the applicant/appellant filed an application before learned Special Judge Insurance Tribunal. On behalf of respondents the said witness was subjected to cross-examination. During cross-examination A.W-1 has categorically stated that after the death of policy holder the applicant/appellant filed the claim papers immediately and there was no delay on the part of the applicant for filing the claim before the respondents. The said witness was cross-examined at length but his evidence could not be shaken during the process of cross-examination regarding the delay if any on the part of the applicant/appellant and nothing was brought on record that the policy was obtained by concealment of facts. Through the cross-examination only proceedings before different forums i.e Ombudsman and President of Pakistan between the parties were questioned. On behalf of State Life insurance Corporation, Muhammad Afzal Manager, State Life Insurance Corporation of Pakistan, appeared as DW-1. He has deposed that according to section 15 of Policy Bond, the State Life Corporation has a right to investigate regarding the worth of the policy if someone expired within the period of two years after getting the policy. According to D.W-1 the State Life Insurance Corporation inquired the matter and found that the policy holder was not eligible to obtain the policy of an amount of Rs.50-lacs. On this ground the State Life Corporation rejected the claim of the legal heirs of the Policy Holder. In this regard he submitted the document Exh.D-2. D.W-1 further deposed that there was no fault on the part of the company for issuing the amount of claim late and infact the original required amount of Rs. 52,40,000/- was disbursed to the policy holder. Record reveals that neither the inquiry report regarding the authenticity of the policy was brought on record by the respondents/State Life Corporation nor the person who allegedly inquired the matter and prepared the report on behalf of State Life Insurance Corporation, was produced in the witness box which prima facie negates the version of the respondents that the policy was obtained by concealment of facts. In this regard reliance is placed on case law reported as "Ghulum Raza Sajid v. State Life Insurance Corporatio of Pakistan and another" (2010 CLD 792).

7. Perusal of record shows that policy holder purchased the policy on 01.07.2005 whereas first premium i.e Rs. 3,59,950/- of said policy was also paid. After about six months, on 02.02.2006 the policy holder was expired and within the required time the applicant/wife of the deceased filed the requisite claim. The State Life Insurance Corporation/ respondents were responsible for the payment of the claim within the prescribed period as the application was filed within the time but it is observed that they objected on the claim and through document, Exh.D-2 letter dated 31.05.2007, the claim was rejected. On perusal of letter Exh.D-2 it reveals that the application of the policy

holder was rejected on the ground that policy holder did not provide the correct information at the time of obtaining the policy. So the State Life Insurance Corporation regrets from the payment of claim. The version of the respondents/State Life insurance Corporation while appearing in the witness box although was different, yet they did not produce any evidence according to their objection. No evidence was produced by the respondents in order to establish that the applicant legal heir of deceased/policy holder filed the policy claim late. So-far-as the objection of the respondents that the policy holder did not provide the correct information and some facts were concealed by the policy holder at the time of obtaining the policy is without force and same is afterthought because it was not the time for making an inquiry regarding genuineness or un-genuineness of the policy, rather, before issuance of policy as per company conditions contain inquiries are conducted then the policy is issued. The respondents/ State Life Corporation received the first premium i.e Rs.13,59,950/- of said policy and did not object regarding anything at that time and as well as in the life time of policy holder. Keeping in view the facts and circumstances of the case, we are of the considered view that the letter Exh.D-2 was not a proper reply to the claim application of the policy holder. The respondents/State Life Insurance Corporation were responsible for causing delay in the payment of insurance amount. The relevant provision of section 118 of Insurance Ordinance 2000 is reproduced as under:-

"Payment of liquidated damages on late settlement of claims--(1) it shall be an implied term of every contract of insurance that where payment on a policy issued by an insurer becomes due and the person entitled thereto has complied with all the requirements, including the filing of complete papers, for claiming the payment, the insurer shall, if he fails to make the payment within a period of ninety days from the date on which the payment becomes due or the date on which the claimant complied with the requirements, whichever is later, pay as liquidated damages a sum calculated in the manner as specified in subsection (2) on the amount so payable unless he proves that such failure was due to circumstances beyond his control.

Explanation. For the purposes of this subsection, failure or delay by any person in making payment (including without limitation payment under a contract of reinsurance) to an insurer shall not constitute circumstances beyond the control of the insurer"

Since the agreement between policy holder and State Life Corporation was intact and it was not struck down through any means, no legal notice was issued by the State Life Corporation for striking down the agreement with the policy holder. Neither any notice/intimation was given to the policy holder in his life time regarding disclosing of wrong information for obtaining the policy nor after his death or immediately after filing of the claim, rather after passing of the considerable period through letter dated

31.05.2007 Exh.D-2 it was informed to the applicant/appellant by the respondents that the requisite claim was rejected .by the company on account of concealments of facts. The respondents were failed to rebut the evidence of applicant/appellant because as per record the applicant filed the application within time and on wrong interpretation the applicant's claim was rejected and due to that reason the applicant/appellant had to file an application before Ombudsman and much time was' consumed for that process and delay was caused due to the act of the respondents for which the applicant/appellant cannot be made liable. is pertinent to mention here that the company/respondents made the payment to the applicant to the extent of insured amount but with delay and did not raise any objection at that time qua the concealment of facts. The company was under obligation to make the payment within a period of 90-days under section 118 of Insurance Ordinance, 2000 which they have failed to do so and that the company was also not justified to establish that the delay was caused due to the act of applicant/appellant. The case laws referred to by learned counsel for the respondents are not applicable to the present proposition because the application for requisite claim was filed within the time by the applicant/appellant and through evidence on record the applicant has proved the same. Keeping in view the evidence' available on record, we are justified to hold that learned Special judge Insurance Tribunal while deciding the issue No.1 had committed material irregularity as no cogent evidence was produced by the respondents to rebut the evidence of the appellant. The document Exh.D-2 on the basis of which the claim was rejected is available and its verdict is clear which has no nexus with the issue framed by the court because it is straight away mentioned that due to concealment of facts the claim was rejected whereas there is no issue of filing the incomplete papers and it cannot be interpreted in any way in the light of document Exh.D-2, therefore, findings recorded by learned trial court on issue No.1 are reversed and same is decided in favour of the applicant/appellant against the respondents, whereas, all the remaining issues have already been decided in favour of the applicant/appellant, therefore, we are of the considered view that the applicant's claim was genuine.

8. In view of what has, been discussed above, instant appeal is accepted and order dated 09.01.2019 passed by learned Special Judge Insurance Tribunal Sialkot is set aside and applicant/appellant is held entitled for the liquidated damages along with profit as per present bank rate as required under section 118 of the 'Insurance Ordinace, 2000. No order as to costs.

KMZ/Z-17/L Appeal allowed.

2021 M L D 1541

[Lahore]

Before Safdar Saleem Shahid, J

ALAM KHAN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.25357-B of 2021, decided on 17th June, 2021.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), S.302---Qatl-i-amd---Bail, refusal of---Unseen occurrence---Last seen evidence---Extra-judicial confession---Recovery of weapon---Matching of empties---Scope---Accused sought post-arrest bail in FIR registered under S.302, P.P.C---Although the incident was unseen yet the accused was nominated by the complainant on the basis of statements made by two persons who had seen the deceased with the accused on the date of occurrence---Police had recorded statements of two witnesses who had stated that the accused had admitted his guilt before them---Pistol was recovered from the possession of accused and the same had matched with the empties secured from the place of occurrence---Offence alleged against the accused came within the purview of prohibitory clause of S.497, Cr.P.C.---Accused was found guilty during investigation conducted by the police---Sufficient incriminating material was available on record connecting the accused with the commission of offence---Grounds urged by the accused required deeper appreciation of evidence which could not be taken into consideration at bail stage---Petition for grant of bail was dismissed, in circumstances.

Sarfraz v. The State and 2 others 2010 YLR 2678 and Jaleel Ahmad and others v. The State 1995 PCr.LJ 1583 ref.

Rana Muhammad Javed for Petitioner.

Ikram Ullah Khan Niazi, D.P.G. and Khalid Mehmood, ASI with record.

Muhammad Ameen Akhtar for the Complainant.

Date of hearing: 17th June, 2021.

ORDER

SAFDAR SALEEM SHAHID, J.---Alam Khan petitioner seeks post arrest bail in a case registered against him vide FIR No.232/2020 dated 10.09.2020 offence under section 302, P.P.C. at police station Harnoli District Mianwali.

2. According to FIR on 09.09.2020 at about 11:00 P.M, unknown accused persons committed the murder of Muhammad Faisal deceased by causing firearm injuries.

3. Arguments heard. Record perused.

4. It has been noticed that although it was an unseen occurrence yet petitioner was nominated in the FIR by the complainant on the basis of statements made by Muhammad Bilal and Muhammad Gull Hasan who had seen Muhammad Faisal deceased along with petitioner on the same day of occurrence (09.09.2020) while going towards 'Kandiwal'. On 11.09.2020 police recorded the statements of Muhammad Qasim and Muhammad Imran P.Ws under section 161 Cr.P.C. In their said statements both the aforesaid P.Ws took stance that on 09.09.2020 they were present in their fields near Kandiwal and on report of firing, they reached at the spot and identified the petitioner who allegedly committed the murder of Muhammad Faisal deceased. Record also reveals that on 12.09.2020 police recorded the statements of Naseer Ahmad and Mohsin P.Ws under section 161 Cr.P.C wherein they took stance that on 11.09.2020 they were present at the shop where petitioner came and confessed his guilt with the claim that he had committed the murder of Muhamamd Faisal. During investigation, pistol 30-bore was recovered from the possession of the petitioner and same was sent to the office of Punjab Forensic Science Agency, Lahore for its analysis. According to the report of Forensic Science Agency, Lahore, the empties which were secured from the place of occurrence were found fired from said pistol allegedly recovered from the possession of the petitioner. The offences alleged against the petitioner come within the purview of prohibitory clause of section 497, Cr.P.C. The petitioner was found guilty during investigation conducted by the police. Prima facie sufficient incriminating material is available on record connecting the petitioner with the commission of instant occurrence. The grounds urged by learned counsel for the petitioner requires deeper appreciation of evidence which cannot be taken into consideration at bail stage. Reliance is placed on cases reported as "Sarfraz v. The State and 2 others" (2010 YLR 2678 Lahore), "Jaleel Ahmad and others v. The State" (1995 PCr.LJ 1583 Lahore), "Mushtaq v. The State" (1993 PCr.LJ 2389) and "Allah Ditta and others" v. The State (1983 PCr.LJ 2545, Lahore).

5. For what has been discussed above, instant petition having no force stands dismissed.

SA/A-56/L Bail declined.

2021 M L D 1859

[Lahore]

Before Safdar Saleem Shahid, J

QAMAR SHAHZAD---Petitioner

Versus

JUDGE FAMILY COURT, FEROZEWALA and 4 others---Respondents

Writ Petition No.32340 of 2021, decided on 25th May, 2021.

(a) Family Courts Act (XXXV of 1964)---

----Ss.5, Sched. 8(2), 9 & 10---Family case---Written-statement, filing of---Scope---Held, that filing of written-statement was not essential.
Manzoor Elahi v. Zulaikhan Bibi and another PLD 2009 Isl. 4 ref.

(b) Family Courts Act (XXXV of 1964)---

----Ss.5, Sched., 8(2), 9 & 10---Civil Procedure Code (V of 1908), O.VIII, R.10---Suit for recovery of maintenance allowance etc.---Contumacious conduct of the defendant (husband)---Family Court closed the right of the defendant to submit written-statement on his failure to file the same despite availing several opportunities---Held, that in view of the conduct of the petitioner/defendant , the Family Court had rightly struck off his right to file written-statement---In case of a contumacious default of a defendant to file written-statement, Family Court, for the orderly dispensation of justice , was well within its authority to make any order in the nature of one envisaged by O.VIII, R.10 of the Civil Procedure Code, 1908---Petitioner not only failed to file written-statement in spite of getting so many opportunities but he also did not comply with the order of the Family Court regarding payment of costs which was imposed while setting aside the ex-parte proceedings ---No case for interference in the constitutional jurisdiction of the High Court was made out---Constitutional petition was dismissed in limine , in circumstances.

Kh. Muhammad Ahmad Qasim v. Mst. Kaneez Fatima and another 2006 MLD 1128;

Fakhar Abbas v. Additional District Judge Tandlianwala, District Faisalabad and 3 others 2017 CLC Note 22

and Khalil-ur-Rehman Bhutta v. Razia and another 1984 CLC 890 ref.

Ch. Saeed H. Nagra for Petitioner.

ORDER

SAFDAR SALEEM SHAHID, J.----Through this petition the petitioner has challenged the order dated 27.04.2021 passed by the learned Judge Family Court, Ferozewala (respondent No.1), whereby right of the petitioner to submit written statement was closed.

2. Brief facts of the case are that respondents Nos.2 to 5, who are wife, daughter and sons, respectively, of the petitioner, filed a suit for recovery of maintenance, dower and dowry articles before respondent No.1 on 11.01.2020, which was decreed ex parte through order and decree dated 19.08.2020.

The petitioner filed an application for setting aside the ex parte proceedings/order and decree, which was accepted through order dated 01.03.2021, ex parte proceedings/order and decree were set aside, subject to payment of costs of Rs.2000/- and the case was fixed for filing of written statement. However, on failure of the petitioner to submit written statement and to pay costs, his right to file written statement was closed through order impugned herein.

3. The learned counsel for the petitioner argued that the right of the petitioner to file written statement has illegally been closed by the learned Judge Family Court as there is no provision in the Family Courts Act, 1964, empowering the Family Court to pass such an order. It is further argued that when basic order is illegal and unlawful then superstructure built thereon could not sustain. The petitioner has been knocked out on the basis of technicalities.

Therefore, prayed that by allowing the instant petition the order dated 27.04.2021 passed by the learned Judge Family Court be declared illegal, void and be set aside and the petitioner be given a chance to submit written statement.

4. Heard.

Record perused.

5. A perusal of the order sheet shows that through order dated 01.03.2021 ex parte proceedings were set aside while allowing the application of the petitioner subject to payment of costs of Rs.2000/- and the case was fixed for 25.03.2021 for summoning of the file, submission of written statement and payment of costs. On 25.03.2021 neither the written statement was filed nor costs was paid and the case was adjourned to 06.04.2021. On the mentioned date the petitioner did not comply with the order of the

Court and the case was adjourned to 12.04.2021. According to the order sheet on 12.04.2021 lawyers were on strike but neither the costs was paid nor written statement was filed and the case was fixed for 19.04.2021 while advancing last opportunity to the petitioner to file written statement and for payment of the costs.

On 19.04.2021 again neither the written statement was filed nor costs was paid and on the request of the petitioner case was adjourned for 23.04.2021. On 23.04.2021 again previous practice was revised by the petitioner and the Court passed the following specific order:-

23.04.2021"

کونسل فریقین حاضر۔
جواب دعوی/ہرجانہ سابقہ داخل نہ ہوا ہے۔کئی موقع جات دیے گے ہیں جواب دعوی/ہرجانہ داخل
نہ کیا گیا ہے کونسل مدعا علیہ جواب دعوی/ہرجانہ کے لیے مہلت کی استدعا کرتے ہیں جو کہ جواز ہے
لہذا حسب استدعا قرین انصاف ملتوی ہو کر برائے ادخال جواب دعوی و ہرجانہ سابقہ قطعی آخری
موقع کے ساتھ مسل بتقرر ۲۷.۰۴.۲۰۲۱ پیش ہووے۔آیندہ جواب دعوی/ہرجانہ داخل نہ کرنے
کی صورت میں جواب دعوی کا حق ختم کر دیا جایگا مزید مہلت نہ دی جائیگی۔"

6. On 27.04.2021 the Court after keeping the case in wait for submission of written statement on behalf of the petitioner till its rising and on failure of the petitioner to file written statement and to pay costs passed the order closing his right to file written statement by discussing in detailed the conduct of the petitioner. Thereafter the case was fixed for evidence of respondent No.1.

7. The Family Courts Act, 1964, is very much clear on the point in like situation. Section 8(2) of the Act, reads under:-

"(2) While issuing the notice or summons to a defendant, the Family Court shall require the defendant to submit a written statement on the day mentioned in the notice or summons."

8. Section 9 of the Family Courts Act, 1964 provides as under:-

"On the date fixed under section 8, the defendant shall appear before the Family Court and file the written statement, a list of witnesses and gist of evidence, and in case the written statement is not filed on that date, the Family Court may, for any sufficient reason which prevented the defendant from submitting the written statement, allow the defendant to submit the written statement and other documents on the next date which shall not exceed fifteen days from that date."

9. Section 10 of the Family Courts Act, 1964 says that:-

"(1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel.

(3) The Family Court may, at the pre-trial stage, ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties.

(4) Subject to subsection (5), if compromise is not possible between the parties, the Family Court may, if necessary, frame precise points of controversy and record evidence of the parties."

10. From the perusal of the above mentioned clauses it is clear that the Court shall examine the plaint, written statement, if any, and evidence, meaning thereby that filing of written statement in family cases is not essential. Reliance in this regard is placed on the case reported as Manzoor Elahi v. Zulaikhan Bibi and another (PLD 2009 Islamabad 4), wherein it is observed as under:-

"It is manifestly clear that the Court shall examine the plaint, written statement, if any and evidence, it would mean that the filing of written statement in the family case is not essential. Subsection (3) of section 10 has contemplated that the Court shall made an attempt to effect compromise or reconciliation between the parties and subsection (4) was further provided that if no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recording evidence.

The word, "if any", in subsection (2) of section 10 signifies that even if there is no written statement, reconciliation proceedings must be held and evidence should be recorded because preamble of the Act, 1964 tends to show that the Family Courts were established in order to achieve an expeditious disposal of the family disputes and the matters relating therewith."

11. Spirit of Section 12A of the Family Courts Act is that the Family Court shall dispose of a case, including a suit for dissolution of marriage, within a period of six months from the date of institution. Provided that where a case is not disposed of within six months, either party shall have a right to make an application to the High Court for necessary direction as the High Court may deem fit.

Purpose of the legislation was to expedite the litigation, especially the family matters so that the social lives of the families may not disturb in pursuing the cases.

12. Keeping in view the conduct of the petitioner it is observed that the Family Court has rightly struck off his right to file written statement. Reliance is placed on the case reported as Kh. Muhammad Ahmad Qasim v. Mst. Kaneez Fatima and another (2006 MLD 1128).

13. Further relying upon the case reported as Fakhar Abbas v. Additional District Judge Tandlianwala, District Faisalabad and 3 others (2017 CLC Note 22), it is observed that the role of the Family Court is not merely adversely but it is also inquisitorial, therefore, it is within its power to pass any order which may promote the ends of justice, Family Court is empowered to take all steps which it deems necessary to ensure that substantial justice is done.

It has been observed in the case of Khalil-ur-Rehman Bhutta v. Razia and another (1984 CLC 890), that though the Family Court is a forum of limited jurisdiction yet it has to regulate its own proceedings.

A situation may crop up, before a Family Court that a defendant persistently defaults in submitting his written statement and acts contumaciously, as happened in the instant case. Will the Family Court be powerless to proceed against such a litigant? If the Court is held to be denuded of authority, to pass a punitive order against such a defaulter that would result in paralyzing its function. It must be remembered that the Family Courts Act has been enacted with the object of expeditious disposal of the disputes relating to the family affairs.

Thus, for the orderly dispensation of justice under the Act, in the case of a contumacious default of a defendant, to file the written statement, the Family Court will be well within its authority to make any order, in the nature of one envisaged by Order VIII, Rule 10, C.P.C. and deprive him of his right to file the written statement.

14. As regards the plea that counsel for the petitioner was infected with Covid-19, it is noticed that neither on any time request for adjournment was made on the ground of ailment of counsel for the petitioner nor any certificate regarding infection with Covid-19 was produced before the trial Court.

Even otherwise, the petitioner had engaged two lawyers and on each date counsel for the petitioner was marked present but with a request for adjournment.

It is further observed that the petitioner not only failed to file written statement in spite of getting so many opportunities but he also did not comply with the order of the Court dated 01.03.2021 regarding payment of costs of Rs.2000/-, which was imposed while setting aside the ex parte proceedings.

15. Under the circumstances, no case for interference in the constitutional jurisdiction of this Court is made out.

The petition is accordingly dismissed in limine.

MQ/Q-4/L Petition dismissed.

2021 M L D 1937

[Lahore]

Before Safdar Saleem Shahid, J

Mst. SHEEDAN BEGUM and others---Appellants

Versus

MUHAMMAD USMAN KHAN and others---Respondents

R.S.A. No.21 of 2011, heard on 27th May, 2021.

(a) Gift---

----Mutation---Scope---Limitation---Appellants challenged the validity of mutations, gift deeds and tamleek namas executed by their predecessor (owner) on the ground of fraud---Validity---Owner who had transferred the properties through mutations, gift deed and tamleek nama all pertained to the years 1949 and 1976---Said owner had remained alive till the year 1991---Registered documents were challenged by the appellants after decades through institution of suit in the year 2000---Sine qua non for the seeker to stand on its own legs, who could not be benefited for weakness, if any, of the adversary---Owner had not challenged anything in his lifetime---Inheritance opened after death of the owner of the property and not during the life---Mutations were sanctioned during life time of the owner---Appellants, being descendants, had no locus standi to challenge the mutations---Maximum period provided to seek such right was six years as per Art.120 of the Limitation Act, 1908---Courts below were quite justified to non-suit the appellants on valid reasons---Second appeal was dismissed.

Sudhangshu Bimal Biswas v. MD Mustafa Chowdhary 1968 SCMR 213; MD. Anwarullah Mazunmdar v. Tamina Bibi and 5 others 1971 SCMR 94; Muhammad Suleman v. Riasat Ali and another 2002 SCMR 1330; Kala Khan and others v. Rab Nawaz and others 2004 SCMR 517; Muhammad Rustam and another v. Mst. Makhan Jan and others 2013 SCMR 299; Ghulam Abbas and others v. Mohammad Shafi through L.Rs. and others 2016 SCMR 1403 and Nasir Fahimuddin and others v. Charles Philips Mills and others 2017 SCMR 468 ref.

(b) Limitation Act (IX of 1908)---

----S.3---Dismissal of suit, etc., instituted after period of limitation---Duty of court---Scope---Court, as per the mandate of S.3 of Limitation Act, 1908, is under obligation to scrutinize the plaint, the application and the appeal on the point of limitation regardless of the fact that the said point has been agitated by either party or not.

(c) Limitation Act (IX of 1908)---

----Preamble---Law of limitation is not merely a formality/technicality, rather said statute furnishes certainty and regularity to the human affairs, matters and dealings.

Messrs Dawood Cotton Mills Ltd. v. Sindh Labour Appellate Tribunal and others 2006 SCMR 630; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Muhammad Hussain and others v. Dr. Zahoor Alum 2010 SCMR 286; Muhammad Islam v. Inspector General of Police Islamabad and others 2011 SCMR 8 and State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others 2012 SCMR 280 ref.

(d) Administration of justice---

----Law helps the vigilant and not the indolent.

Messrs Dawood Cotton Mills Ltd. v. Sindh Labour Appellate Tribunal and others 2006 SCMR 630; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Muhammad Hussain and others v. Dr. Zahoor Alum 2010 SCMR 286; Muhammad Islam v. Inspector General of Police Islamabad and others 2011 SCMR 8 and State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others 2012 SCMR 280 ref.

(e) Limitation---

----Delay---Condonation---Scope---Delay of each and every day has to be explained satisfactorily, otherwise the delay cannot and should not be condoned.

Messrs Dawood Cotton Mills Ltd. v. Sindh Labour Appellate Tribunal and others 2006 SCMR 630; Atta Muhammad v. Maula Bakhsh and others 2007 SCMR 1446; Muhammad Hussain and others v. Dr. Zahoor Alum 2010 SCMR 286; Muhammad Islam v. Inspector General of Police Islamabad and others 2011 SCMR 8 and State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others 2012 SCMR 280 ref.

Mian Zafar Iqbal Kalanauri for Appellant.

Syed Kaleem Ahmad Khursheed for Respondent.

Date of hearing: 27th May, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Through instant R.S.A. appellants have challenged the order dated 20.01.2010 passed by learned trial court whereby application under Order VII, Rule 11, C.P.C. filed by respondents was accepted and plaint filed by appellants was rejected. Against the aforesaid order, appellants filed an appeal which was also dismissed by learned Additional District Judge, Kasur, vide judgment dated 16.10.2010.

2. Brief facts of the case are that plaintiffs filed a suit for declaration in respect of land measuring 33-Kanals and 9-Marlas (1/4 share) of property measuring 133-Kanals and

16 Salim Khata, Qatat 13 bearing Khatooni No.289/291, situated in Beroon Kasur, being legal heirs of Muhammad Akram Khan (deceased) and challenged the mutations, gift deeds and Tamleek Namas on the ground of fraud and all the deeds were made just to deprive the plaintiffs/appellants from their share. The mutation No.241 dated 07.07.1949 regarding land measuring 117-Kanals and 11-Marlas, Khewat No.37, Khatooni No.560, Khasra No.1654(0-19), 1656(9-13), 1657(13-17), 1660, 1662(13-7), 1658(10-4),1717(25-16), situated at Qasba Beroon, Kasur and Mutation No.728 oral gift in favour of Nawazish Ali Khan, Muhammad Aslam Khan, Hameed Asghar Khan by Mst. Begum widow of Ummrah and gift deed bearing documents No.1436 book No.1, volume No.1196 dated 26.04.1976, regarding land measuring 17-Kanals and 5-Marlas, Khewat No.109, Khatooni Nos.609-608, Khasra Nos.1713(9-17), 1661(7-8), Qatat 02, situated at Qasba Beroon, Kasur, by Muhammad Akram Khan in favour of Nawazish Ali Khan, Muhammad Aslam Khan, Hameed Asgher Khan and passed a mutation No.1330 dated 30.11.1976, in this regard. The plaintiffs further challenged registered Tamleek Nama dated 04.03.1990, regarding land 44-Kanalas and 18-Marlas by Hameed Asghar Khan mutation No.7313 dated 20.03.1990 and mutation No.6355, oral Tamleek Nama dated 02.10.1988 regarding land measuring 44- Kanalas and 19-Marlas by Nawazish Ali Khan in favour of Waseem Tahir Khan son of Nawazish Ali Khan. Plaintiffs took the plea that they were widow and daughter of Muhammad Akram Khan (deceased) who was Dakhil Kar of land measuring 133-Kanals and 09-Marlas with rights of occupancy.

3. The respondents filed application under Order VII, Rule 11, C.P.C. for rejection of the plaint. The appellants filed the reply. Learned Civil Judge, vide order dated 20.01.2010 accepted the aforesaid application filed by respondents and rejected the plaint. The appellants filed an appeal before learned Additional District Judge, Kasur, against the aforesaid order which was dismissed vide judgment dated 16.10.2010. Being aggrieved from the orders of both the courts below, this appeal has been preferred with the contention that both the courts below have not appreciated the law; both the courts below erroneously held that appellants/plaintiffs have no cause of action; learned Additional District Judge, also on the same pattern dismissed the appeal while holding that learned trial court has rightly concluded that appellants have no cause of action to file the suit; counsel for the appellants argued that legal heirs and specially women/female can file suit to get their right at any time; neither they can be ousted on the basis of limitation nor on the ground of any other technicality. Learned counsel for the appellants has relied on the case law reported as 'Amichand v. Fajroo' (PLD 1991 SC 1001) and argued that there is no bar for the legal heirs to file suit when it comes into knowledge of legal heirs that by way of fraud he/she has been deprived from inheritance.

4. Respondents Nos.1 to 4 and 7 have been served through publication in daily Nawa-i-Waqt but no one has turned up on their behalf, therefore, they are proceeded against ex-parte.

5. Learned counsel for remaining private respondents, referred Muhammad Rustam and another v. Mst. Makhan Jan and others (2013 PSC 439), 'Mst. Grana through Legal Heirs and others v. Sahib Kamala Bibi and others' (PLD 2014 Supreme Court 167), 'Din Muhammad and another v. Subedar Muhammad Zaman' (2001 SCMR 1992), that the suit is time barred as matter was in knowledge of the appellants. Further relied upon case laws reported as Pakistan Agricultural Storage and Services Corporation Ltd. v. Mian Abdul Latif and others (NLR 2008 Civil 578), 'Pitam Singh and another v. Bishun Narain and others' (AIR 1931 Oudh 58) 'Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited' (PLD 2012 Supreme Court 247), 'Ch. Ghulam Nabi v. Mirza Javaid' (1994 SCMR 1893), `Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad and others' (PLD 2015 Supreme Court 212), 'Islam Din and 7 others v. Naseer ud Din' (1995 SCMR 906) and 'Raja Ai Shan v. M/s. Essem Hotel Limited and others' (PLJ 2007 SC 862) and argued that neither the appellants have challenged the validity of the gift deed nor their suit is within time; the appellants have challenged the mutation No.241 which was attested on 07.07.1949 and the gift deed dated 26.04.1976 in the year 2000, the suit on the face of it is time barred; the mutation No.241 was sanctioned on the order of the Court dated 04.12.1947 and that order has not been challenged by the appellants; furthermore, Muhammad Akram transferred the land during his life time with free will in favour of his sons and in this way Begum widow of Ummrah transferred the property in favour of Nawazish Ali Khan, Muhammad Aslam Khan and Hameed Asghar Khan with free will and no fraud was made during transactions, so, the appellants have no ground to file suit and challenge the transactions; even in the plaint there is no mentioning that these transactions were fraudulently made, therefore, learned Addl. District Judge, was justified to reject the appeal and to hold that the appellants have no cause of action to file the suit.

6. Arguments heard. Record perused.

7. This is not a case of inheritance. The appellants have challenged the mutation, gift deed and Tamleek Nama on the ground of fraud with the contention that those were got sanctioned to deprive the appellants. This is also interesting that the owner Muhammad Akram who transferred the properties through mutations, gift deed and Tamleek Nama all pertains to the years 1949 and 1976. Said Muhammad Akram remained alive till the year 1991 and this factor has not been denied in any way by the appellants. The registered instruments were challenged by the appellants after decays through institution of suit on 10.10.2000. In such like cases, it is sine qua non for the seeker to stand on its own legs, who cannot be benefitted for weaknesses, if any, of the adversary. In this

regard, reliance is placed on the case law 'Sudhangshu Bimal Biswas v. MD Mustafa Chowdhary' (1968 SCMR 213) and 'MD. Anwarullah Mazunmdar v. Tamina Bibi and 5 others' (1971 SCMR 94). The registered document attaches sanctity and there is no ground to disbelieve those documents. The other important question in this proposition was the locus standi to the appellants to agitate/challenge those mutations after a period of more than 30/40 years. The owner remained alive for remarkable period and appellants did not challenge anything in his life time. Inheritance opens after death of the owner of the property and not during the life. These mutations were sanctioned during life time of the owner Muhammad Akram. Being descendants definitely appellants have no locus standi to challenge the aforesaid mutations. Reliance is placed on the case laws reported as 'Muhammad Suleman v. Riasat Ali and another' (2002 SCMR 1330), 'Kala Khan and others v. Rab Nawaz and others' (2004 SCMR 517), 'Muhammad Rustam and another v. Mst. Makhan Jan and others (2013 SCMR 299), Ghulam Abbas and others v. Mohammad Shafi through L.Rs. and others (2016 SCMR 1403) and Nasir Fahimuddin and others v. Charles Philips Mills and others (2017 SCMR 468). This is admitted fact that suit was instituted after more than 30/40 years of the transfer of suit property, whereas as per Article 120 of the Limitation Act, 1908, maximum six years are provided to seek such right but appellants remained silent for decays and did not agitate or assailed any mutation, gift deed or Tamleek specially during life time of Muhammad Akram, therefore, wisdom of the statute is that such matters where limitation affects the rights of other person and also where prima facie locus standi of the claimant persons is doubted such matters should be straight way refused to entertain.

8. As per mandate of section 3 of Limitation Act, Court is under obligation to scrutinize the plaint, the application and the appeal on the point of limitation regardless of the fact that the said point has been agitated by either party or not. The relevant provision of law for clarity and reference, is reproduced hereunder:-

"Section 3: 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 therefore by the First Schedule shall be dismissed, although limitation has not been set up as a defence."

Moreover, it is an established principle by now that law of limitation is not merely a formality/technicality, rather said statute furnishes certainty and regularity to the human affairs, matters and dealings. It is also well settled principle that law helps the vigilant and not the indolent. Furthermore, delay of each and every day has to be explained

satisfactorily, otherwise the delay cannot and should not be condoned. On said settled cannons of law, this Court is fortified by case law reported as 'Messrs Dawood Cotton Mills Ltd. v. Sindh Labout Appellate Tribunal and others (2006 SCMR 630), 'Atta Muhammad v. Maula Bakhsh and others (2007 SCMR 1446), 'Muhammad Hussain and others v. Dr. Zahoor Alum (2010 SCMR 286), 'Muhammad Islam v. Inspector General of Police Islamabad and others (2011 SCMR 8) and 'State Bank of Pakistan through Governor and another v. Imtiaz Ali Khan and others (2012 SCMR 280). In such facts and circumstances, both the courts below were quite justified to non-suit the appellants on valid reasons. This Court is satisfied regarding the vision of the learned trial court and learned Additional District Judge that appellants was having no cause of action to file the suit.

9. The upshot of above discussion is that appellants have failed to point out any illegality or irregularity in the impugned orders of both the courts below who have rightly decided the matter and non-suited the appellants. Thus, instant R.S.A. being without merits stands dismissed.

SA/S-51/L Appeal dismissed.

2021 M L D 2032

[Lahore (Multan Bench)]

Before Safdar Saleem Shahid, J

MUHAMMAD WAQAS and 4 others---Petitioners

Versus

GOVERNMENT OF PUNJAB through Secretary Education, Punjab Lahore and 4 others---Respondent

Writ Petition No.10572 of 2021, heard on 9th July, 2021.

Educational institution---

----Scope---Case of petitioners was that they had already deposited the admission fee being regular students with administration of the College within due date and the administration was responsible for clearance of the petitioners for the upcoming examination schedule but their roll number slips were not issued by the College Administration and the Board, rather, the College had demanded the petitioners to deposit fees at the rate of Rs. 50000 as late admission fee---Validity---Documents attached with the petitions revealed that the petitioners were regular students and it was duty of the College Administration to forward the admission forms along with fees to the Board and there was no fault on the part of the students for not depositing the requisite examination fee---If the official of the College Administration had not deposited the fee of the candidates in the office of Board within due date, the students were not liable for act/omission done by the College Administration, rather, it was a matter between the College Administration and the Board---Constitutional petitions were allowed and the Board was directed to issue roll number slips to the petitioners without imposing any fine or penalty.

Ch. Muhammad Ishtiaq Advocate v. Cantonment Executive Officer, Chunian District Kasur and another PLD 2009 Lah. 240 ref.

Qazi Muhammad Waseem Abbas for Petitioner.

Muhammad Ayub Buzdar, Assistant Advocate-General for Respondent.

Allah Bakhsh Khan Kulachi, Advocate/Legal Adviser for Board of Intermediate and Secondary Education D.G. Khan.

Date of hearing: 9th July, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----This judgment shall govern W.P.Nos.10572 of 2021 and 10365 of 2021 as common question of law and facts are involved.

2. The version taken by the petitioners/students in the instant petitions are that they got admission in Government Decree College Jatoi in the year 2019 as regular students and since then they are getting education from the College.

The grievance of the petitioners/ students is that they have already deposited the admission fee/requisite dues being the regular students, with administration of the college, on the instructions of respondent No.5 within time and respondent No.5/ Administration of the college is responsible for the clearance of the petitioners/ students for the up-coming examination schedule to be held on 10.07.2021 but their Roll number slips have not been issued till yet by College Administration and the Board/ respondent No.3, rather, the respondents demanded from the petitioners/ students to deposit the fee/dues at the rate of Rs. 50,000/- as late admission fee.

Thus, it is submitted that by accepting these petitions a direction be issued to respondents to issue the Roll number Slips to petitioners/students so that they could appear in upcoming examination schedule to be held on 10.07.2021.

3. Learned Legal Adviser entered appearance before this Court on behalf of Board of Intermediate and Secondary Education D.G Khan with the version that if the petitioners/aggrieved students are ready to pay the requisite admission fee as per prescribed rules/ Notification issued by the Punjab Boards of Intermediate and Secondary Education Act, 1976, the Roll number Slips would be issued to the Candidates/aggrieved students.

4. Arguments heard.

Record perused.

5. The documents attached with these petitions reveal that petitioners are the regular students of the college and as per their version, they have already deposited requisite fee in the office of the clerk of the college administration on the instructions of respondent No.1 within the prescribed time and it was the duty of the college administration to forward the applications /admission forms along with fee to the board/ respondent No.3 and there was no fault on the part of the students for not depositing the requisite examination fee.

The petitioners are the students of the college and they cannot be penalized for the negligence if committed by the college administration.

If the official of the college administration had not deposited the fee of the candidates in the office of board within due time, the students/candidates would not be liable for the act/omission done by the college Administration, rather, it is matter between the College Administration and the board.

In these circumstances, the petitioners cannot be deprived of their valuable rights to appear in the up-coming examination schedule to be held on 10.07.2021.

Record also reveals that after conducting a preliminary inquiry into the matter, three officials of the college administration who were allegedly involved in the alleged embezzlement have already been suspended by competent authority.

The competent authority after conducting a thorough inquiry into the matter, shall proceed against the delinquent in accordance with law.

As per settled principle, the lapse if any committed by the College Administration or Board, the students/ petitioners cannot be penalized and their future career cannot be left at the mercy of the College and the Board Administration which would definitely ruin the future career of the candidates/petitioners.

The impugned action of the respondents, if examined on the touchstone of Article 23 of the Constitution it may be held that fundamental rights enshrined by the Constitution are the most sacred rights which are far above the ordinary rights conferred under the law and thus have special significance and sanctity attached thereto;

the importance of these rights can be gauged and spelt out from the provisions of Article 8 of the Constitution which declares that any prevalent law in consistent with the fundamental rights shall be void.

Reliance in this regard is placed on case law reported as

"Ch. Muhammad Ishtiaq Advocate vs. Cantonment Executive Officer, Chunian District Kasur and another"

(PLD 2009 Lahore 240).

6. As a result of above discussion, these petitions are allowed and Chairman Board, D.G Khan/respondent No.3 is directed to issue Roll number Slips to the petitioners/students immediately on depositing of ordinary fee by the petitioners/students without imposing any fine or penalty so that they could appear in the up-come examination schedule to be held on 10.07.2021.

SA/M-162/L Petitions allowed.

P L D 2021 Lahore 757

Before Safdar Saleem Shahid, J

ANA LIAQAT---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, GUJRANWALA and 2 others---Respondents

Writ Petition No. 10090 of 2011, heard on 14th June, 2021.

(a) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Dissolution of Muslim Marriages Act (VIII of 1939), S. 2(ii)(viii)---Suit for dissolution of marriage---Khula in lieu of dower---Scope---Relinquishment of dower---Cruelty by husband---Thirty-two (32) tolas gold ornaments were fixed as dower---Wife/petitioner filed suit on the grounds of cruel behavior and failure to pay maintenance, however, Family Court on failure of reconciliation between the parties dissolved the marriage on the basis of Khula in lieu of dower; which decree was maintained by the appellate Court---Held, that the wife, for decree of dissolution of her marriage, had to forego her claim of dower only in the event of failure of reconciliation between the parties---Family Court on its own could not deprive the lady from the dower and could not order to relinquish the dower as the dower was the right of the lady given by Shariah---Said right could not be discretionarily or arbitrarily exercised by the Court---Family Court in a suit for dissolution of marriage, if reconciliation failed, shall pass decree for dissolution of marriage forthwith and shall restore to the husband the Haq Mehr received by the wife at the time of marriage---Such option could only be exercised if the lady had opted to relinquish the benefit but the Court could not exercise its jurisdiction---Although the Court was empowered to pass a decree on the basis of Khula, but subject to the fact that all the conditions required were fulfilled---In the present case, neither the lady agitated the ground of Khula nor it was her request while making statement before the Court and certain other grounds existed on the basis of which decree for dissolution of marriage could have been passed ---High Court set aside impugned judgments and decrees passed by both the Courts below and dissolved the marriage between the parties on the basis of grounds asserted by the petitioner---Constitutional petition was allowed, in circumstances.

Mst. Saima Irum and 3 others v. Tariq Javed and another 2006 MLD 83 and Lal Muhammad v. Mst. Gul Bibi and another PLD 1986 Quetta 185 ref.

(b) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Suit for dissolution of marriage on the basis of Khula Talaq-e-Baain---Scope---Held, that if the marriage was dissolved on the basis of Khula, it would be Talaq-e-Baain---If the husband and wife compromised with each other, then only the Nikah would be repeated.

(c) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Suit for dissolution of marriage---Khula---Scope---Allegation (cruelty etc) asserted by wife---Scope---Held, that the Court framed the issues regarding the allegations asserted by the lady and those were not proved by her ; at such stage the Court could pass decree for dissolution of marriage on the basis of some condition, but it would not be dissolution of marriage on basis of Khula---Wisdom behind this was that the parties should not be forced to live in a hateful union.

Abdul Ghaffar v. Parveen Akhtar 1999 YLR 2521 and Sajjad Hussain alias Allah Ditta Khan v. Judge Family Court, Mailsi and another 2015 CLC 1347 ref.

(d) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Suit for dissolution of marriage---Khula---Scope---Held, that decree of Khula could be passed even when there existed no ground but lady was not willing to settle down with the husband, however, the condition had to be fulfilled ; and the lady might be asked to return the benefits, but not the full dower rather the half one---Certainly in such situation the lady would have to forego rights which she had gained from the husband.

Mst. Shazia Haider v. Gul Islam PLD 2014 Pesh. 194; Shamim Akhtar v. Arshad Mehmood PLD 2017 SC (AJ&K) 40 and Chanzeb and another v. Mst. Yasmeen Bibi and others 2015 MLD 1140 ref.

(e) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Dissolution of marriage---"Talaq" and "Khula"---Distinction---Held, that there was difference in Talaq and Khula---Dissolution of marriage on the basis of Khula is on the demand of the lady---If offer is accepted by the

husband, then Talaq would be effected otherwise in case of refusal by the husband, the condition of Khula had to be fulfilled.

(f) Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 10(4)---Suit for dissolution of marriage---Khula---Scope---Procedural mistakes in passing decree noted/explained---Decree of dissolution of marriage on the basis of Khula cannot be passed ex-parte---Court had to put the offer of the lady to the husband and on the reply of husband in positive, the decree of Khula could be passed; secondly, if the conditions were put by the lady, for which the husband was not ready or he put some more conditions, then the same would be put to the lady---Unless the spouses were ready on the conditions, the decree could not be passed on the basis of Khula---Now the Court would frame the issues, regarding the other grounds agitated by the lady for dissolution of marriage and would decide the same on the basis of available record.

Asghar Ali Hashmi for Petitioner.

Ex parte vide order dated 22.09.2020 Respondent No. 3.

Date of hearing: 14th June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Through this petition the petitioner has assailed the order dated 28.09.2010 passed by the learned Judge Family Court, Gujranwala and the judgment dated 18.02.2011 passed by the learned Additional District Judge, Gujranwala.

2. Brief facts giving rise to this petition are that the petitioner was married with respondent No.3 on 31.12.2005 and 32.25 tola gold ornaments was fixed as dower, which was paid to her but later on was snatched by respondent No.3. The petitioner was given dowry articles amounting to Rs.13,91,000/- by her parents. Out of the wedlock two children were born, but due to clash between the parties the petitioner filed a suit for dissolution of marriage, recovery of dower, dowry articles and recovery of maintenance. Respondent No.3 contested the suit. The learned Judge Family Court after recording the statements of the parties, vide order dated 28.09.2010, decreed the suit of the petitioner to the extent of dissolution of marriage on the basis of Khula under

section 10(4) of the Family Courts Act, 1964, in lieu of dower. Feeling aggrieved the petitioner filed appeal but the same was dismissed vide judgment dated 18.02.2011 by the learned Additional District Judge, Gujranwala. The petitioner has assailed the order of the trial Court and that of the appellate Court through this writ petition.

3. The learned counsel for the petitioner argued that the suit was filed on the grounds of failure to pay maintenance and cruel behaviour of respondent No.3, which are covered under Section 2(ii) and (viii)(a) of the Dissolution of Muslim Marriages Act, 1939, which says that a marriage cannot be dissolved on the basis of Khula. Whereas, the learned Judge Family Court, under Section 10(4) of the Family Courts Act, 1964, dissolved the marriage on the basis of Khula in lieu of the dower. Likewise, the learned Additional District Judge held that where the wife is not willing to co-habit with her husband she can ask for Khula on the ground of hatred against husband with all consequences flowing therefrom and in such cases she will have to surrender benefit in the form of dower etc. derived from her husband. Learned counsel argued that neither the intention of the petitioner was to get the decree for dissolution of marriage on the basis of Khula nor it was mentioned anywhere in the plaint. She did not make any statement regarding the same. Learned counsel in this regard relied upon the case of Sardar Abid Iqbal v. Tabassam Khursheed (2009 YLR 1745).

4. Respondent No.3 was proceeded against ex parte vide order dated 22.09.2020.

5. Arguments heard. Record perused.

6. I reproduce the proceedings dated 28.09.2010, as under:-

"28.09.2010 کونسل فریقین حاضر۔ فریقین اصالتا حاضر۔ بیانات فریقین قلمبند ہووے۔

<u>بیان ازاں مدعیہ مسماۃ انا لیاقت بر حلف</u>

بیان کیا کہ میرا نکاح ہمراہ مدعا علیہ مورخہ 31-12-05 کو با شرح محمدی سر انجام پایا۔ حق مہر سوا بیتس تولا طلای زیورات مقرر ہوا جو کہ مدعا علیہ نے ادا کرنے کے بعد چھین لیا تھا۔ مدعا علیہ کے ظالمانہ رویہ کی بناء پر مجھے اس سے شدید نفرت ہو چکی ہے۔ میں ہمراہ مدعا علیہ اُبادنہ ہونا چاہتی ہوں۔ مجھے ڈگری تنسیخ نکاح دے دی جاوے۔

سن کر درست تسلیم کیا۔

<u>بیان ازاں مدعا علیہ محمد اویس بر حلف</u>

بیان کیا کہ میں مدعیہ کو ہر شرط پر آباد کرنے کے لئے تیار ہوں۔

سن کر درست تسلیم کیا۔

Order

Pretrial reconciliation proceedings were conducted which ended in smoke. The plaintiff is not willing to reconcile with the defendant at any cost. In such circumstances, this court is of the view, that if she be compelled to join the defendant at his home. It shall proved to be a hateful union, therefore, the matrimonial tie between the parties is dissolved u/s 10(4) W.P. Family Court Act, 1964 in lieu of dower. Certified copy of this order and decree be sent to the concerned union council forthwith. Now to come up for framing of issues on 04.10.10. Announced."

7. The purpose of the West Pakistan Family Courts Act, 1964, is to expedite the family matters in order to save the families from permanent and lengthy litigation in the Courts. Under the provisions of section 2(ii) and (viii) of Dissolution of Muslim Marriages Act, 1939, the marriage cannot be dissolved on the basis of pleadings of the parties and on the failure of reconciliation between the parties. The point of hatred and cruelty, if agitated can only be decided by the trial Court after recording the evidence. Under section 10(4) of the West Pakistan Family Courts Act, 1964, the marriage can be dissolved on the basis of Khula in summary proceedings and the requirement in such proceedings is to provide an opportunity of reconciliation and as a consequence of failure thereof decree for dissolution of marriage can be passed and in this event the wife has to forego her claim of dower. The Court on its own cannot deprive the lady from the dower and cannot order to relinquish the dower because the dower is the right of the lady given by the Shariah. This right cannot be discretionarily or arbitrarily exercised by the Court. Reliance in this regard, is placed on the case of Mst. Saima Irum and 3 others v. Tariq Javed and another (2006 MLD 83), wherein it was held that unless the lady herself has not relinquished her right of dower or any other thing and specifically she asked to dissolve the marriage on the basis of Khula, the Court on its own cannot pass such order for dissolving the marriage on the basis of Khula.

8. The concept of Khula has been interpreted by various scholars in a number of books on the subject. In Al-Hudaya it is summed up:-

"if the cruelty is from the side of the husband his realizing a compensation from the wife for her relinquishment (Khula) is disapproved. If insubordination is from the wife, in that case, the husband may take back only what property which he had given to her.

It was further observed that in case where Khula is decreed on the basis of cruelty the Court may not give any compensation to the husband."

The meaning of Khula in Shria is that as the husband has the authority to exercise his right of divorce, in the similar way the wife is permitted under Sharia to claim dissolution of marriage, after returning the benefits, she gained out of this relation from the husband. If the husband is not agreed, she may file suit for dissolution of marriage on the basis of Khula before the Court. In this scenario, if Court feels that the relation of husband and wife cannot remain proper, then the Court will ask the lady to relinquish her right of dower, and will ask the husband to divorce her against the relinquishment of dower. But even if the husband is not ready to divorce the lady on the condition; the Court cannot on its own pass decree of Khula in favour of lady. This is also important, that if the marriage is dissolved on the basis of Khula, it will be Talaq-e-Baain " ". In case if the husband and wife compromise with each other; then only the Nikah will be repeated. In support of this definition and procedure, I will quote the historic background of the Khula and its application in view of Qur'an and Sunnah:-

"(1) ابوداود نے اپنی سنن میں حضرت عائشہ کی روایت سے اس واقع کو بیان کیا ہے۔ کہ حبیبہ بنت سہل، ثابت بن قیس بن شماس کے نکاح میں تھی۔
ثابت نے حبیبہ کو مارا۔ اور اسکا کوئی عضو ٹوٹ گیا۔ حبیبہ رسول صلی اللہ علیہ وآلہ وسلم کے خدمت میں حاضر ہوئی اور ثابت کی اس بارے میں شکائت کی۔
آپ صلی اللہ علیہ وآلہ وسلم نے ثابت کو بلایا اور فرمایا کہ حبیبہ کے مال میں سے کچھ لیکر اس کو چھوڑ دے۔ ثابت بن قیس نے دریافت کیا۔ یا رسول صلی اللہ علیہ وآلہ وسلم کیا یہ درست ہو گا؟ آپ صلی اللہ علیہ وآلہ وسلم نے فرمایا۔ ہاں۔ اس نے کہا یا رسول اللہ صلی اللہ علیہ وآلہ وسلم میں نے اسکو دو باغ دیے ہیں۔ اور وہ اسکے قبضے میں ہیں۔ رسول صلی اللہ علیہ وآلہ وسلم نے فرمایا۔ ان باغوں کو لے لو۔ اور حبیبہ کو چھوڑ دو۔ چنانچہ ثابت نے ایسا ہی کیا۔
یہ اسلام میں پہلا خلع تھا۔
مقدمہ بلقیس فاطمہ بنام نجم اللہ اکرام میں عدالت نے یہ قرار دیا کہ اگر عدالت اس نتیجے پر پہنچے کہ زوجین حدود اللہ کو قائم نہ رکھ سکیں۔ تو شوہر کی رضا مندی کے بغیر عدالت بیوی سے مناسب معاوضہ شوہر کو دلوا کر خلع کرا سکتی ہے۔ اُسی نقطہ نظر کو سپریم کورٹ نے PLD 1959 Lahore 566 بمقدمہ خورشید بیگم اختیار کیا۔
(2) فتاویٰ عالمگیری جلد دوئم۔
آٹھواں باب۔
فصل اول
بدائع میں ہے۔ اور جب شوہر وجورو میں رنجش پیش آئی اور دونوں کو اسکا خوف ہوا کہ ہم سے حدود اللہ کی پاسداری نہیں ہو گی۔ تو مضائقہ نہیں ہے۔ کہ عورت اتنا مال دیکر کہ شوہراسپر عورت کو خلع دے دے۔ اپنے نفس کو چھڑاوے۔ پس جب دونوں نے ایسا کیا تو ایک طلاق بائن واقع

ہو گی۔ اور عورت پر مال لازم ہو گا۔ یہ ہدایہ میں ہے۔ اور اگر سرکشی مردکی جانب سے ہو۔ تو خلع پر اُسکو کچھ عوض لینا حلال نہیں۔
(3) نذر رحمٰن میں ڈاکٹر جسٹس (ر) تنزیل الرحمٰن نے دفعہ 116 کی ضمن میں وضاحت سے لکھا۔
اگر عدالت کو اس امر کا اطمینان ہو گیا ہو کہ زوجین شدید نا چاقی کے سبب باہمی معاشرت میں احکام خداوندی کی پابندی نہ کر سکیں گے۔ تو شوہر کو خلع کا حکم دے گی۔
مگر شرط یہ ہے کہ اگر مرد قصور وار پایا جائے گا تو عدالت بلا معاوضہ تفریق کرا دے گی۔
مزید شرط یہ ہے کہ اگر قصور عورت کا ہو۔ یا دونوں میں سے کسی کا نہ ہو۔ مگر حالات خلع کے متقاضی ہوں۔ تو شوہر کو عورت سے مناسب معاوضہ دلوایا جائے گا۔"

9. Now if the above said proposition is kept in view, the logical and philosophical dimension of the matter it can be said that a husband if left unchecked shall apprehend no loss if he, for any reason, develops a disposition to break the bondage of marriage and resorts to cruelty with a mind to compel the wife to demand Khula instead of giving benefit of retaining or getting back the dowered property/amount. Such a cruelty would undoubtedly be a purpose oriented one of which the law and Courts must take notice, so as to keep the husband off the oche of cruelty. The jurists have done much work on this proposition that since the lady has filed suit for dissolution of marriage she had also filed a suit for dower and dowry articles along with maintenance allowance and her specific plea in the suit is that the husband was not paying the maintenance allowance to the children and not to her and furthermore he had expelled her from the house and all the belongings (dowry articles and dower) were lying with the husband. Under this situation the Court cannot assume the power to pass an order which is totally against the spirit of the basic law. The lady has not stated anything regarding Khula rather in her statement dated 28.09.2010 she had mentioned the reason that hatred is the cause of the cruel attitude of the husband, then the Court was under obligation to pass the decree of dissolution of marriage not on the basis of Khula because demanding of such a decree on the basis of Khula is the exclusive right of the lady which cannot be exercised by anybody even by the Court itself. The spirit of Section 10(4) of the West Pakistan Family Courts Act, 1964 is clear, the relevant portion of which is reproduced below:-

> *"(1) When the written statement is filed, the Court shall fix an early date for a pre-trial hearing of the case.*
>
> *(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the precis of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties and their counsel.*

(3) The Family Court may, at the pre-trial stage, ascertain the precise points of controversy between the parties and attempt to effect compromise between the parties.

(4) Subject to subsection (5), if compromise is not possible between the parties, the Family Court may, if necessary, frame precise points of controversy and record evidence of the parties."

10. If no compromise or reconciliation is possible the Court shall frame issues in the case and fix a date for recording of evidence provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage. This option can only be exercised if the lady has opted to relinquish the benefit but Court itself cannot exercise its jurisdiction. Reliance in this regard is placed on the case reported as Lal Muhammad v. Mst. Gul Bibi and another (PLD 1986 Quetta 185), wherein it has been held as under:-

"It is quite evident from proceedings in Suit No.8 of 1982, filed by respondent Gul Bibi; that, plea in respect of 'Khula' was not specifically taken. In replication dated 31-5-1982 only a mild reference has been made which too, suggests that in view of strained relations it was not possible for her to reside with petitioner. However learned Civil Judge did frame specific issue regarding entitlement of Mst. Gul Bibi for seeking dissolution of marriage on the ground of 'Khula'. Normally when parties are conscious about point on which they are at variance and specially when issues in that behalf are also framed, in that event mere non-mention of such ground with clarity in the pleadings cannot be made basis for rejecting the claim. But as would be dealt with later, dissolution of a marriage on the plea of 'Khula' is available only if conscious attempt is made by the "woman" to exercise her right in this behalf and not otherwise. Therefore, in this peculiar case unless wife comes forward to specifically claim this right, decree cannot be lawfully allowed on this score merely on Court's motion. Factual position on record is that learned Civil Judge did not accept claim for dissolution of marriage on account of cruelty but surprisingly on the strength of same set of evidence has granted decree by way of 'Khula'. It appears that Family Court has accepted right of 'Khula' merely because wife was adamant and was not inclined to join the petitioner on the behest of her parents. Before adverting to the question as to authority exerciseable by Qazi or

> Court competent under the law to grant decree on the plea of Khula in this case it would be appropriate to make brief reference to the evidence available before the Family Courts for adjudication of family dispute between the parties."

It has been further observed as under:-

> "It is bounden duty of the judicial forum to restrict itself to the evidence on record, and decide the matter on the available fact and circumstances. In deciding the dispute, Courts are not expected to act in an arbitrary capricious or whimsical manner. Most pertinent question for determination therefore, is that, to what extent right to dissolve marriage on the basis of 'Khula' is exerciseable by the wife. Islam undoubtedly has conceded, right to wife to seek dissolution on the ground of Khula in extreme circumstances, but right to claim dissolution of marriage on the basis of 'Khula' is not absolute; and no blanket authority is given to wife for automatically denouncing marital bonds. In fact this right is reasonable controlled and is dependent upon scrutiny of "Court" competent to decide in the matter after properly satisfying itself about existence of reasonable circumstances whereby separation is being claimed, so as to terminate sacrosanct relationship of the spouse. In Holy Qur'an Verse No.229 of Sura Baqr deals with "Right" to Claim "Khula" wherein procedure for sanctioning the right of wife to claim dissolution of marriage on this ground is mentioned. This right, of wife to claim dissolution of marriage on the ground of 'Khula' has been elaborately and authoritatively considered by superior Courts in following cases:-
>
> (i) Saeed Khanem v. Muhammad Sami PLD 1952 Lah. 113,
>
> (ii) Fatima Balqis v. Najamul Islam PLD 1959 Lah. 566,
>
> (iii) Mst. Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97, and
>
> (iv) Abdur Rahim v. Mst. Shahida Khan PLD 1984 SC 329."

11. In case when other grounds for dissolution of marriage are agitated and available in the plaint then if the Court decrees the suit on the basis of Khula under Section 10(4) of the Family Courts Act, 1964, then this is necessary for the Court to mention that decree for dissolution of marriage has been passed on the basis of 'Khula', the Court has to adopt the whole procedure for awarding the decree of dissolution of marriage on the basis of Khula, then, the Court will also discuss that why the other grounds taken by the lady have not been taken into consideration. In that case, the lady may be asked to return the benefit she has taken from the husband, dower and any other benefit. Dower

will only be returned when the lady herself opts for Khula. However, the other benefit, if had been obtained by the lady can be ordered to be returned.

12. I have drawn this enology from the original text that when after the Nikah if Rukhsati has not taken place and the divorce is effected in between the parties, the lady is entitled for half of the dower fixed at the time of Nikah. In that case, even she has not performed any other rights as wife with the husband, but Shariah has declared that she is entitled for half of the dower fixed in Nikah, meaning thereby the full dower cannot be asked to return by the Court under any order of the Court. The lady cannot be deprived from the right of dower, which has been given by Sharia, unless the lady herself requests and exercise her right of Khula and there is no other reason for the Court to pass a decree for dissolution of marriage. In that case if the Court passes the decree on the basis of Khula then the Court may direct the lady to relinquish dower amount. But when there is no request from the lady regarding separation on the basis of Khula; and there are other allegations about the conduct of the husband that he was not maintaining the lady and the children, then certainly Court may pass observation regarding those allegations and then can pass the decree for dissolution of marriage but not on the basis of Khula; the Court may discuss the attitude of the husband that lady is living in her parents' house, non-maintaining the children, if any, and the allegation is also evident from the record and the statement of the lady at the time of pre-conciliation efforts. There is another aspect of the proposition that if the Court frames the issue regarding those allegations and those are not proved by the lady; at this stage the Court may pass decree for dissolution of marriage on the basis of some condition. But it will be not dissolution of marriage on the basis of Khula, because there is the wisdom behind, that the parties should not be forced to live in a hateful union. Reliance is placed upon the cases reported as Abdul Ghaffar v. Parveen Akhtar (1999 YLR 2521) and Sajjad Hussain alias Allah Ditta Khan v. Judge Family Court, Mailsi and another (2015 CLC 1347).

13. The Court has the power to decide the matter in view of the facts before it even through summary inquiry. A decree of Khula may be passed when even there exists no ground but lady is not willing to settle down with the husband, but the condition has to be fulfilled. Now the lady may be asked to return the benefit, but not the full dower but the half one. In that case certainly the lady will have to forego rights which she has gained from the husband. It has been held in Mst. Shazia Haider v. Gul Islam (PLD 2014 Peshawar 194), that even, if wife who omits to demand Khula can be granted a decree for Khula if the conditions exist that in case a decree for dissolution of marriage is not granted it will give birth to a hateful union of the spouses which will not bring the

spouses within the limits prescribed by God. Reliance in this regard is also placed on the cases of Shamim Akhtar v. Arshad Mehmood (PLD 2017 SC (AJ&K) 40) and Chanzeb and another v. Mst. Yasmeen Bibi and others (2015 MLD 1140).

14. Another importasnt factor is that there is difference in Talaq and Khula. The dissolution of marriage on the basis of Khula, is on the demand of the lady. If offer is accepted by the husband, then Talaq will be effected otherewise, in case of refusal by the huisband, the conditions of Khula; then the Talaq will not be effected.

15. Second important thing is that if the lady offers Khula; her demand of dower will be finished. But in case of Talaq by the husband dower is payable by the husband. In case if the husband asks the lady; that he will divorce, if the wife relinquishes her right of dower and lady accepts the same then, Talaq will be effected, without payment of dower and it is the same as the Khula. In Khula, it is not necessary for the husband to use the word 'Talaq'. In case if the lady demands separation on the basis of Khula, and the husband accepts this offer and says that I have accepted the offer of Khula and Khula is awarded it will effect as " ". Now the husband has no right to " "the lady or to take back Khula; but if the spouses are agreed, they may repeat Nikah. There are some procedural mistakes which have been noted with deep concern.

1. The decree of dissolution of marriage on the basis of Khula cannot be passed Ex-parte. The Court has to put the offer of the lady to the husband and on the reply of husband in positive, the decree of Khula can be passed.

2. If on the conditions the husband is not ready, or he puts some more conditions, then, the same will be put to the lady. Unless on the conditions spouses are ready, the decree cannot be passed on the basis of Khula. Now the Court will frame the issues, regarding the other grounds agitated by the lady for dissolution of marriage and will decide the same on the basis of available record.

16. The separation between spouses on the basis of Talaq or Khula, when happens, it has a social impact not only to the extent of the life of the effected families, but also on the society as whole. One of the concepts of marriage is to organize the family system. So, even at the time of Talaq by the husband; the order of Allah is:-

"جب انہیں طلاق دو۔ تو احسن طریقے سے رخصت کرو، اور کچھ دے کر رخصت کرو۔" (سورۃ البقرۃ)

If there are children from the wedlock, certain responsibilities are imposed on the husband. In some cases, the lady has the right even to stay in her ex-husband's house; under the limits described by Sharia. The feeding of baby expenses are also to be borne by the husband. So, in all respect Sharia has given protection to both husband and wife

and the purpose behind is to form a peaceful, beautiful social system. So, when there are other reasons available, the lady cannot be forced to get separation on the basis of Khula, by relinquishing her right of dower, which the Sharia has given to her.

17. Result of the above discussion is that although the Court was empowered to pass a decree on the basis of Khula, but under the circumstances, when neither the lady agitated the same nor it was her request while making statement before the Court and certain other grounds existed, on the basis of which decree could have been passed for dissolution of marriage, the order dated 28.09.2010 and the judgment dated 18.02.2011 passed by the learned Judge Family Court and the learned Additional District Judge, Gujranwala, are without jurisdiction. Respondent No.3 already had been proceeded ex-parte through order dated 22.09.2020. The case of the petitioner for dower will be deemed to be pending before the learned Family Court. She may file the application there, if so advised and can claim her right of dower, and the learned Court will proceed with the matter according to law, while awarding opportunity to respondent No.3 to place his view before the Court and the learned Judge without being influenced by this judgment, will decide the case on merits strictly in accordance with law. Consequently, the instant petition is allowed, both the impugned orders are set aside and decree for dissolution of marriage is granted in favour of the petitioner and against the respondent No.3, as the other grounds exist to pass the decree for dissolution of marriage in favour of petitioner. No order as to costs.

MQ/A-71/L Petition allowed.

PLJ 2021 Cr.C. 1499

[Lahore High Court, Lahore]

Present: **SAFDAR SALEEM SHAHID, J.**

MUJAHID--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 23011-B of 2021, decided on 24.5.2021.

Extra-judicial confession--

----Extra-judicial confession is weak type of evidence and cannot be relied under circumstances specially when there is no corroboration to same. [P. 1501] B

2012 SCMR 387.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 148, 149 & 34--Bail after arrest, dismissal of--Allegation of--Non-bailable offence--Committed murder of deceased by strangulation--Confession of petitioner regarding commission of murder of deceased finds corroboration from post-mortem examination report of deceased as doctor observed that death occurred due to sharp weapon cutting trachea and major blood vessel of neck"--Petitioner was found guilty and he was fully implicated by complainant and P.Ws during investigation--Case of petitioner is one of further inquiry--No evidence is available to connect petitioner with commission of crime--Complainant with *mala fide* has made supplementary statement while impleading petitioner--Extra judicial confession stated by complainant and PW's do not appeal to mind--Recovery mentioned by police, is not genuine one and has been falsely planted--Extra judicial confession of accused is a weak type of evidence which may be maneuvered by prosecution in a case where direct connecting evidence does not come its way whereas learned counsel for complainant has argued that matter falls within purview of prohibitory clause of Section 497, Cr.P.C--Although accused was nominated through supplementary statement but it was not with delay--On confession of petitioner, he was nominated and furthermore during investigation material recovery *i.e*. weapon of offence razor (*Ustra*) and motorcycle which was used during occurrence were recovefed from accused and it was also corroborative with medical evidence *i.e*. post-mortem report of decease--Bail was dismissed. [Pp. 1501 &1502] A, C & D

2020 PCr.LJ 776, 2021 SCMR 381, 2020 MLD 1896 and 2007 SCMR 404.

Retracted judicial or extra judicial confession--

----Question of--Questions as to retracted judicial or extra-judicial confession whether inculpatory or exculpatory, truthfulness or otherwise of judicial confession, absence of evidence against accused, possibility or impossibility of ultimate conviction of accused on basis of such inadmissible evidence, was not to be appreciated at bail stage--Question relating to intrinsic value of retracted judicial confession as to appraisal of evidence was not to be addressed at bail stage--Retracted judicial confession, if found truthful and confidence inspiring, could be relied upon on basis of tentative assessment of prosecution evidence and it was not possible to doubt credibility of judicial statement at bail stage--Matter that accused is not nominated in F.I.R., is riot of much importance when corroborating piece' of evidence is available and connects accused with commission of offence. [P. 1502] E

1990 SCMR 315, 1997 SCMR 445 & 1999 SCMR 1794.

Bail--

----Non-bailable offence--Principle--In non-bailable offence punishable with death, imprisonment for life or ten years R.I. refusal of bail is a rule and grant of bail is an exception. [P. 1502] F

2003 YLR 181.

Mian Muzaffar Hussain Advocate for Petitioner.

Mr. Shabbir Ahmad Deputy Prosecutor General for State.

Malik Muhammad Saddique Awan Advocate for Complainant.

Date of hearing: 24.5.2021.

ORDER

Through instant petition, Mujahid (petitioner) has sought post arrest bail in case arising out of FIR No. 404/2020 dated 12.05.2020, registered under Sections 302,148,149,34, PPC, at Police Station City Tandlianwafa District Faisalabad.

2. According to F.I.R., on 12.05.2020 the dead body of deceased Muhammad Hussain was found lying in the bushes near Water Mines. The complainant entertained suspicion against *Mst.* Tahira Bibi (widow of deceased) that she alongwith unknown culprits had committed the murder of his brother Muhammad Hussain.

3. Arguments heard. Record perused.

4. It has been noticed that although it was an unseen occurrence and petitioner was not nominated in the FIR yet on 13.05.2020 Mujahid petitioner made extra-judicial confession before Allah Ditta complainant and P.Ws Muhammad Ali and Hayadat wherein it was contended by him that he had illicit relations with *Mst.* Thira Bibi widow of deceased and when this fact came into the knowledge of the deceased they prepared a plan for his murder and on the night falling between 11/12.05.2020 they committed the murder of deceased by strangulation. It was further confessed by petitioner before the complainant and P.Ws that he (petitioner) cut throat of the deceased with Razor (*Ustra*) thereafter, they took the dead body from the house and threw it in the bushes. On the basis of aforesaid extra-judicial confession, petitioner was arrested by the police in this case and during investigation of instant case, mobile of deceased, motor-cycle allegedly used during the occurrence and razor (*Ustra*) stained with blood were recovered on his pointation. Confession of the petitioner regarding commission of murder of deceased finds corroboration from the post-mortem examination report of the deceased as doctor observed that death occurred due to sharp weapon cutting trachea and major blood vessel of neck". The petitioner was found guilty and he was fully implicated by the complainant and P.Ws during investigation. Learned counsel for the petitioner has referred the case law reported as *'Gul Muhammad and another vs. The State through Prosecutor-General Balochistan'* (2021 S.C.M.R. 381) and argued that extra-judicial confession is weak type of evidence and cannot be relied under the circumstances specially when there is no corroboration to the same. Learned counsel further referred the case law reported as 'Muhammad Waseem vs. The State and others' (2012 S.C.M.R. 387) that it is case of further inquiry, extra judicial confession is weak type of evidence which was inadmissible in evidence. Learned counsel referred the case law reported as *'Asad Ali vs. The State and another'* (2020 P.Cr.LJ. 776) that the case of the petitioner is one of further inquiry. No evidence is available to connect the petitioner with the commission of crime. The complainant with *mala fide* has made supplementary statement while impleading the petitioner. The extra judicial confession stated by the complainant and PW's do not appeal to the mind. The recovery mentioned by the police, is not genuine one and has been falsely planted. Counsel further referred the case law reported as *'Muhammad Asif Javed vs. The State and another'* (2020 MLD 1896) that extra judicial confession of accused is a weak type of evidence which may be maneuvered by the prosecution in a case where direct connecting evidence does not come its way whereas learned counsel for the complainant has argued that the matter falls within the purview of prohibitory clause of Section 497 Cr.P.C. Although accused was nominated through supplementary statement but it was not with the delay. On the confession of the petitioner, he was nominated and furthermore during investigation

material recovery *i.e.* weapon of offence razor (*Ustra*) and motorcycle which was used during the occurrence were recovefed from the accused and it was also corroborative with the medical evidence *i.e.* post-mortem report of the deceased. Learned counsel in this regard, referred the case law reported as *Farooq Mengal vs. The State through A.G. Sindh, Karachi'* (2007 S.C.M.R. 404) that questions as to retracted judicial or extra-judicial confession whether inculpatory or exculpatory, truthfulness or otherwise of judicial confession, absence of evidence against accused, possibility or impossibility of ultimate conviction of accused on the basis of such inadmissible evidence, was not to be appreciated at bail stage--Question relating to intrinsic value of retracted judicial confession as to appraisal of evidence was not to be addressed at bail stage--Retracted judicial confession, if found truthful and confidence inspiring, could be relied upon on the basis of tentative assessment of prosecution evidence and it was not possible to doubt credibility of judicial statement at bail stage. The matter that accused is not nominated in the F.I.R., is not of much importance when corroborating piece' of evidence is available and connects the accused with the commission of offence. Reliance was made on the case laws reported as *Lal Muhammad vs. The State'* (1990 S.C.M.R. 315), *'Munir Ahmad and another vs. The State'* (1997 S.C.M.R. 445) and *'Raza Mohsin Qazilbash and others vs. Muhammad Usman Malik and others'* (1999 S.C.M.R. 1794). This is also settled principle that in non-bailable offence punishable with death, imprisonment for life or ten years R.I. refusal of bail is a rule and grant of bail is an exception. Reliance is placed on the case law reported as *'Suleman Khan and another vs. Buner Khan and another'* (2003 YLR 181). Prima facie, sufficient incriminating material is available on the record connecting the petitioner with the commission of the instant occurrence.

5. For what has been discussed above, I am not inclined to grant bail to the petitioner which is hereby dismissed.

(A.A.K.) Bail dismissed.

2021 Y L R 1973

[Lahore]

Before Safdar Saleem Shahid, J

Ch. ABDUL WAHEED through L.Rs.---Petitioners

Versus

ZAHIDA PARVEEN alias NAGINA and 5 others---Respondents

Writ Petition No. 39791 of 2017, decided on 27th May, 2021.

(a) Punjab Rented Premises Act (VII of 2009)---

----S. 15--- Eviction petition---Relationship of landlord and tenant---Scope---Petitioners landlord (petitioner) assailed the dismissal of their petition for ejectment of tenant---Validity---Petitioners had admitted that they had filed the ejectment petition on the basis of oral agreement for which there was no knowledge to the petitioners that when it was settled between their predecessor-in-interest and the respondent's predecessor-in-interest---Even time and year was not specifically known to the petitioners---Even there was no such evidence from which it could be believed that the respondents had paid rent to the petitioners at any time---Petitioners had failed to justify as to why after the commencement of the Punjab Rented Premises Act, 2009, they could not ask the respondents/tenants for written agreement of tenancy---Constitutional petition was dismissed, in circumstances.

Muhammad Rashid Hussain Shamsi v. Syed Hameed ud Din and another 2014 CLC 1367 ref.

Mst. Nasira Afridi v. Muhammad Akbar 2015 MLD 171 and Ameena Haq v. Rab Nawaz Khan and 2 others 2018 CLC Note 92 rel.

(b) Punjab Rented Premises Act (VII of 2009)---

----S. 15--- Eviction petition---Relationship of landlord and tenant---Scope---Where the denial of relationship of landlord and tenant is specifically agitated the question before Rent Tribunal is only to see the status of the parties---Obligatory upon a person claiming himself to be landlord of the premises to establish the evidence that the other person is occupying the premises in the capacity of a tenant and none other and that such tenant is also paying rent against the tenancy of the demised premises, otherwise

he would be deemed to have failed to establish his claim and would not be entitled to seek eviction of such a tenant under the Punjab Rented Premises Act, 2009.

Yasin Khan v. Additional District No. VII, District Judge West Islamabad and 2 others 2019 YLR 2894 rel.

(c) Punjab Rented Premises Act (VII of 2009)---

----S. 15--- Eviction petition---Relationship of landlord and tenant---Scope--- Receiving of rent and payment of rent are sine qua non for establishing the relationship of tenancy between the parties and in a case where the relationship itself is under question then, it becomes further necessary and imperative to prove the existence of relationship between the parties through evidence and for the very purpose the factum of payment of rent by the tenant to landlord is pivotal to prove or disprove the claim of tenancy and relief sought.

Muhammad Ibrahim v. Niaz Muhammad 2016 CLC 609 rel.

Faisal Ghafoor Khokhar for Petitioners.

Jahanzeb Masood for Respondents.

ORDER

SAFDAR SALEEM SHAHID, J.---Through the instant constitutional petition, the petitioners have called into question the legality of the judgment dated 18.04.2017 passed by the learned Additional District Judge, Lahore whereby appeal filed by the respondents was accepted.

2. Brief facts of the case as narrated through instant writ petition are that on 18.04.2013 predecessor of petitioners Nos.(i) to (v) during his life time filed an application under section 15 of The Punjab Rented Premises, Act, 2009, whereby sought ejectment of respondents qua the fact that his father namely Inayat Ullah was owner of quarters/property measuring 7-marlas bearing No.SEVI-22S-8/1 situated at Haveli Khalifa Khair Din Yasrub Street No.22, Garhi Shahu, Lahore, who purchased the same vide sale deed dated 11.03.1986. After his death, petitioner along with Abdul Rasheed, Tanveer Ahmad, Rasheeda Bano and Rahila Bano became lawful owners/legal heirs. Where-after, out of total property two quarters measuring 3-Marlas and 170 sq. ft. were sold out by the aforesaid all legal heirs whereas to the

extent of remaining 3-Marlas 55 sq. ft. a surrender deed dated 19.09.2007 was executed by other shareholders in his favour. The property was rented out to respondents since long when rate of rent was quite low which was enhanced gradually. In November, 2011, it was orally settled between the parties that rate of rent shall be Rs.3000/- per month and tenancy was for next two years and was to be expired on November, 2013. In the months of March and April, 2013, respondents refused to pay rent and they defaulted. On this, petitioners filed the ejectment petition on 04.06.2015. Respondents filed leave to contest where many preliminary objections were raised. The version of the respondents was that ejectment was not maintainable and it has been filed with mala fide intention and ulterior motive. There is no relationship of landlord and tenant between the parties. It was objected that in the light of law laid down in The Punjab Rented Premises Act, 2009, the ejectment petition is not maintainable and as per latest law only written tenancies can be considered for adjudication. It was also contended that respondents Nos. 2 and 3 are in possession of the suit property as their grant father namely Umar Din and grand-mother occupied the land underneath which belongs to no one but is a Shamlat Deh which comes within the ambit of Lal Lakeer owned by the Government and constructed the house in question. The court while entertaining the rent petition on 18.04.2013 passed the order under The Punjab Rented Premises Act, 2009, as per section 9(b) of the Act and in obedience of the order, 10% of the annual value of rent was to be deposited by the landlord/petitioners. Leave to appeal was allowed by the Court. Since there was denial regarding relationship of landlord and tenant the following one issue was framed by Special Judge (Rent) Lahore.

1. Whether there exists the relationship of landlord and the tenant between the parties? OP (parties).

2. Relief.

Thereafter, parties produced their evidence. Learned Special Judge (Rent) Lahore allowed the rent petition and issue was decided in favour of the petitioners that relationship of landlord and tenant between the petitioners and respondents stands proved and respondents were directed to hand over possession of the premises to the landlord within 30 days. Against the said judgment dated 29.10.2016, aggrieved party filed appeal before learned District Judge, Lahore who after hearing the parties

accepted the appeal and set aside the impugned judgment dated 29.10.2016 and also in result of that ejectment petition was dismissed. The court held that there was no relationship of landlord and tenant between the parties and present petitioners failed to establish the said relationship.

3. Learned counsel for the petitioners argued that learned Additional District Judge, Lahore, has not properly analyzed the evidence produced by the petitioners; relevant documents of ownership have been produced by the petitioners; that the petitioners are owners of the property and the premises was given on rent by the petitioners to the respondents; oral as well as documentary evidence supports the version of the petitioners. Learned counsel has referred the case law reported as 'Ahmad Ali alias Ali Ahmad v. Nasar ud Din and another' (PLD 2009 SC 453), 'Shafaq Aqeel v. Shafqat Ali Amjad 4 and others (2015 MLD 987), 'Zafar Iqbal v. Dilshad Ahmad and another' (2015 YLR 1092). Further referred the case law reported as 'Shaukat Ali v. Sheikh Muhammad Bashir through L.Rs. and another' (2017 CLC 158) that mere denial from relationship of landlord and tenant is not sufficient but denying from this relationship should be proved with reliable evidence. Further referred 'Shamas ud Din v. Additional District Judge and others' (2016 CLC Note 81), 'Sarfraz v. Mukhtar Ahmed and others' (2016 CLC Note 48), 'Muhammad Shoaib v. Jamila Kahtoon and 4 others' (2015 YLR 1213), 'Ameer Baksh through L.Rs. and others v. Mst. Bakhto and others' (2017 CLC Note 116), 'Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others' (2014 SCMR 914) and argued that petitioners have proved the case through reliable evidence and all the related documents are available on the record to establish the ownership of the petitioners; while passing impugned judgment learned Additional District Judge has committed severe error while holding that there was no relationship of landlord and tenant between the petitioners and respondents.

4. Learned counsel for the respondents, on the other hand, resisted that evidence of the petitioners was sufficient to prove that there was no relationship of landlord and tenant between the petitioners and respondents; evidence of AW.1 is sufficient to prove this fact; AW.1 has no knowledge of anything and his all informations are based on hearsay evidence; he never mentioned that premises was given on rent and by whom and even no witness had ever stated about receiving of rent at any time; the

petitioners were not the owners of the land; the land belonging to the petitioners was some other portion and the portion of land in question does not belong to the petitioners as per record.

5. Arguments heard. Record Perusal.

6. In rent cases where the denial of relationship of landlord and tenant is specifically agitated the question before the court is only to see the status of the parties. It is obligatory upon a person claiming himself to be landlord of the premises to establish through evidence that the other person is occupying the premises in the capacity of a tenant and non other and such tenant is also paying him rent against the tenancy of the demised premises, otherwise he would be deemed to have failed in establishing his claim and will not be entitled to seek eviction of such a tenant under The Punjab Urban Rented Premises Act, 2009. In the case of Yasin Khan v. Additional District No. VII, District Judge West Islamabad and 2 others (2019 YLR 2894), it was held as follows:

"15. The petitioner failed to bring on record any evidence to prove that respondent No.3 had paid rent to him at any stage. Since it was the petitioner who had invoked the jurisdiction of the learned Rent Controller, it was obligatory upon him to have proved the existence as to the factum of the relationship of landlord and tenant between himself and respondent No.3. The petitioner neither produced any independent witness, nor produced any rent receipts to show that such a relationship existed between the petitioner and respondent No.3. Since an eviction order can only be passed by the Rent Controller against a tenant or a person who has been put in possessions of the rented premises by the tenant, it is essential for the eviction petitioner to prove that the person whose eviction is sought, is in occupation of the premises in his capacity as a tenant and none other. There are other remedies available under the law to the owner of immovable property to have an unlawful occupant or a trespasser, who is not a tenant evicted from such property."

In order to correctly understand the meaning of both the terms and to apply the same to the facts of the case in hand, the definition clause of Section 2 of the Act is of great relevant, which provides definition of both the terms. For the purposes of ease of reference, the same are reproduced as follows:

(d) "landlord" means the owner of a premises and includes a person for the time being entitled or authorized to receive rent in respect of the premises.

(l) "tenant" means a person who undertakes or is bound to pay rent as consideration for the occupation of a premises by him or by any other person on his behalf and includes"

Perusal of both the terms clearly depicts the receiving of rent and payment of rent are sine qua non for establishing the relationship of tenancy between the parties and in a case where the relationship itself is under question then, it becomes further necessary and imperative to prove the existence of relationship between the parties through evidence and for the very purpose the factum of payment of rent by the tenant to landlord is pivotal to prove or disprove the claim of tenancy and relief sought. In the case of Muhammad Ibrahim v. Niaz Muhammad (2016 CLC 609), same principle was laid down as under:

"It is an established principle that once a tenant is always a tenant, but in the described circumstances the initial burden was on the respondent (applicant) to establish his status either as of owner or of landlord of the house in question, to enable him to seek for eviction of the appellant. There was no document which could describe his (respondent's) status as of owner of the house in question. There was even no specific oral evidence stating payment of rent to the respondent by the appellant, or any other act on part of the appellant which determined his status as of tenant of the respondent.

Learned Special Judge (Rent) is not concerned with the ownership of the premises in question. This ejectment petition was filed under The Punjab Rented Premises Act, 2009, and even its all provisions are very specific and clear. The violence of these provisions is not curable for any side. Petitioners have admitted that they filed the ejectment petition under The Punjab Rented Premises Act, 2009, on the basis of oral agreement for which there is no knowledge to the petitioners that when it was settled between their predecessor in interest and respondent's predecessor in interest. Even time and year is not specifically known to the petitioners. Even there is no such evidence which can be believed that respondents have paid rent to the petitioners at any time.

7. Payment of rent, in hand kind, is sine qua non for the relationship of landlord and tenant. The petitioner has failed to bring on record any evidence to prove that respondent started payment rent thereafter, therefore, both the FAOs were allowed. Reliance is placed on the case of Mst. Nasira Afridi v. Muhammad Akbar (2015 MLD 171). In case of denial of relationship of tenancy by the tenant and particularly when the landlord himself remained unsuccessful to bring on record convincing evidence to the contrary, then the petitioner cannot be termed as tenant merely on the ground that ejectment petition was filed against him under the rent laws. In the case of Ameena Haq v. Rab Nawaz Khan and 2 others (2018 CLC Note 92), the same principle was iterated by the Court while observing as under:-

"There is no cavil with the proposition that tenant is always a tenant but when a person did not enter the premises in the capacity of tenant he cannot be dubbed as such just due to filing of ejectment petition and that too in absence of any solid proof ".

The petitioners were not able to justify that why after the commencement of the Act, they could not ask the respondents for written agreement of tenancy. Learned Additional District Judge, has rightly relied on the case law reported as 'Muhammad Rashid Hussain Shamsi v. Syed Hameed ud Din and another' (2014 CLC 1367). The documents tendered by the respondents in the evidence supports their version that respondents were residing in the house since long. In no way, the petitioners succeeded to establish the relationship of landlord and tenant between them and respondents regarding the disputed premises. The forum of learned Special Judge (Rent) is not for the purpose to sort out the ownership of any party. The question involved in this proposition was whether relationship of tenant and landlord exit between the parties. The petitioners were unable to prove the same through any consistent and reliable evidence. One other legal aspect of the case is that denial of the respondents regarding relation of tenant and land lord is based on the fact that this piece of land is not the same, which has been claimed through the papers by the petitioners rather it is some other piece of land, which is part of Shamlat-Deh. The site plan mentioned in the petition were not got exhibited by the petitioners. Property number mentioned in the documentary evidence Exh.A-5 to Exh.A-7 of AW.1 is 8/1 while the property number mentioned in the evidence of respondents is 8. Now, this is not forum to ascertain the description of property/'the ownership'. The forum of Rent

Tribunal is only to see the relationship of tenant and landlord, under The Punjab Rent Premises Act, 2009. If these are not established, then certainly the claiming party has the other legal forum to agitate his claim. The purpose of Special law is to regularize the affairs of tenant and land lord. Learned Additional District Judge, Lahore, has rightly decided the appeal filed by the respondents. There is no substance in the writ petition, therefore, same stands dismissed. No order as to costs.

SA/A-54/L Petition dismissed.

2022 C L C 24

[Lahore]

Before Safdar Saleem Shahid, J

MUJAHID KAMRAN----Petitioner

Versus

Mst. SAIRA AZIZ and 2 others----Respondents

Writ Petition No.32191 of 2021, heard on 30th June, 2021.

(a) Muslim Family Laws Ordinance (VIII of 1961)---

----Ss.5 & 9---Nikahnama, contents of---Suit for recovery of maintenance/dower amount---Column No. 20 of Nikahnama---Entry of Rs.25,000/- as monthly maintenance allowance---Allegation of cruelty by husband---Petitioner/defendant claimed for restitution of conjugal rights and also filed a suit for cancellation of conditions/entries of Columns Nos. 14, 16, 17, 19 and 20 of Nikahnama on the ground that the same were illegal and incorporated without his consent in deceitful manner---Family Court partially decreed the respondent's suit to the extent of entitlement of the recovery of maintenance at rate of Rs.25,000/- per month with 10% annual increase from date of marriage till the date of judgment---Petitioner's suit was dismissed---Appeals filed by both parties were also dismissed---Validity---Wife could be justified in living separately if the husband treated her with cruelty or did not pay prompt dower---No disagreement or point of cruelty was quoted/proved by respondent other than the demand of dower---No particular point cited/proved by petitioner as to alleged disobedience except the allegation that respondent remained only one day in his house---Petitioner did not prove his version that columns of Nikahnama were afterwards filled in and were the result of forgery---All witnesses of Nikahnama admitted their signatures over the same---Petitioner had not proved that the copy of Nikahnama was not given to him at that time---Petitioner was bound to pay maintenance allowance according to column No.20---Case of respondent was based on column No.20, which could not be dealt with under the conditions of S.17A of the Family Courts Act, 1964---Neither the Court had to see the financial status of husband nor to fix the maintenance on the conditions mentioned in S.17A---Order as to 10% annual increase was not according to the spirit of Column No. 20 of Nikahnama---Date and Majlis of Nikah and signatures on Nikahnama by respective person were admitted---Execution of Nikahnama was proved by the

respondent---Nikahkhwan, appearing as witness, had certified that all the columns were filled at that time with consent of parties---Presumption would be that the Nikah Pert (paper) was handed over to the petitioner on that very day which was requirement of law after the registration of the same in Union Council---Petitioner did not prove that the entries in the columns were not in his knowledge---Entries of column No. 19 limiting the absolute right of Talaq of the petitioner were against the spirit of the instructions of Almighty Allah, hence, declared void ab initio and not binding to the parties---High Court declared entries of Column No.19 as null and void---Constitutional petition was partly allowed.

(b) Muslim Family Laws Ordinance (VIII of 1961)---

----S.5---Nikahnama, contents of---Scope---Nikahnama is a very important document and it's all columns are legally binding on both the parties---Any right given through Nikahnama to woman is her right strictly protected by law---Woman may sue her husband regarding the past maintenance allowance on the basis of agreement in Nikahnama---All she has to do is to prove the execution of document/Nikahnama where such condition has been agreed between the parties.

Mohammedan Law by D.F. Mulla (S. 278) ref.

(c) West Pakistan Rules under the Muslim Family Laws Ordinance, 1961---

----R.8(1)---Nikah---Proof---Witness, requirement of---Wakeel as witness---Apart from the spouses and their wakeel, if any, at least two witnesses are required to certify the proceedings of "Ijab o Qabool" and that should be conducted in one Majlis---Person who has been appointed as wakeel for the bride, cannot be the witness of Nikah---Wakeel has his specific identity as to accept the proposal on behalf of the bride---Nikahkhawan can also be the witness of the Nikah if he has also heard the "Ijab o Qabool" by himself.

(d) Muslim Family Laws Ordinance (VIII of 1961)---

----S. 5---Qanun-e-Shahadat (10 of 1984), Art. 79---Nikahnama, proof of---Execution of document---Anything which has been brought in writing, if it is witnessed by two persons and signed over the same, under S.79 of Qanun-e-Shahadat, 1984, that document is proved one and in case of denial from that, the person denying the same has to produce the cogent reasons and solid grounds.

(e) Muslim Family Laws Ordinance (VIII of 1961)---

----S.5---Nikahnama, contents of---Proof---Entries in columns---If Nikahnama was written at the time and it was signed in the same Majlis, then it will be presumed that the same was stated to the lady and the proposal and acceptance were there regarding dower which has been mentioned in the Columns Nos. 13 & 14 of Nikahnama.

(f) Muslim Family Laws Ordinance (VIII of 1961)---

----S.7---Talaq, absolute right of---Islamic Law---Husband has an absolute right to divorce his wife---No condition is described in Shariah as well as in the codified law.

Muhammad Bashir Ali Siddiqui v. Muhammad Sarwar Jahan Begum 2008 SCMR 186 ref.

(g) Muslim Family Laws Ordinance (VIII of 1961)---

----S.5---Nikahnama, contents of---Injunctions of Islam---Anything contained in Nikahnama which is against the spirit of Islam or the orders of Allah and Prophet (peace be upon him) cannot bind the parties even if has been made with the consent of the parties.

Iftikhar Ahmad Mian for Petitioner.

Ghulam Rasool Sial for Respondent No.1.

Date of hearing: 30th June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----The instant petition is directed against the consolidated judgments and decrees dated 14.12.2020 and 31.03.2021, passed by the learned Judge Family Court and the learned Additional District Judge, Ahmadpur Sial, District Jhang.

2. Brief facts necessary for disposal of the instant petition are that the petitioner was married with respondent No.1 on 17.12.2017. Respondent No.1 on 23.02.2019, filed a suit for recovery of maintenance allowance and dower amount of Rs.15,00,000/- along with gold ornaments weighing 4-tolas, alleging that at the time of Nikah, Rs.15,05,000/- along with 4-tolas gold ornaments was fixed as dower, out of which only an amount of Rs.5000/-, being prompt, was paid at the time of Rukhsati. Further alleged that as per

columns No.20 of the Nikah Nama the petitioner was also bound down to pay Rs.25,000/- per month to respondent No.1 as maintenance allowance. According to respondent No.1, the petitioner being owner of landed property, cattle etc. earns approximately 80/90 thousand rupees and could easily pay the maintenance allowance as claimed in the plaint. Respondent No.1 also alleged that behavior of the petitioner was cruel from the very first day and lastly he ousted her from his house after 14-days of marriage.

3. The petitioner resisted the suit by filing written statement on 20.04.2019, wherein he raised certain preliminary objections, denied the conditions having been fixed in the Nikah Nama and claimed that dower amount was fixed only Rs.5000/-, which was paid at the time of marriage, which fact could be clearly seen in the video recorded at the time of Nikah. The petitioner claimed that respondent No.1 left his house on the very next day of marriage and did not come back in spite of his best efforts, therefore, she is not entitled to any maintenance allowance. In addition to the prayer for dismissal of the suit of respondent No.1, the petitioner also prayed that his written statement be also considered as a suit for restitution of conjugal rights. Thereafter, on 09.11.2019, petitioner also filed a suit for cancellation of conditions mentioned in columns Nos.14, 16, 17, 19 and 20 of the Nikah Nama, on the ground that the same were illegally incorporated without his consent and in deceitful manner. Respondent No.1 resisted the suit filed by the petitioner on the grounds taken in her own suit.

4. After the pretrial reconciliation having failed, the learned Judge Family Court framed the following issues:-

1. Whether the plaintiff is entitled to recover maintenance allowance, if so, at what rate and for which period? OPP

2. Whether plaintiff is entitled to recover Rs.15,00,000/- and gold ornaments weighing 04-tolas in lieu of dower from the defendant as prayed for? OPP

3. Whether the defendant is entitled to obtain a decree for restitution of conjugal rights as per prayer made by him in his written statement? OPD

3-A.Whether defendant Mujahid Kamran obtains a decree for cancellation of conditions mentioned in column No.14, 16, 17, 19 and 20 of Nikahnama dated 17.12.2017 over foil (پرت) No.1 to 4 between the parties as prayed for? OPD

4. Relief.

The learned Judge Family Court recorded evidence of the parties and having gone through the same, vide consolidated judgment and decree dated 14.12.2020, partially decreed the suit of respondent No.1 in the terms that she was held entitled to recover maintenance allowance at the rate of Rs.25,000/- per month with 10% annual increase from the date of marriage till her legal entitlement, whereas her claim for recovery of dower amount of Rs.15,00,000/- along with gold ornaments weighing 4-tolas was dismissed. The claim of the petitioner for restitution of conjugal rights was, however, decreed but subject to payment of monthly maintenance allowance decreed in favour of respondent No.1, whereas suit of the petitioner for cancellation of conditions mentioned in the Nikah Nama was dismissed. Feeling aggrieved both the parties assailed the said judgment and decree, but the learned Additional District Judge through a consolidated judgment and decree dated 31.03.2021 dismissed both the appeals. The petitioner has assailed both the consolidated judgments and decrees through the instant petition.

5. The learned counsel for the petitioner argued that both the Courts below have erred in law, as on the one hand both of them decreed the suit of the petitioner for restitution of conjugal rights, but on the other hand, decreed the claim of respondent No.1 for recovery of maintenance allowance at the rate of Rs.25,000/- per month with 10% annual increase, as under the law a wife who refuses to perform her marital obligations, is not entitled to receive any maintenance. In this regard referred to Section 277 of the Mohammedan Law. Further submitted that the maintenance allowance has not been fixed by the Courts below on the basis of means of the petitioner, but the amount has been taken from the columns of Nikah Nama and that too with 10% annual increase, which is not justified. Even otherwise, the petitioner challenged the entries of the Nikah Nama, but the Courts below failed to appreciate this aspect.

6. The learned counsel for respondent No.1, on the other hand, resisted the arguments and submitted that the Courts below have passed the impugned judgments and decrees on the basis of the columns of the Nikah Nama, which was duly signed by the petitioner as well as the witnesses, after all the conditions mentioned in its columns were settled between the parties. According to the learned counsel, even from the very first day behavior of the petitioner towards respondent No.1 was cruel and after few days of

marriage he himself ousted her from his house; and that, even if a husband and wife are residing separately, the husband is bound to provide maintenance to his wife.

7. Arguments heard. Record perused.

8. Section 17A of the Family Courts Act, 1964 explains:-

(1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

(a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and

(b) prescribe the annual increase in the maintenance.

(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten per cent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.

Section 277 of the Mohammedan Law defines that "the husband is bound to maintain his wife (unless she is too young for matrimonial intercourse), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain his wife who refuses herself to him or is otherwise disobedient, unless the refusal and disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty."

9. In order to understand the proposition in hand Section 278 of the Mohammedan Law is also very relevant which says that "if the husband neglects or refuses to maintain his wife without any lawful cause wife may sue him for maintenance allowance but she is

not entitled to a decree for past maintenance, unless the claim is based on a specific agreement."

10. The moot point in the proposition is whether the lady is entitled for maintenance allowance in view of the definition of Section 278 of the Mohammedan Law. Section 277 defines the rights and obligations of the husband and wife and binds the husband to maintain the wife. Some conditions also have been imposed and some grounds also have been mentioned on the basis of which husband may refuse to maintain the wife. Section 277 also explains that there is a justification for the lady to live separately if the husband treats her with cruelty or does not pay prompt dower. The suit for maintenance by the wife and children is filed under Section 17A of the Family Courts Act, 1964, where the Court determines the financial status of the husband and in view of the evidence of the parties fixes the maintenance allowance but if the maintenance allowance is agreed between the parties through an agreement then it will be payable in view of the said agreement. Nikah Nama is very important document, as its all columns are legally binding on both the parties. Any right given through Nikah Nama to lady is her right strictly protected by law. The wisdom of Section 278 of the Mohammedan Law, already mentioned in the earlier paragraph is that the lady may sue the husband regarding the past maintenance allowance on the basis of agreement. The lady has to prove the execution of the said document or if it is mentioned in the conditions of Nikah Nama, then certainly she has to prove the Nikah Nama where such entry has been agreed in between the parties. In the present proposition all the above mentioned points are questioned by the petitioner. The petitioner has challenged the contents of Nikah Nama, its columns Nos.14, 16, 17, 19 and 20, with specific allegation of fraud and forgery. It was asserted by the petitioner that the above mentioned columns of Nikah Nama were filled in after the completion of Nikah and without knowledge and consent of the petitioner. The version of the respondent was that the Nikah Nama was validly executed in between the parties; all the witnesses were present at the time of Nikah; all the entries were read over to all the persons present in the Majlis and thereafter Nikah Nama Exh.P.1 was signed by all the relevant witnesses. The allegation of the respondent was that she was expelled from his house by the petitioner. The point of cruelty was also raised by the respondent through the suit whereas the version of the petitioner was that the lady was disobedient and she herself left the house of the petitioner without any reason, rather with a planning only after one day of the Rukhsati on the ground of

marriage of one of her relatives in the company of her relatives and while leaving the house of the petitioner she also took away 4-tolas gold ornaments. The learned Judge Family Court has not fixed any liability of separation in between the spouses on anybody. Actually no evidence was led on this particular point. It has been noted that there could be no such circumstances which could be quoted by any of the parties because period of settlement of the spouses is one day or maximum fourteen days. During this period no particular stance was referred by any of the parties either on the point of cruelty by the petitioner towards the respondent or matter of disobedience on the part of the respondent towards the petitioner. The respondent has produced PW.4 and PW.5, her maternal uncle and paternal uncle, but their evidence is hearsay and is not based on any logic. The lady in her statement has defined the torture as, when she demanded her dower, she was put under torture. She also has admitted in the evidence that she did not pass on this torture to any of her relatives. The cruelty is defined in Section 281(2) of the Mohammedan Law as, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him. So, the point of cruelty to this extent that the lady demanded the dower and it was not paid can be considered. Otherwise, no other disagreement was quoted as proof of the behavior of the husband or cruelty towards the respondent. On the other hand, allegation of disobedience as alleged by the petitioner is not proved. No event or particular point is cited to prove that the respondent was disobedient. Specially keeping in view the version of the petitioner that the lady remained only one day in his house, it cannot be presumed that there was any disobedience on part of the respondent, unless proved and established by the petitioner. From the evidence the petitioner was, however, unable to prove the allegation regarding disobedience of the respondent. Furthermore, there is no other corroboration to the statement of the petitioner in this regard. So, in this case the lady becomes entitled to claim maintenance allowance in view of Section 278 of the Mohammedan Law, as it was the obligation of the husband to pay maintenance allowance as agreed in column No.20 of Exh.P.1, which says:-

"خاوند اپنی بیوی کو ماہانہ خرچ لڑائی جھگڑے تو اسے پچیس ہزار روپے ادا کرنے کا پابند ہوگا"

So, the version of the petitioner that this column was afterwards filled in and is the result of forgery, was not proved by the petitioner. The lady was under obligation to prove the execution of the document Exh.P.1. The execution of Exh.P.1 has been proved, as all the witnesses admitted that they signed over the Nikah Pert and none of them stated that they had not signed the Nikah Pert. Another important factor is that the petitioner has not proved that the copy of Nikah Nama was not given to him at that time. Neither it is the claim of the petitioner nor has he stated regarding this factor at any stage. He did not assail the entries of Nikah Nama for a long time and when the lady filed suit for maintenance allowance and dower, then the petitioner challenged the entries of Exh.P.1. Hence, it is proved to the extent that the petitioner is bound to pay maintenance allowance of Rs.25,000/- in view of column No.20. So far as 10% annual increase is concerned, it is not according to the spirit of column No.20 of Exh.P.1 because the case of respondent for maintenance allowance will not be dealt with under the conditions of Section 17A of the Family Courts Act, 1964, but in fact it would be seen in view of column No.20 of Exh.P.1, where the parties agreed for payment of Rs.25,000/- per month as maintenance allowance. Neither the Court had to see the financial status of the husband under the situation nor the maintenance allowance has to be fixed on the conditions maintained in Section 17A of the Family Courts Act, 1964. Therefore, 10% annual increase as ordered by the learned Family Judge is not according to the spirit of column No.20 of Exh.P.1 and that is not justified. Hence, the order to the extent of 10% annual increase in the maintenance allowance is set aside and findings on issue No.1 is modified to the extent that the lady is entitled for maintenance allowance of Rs.25,000/- per month as agreed between the parties through Exh.P.1, from the date of marriage till her entitlement.

11. The other moot point is the Majlis of Nikah, ingredients of Nikah and valid conditions of Nikah. The petitioner's grievance was that the conditions mentioned in columns Nos.14, 16, 17, 19 and 20 of Nikah Nama were not read over to him at the time of proposal and acceptance by the Nikah Khawan with a further objection that nobody in the Majlis heard the same. So, in view of the principles of Sharia, these conditions are not part of Nikah and as such are not binding upon the petitioner, but no relevant evidence was produced by the petitioner. All the witnesses including Nikah Khawan stated that Nikah Pert Exh.P.1 was signed at the time of Nikah.

12. Another legal aspect of the proposition is that the petitioner filed an independent suit on 09.11.2019 after the filing of the suit by the respondent on 23.02.2019 with the

subject for cancellation of the entries in Nikah Nama Exh.P.1 dated 17.12.2017 regarding the columns 14, 16, 17, 19 and 20. It was the stance of the petitioner that those columns were filled in afterwards and without consent of the petitioner. At the time of the arguments before this court, counsel for the petitioner also brought attention of this court towards the entries of Column No.19 that the entry mentioned against column No.19 is not only fabricated, fictitious and has been filled in without consent and knowledge of the petitioner but also it is against the original text of the Holy Quran/the orders of Allah and the spirit of the instructions of the Almighty Allah and Sunnah. Exh.P.1 is an admitted document where no witness has resiled from his signatures. The date of Nikah is admitted one. The Majlis of Nikah is admitted one. The signatures on the Nikah Nama Exh.P.1 by the respective persons is admitted one. Now the question about the columns mentioned by the petitioner with the allegation that those were filled afterwards, is a very serious allegation and the same were to be proved by the petitioner. Regarding the column No.19 of Exh.P.1, the reservation of the petitioner was that it was not only forged, but also against the principles of Islam. This Court is of the view that Nikah Nama Exh.P.1 and its execution has been proved by the respondent side. All the persons who were present in the Majlis have admitted that this Nikah Nama was executed and was signed by all the persons mentioned in Nikah Nama. Their signatures reflect that all persons were educated and they know the meaning and importance of the paper they were signing and certainly they had gone through the contents of the same. It is noted that all the irrelevant columns were crossed by drawing a line by the Nikah Khawan. The Nikah Khawan PW.2 himself has appeared in the witness box and has certified that all the columns were filled at that time with the consent of the parties.

13. The ingredient for the valid Nikah is that it should be solemnized in one Majlis. There is no definition of Majlis that how many people are required to constitute a Majlis. "Fiqah", says that apart from the spouses, at least two witnesses are required to certify the proceedings of Aijabu Qabool (ایجاب و قبول) and that should be conducted in one Majlis. Therefore, this is the requirement that the person, who had been appointed as Wakeel for the lady, cannot be the witness of Nikah. He has his specific identity as to accept the proposal on behalf of the lady. Therefore, he cannot be the witness to the Nikah if some person is appointed as Wakeel of the lady, then there must be two independent witnesses of the Nikah apart from said Wakeel of the lady. The Nikah Khawan, however, can also be the witness of the Nikah if he also hears the Aijabo

Qabool by himself, of spouses. The objection of the petitioner was that the condition mentioned in column No.14 was not read by the Nikah Khawan at the time of announcing the Nikah. This column was afterwards filled, also the condition mentioned in column No.19 Ex.PA is against the spirit of Islam. Whereas the Nikah Khawan has clearly stated in his statement before the trial court that he read over all the columns and the parties were agreed to that and thereafter signed over it. In the Holy Quran it has been directed by the Almighty Allah that whenever you enter in some contract or you do some deal (معاملہ), write it down and the scribe should write what he has been advised to write, correctly, and thereafter two male among you be made witness to that writing or one male and two females may be the witnesses to the such writing. The witnesses must be from the same "Majlis", and they also had heard and understood the spirit of contract, or deal which has been agreed between the parties and has been written in their presence, then they had signed it, as witness. Now the spirit is that anything which has been brought in writing if it is witnessed by two persons and that is proved that witnesses have signed over the same; then under Section 79 of the Qanun-e-Shahadat Order, 1984, that document is proved one and in case of denial from that, the person denying the same has to produce the cogent reasons and solid grounds. In this proposition nobody had resiled from his signatures. The witnesses who had appeared in the witness box including the petitioner had certified the signatures. It was the liability on the part of the petitioner to prove that the Nikah Khawan got Exh.P.1 late registered in the Union Council office and the copy of the Nikah Nama Exh.P.1 was never handed over to him. In the written statement by the petitioner, no such ground has been taken by the petitioner. It cannot be assessed from the written statement that when the petitioner came to know about the entries. Even in the suit filed although this is mentioned by the petitioner that all the Perts (pages) were with the Nikah Khawan but he did not mention and did not produce any evidence regarding the fact that on the day of Nikah the Pert (page) was not handed over to him. The Nikah Khawan appeared as PW.2. No such specific question was put to the witness PW.2, therefore, it will be presumed that the Pert Nikah was handed over to the petitioner on that very day which is requirement of law after the registration of the same in the Union Council. This is also not mentioned through the evidence of the petitioner that when he demanded the Nikah Pert (page) from the Nikah Khawan or he applied to the Union Council for obtaining the Pert of Nikah. Therefore, the version of the petitioner is not proved that the entries in the column were not in the knowledge of the petitioner. The witnesses of Exh.P.1 signed

over the same in the same Majlis. So, Exh.P.1 is not a disputed document. Therefore, to the extent of the entries, the petitioner is not succeeded to establish his case.

14. Another point raised by counsel for the petitioner was about the validity of the Nikah that anything not mentioned as Haq Mehr at the time of Nikah, it cannot be added afterwards. It was the contention of the petitioner that at the time of Nikah, no such Haq Mehr was fixed Rs.15,00,000/- (rupees 1.5 million) as has been mentioned in column No.14. Neither this was proposed by the petitioner nor it was put to the lady for having the acceptance of the proposal of Nikah. The entry in Column No.14 was made afterwards. Therefore, the entry of Column No.14 cannot be determined as Haq-ul-Mehr and the same is not binding to the petitioner to pay the same in lieu of Haq Mehr. The lady also cannot claim as Haq Mehr that amount mentioned in Column No.14.

15. This court has given thoughtful consideration to the arguments advanced by counsel for the petitioner. The ingredients of Nikah are proposal and acceptance in one Majlis in presence of the witnesses and with the fixation of Haq-ul-Mehr. **مثل** Misle Dower may be fixed that is based on custom that in some families the dower is fixed according to the customs of the families and even if it is not fixed in specific words at that time, then at the time of Nikah the word used is that بالعوض حق المہر مثل and the proposal and acceptance are made with the same words. Now it was for the petitioner to prove that the proposal of **حق المہر** mentioned in Column No.14 was neither offered by the petitioner nor it was proposed before the lady for the acceptance of the Nikah. Therefore, this entry was not valid and it cannot be termed as dower. This is custom rather mandatory that dower is always fixed between the parties prior to the solemnization of Nikah and it is to be proposed and accepted in presence of the witnesses in the same Majlis. Oral Nikah is also valid with all these conditions. If the Nikah Nama was written at that time and it was signed in the same Majlis, then it will be presumed that the same was stated to the lady and the proposal and acceptance were there regarding dower, which has been mentioned in Columns Nos.13 and 14 of the **نکاح پرت** . Since all the witnesses of the Nikah have singed over Exh.P.1 within the same Majlis at the same time immediately after the Nikah and they did not object at any of the entry at that time and even afterwards till the petitioner filed the suit on 9.11.2019 for cancellation of the entries of Exh.P.1, it will be presumed that the said columns were duly filled in at that time in the same Majlis at the time of Nikah and it was a valid **حق المہر**. The petitioner was unable to prove the allegation that it was neither mentioned at the time of pronouncement of Nikah nor it was written at that

time in the same Majlis. No reliable evidence was produced by the petitioner. To this extent, issue No.3-A has been rightly decided by the learned trial court and was rightly upheld by the learned Addl. District Judge, the first Appellate Court.

16. Now, come to column No.19 and its content of Exh.P.1. The right of divorce is given by the Almighty Allah. However, Allah Almighty does not like the act of divorce. I would like to quote the references from the Holy Quran and from some very eminent case laws. In the Holy Quran in Surah Al-Baqra and Surah Talaq the delegation of right of divorce has been described in detail. Similarly, section 7(1) of the Muslim Family Laws Ordinance, 1964 deals with the matter of Talaq. The provision of section 105 of the Code of Muslim Personal Laws also certain this thing that a husband has an absolute right to divorce his wife. In this regard no condition is described in Sharia as well as in the codified law. The same proposition has been discussed in case of "Muhammad Bashir Ali Siddiqui v. Muhammad Sarwar Jahan Begum" (2008 SCMR 186). No condition can be imposed on the husband if he desires to divorce his wife. Because the right of divorce has been given by the Almighty Allah to the husband and this proposition has been discussed in detail. I place reliance on "Mst. Zeenat Bibi v. Muhammad Hayat and 2 others" (2012 CLC 837). Therefore, to this extent, there is no other view that no condition can be imposed on the right of the husband if he desires to divorce his wife. To this extent, the entries of Column No.19 are against the spirit of the instructions of the Almighty Allah. The petitioner has taken a specific plea that the entry against column No.19 is also added afterward without consent of the petitioner; rather it was not in knowledge of the petitioner; furthermore, it is against the injunctions of Islam, hence void, ab initio and liable to be cancelled. The court has decided the issue against the petitioner while observing that regarding those claim for cancellation of entries, no evidence was produced by the petitioner. But to this extent the answer regarding entry No.19 is not correct because to decide the entry of Column No.19, no evidence is required. It pertains to the instructions of the Holy Quran and Sunnah and anything contained in the document which is against the spirit of Islam or the orders of Allah and Muhammad (Peace Be Upon Him) cannot bind the parties even if had been made with the consent of the parties. So to that extent, the judgment on issue No.3-A is modified, there was no need of any evidence but from the bare reading of Column No.19, that is found against the injunctions of Islam, hence, declared void ab initio and not binding to the parties. But since the court had not passed any order regarding the same which could have effect adversely to the petitioner, therefore, this part of the

judgment will have no effect on the other parts of the judgment. However, the entries of Column No.19 are declared void ab initio as these are against the injunctions of Islam. So to that extent, the prayer of the petitioner is allowed. Therefore, under the Constitutional Jurisdiction, this court holds that the entries of Column No.19 for imposing any condition on the husband to divorce his wife are null and void.

17. The lady is still the legally wedded wife of the petitioner and she had not been divorced. The lady is entitled for the monthly expenditure of Rs.25,000/- from the date of Rukhsati till the satisfaction of the decision of the Family Court dated 14.12.2020 where the decree of restitution of conjugal rights has been awarded by the court with the condition to pay the monthly maintenance allowance. Since the lady has not filed any appeal against that judgment, therefore, the decree to the extent of restitution of conjugal rights has attained finality and the respondent will not be entitled for any monthly expenditure/pocket money after the satisfying of the decree dated 14.12.2020, if the respondent does not settle down with the petitioner in lieu of the order of the Court for restitution of conjugal rights dated 14.12.2020. The condition of 10 percent per annum increase in the monthly expenditure is against the spirit of the document, which is declared null and void. Therefore, the finding on issue No.1 is modified to the extent that the lady is entitled to receive monthly expenditure @ Rs.25,000/- from the date of her marriage till the satisfaction of the decree passed by the learned Family Court dated 14.12.2020 and there will be no 10 percent increase per annum in the maintenance allowance.

18. The upshot of the above discussion is that the Writ Petition is partly allowed. The findings on issue No.1 are modified to the extent that 10 percent increase is not justified in the order. The lady is entitled for the monthly expenditure till the date of the decision and satisfaction of the judgment and decree, and the entries of Column No.19 are declared against the injunctions of Islam, hence, declared null and void. There is no order as to costs.

ZH/M-172/L Order accordingly.

2022 C L C 762

[Lahore]

Before Safdar Saleem Shahid, J

Mst. SAFIA BIBI and others----Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No.17918 of 2014, heard on 1st July, 2021.

(a) Guardians and Wards Act (VIII of 1890)---

----S.17---Custody of minor---Preferential right---Age factor---Intelligent/reasonable preference by minor---Welfare of minor---Scope---Ex-parte proceedings were initiated against the petitioner (mother)-- -Application under S.12(2), C.P.C., of petitioner was dismissed also made a ground to dismiss the appeal of the petitioners---Minors' ages being 16 and 15 years were considerable point---Welfare of the minor coupled with his/her own wish, particularly when he/her can make a reasonable preference on account of his/her age, is the primary consideration for a court of law for the decision of such cases---Intelligence preference of the minor could be the way to reach at the consideration regarding the entitlement of the custody, but it was not the sin qua non for the court to make it the basis for its decision---Any force applied in the matter of custody against their wishes, when they had attained sufficient maturity in exercising their preference would not be consistent with their welfare and rather may have adverse effect---High Court set-aside the ex-parte order of Guardian Judge, subject to special cost of Rs.20,000/-; and remanded the case to the Guardian Judge---Constitutional petition was allowed accordingly.

Mst. Ayesha Abdul Maleek v. Additional District Judge, Sahiwal and 2 others 2020 YLR 401; Tariq Mehmood and others v. Additional District Judge and others 2016 MLD 1767 and Tahira Bibi v. Muhammad Saeed and another 2009 MLD 33 ref.

(b) Islamic law---

----Hizanat---Preferential right---Holy Quran and Sunnah did not bar for mother or even the father to hold the custody nor was there any provision which would stipulate that the preferential right of custody lies with the father or the mother; or in their absence grand-

parents/uncles/cousins would be eligible to claim custody---Mother had the preferential right of Hizanat till the minor attained the age of 7 years in the case of males and the age of puberty in case of female minors.

Mst. Razia Rehman v. Station House Officer and others PLD 2006 SC 533 rel.

(c) Constitution of Pakistan---

----Art.227---Quran and Sunnah, injunctions of---Repugnancy---Constitution guarantees that every law of the land will be in accordance with Quran and Sunnah and there will be no deviation from the Ahkam of Allah and Rasool Muhammad (Peace be upon him).

(d) Constitution of Pakistan---

----Art.8---Custom---Law would respect all the traditions/customs of the individual caste if those were not contrary to the law of land.

(e) Constitution of Pakistan---

----Art.199---Custody of minors---Welfare, question of---Jurisdiction---Scope---Welfare of the minors could not be determined within the jurisdiction of Constitution petition---Such was purely the prerogative of the Guardian Court to decide the same.

(f) Guardians and Wards Act (VIII of 1890)---

----Ss.12 & 25-- -Custody of minor---Preferential right---Determining factors---Scope---Held, that court had to see the welfare of the minor, keeping in view whether the person to whom the custody was being given, could facilitate the minor with respect to the health, education and other social norms which were required to build up the person of the minor; what was the financial status of the claiming person as guardian; whether person was capable of having the guardianship as to make the minor a good citizen in a real sense; whether the guardian himself follows law; whether he/she had respect for the law; whether he/she understood regarding the good and bad things/norms of the society; whether he/she had the level of intellect to train the minor to be a good and useful citizen of the society---Character building was not an easy task---Person who was always thinking about his/her benefit, could not be a good leader to build the character of the others.

Mrs. Seema Chaudhry and another v. Ahsan Ashraf Sheikh and others PLD 2003 SC 877; Mst. Rubia Jilani v. Zahoor Akhtar Raja and 2 others 1999 SCMR 1834; Muhammad Tahir v. Mst. Raeesa Fatimah and others 2003 SCMR 1344; Sardar Hussain and others v. Mst. Parveen Umer and others PLD 2004 SC 357; Mst. Beena v. Raja Muhamamd and others PLD 2020 SC 508 and Mst. Naseem Akhtar v. District Judge, Multan and others 2009 SCMR 1052 ref.

(g) Guardians and Wards Act (VIII of 1890)---

----S.17---Conduct of parents---Second marriage of monther---Welfare of the minors was paramount and the conduct of the parents was a secondary consideration---Second marriage of the mother does not disentitle her from the custody of entitlement of ward.

Afshan Noreen v. Nadeem Abbas Shah 1997 MLD 197 and Mst. Ayesha Altaf v.

Fahad Ali and 2 others 2019 CLC Note 66 ref.

Rana Habib ur Rehman Khan for Petitioner.

Imran Mushtaq Bhatti for Respondent No.3.

Date of hearing: 1st July, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through instant writ petition filed under Article 199 of The Constitution of Islamic Republic of Pakistan, 1973, petitioners have assailed the orders dated 24.3.2011 and 13.3.2014 passed by the Guardian Judge-1, Lahore and judgment dated 13.6.2014 passed by the Addl. District Judge, Lahore.

2. The petitioners have sought for relief that the ex-parte proceedings conducted against them are based on mala fide. The orders are illegal and many irregularities have been committed while passing the orders by the courts below.

3. Brief facts, necessary for the conclusion of the propositions are that the respondent No.3 filed a guardian petition under section 25 of The Guardians and Wards Act seeking custody of the minors, petitioners Nos.2 abd 3. The said petition was ex- parte allowed vide order dated 24.3.2011. According to the petitioner lady, the petitioners came into the knowledge of the ex-parte decree when bailable warrants of arrest in

execution proceedings were issued on 28.2.2014 against the petitioners. It is alleged that neither the petitioner was served during the proceedings of the titled petition nor notice in terms of section 9(6) of the West Pakistan Family Courts Act, 1964, of passing of ex-parte order dated 24.3.2011 were served to the petitioners. The petitioners filed an application on 5.3.2014 for setting aside aforesaid ex-parte proceedings. This application was dismissed on 13.3.2014. The petitioners preferred appeal against the aforesaid order which was also dismissed by learned Additional District Judge vide judgment dated 13.6.2014. The petitioners challenge the legality, validity and propriety of the impugned orders dated 24.3.2011 and 13.3.2014 passed by the learned Guardian Judge-1, Lahore and judgment dated 13.6.2014 passed by learned Additional District Judge, Lahore on the ground that the impugned orders and judgment are based on surmises, conjectures and presumptions not supported by the record of the case. Both the impugned judgments are result of misreading and non-reading of the record and misconstruction of law. The petitioner was never served in person and ex-parte proceedings were initiated against the petitioner on the basis of proclamation in newspaper. No notices were ever received back which was allegedly issued to the petitioners by registered post A/D or courier service. Even no notice was issued to the Chairman Union Council where petitioner resides. The requirement of section 8(3) and section 7(2)(3) of the West Pakistan Family Courts Act, 1964 were not fulfilled. It was alleged that the petitioner was knocked out on the basis of technicalities. The minors were never made a party to the application who were the main subject of the application. It was alleged that in the earlier proceedings, the petitioners have been shown present in the case along with the minors whereas the petitioner has never appeared before the court nor has appointed any Attorney/Advocate to contest on her behalf. The petitioner never filed application under section 12(2), C.P.C., through counsel Muhammad Fayyaz Chughtai, Advocate. There is no signature of the petitioner either on the power of attorney or the affidavit annexed with the application filed on behalf of the petitioner under section 12(2), C.P.C., read with section 151, C.P.C. The petitioner claims that being mother, she has been caring the minors and minors are very happy in her company. There could be no substitute for the mother. The ex-parte orders by the courts below are in violation of the principles of law laid down by the Superior

Courts. The decisions on the application of custody of minors are not final and conclusive in nature and it can always be reviewed/re-determined keeping in view the welfare of the minors and changing circumstances. On the wrong addresses, the notices of the petitioners were sent, if any. Therefore, ex-parte orders and judgments passed by the courts below are illegal and void ab initio, ineffective to the rights of the petitioners. The judgment passed by the Addl. District Judge is also against the basic law, therefore, the same should be set-aside and the learned Guardian Judge, Lahore be directed to decide the guardian application of the respondent No.3 on merits.

4. Learned counsel for the petitioners argued that under Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, the impugned orders and judgment of the learned Guardian Judge and the learned Addl. District Judge, Lahore are against the law and are not sustainable in the eye of law. It was argued that respondent No.3 filed application and the address of the petitioners was not correctly mentioned. Whereas the learned courts below have not complied with the requirements of section 7(2)(3) and section 8(3) of the West Pakistan Family Courts Act, 1964. Neither the summons were sent to the correct address nor the required documents were annexed with the summons, registered post A/D or courier service nor on the basis of the report of the said summons, the proclamation in the newspaper could be made. Counsel in this regard referred Mst. Nasreen v. Additional District Judge with Power of Guardian Judge, Alipur and others (2007 PLD Lahore 576) that no one should be condemned unheard. The Constitution of Islamic Republic of Pakistan guarantees every citizen for fair trial and guarantees the equal opportunities to all the citizens to plead their view before the courts. It was argued that the petitioners have been condemned unheard and on the basis of the wrong proceedings conducted by the courts, the petitioners have been deprived from their fundamental right of defending their view/right. It was argued that being the mother, the petitioner No.1 is entitled for the custody of the minors as their ages require her association for their better brought up. It was argued that the leaned courts below have not exercised their jurisdiction judiciously. The propositions should be settled on merits and technicalities should be avoided is a golden principle settled by the Superior Courts.

5. Learned counsel for the respondent No.3 on the other hand resisted the arguments and argued that conduct and character of the person is very important especially when the matter of the brought up of the minors is concerned and attached with that person. It was argued that the lady has not only concealed the facts but also had indirectly blamed the courts while denying about the proceedings of the courts which have the presumption of truth. The lady herself appeared in the court, filed the application under section 12(2), C.P.C. read with section 151, C.P.C. The counsel was appointed. The minors were present in the court and their attendance has been marked by the court. Even then the lady has denied all those factors. Meaning thereby, she had indirectly accuse the court. Such a lady is not entitled for custody of the minors, who has no belief in the rule of law, who has no respect for the court proceedings and who for her minors benefit had let down the settled principles of law and has violated the social norms of the society. It was argued that the courts below have passed the decree strictly in accordance with law. The lady has not been condemned unheard. She was heard by the court. She attended the court and then she absconded from the court proceedings without any reason and thereafter even she did not appear before the court for a long time and also deprived the respondent No.3 from his right. Even the respondent No.3 could not see his minor children for many years. The lady has contracted second marriage and the children are living with a stranger. It was argued the ages of the minors demand and need the support and supervision of some blood relations to look after their rights and daily routine work. A stranger cannot look after such rights. It was argued that it is against the religious teachings as well as the social norms of the society that teenager, grownup female children be given in the custody of a stranger to look after whereas their father is alive and is capable of having their custody. It was argued that respondent No.3 has not contracted second marriage so far. Keeping in view that, his children need his company and supervision. It was argued that the court adopted all the required procedure. The mandatory provisions of section 7(2)(3) and section 8(3) of the West Pakistan Family Courts Act, 1964 were fully complied with by the court. There is no illegality or irregularity in the impugned orders and judgment passed by both the courts below.

6. Arguments heard.

Record perused.

7. It is observed that when a family life is disturbed because of the clash of the husband and wife, normally it leaves a negative impact to the minors, and specially to the female children. The Constitution of Islamic Republic of Pakistan guarantees every citizen for peaceful life and in case of any dispute, the spouses have equal opportunities to avail before the court of law regarding claim of their rights. But it does not mean that if someone abuses the law, should be given a lenient attitude. This is also very important that a person who believes in the supremacy of law and have a respect for the orders of courts, always finds himself/herself in a better position especially with respect to the response of the others. For a minor personal benefit, one can achieve some success for the time being by deceiving or cheating other persons but it cannot be permanent for him/her. Before discussing the proposition in hand, I would like to quote some versus from the Holy Quran. In the Holy Quran and Sunnah, there is no bar for mother or even the father to hold the custody nor is there any provision which stipulates that the preferential right of custody lies with the father or the mother; or in their absence grand-parents or uncles or cousins would be eligible to claim custody. According to the Muslim Personal Law, the mother has the preferential right of Hizanat (temporary custody of the minor) till the minor attains the age of seven years in the case of males and the age of puberty in case of female minors. Reliance in this regard is placed on the case of Mst. Razia Rehman v. Station House Officer and others (PLD 2006 Supreme Court 533). Custody of minor is a very sensitive issue. Guardian Courts are custodian to the rights of the minors. Regarding relation of parents with the children, in case the separation between spouses is effected, the role of individual becomes very important. Therefore, the Courts/Guardian Courts are much concerned while deciding the matter of handover the permanent custody of the minors.

8. The rights of the parents for their children and the obligations of the children for their parents have been described in detail in the Holy Quran. Then the individual right of mother and father also have been described in the Holy Quran as well as in the Ahadees. It is for the parents, mother and father, individually to think whether they are abiding by the orders of Allah and they are living within the limits described by the Sharia. Islam

has given a complete code of life where the duties, obligations of every relation has been described in detail. Even the minors thinks/acts of the social norms have been described in detail by the Sharia. The Constitution of Islamic Republic of Pakistan guarantees that every law of the land will be in accordance with Quran and Sunnah and there will be no deviation from the Ahkam of Allah and Rasool Muhammad (Peace be upon him). The purpose of the law of Guardians and Wards Act, 1890 is to regulate the rights of the minors who are unfortunately disturbed due to the separation of their parents or due to any other incident like death of their parents or death of any of them. Our social life is based on some customs and traditions of the region. Even in a region where different tribes/casts are residing, every caste/tribe has its own customs. The law respects all the traditions/customs of the individual caste if those are not contrary to the law of land. The Guardians and Wards Act, 1890 also regulates and conscious about the welfare of the minors. Therefore, the principles of the custody of minors have been chalked out through the different provisions of the Statute and these are to be strictly followed because the welfare of the minor is the supreme consideration of the Statute. There is no denial that the relation of father and mother is a touchy matter which is attached the emotions/sentiments based on reality. But this is also a hard fact that the court has to see the welfare of the minor, keeping in view that whether the person to whom the custody is being given, can facilitate the minor with respect to the health, education and other social norms which are required to build up the person of the minor. For that, the court at one level sees the financial status of the claiming person as guardian. At the same time, court also observes that the person is capable of having the guardianship as to make the minor a good citizen in a real sense. Whether the guardian himself follows law? Whether the he/she has respect for the law? Whether he/she understands regarding the good and bad things/norms of the society? Whether he/she have the level of intellect to train the minor to be a good and useful citizen of the society. The character building is not an easy task. A person who is always thinking about his/her benefit, cannot be a good leader to build the character of the others. The Superior Courts have chalked out many principles that what sort of the qualities are required to decide the factor that who could be the guardian of the minor. The welfare

of the minor is the supreme consideration and keeping in view that aspect, sometimes the natural emotions and attachments are also to be sacrificed.

I will quote some important citations where the remarks have been passed by the Superior Courts in this respect.

Mrs. Seema Chaudhry and another v. Ahsan Ashraf Sheikh and others (PLD 2003 Supreme Court 877),

Mst. Rubia Jilani v. Zahoor Akhtar Raja and 2 others (1999 SCMR 1834),

Muhammad Tahir v. Mst. Raeesa Fatimah and others (2003 SCMR 1344),

Sardar Hussain and others v. Mst. Parveen Umer and others (PLD 2004 Supreme Court 357),

Mst. Beena v. Raja Muhammad and others (PLD 2020 Supreme Court 508)

and Mst. Naseem Akhtar v. District Judge, Multan and others (2009 SCMR 1052).

I will rely on the case of Mst. Ayesha Altaf v. Fahad Ali and 2 others (2019 CLC Note 66 Lahore) where it has been held as under:-

"Even second marriage of the mother does not disentitle her from the custody of entitlement of ward."

Further reliance is place on the cases of Shabana Naz v. Muhammad Saleem (2004 SCMR 343), Mst. Rabia Bibi v. Abdul Qadir and others (2016 CLC 1460) and Javed Hassan v. Farkhnda Yasmin and others (2018 CLC 273). Another aspect regarding the proposition in hand is that ex-parte proceedings were initiated against the petitioners. Application under Section 12(2), C.P.C., was dismissed. Limitation was also made a ground to dismiss the appeal of the petitioners, whether all these factors could be taken a ground to hold that welfare of the minors do not attach with the petitioner. Can it be a ground to disallow the application of the petitioner that welfare of the minors is not attached with her.

9. In this proposition, the ages of the minors are very considerable. In order dated 19.11.2020 of this court it is mentioned that the ages of the minors are about 15 and 14 years and certainly they are now over 16 and 15 years of age. This is very considerable

point at this stage. As it has been discussed in the earlier paragraphs that the conduct of the lady is considerable which has been discussed by the courts below while passing the judgment and decree in question. But it is also settled principle which has been settled in "Afshan Noreen v. Nadeem Abbas Shah" (1997 MLD 197), what is paramount in such like matters that in welfare of the minors and the conduct of the parents is a secondary consideration.

Now this is also a settled law that the law has given the way for the appointment of the guardian in view of the intellect preference chosen by the ward itself if the minor is old enough to form an intelligent preference. Then there is a principle that in such like matter, the court may consider that precedent. Section 17 of the Guardians and Wards Act, 1890, says that matters to be considered by the court in appointing the guardian;-

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided 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 minor is old enough to form an intelligent preference, the Court may consider that preference.

The other reliance is placed upon "Mst. Tallat Nasira v. Mst. Munawar Sultan and 2 others (1985 SCMR 1367) where it was held that it is axiomatic that in the matter of appointment of guardian, the welfare of the minor coupled with his own wish, particularly when he can make a reasonable preference on account of his age, is the primary consideration for a court of law for the decision of such cases.

Whereas in case "Mst. Ayesha Abdul Maleek v. Additional District Judge, Sahiwal and 2 others (2020 YLR 401) it was held that the intelligence preference of the minor, could be the way to reach at the consideration regarding the entitlement of the custody.

In "Tariq Mehmood and others v. Additional District Judge and others" (2016 MLD 1767) it was held that no doubt when a minor reaches the age of discretion, his/her statement can be considered while determining his/her custody but it is not the sine qua non for the court to make it the basis for its decision.

In case of Tahira Bibi v. Muhammad Saeed and another (2009 MLD 33) it was held by the court that it is true that section 17(3) of the Guardians and Wards Act, 1890 authorizes a court to consider an intelligence preference of a minor in the matter of custody. In Barkat Bibi v. Zahida Parveen and 2 others (2003 YLR 1105) it was held that any force applied in the matter of custody against their wishes, when they have attained sufficient maturity in exercising their preference would not be consistent with their welfare and rather may have adverse effect.

10. The purpose of law is to see the welfare of the minor. Now it can be seen from many angles. The evidence produced by the parties regarding the establishment of their conduct, character, social status, financial status in order to prove that they are capable of being guardian of the ward in order to facilitate them in every walk of life and also with the point of view that they will not only financially facilitate them but will also be helpful in building of their person and character. Now this all can be proved by the parties and can be settled by the court after recording the evidence and after providing opportunities to the parties that who is better one to be appointed as guardian of the wards. In the proposition in hand, although much have been criticized regarding the conduct of the petitioner but this is also settled principle that when things are attached with the emotions, normally the people losses their temperament and even they forget every normal norms of the social values. It is not good for anyone but this is the ground reality and one important aspect of this proposition.

As it has been discussed in the earlier paragraphs that the Constitution of the Islamic Republic of Pakistan gives guarantee to everyone to be treated equally but every citizen is also under obligation to obey and respect the law. Keeping in view that supreme consideration before this Court is the welfare of the minors which cannot be determined within the jurisdiction of this Constitution petition. This is purely the prerogative of the Guardian Court to decide the same. So keeping in view all these facts, the ex-parte order

dated 24.3.2011 passed by learned Guardian Judge is set-aside. subject to special cost of Rs.20,000/- (Rupees twenty thousand) and as a result thereof the order subsequently passed by learned Guardian Judge dated 13.3.2014 and judgment dated 13.6.2014 passed by the learned Additional District Judge are set-aside. The case is remanded to the learned Guardian Judge with the direction to decide the matter expeditiously keeping in view the provisions of the Guardians and Wards Act, 1890. The petitioners are also directed to follow the instructions of the court regarding the proceedings of the application.

11. The result of the above discussion is that instant writ petition is allowed in the terms mentioned in the earlier paragraph. There is no order as to costs.

ZH/S-70/L Petition allowed.

2022 C L C 1300

[Lahore]

Before Safdar Saleem Shahid, J

BASHIR AHMAD----Petitioner

Versus

KHADIM HUSSAIN and others----Respondents

Civil Revision No.2025 of 2013, decided on 16th June, 2021.

(a) Specific Relief Act (I of 1877)---

----S.12---Specific performance of agreement--- Scope---Such is a discretionary relief under Specific Relief Act, 1877---Even if agreement is proved, Court is not bound to decree the suit in the light of prayer but Court may consider other relevant factors brought before it while deciding fate of the case for specific performance.

Ghulam Nabi and others v. Seth Muhammad Yaqub and others PLD 1983 SC 344 rel.

(b) Specific Relief Act (I of 1877)---

----S.12---Transfer of Property Act (IV of 1882), S.53-A---Specific performance of agreement to sell---Title over property---Part performance---Effect---Mere agreement to sell does not create any title and it cannot place any restriction on the rights of owner unless it is proved--- If person having agreement to sell proves its execution then provision of S.53-A of Transfer of Property Act, 1882, protects his rights, otherwise mere on the basis of agreement to sell right to enjoy property by owner cannot be curtaild.

Muhammad Younas and others v. Mst. Muhammad Bibi and others 2001 YLR 2789; Manzoor Hussain v. Muhammad Fazal and 8 others 2002 CLC 1165; Muhammad Ashraf v. Muslim Commercial Bank Limited and 2 others 2018 CLD 911 and Ali Akbar v. Muhammad Aslam Khan and 10 others 2008 CLC 145 rel.

(c) Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance of agreement to sell---Agreement---Proof---Pre-conditions---Misreading and non-reading of evidence---Respondent/plaintiff sought specific performance of agreement to sell regarding suit property---Trial Court and Lower Appellate Court decreed the suit in favour of respondent/plaintiff---Validity---Mere existence of document did not prove its execution---If contents of document in

question were specifically denied, then beneficiary of the document was to prove the same, specially where executant was Parada observing lady or an illiterate person---Claiming person had to prove that document was executed with free consent and knowledge of executant and consideration amount was also paid---High Court was not satisfied with genuineness of document in question and its execution was not proved as neither consideration amount was proved nor it had been proved that the executant was given understanding about its contents---High Court set aside concurrent judgments and decrees passed by two Courts below as error had been committed while appraising evidence of respondent/plaintiff---Revision was allowed accordingly.

Abdul Wahab v. Sarbaz 2014 YLR 1338; Abdul Majid v. Ghulam Hussain 2008 CLC 268; Mst. Waris Jan and another v. Liaqat Ali and others PLD 2019 Lah. 333; Zahid Islam v. Mst. Rehmat Bibi and others 2020 CLC 54; Muhammad Aslam v. Mst. Razia Begum and 3 others 1999 YLR 620 and Ch. Muneer Hussain v. Mst. Wazeeran Mai alias Wazir Mai PLD 2005 SC 658 rel.

Javaid Anwar Janjua for Petitioner.

Syed Mukhtar Abbas and Ch. Amjad Hussain for Respondents.

Date of hearing: 16th June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision is filed against the concurrent findings of the Courts below whereby the learned Civil Judge vide judgment and decree dated 03.12.2012 decreed the suit of the respondent No.1 with the condition that the share of respondent No.2 will remain intact and shortage will be fulfilled from the remaining land of the petitioner and if he has no land in his possession, the value of land 3-Kanals 11-Marlas will be reduced from the sale price and respondent No.1 was also directed to deposit remaining sale price within two months. The aforesaid judgment and decree was assailed before the learned Addl. District Judge who vide judgment and decree dated 05.06.2013 dismissed the appeal on the same grounds.

2. The brief facts of the case are that a suit for specific performance was filed by respondent No.1 Khadim Hussain against the petitioner wherein Syed Alamdar Hussain Shah was placed as defendant. Allegedly before execution of agreement to sell in between the petitioner and respondent No.1, said Syed Alamdar Hussain Shah respondent No.2 purchased the land from the petitioner. The actual stance of respondent

No.1 through the suit for specific performance regarding land measuring 16-Kanals 11-Marlas from the total land 29-Kanals 11-Marlas of Khata No.583/569 situated in Basti Noor Shah, Mauza Garh Maharaja, Tehsil Ahmad Pur Sial, District Jhang, was that respondent No.1 entered into agreement to purchase the land for an amount of Rs.6,00,000/- out of which Rs.3,00,000/- were paid as earnest money. He thus prayed that according to the agreement to sell between him and the petitioner the time for performance of the condition was remaining but the petitioner sold out the land measuring 3-Kanals 4-Marlas to respondent No.2 through sale deed No.466/1 dated 18.8.2007, therefore, respondent No.1 filed suit for specific performance. The important background of the proposition is that the petitioner was owner in possession of the suit property and his brothers filed a suit for specific performance for the land situated in Khata No.583/569 measuring 39-Kanala 11 Marlas. In that suit on 19.06.2007 the petitioner got recorded his statement and the suit was decreed in favour of his brothers to the extent of land 23-Kanals in exchange of Rs.5,00,000/- and to the extent of remaining land, property 16-Kanals 11-Marlas, suit of Nazir Ahmad etc., the suit of the brothers of the petitioner, was dismissed. For that above-mentioned remaining land the respondent No.1 entered into an agreement with the petitioner for Rs.6,00,000/- and executed agreement on 19.06.2007, wherein it was mentioned that the respondent No.1 would pay remaining sale price upto 15.10.2007 and the petitioner was bound to then register the sale deed in his favour and to handover the possession. But still the limitation of agreement of respondent No.1 was existed when the petitioner resiled from his commitment and out of above said 16-Kanals 11-Marlas the petitioner transferred 3-Kanals 11-Marlas land to respondent No.2 without knowledge and notice to the respondent No.1. Knowingly this act was done by the petitioner. Khadim Hussain respondent No.2 was also having the knowledge of above said agreement between petitioner and respondent No.1. Then the respondent No.1 filed the suit with the version that the agreement to sell dated 01.07.2008 was in the knowledge of respondent No.2, but he with mala fide intention and to cause loss to the agreement of respondent No.1 fraudulently got registered a sale deed which is ineffective upon the rights of the respondent No.1. It was also alleged by the respondent No.1 that he was always ready to make payment of remaining consideration amount.

3. The petitioner filed written statement, contested the suit on legal as well as factual grounds, raised preliminary objections that whole stance of the respondent No.1 is false, based on forged and fictitious narrations and suit is liable to be dismissed. The

respondent No.2 also filed a written statement where he mentioned that he is a bona fide purchaser of land measuring 3-Kanals 11-Marlas for consideration of Rs.1,25,000/- and he also had the possession of the same and the respondent No.1 has no cause of action and alleged agreement to sell claimed by respondent No.1 is forged, fictitious, illegal, based on fraud and liable to be cancelled. Out of pleadings of the parties, learned trial court framed six issues, recorded evidence and decreed the suit vide judgment and decree dated 18.01.2012. Appellate Court, however, remanded the case for fresh trial with the direction to frame additional issues vide judgment and decree dated 06.03.2012. These issues are reproduced as under:-

1. Whether defendant No.1 entered into agreement to sell with plaintiff regarding the suit property in consideration price of Rs.6,00,000/- and plaintiff has paid Rs.3,00,000/- as earnest money? OPP

2. Whether plaintiff is entitled to decree for specific performance of contract as prayed for? OPP

3. Whether plaintiff has no cause of action? OPD.

4. Whether suit is not maintainable in its present form? OPD

5. Whether suit is false and frivolous and is liable to dismiss with special costs? OPD

6. Whether alleged agreement to sell is forged and fictitious and based on fraud? OPD.

7. Relief.

6-a. Whether defendant No.2 has purchased the property measuring 03 kanals and 11 marlas out of the suit land from the defendant No.1 through registered sale deed No.466/1 and he is bona fide purchaser of the same? OPD-2

6-b. Whether the defendant No.2 has knowledge and notice of the alleged agreement to sell dated 1.8.2007 prior to his purchase through registered sale deed No.466/1? OPP

6-c. Whether plaintiff has come to the court with clean hands? OPP

6-d. Whether the instant suit is not maintainable due to non-joinder and mis-joinder of the parties? OPD-1

6-e. Whether the defendant No.2 is entitled to get special costs under section 35-A of CPC? OPD-2

7. Relief.

4. After hearing the parties, the learned Civil Judge again decreed the suit in favour of the plaintiff/respondent No.1 vide judgment and decree dated 03.12.2012. Against the aforesaid judgment and decree, petitioner preferred an appeal before learned Additional District Judge, which was dismissed vide judgment and decree dated 05.06.2013.

5. It was version of the petitioner that Article 114 of the Qanun-e-Shahadat Order, 1984 was applicable to the present proposition. The respondent No.1 was bound to deposit remaining amount of Ex.P1 till 15.10.2007, which he did not deposit, so he was not entitled to the decree for specific performance but this legal aspect of the proposition was ignored by the courts below.

6. The judgments and decrees of the courts below also have been assailed on the ground that the execution of Ex.P1 is not proved. The witnesses of said agreement to sell have not proved that Ex.P1 was written against some consideration, the payment of past consideration amount, is also not proved. The version of the petitioner was that he denied the execution of Ex.P1 from the very beginning on the ground that he was illiterate person. Although he sold the land to different persons at different times but he did not sell land measuring 16-Kanals 11-Marlas under the agreement to sell Ex.P1 to respondent No.1. It was for the respondent No.1 to prove that Ex.P1 was genuinely executed. Both the courts below have not appreciated the evidence of the parties. It was argued that there is an element of misreading and non-reading of evidence. Law also has not been properly appreciated, rather has been wrongly interpreted. The counsel for the petitioner argued that legal aspect of the proposition has been ignored by the courts while framing of issues and deciding of the fate of Ex.P1. It was argued that in Ex.P1, the date for completion of agreement to sell is mentioned 15.10.2007, till that date, the respondent No.1 had not paid the remaining amount, therefore, respondent No1. was not entitled for the decree of specific performance. It was argued that respondent No.1 had never sent any legal notice to the petitioner for making of the remaining payment of Ex.P1. Therefore, as per spirit of Article 114 of The Qanun-e-Shahadat Order, 1984, the suit for specific performance of respondent No.1 could not be decreed in his favour.

7. It was argued by counsel for the petitioner that mere agreement to sell does not create any title. The person claiming his title under any document has to prove about the genuineness of the document and in this regard it has to prove that he had played his role on his part. It was argued that PWs were not sure about the contents of agreement to sell. They were not consistent in their statements regarding the settlement of the

agreement, regarding the purchase of stamp paper and regarding its execution; the PWs were unable to prove that all ingredients of Ex.P.1 were pen down with consent and knowledge of the petitioner. It was argued that no reliable evidence was produced by respondent No.1 regarding the payment of the alleged consideration amount. So any agreement without consideration is not a valid agreement and is not executable at law. It was argued that specific performance of a contract is a discretionary relief and it cannot be awarded on the basis of doubted evidence specially when the execution of agreement to sell is highly doubtful. Counsel for the petitioner further argued that the petitioner has alleged that he is illiterate person. Then the spirit of law is that his version would be seen in scenario of his intellect capacity. It was argued that the petitioner has brought relevant evidence on record. His witnesses were consistent that no such agreement was settled down between the petitioner and respondent No.1 and no such document was ever executed in between them. The document Exh.P.1 was not a genuine document to be relied upon. It was argued that in spite of lengthy cross-examination the respondent could not shake the veracity of the DWs. The courts below have committed error while apprising the factual and legal position of the proposition. Therefore, both the judgments and decrees of the courts below be set-aside.

8. On the other hand, counsel for respondent No.1 resisted the arguments that the case of respondent No.1 was filed within time. It was further argued that respondent No.1 proved the case beyond shadow of doubt. The agreement to sell Ex.P1 was proved through reliable evidence. The PWs were consistent regarding the execution of Ex.P1. The witnesses were consistent regarding the settlement of the agreement and the payment of consideration. Even regarding the purchase and its writing, there was no discrepancy in the evidence of the PWs. It was further argued that the petitioner was in agreement with the respondent No.1 and thereafter satisfaction of the petitioner and after understanding the contents of the document Ex.P1, he signed and thumb marked the same. It was argued that the respondent No.1 remained always ready to pay the remaining consideration amount. Suit was filed even before the expiry of date for payment of remaining amount in Ex.P1. i.e. 15.10.2007, as the petitioner resiled from his commitment and he sold out some land under question (Ex.P1) to one Alamdar Shah through registered sale deed No.466/1 dated 18.8.2007. So the respondent No.1 had to file the suit earlier than the expiry of the period mentioned in Ex.P1. It was argued that filing of suit was a notice to the petitioner to show the willingness of respondent No.1 for the payment of the remaining consideration amount on the part of respondent No.1.

It was argued that respondent No.1 proved its case as all PWs have supported his version regarding the genuineness of agreement and execution of document Ex.P1. Under the Qanun-e-Shahadat Order, 1984 the document Ex.P1 is proved one and the courts below have rightly decided the issues in favour of respondent No.1 against the petitioner.

9. It was argued by counsel for respondent No.1 that respondent No.2 knowingly the agreement to sell between the petitioner and respondent No.1, in order to cause loss to respondent No.1 got transferred through registered sale deed in his favour 3-kanals 11-Marlas land which also was assailed by the respondent No.1 through the suit. It was argued that the court has given benefit to respondent No.2 as he had reregistered sale deed in his favour and his right was also admitted by the petitioner. It was argued that in fact respondent No.2 was not entitled for the land and under Section 53-A of The Transfer of Property Act, the rights of the respondent No.1 were protected by law but the court has ignored that part of aspect. It was argued that the trial court decreed the suit in favour of respondent No.1. The matter was assailed before the Appellate Court and the Appellate Court after framing the additional issues i.e. 6-A to 6-E, remanded the case. Counsel for the respondent No.1 criticized that again the evidence of the parties were recorded. The petitioner's witnesses (DWs) changed their stance and they dishonestly made improvements over their statements as they had got recorded previously before the court. In fact the petitioner's witnesses (DWs) tried to fill in the lacunas which they left during the evidence previously recorded before this court in this case. It was argued that although the courts took the notice of the same, yet, that came on record that the petitioner had made intentionally the dishonest improvements through his witnesses. It was argued that there is no substance in the civil revision. All the issues have been decided on its merits. The same be dismissed.

10. Arguments heard. Record perused.

11. Respondent No.1 Khadim Hussain filed the suit for specific performance on the basis of agreement to sell dated 19.6.2007 for the property measuring 16-Kanals 11-Marlas for consideration amount Rs.6,00,000/-, allegedly out of which 3,00,000/- were paid to the petitioner at the time of execution of agreement to sell, while remaining amount Rs.3,00,000/- were to be paid till 15.10.2007 and the petitioner was bound to then transfer the land in the name of respondent No.1. In the same suit, the prayer of respondent No.1 was for cancellation of registered sale deed No.466/1 dated 18.8.2007

for the land 3-Kanals 11-Marlas transferred through registered sale deed in favour of respondent No.2 by the petitioner. It was the subject matter of the suit of respondent No.1. While in the body of plaint, the respondent No.1 has specifically mentioned in Para Nos.1 and 2 which I reproduce here:-

یہ کہ مدعا علیہ کھاتہ نمبر 583/569 مربعہ نمبر 180 کیلہ نمبران 15/2 (تین کنال۔ دو مرلہ) 16/1 (ایک کنال 16 مرلہ) مربعہ نمبر 20/8 – 21/8 مربعہ نمبر 172 کیلہ نمبران 16(8-0)17/1(8-3)-25/1(6-18) کل برقبہ 39 کنال 11 مرلہ گڑھ مہاراجہ، بستی نورشاہ، تحصیل احمد پور سیال میں مالک اراضی تھا۔ جس میں برادران نذیر احمد، محمد رمضان، محمد انور کو دعویٰ تکمیل معاہدہ بعنوان "نذیر احمد وغیرہ بنام بشیر احمد" میں مورخہ 19.6.2007 کو بیان دے کر 23 کنال بلعوض پانچ لاکھ روپے بحق نذیر احمد وغیرہ ڈگری کرادی۔ اور بقیہ کی حد تک نذیر احمد وغیرہ کا دعویٰ خارج ہوگیا۔ اس طرح بقایا اراضی مذکورہ بالا کا مالک بدستور رہا۔

یہ کہ مدعا علیہ نمبر 1 نے بعد فیصلہ مورخہ 19.6.2007 اپنی بقایا اراضی کو سودا بیعہ ہمراہ من مدعی بلعوض چھ لاکھ روپے کیا۔ تین لاکھ روپے مورخہ 1.8.2007 کو روبرو گواہان من مدعی نے وصول کر لئے اور معاہدہ بیعہ بحق مدعی تحریر کر دیا۔ شرائط اقرار نامہ کے مطابق بقیہ زرثمن تین لاکھ روپے مورخہ 15.10.2007 کو من مدعی سے وصول پا کر رجسٹری انتقال کرانا تھا اور قبضہ اراضی بھی حوالے من مدعی کرنا تھا۔ بوقت تحریر اقرار نامہ مدعا علیہ نمبر 1 نے شناختی کارڈ کی فوٹو کاپی شامل کی تھی۔

12. In Para No.2, the respondent No.1 mentioned that in presence of witnesses Rs.3,00,000/- were paid on 1.8.2007 and agreement to sell was executed, according to which the remaining part of the agreement regarding payment of remaining amount Rs.3,00,000/- was to be paid on 15.10.2007 and with the payment of the remaining amount, the land would also be transferred in the name of respondent No.1. Before expiry of the date i.e. 15.10.2007 for the completion of agreement to sell, the petitioner sold out 3-Kanals 11-Marlas land to respondent No.2 and because of that, the respondent No.1 had to file the suit on 6.9.2007, before the date of completion of the agreement so that to force the petitioner to fulfill the agreement to sell. In rest of the paras of the plaint, the respondent No.1 agitated against the respondent No.2 for having registered the sale deed in his favour. It was the stance of respondent No.1 that respondent No.2 was well aware of the agreement to sell between the petitioner and respondent No.1 but with mala fide intention in order to cause loss to respondent No.1, he got registered the land in his favour measuring 3-Kanals 11-Marlas. The respondent No.2 submitted separate written statement and mentioned that he was bonafide purchaser. The learned Civil Judge framed the issues in the first round of the trial, but

did not frame any issue regarding the controversy between the respondent No.1 and respondent No.2. The suit was decreed by the trial court and the decree was assailed before the first Appellate Court. The first Appellate Court remanded the case to the trial court while framing additional issues Nos.6-a to 6-e.

13. There are many factors to analyze in this proposition. It is settled principle that the relief of specific performance is a discretionary relief under the Specific Relief Act. Even if the agreement is proved, the court is not bound to decree the suit in light of the prayer. But the court will consider the other relevant facts brought before it while deciding the fate of the case for specific performance.

14. Before going into the merits of the proposition in hand, I would like to produce the wisdom of section 53-A of the Transfer of Property Act which protects the rights of the purchaser. While relying on case titled "Ghulam Nabi and others v. Seth Muhammad Yaqub and others" (PLD 1983 Supreme Court 344). Section 53-A of Transfer of Property Act says that:

> "Section 53-A read with Specific Relief Act (I of 1877), S. 27(b)-Contract for sale of immovable property-specific performance of-Protection under S. 53-A of transfer of Property Act-Does not affect rights of a transferee, for consideration, having no notice of contract or of performance thereof-Vendor without transferring his interest in property entering into an agreement with another to sell same-Can confer title on a third party by executing a sale-deed in his favour. Person in whose favour prior agreement exists can, however, specifically enforce his agreement under S. 27(b), Specific Relief Act and compel vendor to execute a sale-deed in his favour-Held, section 53-A of Transfer of Property Act does not apply where a plaintiff claiming possession of property under a good and genuine contract of sale earlier in date to defendant's contract and latter taking his contract with knowledge of plaintiff's earlier title."

15. It is also settled principle that mere agreement to sell does not create any title and it cannot place any restriction on the rights of the owner unless it is proved. The reliance is placed upon "Muhammad Younas and others v. Mst. Muhammad Bibi and others" (2001 YLR 2789), "Manzoor Hussain v. Muhammad Fazal and 8 others" (2002 CLC 1165), "Muhammad Ashraf v. Muslim Commercial Bank Limited and 2 others" (2018 CLD 911), "Ali Akbar v. Muhammad Aslam Khan and 10 others" (2008 CLC 145). The

above mentioned two principles have its application separately if the person having agreement to sell proves its execution, then certainly section 53-A of the Transfer of Property Act will protect his rights, otherwise mere on the basis of agreement to sell the right to enjoy the property by the owner, cannot be curtailed. Keeping in view the above mentioned legal aspect, the courts below were to analyze the proposition in hand.

The moot points in this proposition were,

(i) Whether any agreement to sell was agreed between the petitioner and respondent No.1?

(ii) Whether in lieu of said agreement, document Ex.P1 was executed ?

(iii) If so, then its effects?

Law is clear on this point. A valid agreement is defined as under:-

"Agreement". Every promise and every set of promises, forming the consideration for each other, is an agreement."

16. Mere presence of a document regarding agreement to sell does not mean that it is a proved document. When the document is challenged or its contents are denied, there are certain principles to prove it. In some events the person denying its execution has to prove that it was not executed but in some cases the beneficiary of the document has to prove that it was validly executed. The usual denial from the execution of document is on the grounds:

(i) That the document was not executed by the executant. Its signatures and contents are totally denied. Even in some cases, the issuance of stamp paper from the stamp vender is denied.

(ii) In some cases the presence of document is admitted one and its issuance from the stamp vender is also admitted but its contents are denied

(iii) In case of a Parda Nasheen Lady or illiterate person, usually the beneficiary of the document has to prove the document. In some cases the execution of document is admitted but with the version that it was executed under pressure or by inducing undue influence.

(iv) Similarly in some cases the element of fraud is made base for denial of the execution of the document.

17. In all the above mentioned cases, the court has to see the reply of the other side regarding the execution of the document. According to the controversy of the parties, out of the pleadings, issues are to be framed in view of Order XIV, Rules 1 and 2, C.P.C. On the basis of evidence produced before the court, on the framed issues, the courts draw the conclusion. On the legal issues, the courts sometimes frame the preliminary issue and decide the same, like the point of jurisdiction of the court and sometime regarding the limitation. In this proposition, the petitioner never took the ground of limitation in the written statement. No issue regarding this aspect was framed by the trial court. This ground was not agitated before the first Appellate Court but before this court in the Civil Revision this particular point is raised by the petitioner with specific reference to Article 114 of the Qanun-e-Shahadat Order, 1984 that the suit of respondent No.1 was not maintainable. It is settled law that where the time is essence of the contract, the provision of Article 114 of Qanun-e-Shahadat Order, 1984 is specifically applicable. But in this proposition it has no relevancy because the suit was filed before the date of expiry of the date for payment of amount in Ex.P1. Therefore, there was no question of limitation. The objection of petitioner was not genuine one, hence, rejected. Furthermore, it is settled principle that the objection not raised before trial court or before the first Appellate Court cannot be raised in the revisional jurisdiction of the court.

18. Ex.P.1 is denied by the petitioner and the respondent No.2 whereas the case of respondent No.1 was totally based on the said document. As it has been discussed in earlier paragraph, that mere existence of document does not mean that it is approved one. When its contents are denied, then the document is examined under Article 17 of Qanun-e-Shahadat Order, 1984, regarding its production and under Article 79 Qanun-e-Shahadat Order, 1984 whether the same was proved through reliable evidence. According to the contents of Ex.P1 which was written on 01.8.2007, the petitioner had received Rs.3,00,000/- as advance amount in presence of the witnesses. Both the witnesses appeared before the court. Safdar Ali appeared as PW.2 where Malang appeared as PW.3. The statement of PW.2 Safdar Ali is very interesting. I quote it as under:-

"بیان کیا کہ میں مدعی اور مدعا علیہ نمبر 1 کو جانتا ہوں۔ مدعا علیہ نے رقبہ زرعی کو اراضی بقدر 16 کنال 11 مرلہ مدعی بلعوض 6 لاکھ روپے فروخت کی اور بیعانہ مبلغ 3 لاکھ روپے روبرو گواہان دیا گیا۔"

Where the other witness of Exh.P.1, Malang stated that:

"بیان کیا کہ میں فریقین کو جانتا ہوں۔ مدعی نے مدعا علیہ نمبر 1 سے 16 کنال 11 مرلہ اراضی
کا سودا بلعوض مبلغ 6 لاکھ روپے میرے روبرو کیا اور بوقت تحریر مبلغ تین لاکھ روپے بیعانہ دیا۔"

19. From this evidence of the witnesses, it cannot be confirmed that payment of advance amount of Rs.3,00,000/- was made in presence of the witnesses PW.2 and PW.3. Neither PW.2 nor PW.3 has specifically stated about the factum that payment of advance amount was made in their presence. PW.3 states that the payment was made in presence of the witnesses, but has not specifically named himself or any of the witness. Whereas PW.3 says that agreement was settled in his presence while payment of Rs.3,00,000/- were made at the time of writing of Ex.P1 and he does not state that it was given in his presence. The learned trial court has relied on the statements of PW.2 and PW.3. But from the reading of statements of both PWs, the payment of Rs.3,00,000/- as stated by respondent No.1 is not proved. As it has been mentioned in the earlier paragraphs that existence of document is different thing while proving of document is altogether a different thing.

20. If Ex.P1 is analyzed, its issuance is a question mark. On its back, on the other side of the stamp paper, date shows some change, 28 perhaps been converted to 30. Ex.P1 also shows that it was purchased to prepare Iqrar Nama only. The purpose for its purchase and issuance was not mentioned as Iqrar Nama Baiy ". The other important thing is that it was purchased from Jhang whereas the parties are residents of Ahmad Pur Sial. They properly belong to Ahmad Pur Sial. The witnesses of Ex.P1 are also residents of Ahmad Pur Sial Tehsil. Then what was the need to purchase the stamp paper from Jhang. No explanation in this regard has been tendered in the evidence by the respondent No.1 nor any explanation is mentioned on the stamp paper regarding this fact. It was issued on 30.7.2007 whereas it was written on 1.8.2007, after the delay of two days without any explanation. This all shows that the agreement to sell was settled between the parties some days before 30.7.2007 but no evidence in this regard is produced by respondent No.1. The respondent No.1 did not state anything in his statement while appearing before the court in examination in chief regarding the above said facts. In the cross examination, however, he admitted this fact that 4-5 days prior to writing of Ex.P1 the agreement was settled between the respondent No.1 and the petitioner. One Shaban was present at the time of agreement. This Shaban has not been produced before the court. What conditions were settled at that time, also has not been brought on record by respondent No.1. Even no word or sentence is mentioned in Ex.P1

regarding the earlier agreement to sell settled between the parties as alleged by responder No.1. So, this all make the genuineness of the Ex.P1 doubtful. Another aspect of evidence of respondent No.1 Khadim Hussain is that he mentioned that he purchased some other land from the petitioner prior to the purchase of this land and he got the same registered in his favour and for that also the agreement was pen down but that agreement was not produced before the court. Another important factor of this proposition is that one Sultan Mehmood pen down the document Ex.P1. This Sultan Mehmood had not appeared in the witness box. This witness was not produced by respondent No.1. Under the circumstances, this witness was best evidence to prove execution of document Ex.P-1. Relying on "Abdul Wahab v. Sarbaz" (2014 YLR 1338) and "Abdul Majid v. Ghulam Hussain" (2008 CLC 268), it can be said that best possible evidence with respondent No.1 to prove Ex.P1 was withheld by the respondent No.1. Under Article 129 of the Qanun-e-Shahadat Order, 1984 the inference can be drawn if the said witness had appeared in the witness box might have not supported the version of respondent No.1 regarding the execution of document Ex.P1. This is also important to mention that in the document it is not written on whose instance the document was being written. There is no mentioning of the fact that this document was read over to the executant. There is no mentioning of the fact regarding the time and place where it was being written. Another factor is that respondent No.1 was not succeeded to prove that it was purchased on the date which is mentioned on the stamp paper. Respondent No.1 was also unable to explain that why the stamp paper was written after two days of its purchase. It was the duty of the respondent No.1 to prove the execution of the document Ex.P1. The version of the petitioner from the very beginning was that he was illiterate person. The learned courts below have ignored this fact and had not kept in view the intellect level of the petitioner and the law concerned. Only with the statements of the PWs that Ex.P1 was executed, no inference can be dawn. Reliance is placed on the case of "Mst. Waris Jan and another v. Liaqat Ali and others" (PLD 2019 Lahore 333) where it has been held as under:-

"Principles of contact law---Validity of contracts/transactions by illiterate persons---Fraud and undue influence in a contractual arrangement---Burden of proof---Maxim "non est factum"---Exceptions in adjudication by Courts for illiterate person(s) vis-a-vis performance of contractual obligations---Scope---"Non est factum" ("it is not my deed,) was a defence in contract law which allowed a signing party to escape performance of an agreement which was fundamentally different from what he or she intended to

execute or sign---Person challenging the validity of a transaction, ordinarily, on the ground of fraud or undue influence, had to discharge burden of proof---Major exception to said rule was when such burden of proof would shift if it were brought to the notice of the courts such person was illiterate---Illiteracy was regarded as a misfortune and not a privilege and some measure of protection was accorded to illiterate persons in their contractual transactions---Burden of proof in respect of genuineness of a transaction with an illiterate person and a document allegedly executed by such a person lay on the beneficiary of such document, who was legally obliged to prove and satisfy the Court; firstly, that such document was executed by an illiterate person; secondly that such illiterate person had complete knowledge and full understanding about the contents of the document; thirdly that such document was read over to him/her and terms of the same were adequately explained to him/her; and fourthly, that he/she had independent and disinterested advice on the matter before coming into the transaction and executing the document---Incumbent upon a person who wrote any document at the request, or on behalf, or in the name of any illiterate person to also to write on such document, his/her own name as the writer thereof and his address as well as the endorsement to the effect that such document was written in presence of the such person's consultant who could read and write the language of the document; and understood the contractual transaction; and had no conflict of interest and had advised the illiterate person about the contractual transaction---Factor of advice could not be treated lightly as a mere formality and law contemplated effective, meaningful and purposeful consultation of the illiterates with a person who could read and write the language of the document, comprehend the implication of contractual transaction, and had no conflict of interest; in order to establish "consensus ad idem"

21. Further reliance is placed on the case of "Zahid Islam v. Mst. Rehmat Bibi and others" (2020 CLC 54). In fact, according to the provisions of Qanun-e-Shahadat Order, 1984, the witnesses are to prove that they are truthful witnesses and their evidence can be relied upon. For the execution of document, the relevant ingredients are to be proved. It was mandatory for respondent No.1 to prove where the agreement to sell was written. Perusal of evidence shows that it is stated nowhere. The respondent No.1 was also unable to prove that who was present by that time when the agreement to sell was settled between the parties and what terms and conditions were settled between the parties. Furthermore, what mode of payment was settled between the parties for the agreement to sell. No person/witness in this regard was produced by the respondent No.1 although he

himself stated in the cross-examination that 4-5 days prior to the purchase of the stamp paper, the matter was settled between him and the petitioner in presence of the witnesses. So in this regard, the execution of Ex.P.1 is highly doubtful rather it is not proved in any way as required. Therefore, the observations of both the courts below are not correct regarding the execution of the document Ex.P.1. The witnesses only had made statements regarding the writing of the document but without consideration or without payment of any advance or partial amount it is settled law that no such agreement to sell is valid and executable. To my mind, the respondent No.1 was not able to prove his version regarding the execution of Ex.P1 and regarding making of payment of the amount to the petitioner. Reliance is placed on the case of "Muhammad Aslam v. Mst. Razia Begum and 3 others" (1999 YLR 620) where it has been held as under:-

"---Art. 78 ----Document, execution of ---Meaning---Execution of document in fact and law, means that a person who is affixing signature on a document as an executant, is aware of the nature and the contents thereof"

Further reliance is placed on the case of "Ch. Muneer Hussain v. Mst. Wazeeran Mai alias Wazir Mai" (PLD 2005 Supreme Court 658). Furthermore, under Section 102 of Qanun-e-Shahadat Order 1984, Ordinarily a document is not proved by itself unless admitted by its executant. Reliance in this regard is placed on the case of "Walayat (deceased) through L.Rs and others v. Shahadat through L.Rs and others" (2021 CLC 584) wherein it has been held as follows:

"---S.102---Burden of proof---Scope---Ordinarily a document is not proved by itself unless admitted by its executant, otherwise, when there is specific denial, it becomes sine qua non for the beneficiary to prove the document as per S.102 of the Evidence Act, 1872."

The evidence of DWs was consistent on the point that no such agreement was settled between the petitioner and respondent No.1. No such document Exh.P1 was written in this behalf otherwise it was for the respondent No.1 to prove the same. So, I don't feel it necessary to discuss in detail the evidence of DWs.

22. The result drawn from the above discussion is that mere existence of document will not prove its execution. Secondly, if the contents of document in question are specifically denied, then the beneficiary of the document has to prove the same specially in case, where the executant is parda observing lady or an illiterate person. Thirdly the claiming person has to prove that it was executed with free consent and knowledge of

the executant and also the consideration amount was paid. So keeping in view the above said facts, I am not satisfied about the genuineness of document Ex.P1. Its existence is only proved where neither the consideration amount as mentioned in Ex.P1 is proved nor it has been proved that the executant was given understanding about its contents.

23. So far as the matter of Alamdar Hussain respondent No.2 is concerned, his title is based on the registered sale deed which had not been denied by the petitioner or any other person. The claim of respondent No.1 was that knowingly the agreement between him and the petitioner, the respondent No.2 got transferred the land 3-Kanals 11-Marlas in his favour with malafide intention but regarding the same no evidence was produced by the respondent No.1. The learned trial court had rightly decided the concerned issues Nos.6-A, 6-B in favour of the respondent No.2.

24. The upshot of the above discussion is that the petitioner is succeeded to establish that the learned courts below have committed an error while apprising the evidence of respondent No.1 regarding the genuineness of Ex.P.1, therefore, the instant revision petition is allowed. The judgment and decree dated 03.12.2012 passed by learned Civil Judge and judgment and decree dated 05.06.2013 passed by the learned Addl. District Judge are set-aside. Resultantly, the suit of respondent No.1 for specific performance is dismissed without any order as to costs.

MH/B-15/L Revision allowed.

2022 C L C 1368

[Lahore]

Before Safdar Saleem Shahid, J

GHULAM RASUL----Petitioner

Versus

JAVED AHMAD and others----Respondents

Civil Revision No.1378 of 2009, heard on 27th May, 2021.

(a) Punjab Pre-emption Act (I of 1913) [since repealed]---

----S.22---Plaintiff may be called on to make deposit or to file security---Scope---Where the decretal amount was deposited by the plaintiff and the possession was also delivered to him then the question of non-deposit of Zar-e-Panjum was of no significance.

(b) High Court (Lahore) Rules and Orders---

----Vol.IV, Chap. 16, Part-D, Cl.(4)---Custody of judicial records---Scope---If any document or part of record is subsequently found missing, the Presiding Officer of the Court shall immediately take action for its recovery or reconstruction---Presiding Officer shall also fix responsibility on the custodian if the document was on the index, or on the official whom the custodian relieved, if it was not on the index.

Nazir Ahmad v. Muhammad Rafiq 1993 CLC 257 and Mst. Gul Begum and 17 others v. Mst. Rehmat Jan and 8 others 1995 CLC 1643 ref.

Mst. Khudija Begum v. The State and others PLD 1971 Baghdad-ul-Jadid 19 rel.

(c) Administration of justice---

----Principle that acts or omissions of a Court do not injure a litigant is a truism by now.

Namdar Khan v. Muhammad Akram Khan and 14 others 1993 SCMR 434 ref.

Sh. Suleman Elahi for Petitioner.

Arshad Malik Awan for Respondents Nos.1 and 2.

Date of hearing: 27th May, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----This civil revision is directed against the judgments and decrees dated 01.12.2000 and 01.07.2009 passed by the learned Civil Judge, Gujrat and learned Additional District Judge, Gujrat, respectively. The suit for pre-emption was filed while proceeding was conducted under the old Pre-emption Act, because the

sale relates to the time before the enactment of the new Pre-emption Act (Punjab Pre-emption Act, 1991).

2. Brief facts of the case are that one Mst. Majeedan widow of Islam-ud-Din, who was son of Elahi Bakhsh, sold her land measuring 51-kanals 13-marlas, as detailed in the plaint, in favour of Abdullah son of Pir Bakhsh (late) (father of the present petitioner), through a registered sale deed dated 21.08.1962 against total consideration of Rs.10,000/-. Father of the petitioner was also owner of land measuring 5 marlas, which he had purchased from previous owner Mirza Inayat Baig, on 12.10.1960. Respondents Nos.1 and 2 filed a suit for possession through pre-emption on the ground that they have a superior right as they are owner in the village, whereas father of the petitioner was not owner in the village before purchase of the disputed land. Written statement was filed while taking legal as well as factual objections that property in question being an evacuee property, was not pre-emptible and that the suit was not maintainable due to misjoinder and non-joinder as the custodian of the trust property was not made party to the suit. The learned trial Court framed the following issues:-

1. Whether the plaintiffs are estopped? OPD

2. Whether the plaintiffs have got superior right of pre-emption? OPP

3. Relief.

3. Both the parties produced evidence. However, file of the case was lost in 1975 in which Mirza Inayat Baig son of Faujdar Baig, from whom father of the petitioner had purchased land measuring 5 marlas, had appeared as DW.1 and confirmed the said sale, but his statement could not be traced due to loss of file. The said DW.1 could not be produced in original proceedings as he had died after the statement. The learned trial Court decreed the suit of respondents Nos.1 and 2 vide judgment and decree dated 01.12.2000. The petitioner filed appeal, which was dismissed through judgment and decree dated 01.07.2009. Both the said judgments and decrees have been challenged through this petition.

4. Learned counsel for the petitioner submitted that both the Courts below have acted in exercise of their jurisdiction illegally and with material irregularity as they have failed to take notice of the fact that respondents Nos.1 and 2 did not deposit Zar-e-Panjum as ordered by the Court. The learned Courts below have not properly appreciated the revenue record, including Khasra Girdaweri which is a public document and presumption of truth has been attached thereto, produced by the petitioner. The learned trial Court has not framed proper issues keeping in view the preliminary objections taken by the petitioner. The Courts below have not applied the correct law while passing the impugned

judgments and decrees. According to the learned counsel the learned trial Court has committed an error while passing the judgment and decree as file of the case had lost and was reconstructed without obtaining order from the concerned authority. Learned counsel, however, conceded the preferential right of respondents Nos.1 and 2 and did not argue on that aspect of the case.

5. The learned counsel for respondents Nos.1 and 2, on the other hand, resisted the arguments by submitting that suit of respondents Nos.1 and 2 was decreed ex parte, possession of the property was also delivered in execution of the decree. The learned trial Court has clearly mentioned in the judgment dated 01.12.2000 that decretal amount was deposited in accordance with the decree dated 22.03.1980, which will be considered to be a payment of decretal amount within the stipulated period. According to the learned counsel for respondents preferential right of respondents Nos.1 and 2 was established and after the deposit of decretal amount objection regarding non-deposit of Zar-e-Panjum was baseless. Furthermore file was reconstructed in accordance with law and that the petitioner did not raise objection regarding reconstruction during the proceedings either before the trial Court or before the learned Additional District Judge, therefore, this plea cannot be raised at this stage.

6. Arguments heard. Record perused.

7. As regards objection that Zar-e-Panjum was not deposited by respondents Nos.1 and 2, reliance is placed on the wisdom maintained in the cases reported as Sanwal Das v. Jaigo Mal and others (AIR 1924 Lahore 68), Shah Wali v. Ghulam Din alias Gaman and another (PLD 1966 SC 983) and Muhammad Bashir and others v. Syed Altaf Hussain Shah (deceased) and another (1988 MLD 270) that the object of an order under Section 22(1) is to guarantee vendees against frivolous proceedings on the part of possible pre-emptors. The deposit is a token of good faith and once the pre-emptor has obtained a decree the need for a deposit no longer exists so far as the trial Court is concerned.

8. Further reliance is placed on the case reported as Miraj Din and another v. Saleh-ud-Din Ahmad Khan and 2 others (1986 MLD 461), wherein it is held that the trial Court was required to give direction to pre-emptor before settlement of issues to deposit either Zar-e-Panjum or to give security and failure to comply with the direction, however, would attract penal provision of Section 22(4) of Act I of 1913. The trial Court did issue a direction for submission of security bond which was complied with and that finding of fact cannot be reopened at revisional stage. The mere fact that security bond submitted by respondents Nos.1 and 2 is no longer available on record would not attract the penal provision of Section 22 of the Act.

9. Furthermore in the case of Din Muhammad and others v. Mst. Sultan Bibi (1985 CLC 2536), it was held as under:-

> "The trial Court extended four days time for the deposit of Zar-i-Panjum without notice to the respondent/plaintiff but the petitioners, did not challenge the same through appeal/revision at that time. So much so that this objection was not raised in the memorandum of appeal and was also not argued before the learned District Judge: that being the position, I am of the view that it does not lie in the mouth of the petitioners/defendants to agitate this question before this Court at this stage."

10. The Courts below have given sound and cogent reasons in support of the conclusion arrived at by them and as such argument of the learned counsel is without substance. Even the time can be extended to deposit Zar-e-Panjum but when the decretal amount was fully deposited and the possession was delivered to respondents Nos.1 and 2 then the question of non-deposit of Zar-e-Panjum at the appropriate time does not arise because the presumption of the pre-emptors is clear from their depositing the decretal amount, as ordered by the Court.

11. Guidelines on the point of deposit of Zar-e-Panjum are given in Para-3 of the judgment in the case reported as Muhammad Bashir and others (supra), which is reproduced as under:-

"3. The record shows that the trial Court failed to pass an appropriate order under section 22(1) of the Punjab Pre-emption Act in directing the respondents-plaintiffs either to deposit Zar-i-Panjam or to furnish security. Notwithstanding this omission the order dated 17-5-1976 reveals that security was in fact received from them. Apparently, receiving security at a later date without having asked for it previously, was quite unusual and indeed not contemplated by the provisions of Section 22 ibid. A specific order had to be passed for doing so before framing the issues. The record does not support if this formality was observed. Its receipt subsequently was for obvious reasons of no consequence and could not adversely affect the main suit itself. It appears to be a case of omission on the part of the Court of which the respondents may not take any undue advantage. In Balmolkand and others v. Mst. Lachhman Bai and others (AIR 1921 Lahore 392, 67 I C 796) the Court had omitted to fix time before which the pre-emptor could make deposit of the Zar-i-Panjam. It was held that the omission could not be utilized to penalize the pre-emptor. For analogical reasons, in this case too, the omission to pass a relevant order would not be allowed to be used as a lever to penalize the respondents/pre-emptors. They could be visited with a penalty only if they had failed to obey a specific order passed in that behalf. Learned counsel could not cite any authority to support his contention that

such an omission on the part of the trial Judge could have the effect of vitiating the whole proceedings. The object of the section is to guarantee the vendees against frivolous proceedings on the part of the possible pre-emptors. The deposit is a token of good faith, and once the pre-emptor has obtained a decree, the need for a deposit or for that matter furnishing security no longer exists so far as the trial Court is concerned. Sanwal Das v. Jaigo Mal and others (AIR 1924 Lahore 68) and Shah Wali v. Ghulam Din alias Gaman and another (PLD 1966 S C 983) provide so. Further the deposit or the security bond are taken to satisfy the Court itself that the plaintiffs will ultimately pay the costs, if any, and this satisfaction is entirely subjective with the Court so that it may be varied without using it as a vehicle of oppression against the plaintiffs or jeopardizing substantial rights of the defendants. Mst. Resham Jan v. Khan Nawab Khan and others (PLD 1970 Azad J&K 66) refers. Since in the present case the Court accepted the security bond as a sufficient guarantee for payment of costs etc., legally speaking there may be no objection to the subjective satisfaction of the Court. Secondly the final decree has already been passed by the trial Court and is not being assailed on any substantial ground whatsoever. Even the entire pre-emptions amount has already been deposited, and the same supported the plea of the respondents/pre-emptors that they were exercising their right quite genuinely. One of the reasons directing deposit or furnishing security bond was to see that no frivolous suit is brought. But in case where pre-emptor pays up the entire pre-emption amount, such an impression is obviously misplaced. The purport of the provision is adequately met. We have no hesitation to repel his objection."

12. Further reliance is placed upon the case reported as Namdar Khan v. Muhammad Akram Khan and 14 others (1993 SCMR 434), wherein it is held that acts or omissions of a Court do not injure a litigant is a truism by now. Therefore, the omission having been supplied under the impugned order and deposit made, no interference is called for.

13. The crux of the above discussion is that since the decretal amount was deposited by respondents Nos.1 and 2 and the possession was also delivered to them in view of the deposit of the decretal amount this question will not arise that Zar-e-Panjum was not deposited by respondents Nos.1 and 2. This objection of petitioner was correctly settled by the Courts below.

14. So far as the objection of petitioner regarding reconstruction of file is concerned, Clause 4 of Chapter 16 Part-D, of the High Court Rules and Orders, Volume-IV, says that if any document or part of record is subsequently found to be missing, the Presiding Officer of the Court shall immediately take action for its recovery or reconstruction. He

shall also fix responsibility on the custodian if the document was on the index, or on the official whom the custodian relieved, if it was not on the index.

15. Reliance is placed on the case reported as Nazir Ahmad v. Muhammad Rafiq (1993 CLC 257) and Mst. Gul Begum and 17 others v. Mst. Rehmat Jan and 8 others (1995 CLC 1643), wherein the principle has been discussed that reconstruction of lost record is within the inherent power or authority of the Court concerned and having failed to raise such an objection before the trial or appellate Court cannot be allowed to be raised for the first time at the revisional stage.

16. Further reliance is placed on the case reported as Mst. Khudija Begum v. The State and others (PLD 1971 Baghdad-ul-Jadid 19), the relevant para whereof is reproduced as under:-

"The principle thus is found to have been established in our system of law and in almost every other system of jurisprudence, that the reconstruction of lost record is within the inherent power of the authority of Court, concerned with that record, in original, appellate or supervisory capacity."

17. The petitioner joined the proceedings and did not object during the proceedings regarding reconstruction of the lost file. The petitioner also did not raise such objection before the appellate Court, which satisfied his grievance that no important record of the suit was missing. Therefore, the reconstruction of file was correctly organized by the learned trial Court and on this score respondents Nos.1 and 2 cannot be deprived from their right which they successfully proved regarding their preferential right of pre-emption, the issue of preferential right was rightly decided in favour of respondents Nos.1 and 2. They were owner in the village before the sale of the land; during the proceeding of the pre-emption suit and till the decision of the suit. So, they had the preferential right of pre-emption qua the rights of the petitioner, who could not prove his ownership at the relevant required time. Hence the suit was decreed by the learned trial Court vide judgment and decree dated 01.12.2000, which was rightly upheld by the first appellate Court vide judgment and decree dated 01.07.2009.

18. Upshot of the above discussion is that the petitioner has failed to point any illegality in the judgments of both the Courts below, calling for interference in the revisional jurisdiction of this Court. The petition, therefore, fails and is accordingly dismissed with no order as to costs.

SA/G-18/L Revision dismissed.

2022 C L C 1815

[Lahore]

Before Safdar Saleem Shahid, J

MUHAMMAD ASHRAF----Appellant

Versus

RIAZ MAHMOOD----Respondent

R.F.A. No.31 of 2021, decided on 7th October, 2021.

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

----O.XXXVII, Rr. 2 & 3---Qanun-e-Shahadat (10 of 1984), Arts. 21 & 113---Suit for recovery---Cheque dishonoured on ground of insufficient balance---Respondent launched FIR which was cancelled by the Police---Respondent/plaintiff claimed that appellant demanded and received an amount of Rs.18,00,000/- and issued a cheque which was dishonoured---Appellant's application for leave to defend was accepted and he failed to comply with the Trial Court's direction to deposit surety bond equivalent to the amount mentioned in the cheque---Trial Court recalled its order due to non-compliance and decreed the suit---Appellant contended that witnesses had not proved execution of the cheque; that cheque was not produced through Bank employees and had not been exhibited in the statement of respondent as witness; that FIR lodged by respondent was cancelled by the police after due investigation as cheque was issued by the appellant in lieu of the alleged amount; that the appellant was a wealthy person, settled abroad since long and had no need to borrow said amount; that without framing the issues ex-parte evidence was recorded by the learned trial Court; that due to "Corona" virus crises and strike of revenue officials the appellant could not deposit the surety bond within time; that the appellant was not present in the Trial Court; that Trial Court took harsh step under O.XVII, R.3, C.P.C. instead of the initiation of the proceedings under O.XVII, R.2, C.P.C.; on the date of hearing for recording of evidence, but on that date evidence was recorded, the suit was decreed and the suit was converted into execution proceedings and Court issued the show-cause notice to appellant/judgment debtor---Validity---Appellant was given by the trial Court three opportunities to deposit the surety bond but he failed to deposit the same---Trial Court adjourned the case for recording of the ex-parte evidence and on the next hearing evidence of the respondent was recorded and the suit was decreed---Appellant did not file any application to get set aside the order of Trial Court, nor any application for

extension of time for deposit surety bond---Appellant, after initiation of execution proceedings, did not appear before the Court rather he filed present appeal and did not comply with its direction to deposit 50% of the decretal amount within 15 days---Appellant's conduct/attitude reflected that he was not entitled for any relief---Appellant, in his application for leave to defend, admitted that the cheque was issued by him, therefore, Trial Court had no need to record any evidence to prove such admitted fact---No plausible explanation was tendered by the appellant for non-depositing of the surety bond during the trial and non-depositing of the 50% decretal amount in execution proceedings---Record showed that, appellant's counsel was present but order of the Court was not complied with nor any application for extension of time was submitted---Appeal was dismissed accordingly.

Haji Ali Khan & Company Abbottabad and 8 others v. Messrs Allied Bank of Pakistan Limited Abbottabad PLD 1995 SC 362 rel.

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

----O.XXXVII, Rr. 2 & 3---Summary procedure---Judicial wisdom---Procedure for suit founded on the special documents was that defendant was not, as in ordinary suit, entitled as of right to defend the suit---Object underlying such procedure was to prevent unreasonable obstruction by defendant who had no good defence to put up---When it was a suit upon a bill of exchange/Hundi/Promissory note and the plaint/summonses were in the prescribed form, the defendant would not be allowed to appear/defend the suit unless he obtains leave from the Court.

Abdul Ghaffar Khan Chughtai for Petitioner.

Ms. Samina Qureshi for Respondent.

Date of hearing: 7th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through instant RFA, the appellant has challenged the validity of judgment and decree dated 26.01.2021 passed by learned Additional District Judge, Fort Abbas, whereby suit filed by Riaz Mahmood respondent.

2. Brief facts for disposal of instant appeal are that parties had relationship of trust inter se and on 01.08.2019 appellant/defendant came to respondent/plaintiff in presence of witnesses and demanded Rs.18,00,000/- for personal need with promise to return the same on 15.05.2020. On account of above said relations, respondent handed over the

said amount to the appellant and the appellant issued a cheque No. 15016255 dated 15.05.2020 of Meezan Bank Fort Abbas Branch. On the said date when respondent demanded the amount mentioned above, appellant sought some more time and afterwards refused to pay the said amount to the respondent. Upon which respondent presented the cheque in the bank for encashment which was dishonoured due to insufficient funds. Respondent also lodged FIR No. 531/2020, offence under Section 489-F, PPC, against the appellant at P.S. Fort Abbas but the local police recommended the case for cancellation. Respondent demanded the amount time and again from the appellant but in vain so respondent filed a suit for recovery of said amount before learned trial Court on 30.11.2020.

3. The appellant appeared before the Court and filed application for leave to defend on various grounds but on the statement of learned counsel for respondent dated 18.12.2020 application for leave to defend was accepted and appellant was directed to deposit surety bond equivalent to the amount mentioned in the cheque but after that learned trial Court recalled the order dated 18.12.2020 due to non-compliance vide order dated 18.01.2021 and on 26.01.2021 decreed the suit vide impugned judgment and decree of even date.

4. Learned counsel for the appellant has argued that impugned judgment and decree has been passed by the learned trial Court while ignoring the relevant law and facts of the case, therefore, same is not sustainable; witnesses have not proved execution of cheque in question in lieu of the payment of the amount as alleged by the respondent; cheque in question was not produced through bank employees and it has not been exhibited in the statement of PW-1/respondent which is violation of Qanun-e-Shahadat Ordinance, 1984; respondent also lodged FIR against the appellant which was cancelled by the police after due investigation as no such amount was given to the appellant and no cheque was issued by the appellant in lieu of amount mentioned therein; the appellant was a wealthy person and was settled in Canada for the last 30 years, therefore, there was no need to borrow said amount from the respondent; without framing the issues ex-parte evidence was recorded by the learned trial Court which is nullity in the eyes of law; in fact due to Corona virus crises and strike of revenue officials the appellant could not deposit the surety bond as directed by the Court; order of the Court recalling the order dated 18.12.2020 is totally against the law as the appellant did not appear on the said date; proceedings under Order XVII, Rule 2, C.P.C. could have been initiated but Court took harsh step and proceeded under Order XVII, Rule 3, C.P.C.; the case was

fixed for evidence on 26.01.2021 and on that date not only evidence was recorded but also the case was decreed and it was directed by the Court through same order that under amended Rule 10 of Order XXI of C.P.C., the suit is converted into execution proceedings and show-cause notice is issued to the judgment debtor that as to why decretal amount may not be recovered from him.

5. Learned counsel for the respondent argued that conduct of the appellant is obvious from the order sheet; on 18.12.2020 learned counsel for respondent made consenting statement that leave to defend application be allowed in the interest of justice and for speedy trial and to secure the Court time upon which said application of the appellant was allowed and direction was issued to him to deposit surety bond in the sum of Rs.18,00,000/- but appellant after obtaining three adjournments did not deposit the same; on 18.01.2021 he even did not himself appeared in the Court and the Court then struck of his defence and withdrew the order dated 18.12.2020 whereby application for leave to defend was allowed; after recording of the evidence the Court decreed the suit, therefore, there was no question of mis-reading and non-reading of evidence; even after withdrawal of the order dated 18.12.2020 the appellant did not file application for recalling the order and for extension of time for submitting surety bond under Section 148, C.P.C.; the appellant filed instant appeal but did not comply with the order of this Court pertaining to deposit of 50% of the decretal amount with learned Executing Court within 15 days and when his warrants of arrest were issued by the said Court then he made payment in the Court on 03.04.2021; all the proceedings were conducted by the learned trial Court strictly in accordance with law and cases Under XXXVII, Rules 1 and 2, C.P.C. are to be tried summarily; sufficient time was granted by the learned trial Court to the appellant to deposit the surety bond but he did not comply with the order of the Court, therefore, the Court rightly decreed the suit. Reliance in this regard is placed on the case of Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company (PLD 2006 Supreme Court 226) and Col. (R) Ashfaq Ahmed and others v. Sh. Muhammad Wasim (1999 SCMR 2832).

6. Arguments heard. Record perused.

7. It has been noticed that conduct of the appellant is to be considered that he appeared before the learned trial court on 07.12.2020 and also submitted an application for leave to defend which was allowed by the Court on the consenting statement of learned counsel for respondent with the direction to submit surety bond in the sum of Rs.18,00,000/- but thereafter the appellant did not deposit the same and got three

opportunities. The learned trial Court withdrew the order dated 18.12.2020 through which application of the appellant for leave to defend was allowed. Thereafter, the Court did not straight away decree the suit but adjourned the same for recording of the evidence and on the next date evidence of the respondent was recorded and the suit was decreed. The appellant did not bother to file any application to get set aside the order of that very Court. He also did not file any application under Order 148, C.P.C. for extension of time in order to deposit surety bond and even when the execution proceedings were initiated he did not appear before the Court rather he filed instant RFA. On 08.02.2021 this Court directed that "subject to deposit of 50% of the decretal amount with learned Executing Court within 15 days no coercive measures shall be adopted against the appellant" but he did not deposit the said amount and when his warrants of arrest were issued by the said Court then he deposited the said amount in the learned Executing Court on 03.04.2021 and thereafter filed an application with the prayer that deposit of aforesaid amount i.e. 50% of the decretal amount be considered within time. Such attitude reflects that appellant was not entitled for any relief as he failed to fulfill the conditions specified in the conditional order granted by the Courts firstly by the learned trial Court for depositing of the surety bond and then by this Court for depositing of 50% of the decretal amount. Issuance of cheque is admitted one. In the application filed by the appellant for leave to defend, he himself mentioned that he issued the cheque and the reason for issuing the cheque, he could not defend the same as he failed to deposit surety bond, therefore, to this extent that the cheque was issued by him was an admitted fact then there was no need for the learned trial Court to record any evidence to prove the same. The grounds taken by the appellant in the application for leave to defend are contrary to what he has shown during the proceedings of the suit before the learned trial Court as well as before this Court. No plausible explanation was tendered by the appellant for non-depositing of the surety bond in compliance of order of the learned trial Court dated 18.12.2020. Even otherwise, the appellant also remained unable to explain that why he has not followed the order of this Court dated 08.02.2021 and did not deposit the 50% of the decretal amount in time whereas his claim was that he is a wealthy man and he was not in need to borrow any amount from the respondent. Leave to defend was rightly refused by the Court and admission of the appellant is there regarding issuance of the cheque and the learned trial Court rightly decreed the suit. So-far-as the contention of the appellant counsel regarding this legal aspect of the proposition that the Court should have proceeded under Order 17(2), C.P.C. instead of struck off the defence of the appellant under Order 17(3), C.P.C. is concerned, the

record shows that on 18.01.2021, learned counsel for the appellant was present but order of the Court was not complied with. No application for extension of time was submitted by the appellant or on his behalf by his learned counsel, therefore, order passed by the learned trial Court for refusing leave to defend was justified and it was within the ambit of law. The essence of summary procedure for suits founded on the special documents as prescribed by Order XXXVII, C.P.C. is that defendant is not, as in ordinary suit, entitled as of right to defend the suit, the object underlying this procedure being prevent unreasonable obstruction by a defendant who has no good defence to put up. Therefore, when it is a suit upon a bill of exchange, Hundi or promissory note and the plaint and summonses are in the prescribed form, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so as to appear and defend the suit under Rule 2, sub-rule (2) of the Order. The words "as hereinafter provided" are plain and referred to Rule 3. So, Rules 2 and 3 must be read together. Rule 3 sub-rule (1), provides for the grounds on which the Court shall give leave to appear and defend. The defendant must make an application with affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts the Court may deem sufficient to support the application. The Court allowed the appellant to defend the suit but the appellant did not comply with the order of the Court so he was not entitled for any relief from the learned trial Court who rightly recalled the order for granting leave to defend. In this regard, reliance is placed on the case of Haji Ali Khan and company Abbottabad and 8 others v. M/s Allied Bank of Pakistan Limited Abbottabad (PLD 1995 Supreme Court 362). The appellant has failed to point out any illegality or irregularity in the impugned judgment and decree passed by learned trial Court calling for interference by this Court.

8. In view of what has been discussed above, instant RFA having no force stands dismissed. No order as to costs.

ZH/M-101/L Appeal dismissed.

2022 C L D 769

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

HABIB BANK LIMITED---Petitioner

Versus

FEDERATION OF PAKISTAN and others---Respondents

Writ Petition No. 3848 of 2021, heard on 7th September, 2021.

Banking Companies Ordinance (LVII of 1962)---

----S. 82-D--- Federal Ombudsmen Institutional Reforms Act (XIV of 2013), S. 9--- Constitution of Pakistan, Art. 175---Banking Mohtasib---Powers---Dispute, determination of---Jurisdiction---Petitioner Bank was aggrieved of order passed by Banking Mohtasib directing petitioner to make good loss caused to complainant---Validity---Banking Mohtasib had only power to entertain complaint and then to formulate recommendation in view of inquiry or report and then to submit it before concerned authority---Matters to decide rights or penalizing parties was specific prerogative of Courts---Loss to complainant was pointed by bank official so inquiry could be sent to the authority---Banking Mohtasib by exercising his capacity under S. 82-B of Banking Companies Ordinance, 1962, could not decide the matter as it related to judicial side---Banking Courts were constituted under law to deal with such matters---High Court set aside orders passed by Banking Mohtasib and maintained by appellate authority, as such orders were against law and in violation of Art. 175 of the Constitution---Constitutional petition was allowed in circumstances.

United Bank Limited v. Federation of Pakistan and others 2018 CLD 587 rel.

Rao Amer Faraz for Petitioner.

Muhammad Shahid Akhtar, Assistant Attorney General for Federation of Pakistan.

Date of hearing: 7th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Through instant writ petition, the petitioner/Bank has challenged the validity of orders dated 17.02.2020 and 10.12.2020 passed by Banking Mohtasib Pakistan/ respondent No.3 and President's Secretariat, Islamabad/ respondent No.2 whereby it was concluded that under the powers vested to him (Banking Mohtasib Pakistan) vide section 82-D of the BCO, 1962 read with section 9 of Federal Ombudsmen Institutional Reforms Act 2013, advise HBL/petitioner to make good the loss by crediting the complainant's account with remaining sum of Rs. 3,41,700/-.

2. Brief facts necessary for disposal of instant writ petition are that Muhammad Fazal respondent No.4 filed an application/complaint before respondent No.3/Banking Mohtasib Pakistan with the claim that the complainant having two accounts with HBL, on 07.11.2018, he had sent his employee to deposit some funds in his joint account and thereafter he was surprised to know that his joint account was debited through Internet Banking for an amount of Rs. 6,41,700/-, the detail of his accounts is mentioned in para No. 3(i) of instant writ petition; that the petitioner/Bank filed written statement and raised legal as well as factual objections as the claim was fake and bogus/fictitious and prayed for dismissal of the claim; that the complaint of respondent No.4 was heard and vide impugned order dated 17.02.2020 the complaint was accepted by respondent No.3 and Rs. 3,41,700/- was awarded to respondent No.4; that the impugned order dated 17.02.2020 was assailed by the petitioner/bank through Representation under section 14 of the Federal Ombudsmen Institutional Reforms Act 2013; that the respondent No.2 vide impugned order dated 10.12.2020 rejected the representation of the petitioner/bank. Hence instant writ petition.

3. It was contended by learned counsel for the petitioner/bank that respondents Nos.2 and 3 can only perform non-judicial function within the scope and preview of powers particularly oversee the observance by the banks of the policy directives of the State Bank of Pakistan, in respect of various banking operation and Finance and contrast the determination of facts under the law is alien to the non-judicial functions of respondents Nos.2 and 3; that respondents Nos.2 and 3 were not competent to decide the matter in issue; that malpractices of the bank officials and dispute involved

regarding the bank affairs can only be decided by the court of law under Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973; that being administrative bodies, the respondents Nos. 2 and 3 cannot perform the function and cannot exercise the judicial powers of the court created under Article 175 of the Constitution; that respondents Nos.2 and 3 passed the impugned orders on the complaint filed by a customer of the Bank and both the respondents adjudicated upon disputed question of facts which is within the jurisdiction of the courts and being executive authority Banking Mohtasib Pakistan cannot interfere in the judicial matters which do not come within his domain; that the respondents Nos. 2 and 3 exercised the judicial powers and functions under sections 10, 11, 12, 18 and 24 of the FOIRA which are in violation of provisions of the Articles 10-A and 175 of the Constitution of the Islamic Republic of Pakistan 1973; that jurisdiction of respondents Nos.2 and 3 in respect of the matter under sections 82-A and 82-B of the Banking Companies Ordinance 1962 were ousted after promulgation of the Payment System and Fund Transfer Act, 2007 as all such matters are to be decided by the court of competent jurisdiction constituted under section 55 of the above said Act; that impugned orders were passed by respondents Nos.2 and 3 without jurisdiction, against the law and facts, therefore, same are liable to be set aside .

4. Vide order dated 05.05.2021 notice was issued to respondent No.4 but he did not turn-up, therefore, he is proceeded against ex-parte.

5. Learned Law Officer defends impugned orders and submits that learned counsel for petitioner has failed to point out any illegality or material irregularity in the same, which are liable to be upheld.

6. Arguments heard. Record perused.

7. Perusal of record reveals that Muhammad Fazal respondent No.4 filed a complaint against the petitioner/HBL under section 82-D of the Banking Companies Ordinance 1962 before Banking Mohtasib Pakistan wherein it was alleged by him that he was running a joint Basic Banking Account Number 17647900077803 with his father Muhammad Nawaz with HBL Adda Pull Murad Branch Chishtian. It was further contended by him that he also runs a single account number No.01057902015603 in

his personal name with HBL Ghalla Mandi Branch, Chishtian. On 07.11.2018 he had sent his employee to deposit some funds into his joint account and upon making a balance enquiry he was surprised to know that his joint account was debited for an amount aggregating Rs. 6,41,700/- through internet banking without his consent or knowledge. He was not issued any ATM card for the joint account and used to withdraw money through cheques. The Bank/petitioner had not resolved his grievance despite his repeated requests.

8. During the proceedings before Banking Mohtasib Pakistan the petitioner/bank took stance that the complainant/respondent No.4 had received a call from a number similar to Bank's helpline, where caller portrayed himself a Bank representative and asked for personal credentials which he disclosed. The complainant's mobile Banking Application was created on 06.11.2018 after submission of his CNIC, Debit Card Number, ATM Pin Code and One time Activation Password, correctly. Further, IVR call back was made to complainant on his registered mobile number on 06.12.2018, where, confirmation of execution of financial transactions were observed. During 6/7 November, 2018, six beneficiary accounts were added to his account which required One Time Password.

9. After hearing both the parties, Banking Mohtasib Pakistan vide order dated 17.02.2020 concluded that under the powers vested to him vide section 82-D of the BCO 1962 read with section 9 of Federal Ombudsmen Institutional Reforms Act 2013, advise HBL/petitioner to make good the loss by crediting the complainant's account with remaining sum of Rs. 3,41,700/-. Being aggrieved by the said order, the bank/petitioner filed Representation before President's Secretariat, Islamabad which was rejected vide order dated 10.12.2020.

10. While seeking guidance from case reported as "United Bank Limited v. Federation of Pakistan and others" (2018 CLD 587) wherein it has been concluded that Banking Mohtasib Pakistan has no jurisdiction to decide the judicial matter. The appointment of the Banking Mohtasib Pakistan is made according to section 82-A of the Banking Companies Ordinance, 1962 which clearly maintains the terms and conditions of the

Banking Mohtasib Pakistan and also maintains the jurisdiction of Banking Mohtasib Pakistan .

The relevant portions of the said provision is reproduced as under:-

82A. Appointment of Mohtasib---There shall be a Banking Mohtasib who shall be appointed by the President in consultation with the Governor of the State Bank of Pakistan.

(2)

(3) The jurisdiction of the Banking Mohtasib in relation to banking transactions shall be to-

(a) enquire into complaints of banking malpractices:

(b) perverse, arbitrary or discriminatory actions;

(c) violations of banking laws, rules regulations or guidelines;

(d) inordinate delays or inefficiency; and

(e) corruption, nepotism or other forms of maladministration.

Similarly, section 82B sets out the power and authority of the Banking Mohtasib. Its operative part reads as under:-

82B. Terms and conditions of the Banking Mohtasib.-

(4) The Banking Mohtasib shall have the power and responsibility-

(a) to entertain complaints from customers, borrowers, banks or from any concerned body or organization;

(b) to facilitate the amicable resolution of complaints after giving hearings to the complainant and the concerned bank;

(c) to receive evidence on affidavit;

(d) to issue commission for the examination of witnesses; and

(e) in the event that complaints cannot be resolved by consent, to give finding which shall be acted upon in the manner set out herein.

(5) The Banking Mohtasib shall exercise his powers and authority in the following manner:--

(a) In relation to all banks operating in Pakistan:- The Banking Mohtasib shall be authorized to entertain complaints of the nature set out herein below:-

(i) failure to act in accordance with banking laws and regulations including policy directives or guidelines issued by the State Bank from time to time.

Provided that if there is a dispute as to the proper interpretation of any regulations, directions or guidelines, the same shall be referred to the State Bank for clarification.

(ii) delays or fraud in relation to the payment or collection of cheques, drafts or other banking instruments or the transfer of funds;

(iii) fraudulent or unauthorized withdrawals or debit entries in accounts;

(iv) complaints from exporters or importers relating to banking services and obligations including letter of credits;

(v) complaints from holders of foreign currency accounts, whether maintained by residents or non-residents;

(vi) complaints relating to remittances to or from abroad;

(vii) complaints relating to mark-up or interest rates based on the ground of a violation of an agreement or of State Bank directives; and

(viii) complaints relating to the payment of utility bills.

(b) In relation to banks in the public sector.- The Banking Mohtasib shall be authorized to entertain complaints against such banks on the following additional grounds as well-

(i) corrupt or mala fide practices by bank officers;

(ii) gross dereliction of duty in dealing with customers; and

(iii) inordinate delays in taking decisions; and

(c) The Banking Mohtasib shall not entertain any complaint or application which has already been disposed of by the State Bank, or any court in Pakistan.

The study of section 82A of the Ordinance shows that the jurisdiction conferred on the Banking Mohtasib relates primarily to enquire into the complaints filed by the customers on the malpractice and mal-administration of the banks/financial institutions and their officials with regard to the banking laws and regulations and policy directives issued by the State Bank of Pakistan. However, section 82B significantly expands the area of jurisdiction of Banking Mohtasib and allows him to exercise power and authority to entertain and adjudicate upon complaints filed, inter alia, regarding cases of fraud or delay in relation to banking instruments and/or transfer of funds, fraudulent/unauthorized entries or withdrawals from accounts. However, Banking Mohtasib Pakistan can only formulate the recommendations regarding those complaints and cannot decide the rights in between the parties or in between the bank and parties. Banking Mohtasib Pakistan cannot use the powers vested in a court. The courts are constituted under Article 175 of the Constitution and it provides the jurisdiction that can be exercised by the courts only. So the powers under Article 175 of the Constitution of Pakistan and the powers of Banking Mohtasib Pakistan under section 82B of the Banking Companies Ordinance, 1962 are altogether different and it cannot be conferred upon the administrative body.

Banking Mohtasib Pakistan has only power to entertain the complaint and then to formulate the recommendation in view of inquiry or report and then to submit it before the concerned authority. The matter to decide the rights or penalizing the parties is specific prerogative of the courts. The matter of loss to complainant has been pointed out by the bank official so inquiry can be sent to the authority whereas the Banking Mohtasib Pakistan by exercising his capacity under section 82B of the Banking Companies Ordinance, 1962 cannot decide the matter as it relates to the judicial side and for that the banking courts have been constituted under the law to deal with such matters. In these circumstances, I am of the considered view that both

the respondents (Nos. 2 and 3) erred in law while passing the impugned orders which are against the law and in violation of the Article 175 of the Constitution of Pakistan.

11. For what has been discussed above, instant writ petition is accepted and orders dated 17.02.2020 and 10.12.2020 passed by Banking Mohtasib Pakistan/respondent No.3 and President's Secretariat, Islamabad/respondent No.2 respectively are set aside. However respondent No. 4 can approach the banking Court concerned for redressal of his grievance if so advised.

MH/H-10/L Petition allowed.

2022 C L D 1058

[Lahore]

Before Safdar Saleem Shahid, J

HUMAYUN MIRZA---Petitioner

Versus

STATION HOUSE OFFICER, POLICE STATION SHAHPUR SADAR, TEHSIL SHAHPUR, DISTRICT SARGODHA and 8 others---Respondents

Writ Petition No. 41397 of 2020, decided on 23rd February, 2022.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 2(c)---Criminal Procedure Code (V of 1898), S. 22-A---Penal Code (XLV of 1860), S. 409---Criminal breach of trust by public servant, or by Banker, merchant or agent---Scope---Petitioner assailed order passed by Ex-officio Justice of Peace whereby his application under S. 22-A, Cr.P.C. was dismissed on the ground that the matter came within the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001---Case of petitioner was that a sugar mill had obtained the facility of loan from petitioner/Bank by pledging sugar bags---Bank appointed surveyors for security of the stock but during joint inspection came to know that the pledged sugar bags were missing---Bank alleged that the sugar bags were misappropriated/ sold/alienated by respondents/ proposed accused persons---Financial Institutions (Recovery of Finances) Ordinance, 2001 was only applicable where there was a relationship of customer and financial institution between the parties---Proposed accused persons did not come within the definition of customer---Surveyor, by virtue of its appointment, had become an agent of the Bank and had to act in accordance with such agency---Constitutional petition was accepted and the SHO was directed to record statement of petitioner.

Faisal Farooq and 3 others v. Station House Officer and another 2017 CLD 1 rel.

Muhammad Jawad Khan Lodhi for Petitioner.

Malik Javed Ali Dogar, Assistant Advocate-General and Ghulam Muhammad, ASI.

Madam Uzma Razzaq Khan for Private Respondents.

ORDER

SAFDAR SALEEM SHAHID, J.---Through this constitutional petition, Humayun Mirza petitioner has challenged the validity of order dated 24.08.2020 passed by learned Additional Sessions Judge/Ex-Officio Justice of Peace Shahpur District Sargodha, whereby, direction was not issued to SHO concerned for registration of FIR against the proposed accused persons/respondents.

2. Learned counsel for the petitioner contended that from the contents of application under section 22-A, Cr.P.C submitted by the petitioner before the learned Ex-Officio Justice of Peace commission of cognizable offence was made out against the proposed

accused persons but learned Ex-Officio Justice of Peace dismissed the aforementioned application of the petitioner without any lawful justification; that learned Ex-Officio Justice of Peace dismissed the application of the petitioner on the ground that matter comes within the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001, therefore, said court lacks jurisdiction to entertain the application of the petitioner under section 22-A/B Cr.P.C, rather, Banking Court constituted under the aforesaid Ordinance is competent to take action against criminal act as well as civil act performed by the parties; that the observation of learned Ex-Officio of Justice of Peace is against the law and facts because in the instant case there is no relationship of customer and financial institution between the parties, rather, as per allegations as narrated by the petitioner in application under section 22-A, Cr.P.C submitted by him before the learned Ex-Officio Justice of Peace, Messrs Al-Arabia Sugar Mills limited obtained facility of specific loan from Faisal Bank and pledged the sugar bags as a security and thereafter Bank appointed M/s Atlantic Surveyors (Pvt.) as Muccadum for security of said sugar bags which were allegedly misappropriated/sold/alienated by the respondents/ Muccadum (proposed accused persons), therefore, commission of cognizable offence is made out against the proposed accused persons. Thus, it is prayed that by accepting this petition, impugned order dated 24.08.2020 passed by learned Ex-Officio Justice of Peace Shahpur District Sargodha is liable to be set aside and direction be issued to SHO concerned to register FIR against the proposed accused persons.

3. Learned counsel for respondents has vehemently opposed this petition on the grounds that from the contents of application under section 22-A, Cr.P.C submitted by the petitioner before the learned Ex-Officio Justice of Peace commission of cognizable offence was not made out against the proposed accused persons; that learned Ex-Officio Justice of Peace has rightly dismissed the application of the petitioner by observation that matter comes within the definition of Financial Institutions (Recovery of Finances) Ordinance, 2001 and Banking Court has exclusive jurisdiction to take action against a criminal act as well as civil act performed by the parties. Thus, it is submitted that instant petition is liable to be dismissed.

4. Arguments heard. Record perused.

5. According to allegations as narrated by the petitioner/Bank in application under section 22-A, Cr.P.C submitted by him before learned Ex-Officio Justice of Peace, one Messrs Al-Arabia Sugar Mills Limited obtained the facility of specific loan from Faisal Bank/petitioner as per agreement arrived at between Bank and Messrs Al-Arabia Sugar Mills Limited by pledging the sugar bags. It has further been submitted in the application that for the purpose of security/safety of pledged stock, the Bank appointed Messrs Atlantic Surveyors (Pvt.) Limited as Muccadum. On 07.05.2020 the Bank conducted a joint inspection of the Godowns at Shahpur Sadar wherein it came into the knowledge of the Bank that 1,77,890 pledged sugar bags were found missing

which were allegedly misappropriated/sold/alienated by the respondents/proposed accused persons.

6. It has been noticed that an agreement was executed between the Bank and Atlantic Surveyors (Pvt.) Limited, a company carrying on business of Muccadam. According to terms and conditions of the said agreement it was primarily duty of the Muccadam/respondents (proposed accused persons) to secure the pledged stock (sugar bags) which were lying in the Godowns, in its custody and possession. As per allegation narrated by the petitioner/Bank in application under section 22-A, Cr.P.C submitted by him before learned Ex-Officio Justice of Peace, the respondents/proposed accused persons committed theft of sugar bags (1,77,890 pledged sugar bags) and misappropriated the same. It is settled law that Financial Institutions (Recovery of Finances) Ordinance, 2001 is only applicable where there is a relationship of "customer" and " financial institution" between the parties. In the given circumstances, the Muccadam/proposed accused persons neither come within the definition of Financial Institutions (Recovery of Finances) Ordinance, 2001 nor as customer, rather, they had been appointed as Muccadam by the Bank for the purpose of security/safety of the pledged stock of Messrs Al-Arabia Sugar Mills Limited. The definition of "customer" as defined in section 2(c) of Financial Institutions (Recovery of Finances) Ordinance, 2002 is reproduced as under for ready reference:- "Customer" means a person to whom finance has been extended by a financial institution (within or outside Pakistan) and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier; Admittedly the respondents/proposed accused are the employees of Atlantic Surveyors (Pvt.) limited, a company carrying on business of Muccadam. From the above said definition, the Muccadam does not come within the definition of "customer" rendering the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001, rather it is applicable to the company Messrs Al-Arabia Sugar Mills Limited which had obtained a loan facility from the Faysal Bank Limited. From the contents of application under section 22-A, Cr.P.C submitted by the petitioner, it clearly shows that allegation of misappropriation/theft of pledged sugar bags has been levelled by the petitioner against the Muccadam. In the case law reported as "Faisal Farooq and 3 others v. Station House Officer and another (2017 CLD Lahore 1) wherein Division Bench of this Court observed in paragraph No.13 of the judgment as under:-

"It can be seen that the provisions of sections 408 and 409, P.P.C. are of a much wider import and encompass within themselves prosecution against certain individuals and persons other than the customers of the financial institutions who have executed certain documents with the financial institutions. Thus, in case the prosecution is sought to be launched against a clerk or a servant of a customer or it is sought to be included in the prosecution any of the bankers, agents, attorneys or brokers who have committed a

criminal breach of trust in respect of property, that may only be brought in terms of sections 408 and 409, P.P.C. and not under the Ordinance, 2001. Further, if prosecution is sought to be initiated by any other person other than a financial institution, it can only be done under the general law and not under the Ordinance, 2001. In most cases, the Muqaddam appointed by the banker is also sought to be prosecuted and it is clear that no prosecution can be brought against the Muqaddam under the Ordinance, 2001 and proceedings will necessarily have to be initiated under the general law. This begs the question; if the criminal complaint or FIR includes the name of accused other than customers then can it be said that the prosecution can only lie under section 20, of the Ordinance, 2001 and under no other law? To lay down such a proposition will be fallacy and irrational and would be tantamount to a complete ouster of the general jurisdiction to register cases conferred upon the officers under the Cr.P.C and taking of cognizable of such offences by the Courts under the general law or under the special law relating to banks which can take cognizance of scheduled offences".

Keeping in view the facts and circumstances of the case and while seeking guidance from aforesaid case law, the Muccadam by virtue of its appointment becomes an agent of the Bank and has to act in accordance with such agency. However, if the agent commits a criminal act, then such criminal acts comes under the general law (under the jurisdiction of Pakistan Penal Code and Criminal Procedure Code) and not under any Special law. Learned Ex-Office Justice of Peace while passing the impugned order erred in law by holding that matter comes within the definition of Financial Institutions rendering special law. Prima facie from the contents of aforesaid application, commission of cognizable offence was made out against the proposed accused persons. Keeping in view the facts and circumstances of the case, this court has reason to believe that observation of learned Ex-Officio Justice of Peace, that matter comes within the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001, therefore, said court lacks jurisdiction to entertain the application of the petitioner under sections 22-A/B, Cr.P.C, rather, Banking Court constituted under the aforesaid Ordinance is competent to decide the matter, is against the law and facts.

7. For what has been discussed above, instant petition is accepted and impugned order dated 24.08.2020 passed by learned Ex-Officio Justice of Peace, Shahpur District Sargodha is set aside. Station House Officer Police Station Shahpur Saddar District Sargodha, is directed to record the statement of the petitioner and to act and proceed strictly in accordance with law keeping in view the provisions of section 154, Cr.P.C.

SA/H-12/L Petition accepted.

2022 C L D 1318

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

MUHAMMAD AFZAL---Appellant

Versus

MUHAMMAD ASLAM---Respondent

R.F.A. No. 1 of 2021, decided on 28th September, 2021.

Negotiable Instruments Act (XXVI of 1881)---

----S. 118---Civil Procedure Code (V of 1908), O. XXXVII, Rr. 1 & 2---Recovery of money---Negotiable instrument---Expression "until the contrary is proved"---Scope---Presumption conclusive/rebuttable---Suit filed by respondent/plaintiff was decreed in his favour for recovery of Rs.4,000,000/- on the basis of Bank cheque which was dishonoured on presentation---Validity---Conclusive presumption was not envisaged under S. 118 of Negotiable Instruments Act, 1881, about drawing consideration etc. of negotiable instrument---Such presumption was rebuttable in nature and such was clear and obvious from the expression "until the contrary is proved" used in S. 118 of Negotiable Instruments Act, 1881---Respondent/plaintiff failed to prove his case as setup and that as to why he had paid a huge amount of Rs. 4,000,000/- to appellant/defendant simply on his request who had no blood or family relationship with him---High Court reversed findings of Trial Court on relevant issues and the same were decided in favour of appellant/defendant---High Court set aside judgment and decree passed by Trial Court, as it failed to appreciate evidence on record and committed an error while passing judgment and decree---Appeal was allowed, in circumstances.

Salar Abdul Rauf v. Mst. Barkat Bibi 1973 SCMR 332 rel.

Muhammad Arslan Asghar Ch. and Sardar Muhammad Afzaal for Appellant.

Muhammad Asif Mehmood Pirzada and Ch. Sajad Haider Duggal for Respondent.

Date of hearing: 28th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Against the judgment and decree dated 10.11.2020 passed by learned Addl. District Judge Hasilpur, whereby suit filed by respondent/plaintiff for recovery of 40,00,000/- on the basis of cheque under Order XXXVII, Rules 1, 2, C.P.C. was decreed, instant appeal has been preferred.

2. The brief facts of the case are that respondent/plaintiff filed the aforesaid suit against the appellant/defendant on the basis of cheque No.82485952 dated 22.10.2015 pertaining to Habib Metropolitan Bank Ltd, Hasilpur issued by the appellant/defendant with the assertion that there was cordial business relations between the parties inter-se; that in the month of November, 2015 the appellant/defendant came to respondent/plaintiff and demanded an amount of Rs. 40,00,000/- in order to meet his personal needs for sending some persons to Saudi Arabia; that the respondent/plaintiff handed over the aforesaid amount to appellant/defendant in presence of the witnesses namely Muhammad Boota and Tanvir and issued the aforesaid cheque in favour of respondent/plaintiff and it was promised by the appellant/defendant to return the said amount on due date; that on 27.10.2015 the respondent/plaintiff presented said cheque in the bank which was dishonoured; that the respondent/plaintiff filed an application under sections 22-A/22-B, Cr.P.C seeking registration of criminal case before the then learned Addl. Sessions Judge/Ex-Officio Justice of Peace, Hasilpur and on the direction of said court case FIR No.519/2016 under section 489-F, P.P.C. was registered at Police Station City Hasilpur; that the appellant/defendant is bound to pay the said amount to him; that the appellant/defendant has been asked repeatedly to pay his amount along with 20% profits but he refused to do so.

3. The appellant/defendant moved an application for leave to appear and defend the suit which was allowed by the learned trial court vide order dated 03.12.2018. The appellant/defendant contested the suit by filing written statement alleging therein that nothing was outstanding against him. Out of divergent pleadings of the parties, following issues were framed:-

ISSUES:

1. Whether the plaintiff is entitled to recover Rs. 40,00,000/- from the defendant on the basis of cheque No.82485952 relating to Habib Metropolitan Bank Ltd. Hasilpur? OPP.

2. Whether the alleged cheque is result of fraud, forgery as the defendant issued two open cheques as guarantee and two stamp papers including the impugned cheque to plaintiff in lieu of amount of Rs. 4,30,000/- loan which has been paid by him and as such the suit is liable to be dismissed? OPD

3. Whether the plaintiff has no cause of action to file this suit". OPD

4. Relief.

4. The plaintiff examined four witnesses including his statement as PW-1 and also tendered on record the original cheque Exh.P-1, Memo thereof as EXh.P2. The plaintiff/respondent (P.W-1) in his examination-in-chief deposed that four years prior to the institution of the suit the appellant/defendant Muhammad Afzal came to him and demanded an amount of Rs. 40,00,000/- on the pretext of sending some persons to Saudi Arabia. After 4/5-days he handed over the said amount to appellant/defendant in presence of witnesses namely Muhammad Boota, Zulfiqar and Tanvir Ahmed whereupon he (Muhammad Afzal appellant) delivered cheque (Exh.P1) to him but the said cheque was dishonoured on its presentation in the bank. It was further alleged by P.W-1 that he also lodged a criminal case under section 489-F, P.P.C. against the appellant on the basis of said cheque. Muhammad Boota P.W-2 deposed that in the year 2014 he along with P.W Zulfiqar was present at the house of the respondent, in the meanwhile Muhammad Afzal appellant and his uncle came over there and respondent handed over an amount of Rs.40,00,000/- to appellant whereupon he (Muhammad Afzal appellant) delivered cheque Exh.P.1 to respondent. It was further alleged by P.W-2 that he has no knowledge whether it was an open cheque or not. P.W-3 Zulfiqar deposed in accordance with the version of P.W-2. On the other hand the appellant/ defendant/DW-1 deposed that in fact he obtained an amount of Rs. 4,30,000/- as a loan from the respondent and in this regard he delivered two open cheques and two stamp papers to respondent as a security/ guarantee; that on the date fixed the respondent demanded for return of his amount whereupon the appellant approached the close friend of the respondent namely Munir Ahmad who used to work of interest with the respondent, for payment of disputed amount and he agreed to pay the said amount, however said Munir Ahmad also demanded Rs. 2,00,000/- as interest from the appellant upon which said Munir Ahmad called the respondent through telephonically and paid the whole amount to the respondent but he did not return his surety cheques and stamp papers, rather used the same against the appellant/defendant on the basis of mala fides. DW-2 also deposed in line with DW-1. In documentary evidence he produced the copy of FIR No.139 of 2016 under sections 3/4 of Money Laundering Act Police Station Saddar Hasilpur as Mark 'A'.

5. Learned counsel for the appellant/defendant contended that appellant neither obtained any amount from the respondent nor issued the cheque in question in his favour; that in fact the appellant obtained an amount of Rs. 4,30,000/- as a loan from the respondent and in this regard he delivered two open cheques and two stamp papers to respondent as a security/guarantee; that on the fixed date the respondent demanded for return of his

aforesaid amount whereupon the appellant approached the close friend of the respondent namely Munir Ahmad who also used to work of interest with the respondent, for payment of disputed amount who agreed to pay the said amount, however said Munir Ahmad also demanded Rs. 2,00,000/- as interest from the appellant upon which the said Munir Ahmad called the respondent on telephone and paid the whole amount to the respondent; that the appellant demanded for return of cheques and stamp papers from the respondent who delayed the same on one pretext or the other and thereafter he got registered case FIR No.519/2016 offence under section 489-F, P.P.C. at Police Station City Hasilpur; that the respondent is notorious blackmailer and usurer person and this fact has been admitted by the respondent in his cross-examination; that during cross-examination the respondent/PW-1 admitted that a criminal case FIR No.139 of 2016 regarding Punjab Prohibition of Private Money Lending Act 2007 was registered against him at the instance of one Muhammad Shafi (close relative of the appellant); that evidence of P.W-2 and P.W-3 is not trustworthy and confidence inspiring because the said witnesses are involved in immoral activities who are companions of the respondent; that neither the respondent nor the P.Ws had mentioned any specific date in the plaint or in evidence as to when the loan amount was advanced to the appellant/defendant; that the respondent has failed to produce cogent evidence in order to establish his financial position and capacity to pay such a huge amount as loan; that in fact complainant of aforesaid FIR is close relative of the appellant, therefore, on the basis of said grudge the complainant did not return the disputed cheques and stamp papers to appellant/defendant and thereafter used the said cheques against the appellant on the basis of mala fide; that Muhammad Boota who was cited as eye-witness in case FIR No.519 of 2016 offence under section 489-F, P.P.C. registered against the appellant at the instance of respondent, totally denied the plaintiff's version by recording his statement before the I.O vide diary No.14 dated 02.10.2018 with the claim that neither the appellant obtained an amount of Rs. 40,00,000/- from the respondent in his presence nor he had any knowledge regarding the alleged transaction and his pre-arrest bail was confirmed by this Court vide order dated 16.01.2019; that respondent mentioned two eye-witnesses namely Tanvir and Muhammad Boota in the FIR registered under section 489-F, P.P.C. regarding the disputed cheque whereas in the suit name of Zulfiqar P.W is also mentioned along with said Tanver and Boota P.Ws, therefore he has made improvement in the suit; that P.W1/respondent during his cross-examination contended that the appellant along with his uncle came to the respondent for obtaining the amount whereas P.W2 and P.W-3 took a different stance that the appellant came alone for obtaining the money; that P.W-1 took stance in FIR that he had handed over the amount

to the appellant in court premises but in the suit as well as in his statement he took a contrary stance that the said amount was handed over to appellant in his drawing room; that learned trial court while passing the impugned judgment and decree did not consider the evidence available on record in its true perspective and passed the impugned judgment without discussing the material available on record which is not sustainable in the eye of law. Thus, it is submitted that by accepting instant appeal impugned judgment and decree passed by learned trial court is liable to be set aside and suit of the respondent be dismissed.

6. On the other hand, learned counsel for respondent defends the impugned judgment and decree 10.11.2020 and submits that learned counsel for appellant has failed to point out any illegality or material irregularity in the same, which is liable to be upheld; that appellant obtained an amount of Rs. 40,00,000/- from the respondent as loan in presence of witnesses Muhammad Boota, Zulifqar and Tanvir Ahmad on the pretext of sending some persons to Saudi Arabia and issued cheque Exh. P1 and thereafter the appellant did not return the said amount on the due date and the cheque was dishonoured on its presentation in the bank; that execution of cheque Exh.P-1 has not been denied by the appellant; that the witnesses of the respondent have fully supported the version of the respondent; that the respondent/plaintiff by producing trust worthy and confidence inspiring evidence has proved its case against the appellant and learned trial court has decreed the suit in accordance with law after taking into consideration the evidence lead by the parties. Thus, it submitted that instant appeal is liable to be dismissed.

7. Arguments heard. Record perused.

8. In the plaint the respondent/plaintiff has not mentioned the date, time and place when an amount of Rs. 40,00,000/- was handed over to appellant/defendant. In the plaint the plaintiff/ respondent took stance that the aforesaid amount was handed over to appellant Muhammad Afzal in presence of witnesses Tanvir and Muhammad Boota whereas the respondent/plaintiff while appearing as P.W-1 before the learned trial court made improvement by contending that Zulfiqar P.W was also present at that time but said P.W (Zulfiqar) was neither cited as witness in the FIR nor in the plaint. The plaintiff/respondent in his statement has also not disclosed the date, place and time when the appellant came to him and demanded the money from him and thereafter he handed over the amount to appellant simple on his request. P.W-1 in his statement took stance that appellant came alone and obtained the amount from him on the pretext of sending some persons to Saudi Arabia but Muhammad Boota (P.W-2) and Zulfiqar Ali

P.W-3 deposed contrary that Muhammad Afzal appellant and his uncle came at the house of the respondent/plaintiff where he gave the amount to appellant and it was not disclosed by the appellant that the said amount is required for sending some persons to Saudi Arabia. During cross-examination he stated that he is not the owner of any land, rather he used to cultivate the land on lease. During cross-examination, he also stated that he runs the business of sale and purchase of wheat and cotton but he has no shop for such business. It was also contended by him that he has no cash book or maintains the record regarding his business and he does not pay any tax to Govt. of Pakistan in this regard.

It was also admitted by P.W-1 during cross-examination that the appellant/defendant has no business in Pakistan. He further stated that besides Muhammad Afzal appellant he also gave an amount of Rs. 30,00,000/- to Muhammad Sajjad as a loan and he filed suit for recovery of said amount against him. PW-1 further stated that he also delivered an amount of Rs. 14,00,000/- to Muhammad Shafi and Muhammad Shahbaz as a loan who are the close relative of the appellant but they did not pay the said amount to him. During cross-examination he admitted that said Muhammad Shafi (relative of appellant) got registered a criminal case FIR No.139/2016 under sections 3/4 of the Punjab Prohibition of Private Money Lending Act, 2007 against him at Police Station Saddar Hasilpur. He also stated that he used to cultivate the land of Muhammad Munir brother of Muhammad Tanvir P.W.

9. From the evidence it is crystal clear that the respondent has not been able to establish that in the year 2014 he had such a financial position and capacity to pay such a huge amount as a loan to appellant as well as other persons. It is quite improbable that such a substantial amount shall be given by the respondent/plaintiff to appellant simple on his request who has no blood or family relation.

Mere the fact that respondent/plaintiff is in cultivating the land on lease belonging to Muhammad Munir brother of Muhammad Tanvir P.W.

Although Muhammad Tanvir was cited as witness in the plaint as well as in the FIR but admittedly he was not produced before the learned trial court, in this way, best evidence has been withheld by the respondent/plaintiff, thus, an adverse inference under illustration (g) to Article 129 of the Qanun-e-Shahadat Order, 1984 could easily be drawn that in case he was produced he would not have supported plaintiff's version.

The evidence of respondent/plaintiff (P.W-1) is not reliable, trustworthy and confidence inspiring because he is involved in Punjab Prohibition of Private Money Lending Act

2007 case and this fact was confirmed by him during his cross-examination that case FIR No.139 of 2016 regarding Money Lending was also registered against him.

10. In the plaint as well as in the FIR the respondent took stance that appellant had obtained an amount of Rs. 40,00,000/- from him as a loan for sending some persons to Saudi Arabia but no evidence has been produced by the respondent in order to establish that appellant was running the business of travelling agency or he had established any office for providing employment Visas to the people. The respondent/plaintiff failed to prove any business of the appellant to invest the amount. It has further been noticed that pertaining to disputed cheque the respondent lodged case FIR No.519 of 2016 offence under section 489-F, P.P.C. at Police Station City Hasilpur. Muhammad Afzal appellant filed his pre-arrest bail petition through Criminal Misc. No.3214-B of 2018 and his pre-arrest bail was confirmed by this Court vide order dated 16.01.2019 on the ground that

"one of the witness namely Muhammad Boota, mentioned in the FIR, in whose presence the petitioner/appellant allegedly borrowed the amount, has totally denied the prosecution's story by recording his statement with the I.O vide zimini No.14 dated 02.10.2018, stating that neither the appellant obtained Rs. 40,00,000/- from the respondent in his presence nor he has any knowledge in this regard. During investigation vide zimini No.14 dated 02.10.2018, it has also been concluded that actually the appellant borrowed Rs. 4,30,000/- instead of Rs. 40,00,000/- from the respondent and appellant issued two cheques and a blank stamp paper as guarantee to the respondent in this regard and he had already paid the said amount to the respondent.

Muhammad Boota appeared as P.W-2 before the learned trial court and his version/statement is totally contrary to the stance taken by him before the I.O during the investigation.

11. Section 118 of the Negotiable Instruments Act, 1881, does not envisage a conclusive presumption about drawing consideration etc of the negotiable instrument, rather, without any fear of contradiction, it can be held to be rebuttable in nature and this is so clear and obvious from the expression used in the Section i.e

"until the contrary is proved".

The question, which shall thus arises for the consideration is that where a claim is propounded on the basis of a negotiable instrument, is it necessary and imperative in all such cases that the defendant should prove in the negative, that he has not drawn the instrument and that it is without consideration or it is for the plaintiff to discharge the

initial burden of proving his case in this regard especially when the plaintiff has undertaken to prove that the negotiable instrument (cheque) has been duly executed for the consideration by not only that Issue No.1 has been framed in this case, which has placed the onus in this behalf upon the respondent/plaintiff rather he himself led evidence to prove the payment of the money through two witnesses PW-2 and PW-3, his own statement, therefore, as per the judgment reported as Salar Abdul Rauf v. Mst. Barkat Bibi (1973 SCMR 332), the respondent/plaintiff is precluded in law to urge in this case that it was for the respondent to prove to the contrary.

12. Keeping in view the evidence available on record the respondent/plaintiff failed to prove his case as setup and that as to why he had paid a huge amount of Rs. 40,00,000/- to appellant/defendant simple on his request who had no blood or family relationship with him. In these circumstances, the findings of learned trial court on issues Nos.1, 2 and 3 are reversed and same are decided in favour of the appellant/defendant.

The learned trial court failed to appreciate the evidence on record and committed an error while passing the impugned judgment and decree dated 10.11.2020.

Thus, instant appeal is accepted, judgment and decree dated 10.11.2020 passed by learned Addl. District Judge Hasilpur is set aside. Resultantly, the suit of the respondent/ plaintiff for recovery of an amount of Rs. 40,00,000/- on the basis of cheque under Order XXXVII, rules 1, 2, C.P.C. is dismissed. No order as to costs.

MH/M-105/L Appeal allowed.

2022 M L D 54

[Lahore]

Before Safdar Saleem Shahid, J

MAQBOOL AHMAD---Petitioner

Versus

MANZOOR HUSSAIN and 3 others---Respondents

Writ Petition No.8228 of 2017, decided on 26th May, 2021.

(a) Punjab Rented Premises Act (VII of 2009)---

----S.15---Eviction of tenant---Rent Petition---Description of demised-property in rent petition---Scope---Wisdom behind the requirement to mention in detail the description of demised-property in rent petition was to ascertain the right of the tenant and landlord over the mentioned premises---Any portion which was part of the property, but not subject to rent deed, order of Rent Tribunal would not be operative against the same---Any person under possession of such portion would not be subjected to the eviction order---Although law had given its way to exercise against such person, but the status of that person regarding his possession had to be defined/specified by the claimant/owner.

Allah Bakhsh v. Allah Yar and others 2015 CLR 1522 and Muhammad Sharif and another v. Malik Abdul Razzaq and others 2011 MLD 736 ref.

(b) Punjab Rented Premises Act (VII of 2009)---

----S.28---Appeal, filing of---Limitation---Appeal filed by the eviction petitioner before the Appellate Court was barred by time for three days---Held, that the petitioner had failed to explain the delay as required by the law, as such the same was rightly dismissed by the Appellate Court---Constitutional petition was dismissed, in circumstances.

Tariq Mahmood Bhalli for Petitioner.

Malik Abdul Wahid for Respondents Nos.2 and 3.

Nemo for Respondent No.1.

ORDER

SAFDAR SALEEM SHAHID, J.----Through the instant petition the petitioner has called into question the legality of the order dated 07.01.2017 passed by the learned

Special Judge Rent, Sialkot and the order dated 06.03.2017 passed by the learned Additional District Judge, Sialkot.

2. Brief facts are that an ejectment petition filed by the petitioner for eviction of respondent No.1 from a house, measuring 5-marlas, situated at Mohallah Pura Heeran, Rangpura, Sialkot, was accepted on 18.11.2015 and during the execution proceedings respondents No.2 and 3 filed an objection petition claiming that ejectment order has been obtained by concealing real facts. Along with the objection petition they also moved an application for appointment of local commission with the contention that the petitioner was well aware of the fact that the property in dispute had domestically been partitioned. The petitioner contested both the applications by filing replies thereto. The learned Special Judge Rent, however, taking into consideration the material brought on record and contentions of the parties, while dismissing the application for appointment of local commission, accepted the objection petition with the observation that warrant of possession be issued only against respondent No.1 without disturbing the possession of the objectors/respondents Nos.2 and 3, through order dated 07.01.2017. The petitioner challenged the said order by filing an appeal on 11.02.2017, which was dismissed by the learned Additional District Judge, Sialkot through order dated 06.03.2017, without touching the merits on the ground of being barred by time for three days. The petitioner has now assailed both said orders through the instant petition.

3. Respondent No.1 has not put in appearance, whereas respondents Nos.2 and 3 are represented through counsel, who argued that the ejectment petition was filed against respondent No.1 only. It is a special law, therefore, the eviction order is not applicable to the extent of respondents Nos.2 and 3, who were already residing in the house in question.

4. Arguments heard. Record perused.

5. Perusal of the record shows that the petitioner and all the three respondents are brother inter-se and the house in question was admittedly owned by their mother, which as per claim of the petitioner was purchased by him through registered sale deed No.1528 dated 30.04.2014, whereas respondents Nos.2 and 3, claiming the disputed house to have been partitioned amongst them by their mother, submitted that the alleged sale deed is a forged document and has been obtained taking benefit of old age of their mother. The petitioner did not mention in the ejectment petition that respondents Nos.1 to 3 were residing in the same house, but in different rooms, as claimed by respondents

Nos.2 and 3/objectors. The petitioner filed ejectment petition only against respondent No.1. During the proceedings of objection petition, however, the petitioner failed to negate the fact that respondents Nos.2 and 3/objectors were also residing in a portion of the same house.

6. The purpose of special law is to provide protections to the right of the owner as well as tenant. Wisdom behind the requirement to mention in detail the description of property in rent petition is to ascertain the right of the tenant and landlord over the mentioned premises. Any portion which is part of the property, not subject to rent deed, no order of Rent Tribunal will be operative against it. Any person under possession of such portion will not be subject to the eviction order. Nobody can be condemned unheard. Law has given its ways to exercise against such person. But the status of that person regarding his possession has to be defined / specified by the claimant/owner.

7. It is notable that the learned Special Judge Rent has no concern with the ownership of the premises when the relationship of landlord and tenant is admitted between the parties but the question remains that why the petitioner did not implead respondents Nos.2 and 3/objectors in the ejectment petition. Even if it is considered that after filing of the ejectment petition the objectors got possession of the house, there was a way to file a suit for possession against them or another application before the learned Special Judge Rent. The learned Special Judge Rent has passed a legal order on the objection petition of respondents Nos.2 and 3/objectors because neither the petitioner filed ejectment petition nor during the pendency of the whole proceedings this fact was brought before the Court that some of the portion of the premises was in possession of respondents Nos.2 and 3/objectors. Even at the time of filing the execution petition this fact was concealed by the petitioner, as such the order of eviction was not applicable to the extent of respondents Nos.2 and 3/objectors. Reliance in this regard is placed upon the case of Allah Bakhsh v. Allah Yar and others (2015 CLR 1522), wherein it has been held as under:-

"On the other hand, admittedly respondents Nos.1 to 4 were neither party in the ejectment decree nor they were impleaded in the execution petition and it was incumbent upon the petitioner to have impleaded the respondents Nos.1 to 4 as party in whose absence the ejectment order having caused prejudice to respondents Nos.1 to 4 would not be executable as nobody can be condemned unheard."

8. In another case reported as Muhammad Sharif and another v. Malik Abdul Razzaq and others (2011 MLD 736), it was held as under:-

"When it was well in knowledge of respondent No.1 that the petitioners are in possession of the suit property since decades but respondent No.1 did not implead the petitioners Muhammad Sharif and Shujah Butt as party, the order of Rent Controller could not be executed against them. Because an order, or a decree is binding only against a party to the suit and not on strangers."

9. Even otherwise, appeal filed by the petitioner before the learned Additional District Judge was barred by time for three days and learned counsel for the petitioner failed to explain the delay as required by law, as such the same was rightly dismissed. The learned counsel for the petitioner has failed to satisfy the Court even on the point of limitation.

10. The learned counsel has not been able to point out any material illegality or irregularity in the orders passed by the Courts below.

11. Under the circumstances, the petition fails and is accordingly dismissed with no order as to costs.

MQ/M-122/L Petition dismissed.

2022 M L D 731

[Lahore]

Before Safdar Saleem Shahid, J

SAMIA ANWAR and another---Petitioners

Versus

NASIR HUSSAIN and 2 others---Respondents

Writ Petition No.32224 of 2015, decided on 10th January, 2022.

(a) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of maintenance, delivery charges and dowry articles---Petitioner/plaintiffs (wife) claimed that respondent (husband) behaved cruelly and ousted the petitioner from his house (in 4th month of marriage); that minor was born out of wedlock; that respondent was working abroad and owned land and could pay maintenance of Rs.30,000/- per head/per month; that he pronounced divorce; that he had refused to pay maintenance and delivery charges of Rs.40,000/- incurred by petitioner---Respondent, in written statement, alleged that petitioner left his house nearly 4 years after marriage and refused to rehabilitate; that on petitioner's demand, he pronounced divorce on 20/05/2013; and that he was ready to return dowry articles as per his list attached with written statement---Trial Court decreed suit holding the wife entitled to recover of Rs.7000/- per month as maintenance till the period of Iddat, whereas minor was held entitled to Rs.7000/- per month from the said date; and suit to the extent of recovery of delivery expenses was dismissed---Appeals filed by both parties were dismissed by District Court---Held, that matter regarding recovery of dowry articles was settled during pendency of suit---Petitioner/wife admitted in cross-examination that minor was born in hospital through normal delivery; that she had no proof regarding financial income of respondent---Courts below had concurrently fixed the maintenance allowance @ Rs.7000/- per month after due consideration of the needs/requirements of minor andby taking into account financial status of respondent---Constitutional petition was dismissed accordingly.

Syed Hussain Naqvi and others v. Mst. Begum Zakara Chatha through L.Rs. and others 2015 SCMR 1081 rel.

(b) Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Maintenance, re-fixation of---Determining factor---Financial status---Principle---Family Court had exclusive jurisdiction relating to maintenance allowance and matters connected therewith---If the granted rate for per month allowance was insufficient/inadequate, institution of fresh suit was not necessary, rather the Family

Court may entertain any such application---Court may increase/decrease the maintenance after considering financial status of husband/father---For enhancement of maintenance allowance on behalf of minors, application could be filed by the person having custody of minors---If maintenance allowance was fixed without considering the financial status of person who had been burdened with such future financial liability, he could file application for re-fixation of maintenance allowance.

S.M. Zeeshan Mirza, Rana Muhammad Majid, Zaheer Abbas, Tahir Mahmood Mughal and Naveed Khalid Rana for Petitioners.

Nemo for Respondent No.1.

ORDER

SAFDAR SALEEM SHAHID, J.----This petition is directed against concurrent judgments and decrees dated 23.01.2015 and 04.05.2015 passed by the learned Judge Family Court and learned Additional District Judge, Gujrat.

2. Brief facts necessary for decision of the instant petition are that the petitioners filed a suit for recovery of maintenance allowance, delivery charges and dowry articles, alleging that petitioner No.1 was married with respondent No.1 on 23.07.2009 but behavior of respondent No.1 remained cruel and ultimately he ousted petitioner No.1 from his house in November, 2009, whereafter a son (petitioner No.2) was born out of the wedlock. It was claimed that respondent No.1 works in Dubai and also owns landed property and can easily pay maintenance allowance of Rs.30,000/- per head per month. According to the petitioners respondent No.1 has pronounced divorce, but has refused to return the dowry articles given to petitioner No.1 by her parents at the time of marriage and has also refused to pay maintenance allowance and the delivery charges Rs.40,000/- incurred by petitioner No.1. The suit was contested by respondent No.1 by filing written statement, wherein he alleged that petitioner No.1 left his house on 30.04.2013 and refused to rehabilitate as such on her demand he pronounced divorce on 20.05.2013 and that he is ready to return the dowry articles as per list attached with the written statement, which are lying with him.

3. Out of divergent pleadings of the parties, the learned trial Court framed issues, recorded evidence of the parties and after having gone through the same partially decreed the suit holding petitioner No.1 entitled to recover Rs.7000/- per month as maintenance allowance from 30.04.2013 till the period of Iddat, whereas petitioner No.2 was held entitled to recover Rs.7000/- per month as maintenance allowance from 30.04.2013 till his legal entitlement with the direction that the interim maintenance

allowance already given shall be adjusted in his maintenance. The suit to the extent of recovery of delivery expenses was, however, dismissed, whereas to the extent of recovery of dowry articles the same was dismissed as withdrawn. Both the parties assailed the judgment by filing their respective appeals, but both the appeals were dismissed by the learned Additional District Judge.

4. Despite repeated calls no one appeared on behalf of respondent No.1, hence he is proceeded against ex parte. The case has been taken up for hearing with the assistance of the learned counsel for the petitioner.

5. The petitioners have filed the instant petition with the prayer that by setting aside the judgments and decrees of both the Courts below, their suit be decreed as prayed for. Matter regarding recovery of dowry articles was settled during the pendency of the suit, whereas since in her cross-examination petitioner No.1 had admitted that Ali Hassan minor was born in a hospital through a normal delivery, the suit to the extent of recovery of delivery expenses was rightly dismissed by the Courts below. As regards prayer for grant of maintenance allowance, petitioner No.1 admitted in her cross-examination that there was no proof with her regarding financial income of respondent No.1. In the circumstances, learned Courts below decreed the suit holding the petitioners entitled to recover the maintenance allowance at the rate of Rs.7000/- per month each for the periods mentioned against each of them. Courts below have concurrently fixed the maintenance allowance after giving due consideration to the needs/requirements of the minor and by taking into account the financial status of respondent No.1. Besides, the concurrent findings of facts recorded by the Courts below do not suffer from any illegality, infirmity or perversity, which could convince to interfere in the same while exercising constitutional jurisdiction of this Court. In this regard reliance can be placed upon the case of Syed Hussain Naqvi and others v. Mst. Begum Zakara Chatha through L.Rs. and others (2015 SCMR 1081), wherein it has been held as under:-

"15. There are concurrent findings of fact recorded by the learned courts below against the appellants. This Court in Muhammad Shafi and others v. Sultan (2007 SCMR 1602) while relying on case-law from Indian jurisdiction as well as from the Pakistani jurisdiction has candidly held that this Court could not go behind concurrent findings of fact "unless it can be shown that the finding is on the face of it against the evidence or so patently improbable, or perverse that to accept it could amount to perpetuating a grave miscarriage of justice, or if there has been any misapplication of principle relating to appreciation of evidence or finally, if the finding could be demonstrated to be

physically impossible." No such thing could be brought on record to warrant interference by this Court."

6. Furthermore, legislature has established the Family Courts for expeditious settlement and disposal of the disputes relating to marriage, family affairs and the matters connected therewith. Under the provision of section 5 of the Family Courts Act, the Family Court is vested with the exclusive jurisdiction to entertain and adjudicate upon the matter specified in the schedule. The matter of maintenance is at serial No.3 in the schedule. Thus, the Family Court has exclusive jurisdiction relating to maintenance allowance and the matters connected therewith. Once a decree by the Family Court in a suit for maintenance is granted thereafter, if the granted rate for per month allowance is insufficient and inadequate, in that case, according to scheme of law, institution of fresh suit is not necessary rather the Family Court may entertain any such application and if necessary make alteration in the rate of maintenance allowance.

7. In the circumstances, in case the petitioners think the rate of maintenance at lower side, they can move application before the learned trial Court which is empowered to increase the same after having considered financial status of respondent No.1. It is statutory provision, that for enhancement of maintenance allowance on behalf of the minors, the application can be filed by the person, having custody of the minors; similarly if the maintenance allowance is fixed without considering the financial status of the person, who has been burdened with such future financial liability can file application for re-fixation of maintenance allowance in view of financial status of the person is also entertainable under the same analogy.

8. The learned counsel for the petitioner has been unable to point out any exercise of excess of jurisdiction by the learned Courts below or indeed that their decisions are perverse. The learned counsel for the petitioner has similarly been unable to point out any illegality or material irregularity having been committed by the learned Courts below. Under the circumstances this petition fails and is accordingly dismissed with no order as to costs.

ZH/S-13/L Petition dismissed.

2022 M L D 1129

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

MUHAMMAD FAROOQ and others---Petitioners

Versus

MEMBER (JUDICIAL-II) BOARD OF REVENUE, PUNJAB LAHORE and others---Respondents

Writ Petition No.4399 of 2017, decided on 6th September, 2021.

Constitution of Pakistan---

----Arts.23, 24 & 201---Constitutional petition---Allotment of government land, resumption of---Revenue hierarchy---Land in question was allotted to the predecessor of petitioners under the Tube Well Sinking Scheme by the order of District Collector---Said land was resumed in favour of the State by the Deputy Commissioner/Collector---Appeal and revision filed by the petitioners against the said resumption order were dismissed by Revenue Authorities---Petitioners filed Constitutional petition before High Court which was accepted and impugned resumption orders was declared without authority---District Collector again resumed the land in question in favour of the State and appeal thereagainst was also dismissed---ROR was accepted by Member (Colonies) Board of Revenue observing that "the area lying outside the Municipal Committee limits should be restored and the request of allottee for allotment of alternative land shall be considered in the light of the policy of Government on the subject"---Allottee in compliance of direction of High Court approached the District Collector who third time resumed the land in favour of the State on the ground that the land/area was situated within the prohibited zone and its proprietary rights could not be granted---District Officer (Revenue) directed the allottee to apply for allotment of alternative land to the Board of Revenue---Allottee filed an application before Member (Colonies) Board of Revenue which was accepted by the Board with direction to relevant Authorities to implement the order---District Collector filed a time barred review petition in ROR before Member Board of Revenue which was accepted---Petitioner contended that date of allotment had to be kept in view while deciding the question of resumption of land to an allottee; that resumption had been declared to be without lawful authority and could not be re-opened except any fresh ground was available which was not existing in the record; that the decision of High Court were binding on all the Courts/Tribunals/Board

of Revenue and the public functionaries; that at the time of allotment, the land in question was not falling within the prohibited zone---Held, that instructions qua the prohibited zone were that the distance should be measured as required when the allotment was made and not when the proprietary rights are conferred---Date of allotment was the crucial and was to be kept in view while deciding the propriety rights of the land to an allottee---District Officer (Revenue) and Board of Revenue had to consider such date for the approval/rejection of the prayer---Stance taken by the law officer was not logical that since the land in question fell within the prohibited zone, therefore, it could not be allotted to the petitioner under the scheme; and that at the time of earlier allotment to the predecessor of the petitioners, it was not pointed out whether that land fell within the prohibited zone or outside, so the matter related to the inquiry---Parties were contesting the matter in third round of litigation before different forums---At the time of allotment to predecessor of the petitioners, the land in question did not fall within the prohibited zone---Constitutional petition was accepted accordingly.

Province of Punjab through District Collector Vehari v. Ghulam Muhammad 1994 SCMR 975 rel.

Ahmad Mansoor Chishti for Petitioner.

Malik Altaf Hussain Raan, Assistant Advocate General, Punjab for Respondents.

Date of hearing: 6th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through instant constitutional petition, petitioners have assailed the order dated 19.10.2016 passed by Member (Judl-II) Board of Revenue, Punjab, Lahore/respondent No.1 in review petition No. 227/2008 in ROR No. 856/1980 titled as 'Muhammad Ismail v. The Province of Punjab and others' with the contention that the aforesaid order be set aside being illegal, against the law, without jurisdiction and lawful authority.

2. Brief facts necessary for disposal of instant writ petition are that land measuring 26-Acres 5-Kanals and 10-Marlas, Lot No.3, situated in Chak No.4/Fordwah Tehsil Chishtian District Bahawalnagar, was allotted to one Muhammad Ismail son of Faqir Muhammad the predecessor of present petitioners under the Tube Well Sinking Scheme by the order of District Collector, Bahawalnagar on 26.11.1961. The said land was resumed in favour of the State vide order dated 25.03.1968 by the Deputy

Commissioner/Collector. Feeling aggrieved, petitioner filed an appeal before Additional Commissioner, Bahawalpur, against the aforesaid resumption order which was dismissed on 26.09.1968.

The petitioner challenged the orders dated 25.03.1968 and 26.09.1968 through a revision petition before Member (Colonies) Board of Revenue Punjab, which was also dismissed vide order dated 02.12.1968. Thereafter, petitioners filed writ petition before this Court and the same was accepted vide order dated 26.01.1976 and impugned resumption orders of land were declared without authority. Afterwards, District Collector, Bahawalnagar, again resumed the aforesaid land in favour of the State vide order dated 02.07.1979. In 2nd round of litigation allottees preferred an appeal against the resumption of land before Additional Commissioner, Bahawalpur, which was dismissed vide order dated 20.02.1980. The allottee Muhammad Ismail preferred ROR Nos. 856 of 1980 before Member (Colonies) Board of Revenue, Punjab, which was accepted vide order dated 26.03.1981 with the following observations:

'That the area lying outside the Municipal Committee limits should be restored and the request of allottee for allotment of alternative land shall be considered in the light of the policy of Government on the subject.'

Being dissatisfied with the aforesaid direction, allottee filed writ petition before this Court which was disposed of with the direction to allottee to approach the District Collector who shall consider the case of allotment of alternative land in lieu of land resumed earlier according to law of the allotment policy of the Government warranted. The said allottee in compliance of direction of this Court approached the District Collector who 3rd time resumed the land in favour of the State vide order dated 16.04.2002 on the ground that the land/area was situated within the prohibited zone and its proprietary rights could not be granted. The District Officer (Revenue) directed the allottee to apply for allotment of alternative land to the Board of Revenue, Punjab, Lahore. The allottee filed an application before Member (Colonies) Board of Revenue, Punjab, Lahore, for the implementation of order dated 26.03.1981 passed by Member (Colonies) in ROR No. 856/1980 filed by the petitioners upon which Board of Revenue called for a report from District Collector, Bahawalnagar. The said application filed by the allottee was accepted vide order dated 29.01.2008 by Member (Judl-II) Board of Revenue, Punjab, Lahore, with the direction to DOR Bahawalnagar and the DDOR Chishtian to implement the order dated 26.03.1981

passed by Member (Colonies) Board of Revenue in ROR No. 856/1980. The State through District Collector Bahawalnagar filed a time barred review petition in ROR No. 856/1989 before Member (Judicial-II) Board of Revenue Punjab which was accepted vide order dated 19.10.2016. Hence, this petition.

3. Notices were issued to the respondents and learned Assistant Advocate General appeared on behalf of Province of Punjab and contested the writ petition.

4. Learned counsel for the petitioners contended that the review petition was time barred and order passed by Member (Judicial-II) Board of Revenue, Punjab, in the review petition was totally against the law and facts of the case. The date of allotment was crucial date which was to be kept in view while deciding the question of resumption of land to an allottee. The date of allotment was to be considered by the authority for approval or rejection of the prayer. While deciding the miscellaneous application in ROR No.856/1980, Member Judicial (Judl-II) Board of Revenue, Punjab, specifically mentioned that the petitioner's right to enjoy the leased land under the law has been guaranteed under Article 23 of the Constitution of the Islamic Republic of Pakistan. The resumption has been declared to be without lawful authority and cannot be re-opened except any fresh ground is available which is not existed in the record. As per Article 201 of the Constitution of the Islamic Republic of Pakistan 1973, the decision of this Court are binding on all the Courts, Tribunals, Board of Revenue and the public functionaries. At the time of allotment, the land in question was not falling within the prohibited zone. Prays for acceptance of instant writ petition.

5. Learned law officer on the other hand contended that since the land in question falls within the prohibited zone, therefore, it cannot be allotted to the petitioner under the scheme. It was further contended by learned law officer that at the time of earlier allotment to the predecessor in interest of the petitioners, it was not pointed out that whether this land falls within the prohibited zone or outside, so this matter relates to the inquiry. Prays that instant writ petition be dismissed.

6. Arguments heard.

Record perused.

7. It has been noticed that on 26.11.1961 land measuring 26-Acres 5-Kanals and 10-Marlas, Lot No.3, situated in Chak No.4/ Fordwah Tehsil Chishtian District Bahawalnagar, was allotted to one Muhammad Ismail son of Faqir Muhammad the

predecessor of present petitioners under the Tube Well Sinking Scheme by the order of District Collector, Bahawalnagar, which was resumed in favour of the State vide order dated 25.03.1968 by the Deputy Commissioner/Collector. Appeal and revision petition filed against resumption order were also dismissed. Writ petition filed by the petitioner before this Court was accepted vide order dated 20.01.1976 and impugned resumption orders of land were declared without authority. Again District Collector, Bahawalnagar, resumed the aforesaid land in favour of the State vide order dated 02.07.1979. In 2nd round of litigation appeal filed by the allottees against the resumption of land was also dismissed.

The allottee Muhammad Ismail preferred ROR No. 856 of 1980 before Member (Colonies) Board of Revenue, Punjab, which was accepted vide order dated 26.03.1981 with the aforesaid direction. Feeling aggrieved with the aforesaid direction, allottee filed writ petition before this Court which was disposed of with the direction to allottee to approach the District Collector who was directed to consider the case of allotment of alternative land in lieu of land resumed earlier according to law of the allotment policy of the Government warranted.

In compliance of direction of this Court allottee approached the District Collector who resumed the land in favour of the State vide order dated 16.04.2002 on the ground that the land/area was situated within the prohibited zone and its proprietary rights could not be granted. The District Officer (Revenue) directed the allottee to apply for allotment of alternative land to the Board of Revenue, Punjab, Lahore.

The allottee filed an application before Member (colonies) Board of Revenue, Punjab, Lahore, for the implementation of order dated 26.03.1981 passed by Member (Colonies) in ROR No. 856/1980 filed by the petitioners upon which Board of Revenue called for a report from District Collector, Bahawalnagar. The said application filed by the allottee was accepted vide order dated 29.01.2008 by Member (Judl-II) Board of Revenue, Punjab, with the direction to DOR Bahawalnagar and the DDOR Chishtian to implement the order dated 26.03.1981 passed by Member (Colonies) Board of Revenue in ROR No. 856/1980.

The State through District Collector Bahawalnagar filed a review petition in ROR No. 856/1989 before Member (Judicial-II) Board of Revenue Punjab which was accepted vide order dated 19.10.2016.

The review application has been allowed on the ground that as the land in question is situated within the prohibited zone, therefore, propriety rights cannot be granted to the petitioners. As regards the prohibited zone, the instructions were that the distance should be measured as required when the allotment was made and not as when the proprietary rights are conferred. The date of allotment was the crucial one, which was to be kept in view while deciding the propriety rights of the land to an allottee. The District Officer (Revenue) and Board of Revenue had to consider this date for the approval or rejection of the prayer. The stance taken by the learned law officer was not logical that since the land in question falls within the prohibited zone, therefore, it cannot be allotted to the petitioner under the scheme. It was further contended by learned law officer that at the time of earlier allotment to the predecessor in interest of the petitioners, it was not pointed out that whether this land falls within the prohibited zone or outside, so this matter relates to the inquiry. The said contentions of learned law officer are not logical. Prior to this no one has pointed out this fact before any forum.

The petitioners and state functionaries are contesting the matter in third round of litigation before different forums. At the time of allotment of the land in question to the predecessor in interest of the petitioners, the same was not falling within the prohibited zone. Reliance is placed in this regard on the case of "Province of Punjab through District Collector Vehari v. Ghulam Muhammad" (1994 SCMR 975).

8. In view of what has been discussed above, instant writ petition is accepted and impugned order dated 19.10.2016 passed by Member (Judicial-II) Board of Revenue, Punjab Lahore, is set aside.

ZH/M-75/L Petition allowed.

2022 M L D 1138

[Lahore]

Before Safdar Saleem Shahid, J

PROVINCE OF PUNJAB through Additional District Collector, Jhang and another---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE, JHANG and 2 others---Respondents

Writ Petition No.9498 of 2017, decided on 17th January, 2022.

(a) Punjab Rented Premises Act (VII of 2009)---

-----S.20---Colonization of Government Lands (Punjab) Act (V of 1912), S.24---Constitution of Pakistan, Art.199---Constitutional petition---Application for deposit of rent---Power of imposing penalties for breach of conditions---Alternate remedy, availability of---Scope---Respondent (tenant) filed an application before the Rent Tribunal with the contention that he being lessee of the petitioners (landlords) from long time was paying rent without any default, however, they refused to accept the rent for January, 2016, therefore, he sought permission to deposit the same as per law---Rent Tribunal accepted the application and directed the respondent to deposit the rent for the year 2016 and in the meanwhile restrained the petitioners from ejecting the respondent---Petitioners assailed the order passed by Rent Tribunal through an appeal, which was dismissed---Validity---Section 24 of Colonization of Government Lands (Punjab) Act, 1912, had empowered the Collector (petitioner) that in case of breach of conditions of tenancy he might proceed against the lessee---Petitioners had an alternate remedy---So far as the impugned order was concerned, the same was in accordance with record produced by the petitioners, as there was nothing in writing till the time regarding approval of the recommendations of the District Assessment Committee for enhancement of the lease amount---No need to frame any issue or to record evidence because it was just an application seeking permission to deposit rent---Courts below had not created bar for the petitioners to proceed against the lessee, if there was any violation or breach of contract on his part; even the impugned orders were not applicable to the issuance of notice to the lessee for recovery of the arrears, if any---Constitutional petition to the extent of granting permission to deposit the lease amount for the year 2016 was dismissed.

(b) Colonization of Government Lands (Punjab) Act (V of 1912)---

----S.24---Power of imposing penalties for breach of conditions---Scope---Section 24 of Colonization of Government Lands (Punjab) Act, 1912, empowers the District Collector to initiate proceedings against the lessee in case of any violation of the lease agreement---Lease agreement can also be cancelled and the lessee can be ejected from the land leased out to him but for such action a mechanism procedure has been provided---Department may issue notice for recovery of the arrears, if due, from the lessee and in due course of law proceedings can be initiated.

Sardar Javed Ali Dogar, Assistant Advocate General for Petitioner.

Muhammad Bilal Dogar and Ms. Fauzia Yasmeen for Respondent No.3.

ORDER

SAFDAR SALEEM SHAHID, J.----The instant petition has been directed against the order dated 14.07.2016, whereby the learned Rent Tribunal accepted the application for deposit of rent filed by respondent No.3 and the judgment dated 24.11.2016, whereby the learned Additional District Judge, Jhang, dismissed the appeal filed by the petitioners.

2. Brief facts necessary for decision of the instant petition are that respondent No.3 filed an application before the learned Rent Tribunal with the contention that he being lessee of the petitioners from long time was paying rent at the rate of Rs.400/- per month regularly without any default, however, they have refused to accept the rent for January, 2016, therefore, he sought permission to deposit the same as per law.

3. The petitioners contested the application on the ground of default in payment of rent from 1993 to 2015 by submitting that initially in the year 1905, the shops/houses on the land owned by provincial government were rented out as per para No.516-A of the Colony Manual under the supervision of Darogha at the rate of Re.1/- per marla per month; that residential areas were leased out for one year which was extendable on year to year basis; that the rate of rent was enhanced to Rs.450/- per marla per month from 1993 to 1996 and thereafter in accordance with the policy of local government the District Assessment Committee enhanced the rate of lease to 5% for residential areas and 10% for commercial areas for the years 1997 to 2015, but despite notice for deposit of the enhanced rent respondent No.3 failed to comply with the same. The learned Rent Tribunal accepted the application and directed respondent No.3 to deposit the rent for the year 2016 keeping in view condition No.7 of the Lease Deed Form sanctioned on

12.08.1971 by the Deputy Commissioner, Jhang and in the meanwhile restrained the petitioners from ejecting respondent No.3 from the shops/houses in question. The petitioners challenged the order of the learned Rent Tribunal by filing an appeal, which was dismissed by the learned Additional District Judge, Jhang.

4. Arguments heard. Record perused.

5. Perusal of the record transpires that the learned Rent Tribunal allowed respondent No.3 for deposit of rent for the year 2016 and in the meanwhile petitioners were restrained from ejecting him from the shops/houses. However, this order does not reflect that the petitioners were forbidden from initiating proceedings against the defaulters if there was any violation of the lease agreement regarding deposit of rent in advance every year and as such the order cannot be interpreted to be operative for deposit of the future rent on the same analogy. Likewise, this order also does not stop the Province of Punjab to recover the arrears, if due, from the lessee in any way. Section 24 of the Colonization of Government Lands (Punjab) Act, 1912, empowers the District Collector to initiate proceedings against the lessee in case of any violation of the lease agreement. Lease agreement can also be cancelled and the lessee can be ejected from the land leased out to him but for such action a mechanism procedure has been provided. The department may issue notice for recovery of the arrears, if due, from the lessee and in due course of law proceedings can be initiated.

6. Here I would like to quote section 24 of Colonization of Government Lands (Punjab) Act, 1912:-

"24. Power of imposing penalties for breaches of conditions---When the Collector is satisfied that a tenant in possession of land has committed a breach of the conditions of his tenancy, he may, after giving the tenant an opportunity to appear and state his objection.

(a) impose on the tenant a penalty not exceeding one hundred rupees; or

(b) order the resumption of the tenancy:

Provided that if the breach is capable of rectification, the Collector shall not impose any penalty or order resumption of the tenancy unless has issued a written notice requiring the tenant to rectify the breach within a reasonable time, not being less than one month, to be stated in the notice and the tenant has failed to comply with such notice."

This section empowers the Collector that in case of breach of conditions of tenancy he may proceed against the lessee. The petitioner has alternate remedy by invoking the provision of said Act under which the property has been leased out.

7. So far as the impugned order is concerned the same has been passed by the learned Rent Tribunal in accordance with the record produced by the department, as there was nothing in writing till that time regarding approval of the recommendations of the District Assessment Committee for enhancement of the lease amount. There was no need to frame any issue or to record evidence because it was just an application seeking permission to deposit rent. The appeal filed by the petitioners was also rightly dismissed by the learned Additional District Judge with the observation that after the approval of Board of Revenue to the new rates of rent proposed by the Assessment Committee, respondent No.3 will be bound to pay all the arrears as well as future rent at the said rate, otherwise as per terms and conditions of rent agreement he will have to face the consequences.

8. For what has been discussed above, it is observed that decisions of the Courts below do not create bar for the authorities/District Collector to proceed against the lessee, if there is any violation or breach of contract on his part; even the said orders are not applicable to the issuance of notice to the lessee for recovery of the arrears, if any. With this observation, the instant petition to the extent of granting permission to deposit the lease amount for the year 2016 is dismissed. There shall be no order as to costs.

SA/P-6/L Petition dismissed.

2022 M L D 1995

[Lahore]

Before Safdar Saleem Shahid, J

MUHAMMAD KASHIF---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and 3 others---Respondents

Writ Petition No.14198 of 2022, heard on 17th May, 2022.

(a) Family Courts Act (XXXV of 1964)---

----S.5, Sched---Quantum of maintenance for minor---Pervious maintenance of wife---Summoning of witness---Wife and minor (respondents) filed suit for recovery of maintenance allowance, dowry articles, car and gold ornaments against husband/father/petitioner before Family Court---Petitioner appeared and contested the suit by filing written statement ---Family Court decreed the suit---Both parties preferred appeals before Appellate Court which was dismissed----Held, that to the extent of maintenance allowance of the minor, petitioner/father was religiously, legally and morally bound to maintain his child, so far as, quantum of maintenance allowance for minor was concerned, wife (respondent) had claimed that petitioner was serving as Major in the Army and received Rs,150,000/- salary ,therefore could easily pay Rs. 35,000/- per month maintenance to the minor where as petitioner took the stance that he had to pay mess bill and other expenses worth Rs.50,000/- and also had other dependents----Minor was school going girl and her expenses would definitely increase in future---Keeping in views the facts and circumstances of the case, status of the parties and evidence produced during the trial, Family Court rightly fixed the quantum of maintenance allowance with 10% annual increase---Wife/respondent had claimed her pervious maintenance allowance since October 2016 but was unable to establish the fact when, where, in whose presence and for what reason, she was forcibly expelled by petitioner from his house---Wife had also not specifically alleged that she had been tortured by the petitioner---When the lady was not residing with the petitioner and not performing her matrimonial obligations, petitioner was not under obligation to maintain respondent (wife) for the said period---Wife had claimed that the car and 12 tolas gold ornaments given as dowry articles were not returned by the petitioner and were still in petitioner's possession where as petitioner had denied said fact---During pendency of suit, wife (respondent) filed an application for recording evidence of real mother of the petitioner which was allowed and mother of petitioner was summoned---Petitioner's

mother deposed against the petitioner and there was no reason to disbelieve the real mother who had deposed against her own son/petitioner---Special power of attorney of petitioner did not opt to cross-examine the petitioner's mother meaning thereby her statement was admitted by the special attorney---Neither any independent evidence was brought on record to prove that petitioner's mother had deposed against petitioner due to some enmity nor any evidence was produced that her statement was not the correct picture---Even petitioner himself had not appeared in the witness box whereas petitioner's special attorney appeared who was neither having full information about the event of marriage and nor about proceedings of the Court----Petitioner's mother was put questions by the Court, she replied to them, which showed that she was making independent statement and her statement could not be said to be under the influence of any body or within the meaning of tutored statement ---Even otherwise, the response/behaviour of petitioner to the application for summoning the petitioner's mother revealed that statement of the petitioner's mother was a correct picture---Petition was dismissed, in circumstances.

(b) Family Courts Act (XXXV of 1964)---

----S.5, Sched----Power of Family Court to summon any witness---Family Court was empowered to adopt any way/procedure for the ends of justice which was not against the principles of natural justice to decide the matter and the ample provisions were with the Family Court to call any witness at any stage necessary for the decision of the case---Petition was dismissed, in circumstances.

Ghulam Muhammad v. Zohran Bibi and others 2021 SCMR 19 and Dr. Shahabdullah Khan and 2 others v. Mst. Sobia Mehrin and 2 others 2009 CLC 1188 ref.

(c) Constitution of Pakistan---

----Art.199---Concurrent findings of fact of two Courts below could not be disturbed in writ petition unless there was some jurisdictional error or defect pointed out by petitioner.

Muhammad Habib v. Mst. Saila Bibi and others 2008 SCMR 1584; Ashfaq Ahmad v. Judge, Family Court, Okara and another 2007 YLR 1550; Muhammad Anwar v. Shamim Akhtar and others 2007 CLC 195 and Rahman Gul v. Nizakat Bibi and another 2007 MLD 551 rel.

(d) Family Courts Act (XXXV of 1964) ---

----Preamble---Qanun-e-Shahadat, (10 of 1984), Art.129----Although the provisions of the Qanun-e-Shahadat, 1984 were not as such applicable to the proceedings of family cases, yet the Family Courts Act, 1964 empowered the courts to make its own assessment---Art. 129 of Qanun-e-Shahadat, 1984, also given powers to the Court to form an opinion about the evidence produced.

Shafique Sultan v. Mst. Asma Firdous and others 2017 SCMR 393; Muhammad Farhan v. Mst. Samina Saddique and others 2019 MLD 1145 and Muhammad Ahmad v. Additional District Judge and others 2019 CLC 89 rel.

Ch. Shahid Tabbasam for Petitioner.

Asif Imran Awan for Respondents Nos.3 and 4.

Date of hearing: 17th May, 2022.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through instant petition, petitioner has called in question the validity of judgment and decree dated 03.09.2021 passed by learned Judge Family Court, Hafizabad and judgment and decree dated 31.01.2022 passed by learned Additional District Judge, Hafizabad.

2. Brief facts necessary for decision of instant writ petition are that marriage of Mst. Saima Faazil respondents No.3 was solemnized with the petitioner on 2-8.06.2013. At the time of marriage, costly dowry articles including car and gold ornaments were given to respondent No.3. Out of this wedlock, Mahnum respondent No.4 was born. Thereafter the relations between the parties became strained which ended on separation.

Respondent Nos.3 and 4 filed a suit for recovery of maintenance allowance, dowry articles i.e. car and gold ornaments against the petitioner before Judge Family Court concerned. The petitioner appeared and contested the suit by filing written statement and raising many legal as well as factual objections.

Out of divergent pleadings of the parties issues were framed by learned trial court. After recording evidence and hearing both the parties, learned trial court decreed the suit vide judgment and decree dated 03.09.2021 in the terms as under:-

The plaintiff is entitled to have the maintenance allowance from the defendant for the period of her Iddat @ Rs.10,000/- per month.

The claim of plaintiff No.2 for maintenance allowance is hereby decreed against the defendant @ Rs. 15,000/- per month w.e.f April, 2018 till her legal entitlement along with 10% annual increment.

The plaintiff is also held entitled to the return of her dowry articles comprising Motorcar and gold ornaments weighing 12 tolas and in alternate Rs.15,00,000/- in lieu of price of motorcar and at the rate of market value of 12 tolas gold ornaments applicable on the date of return thereof.

Against the said judgment and decree, both the parties preferred appeals before learned Additional District Judge and the said court dismissed both the appeals vide judgment and decree dated 31.01.2022. Hence, this writ petition.

3. Learned counsel for the petitioner contended that impugned judgments and decrees have been passed by both the courts below while ignoring the relevant law and facts of the case, therefore, same are not sustainable in the eyes of law; respondents Nos.3 and 4 could not prove their claim through cogent and reliable evidence but the courts below remained unable to appreciate the same; statement of CW.1 cannot be relied upon and termed as evidence; maintenance allowance of the minor has been fixed at a higher rate without taking into consideration the financial status of the petitioner; respondent No.3 could not prove handing over the car to the petitioner and neither any invoice or other document has been produced in order to establish the fact that the car in question was purchased by brother of respondent No.3; impugned judgments and decrees are the result of mis-reading and non-reading of evidence produced by the parties.

4. Learned counsel for respondents Nos.3 and 4 on the other hand

has opposed this petition on the ground that impugned judgments and decrees have been passed by the courts below quite in accordance with law; no illegality or irregularity has been pointed out by learned counsel for petitioner in the impugned judgments and a decrees, therefore, instant petition is liable to be dismissed.

5. Arguments heard. Record perused.

6. It has been noticed that a suit was filed by respondents Nos.3 and 4 for the recovery of maintenance allowance and dowry article i.e. car and gold ornaments against the

petitioner before Judge Family Court which was decreed. Feeling aggrieved, both the parties preferred their appeals before Addl: District Judge which were dismissed by the said court. In order to prove her claim, respondent No.3 herself appeared as PW.1 and produced Ghulam Habib her brother and Nasrullah Khan as PWs.2 and 3 respectively. On the other hand, Zahid Saleem special attorney of the petitioner appeared as DW.1 as sole witness.

To the extent of maintenance allowance of the minor, there is no cavil to the proposition that petitioner is religiously, legally and morally bound to maintain his child. So-far-as, quantum of maintenance allowance is concerned, respondent No.3 has claimed that petitioner is serving as Major in Pakistan Army and drawing Rs.150,000/- as salary, therefore, can easily pay Rs.35,000/- per month maintenance allowance to the minor whereas the petitioner took the stance that he has to pay mess bill and other expenses worth Rs.50,000/- and also has other dependents. The minor is school going girl and getting education in City School Hafizabad, therefore, her expenses would definitely increase in future.

Keeping in view the facts and circumstances of the case, status of the parties and evidence produced during the trial, learned Judge Family Court rightly fixed the quantum of maintenance allowance with 10% annual increase after critically examining, discussing and evaluating the evidence produced by the parties which was upheld by learned appellate court with justified reasons. Regarding previous maintenance of the minor, learned trial court and learned 1st appellate court rightly fixed the maintenance from April, 2018 while mentioning reasonable justification.

7. As far as the claim of respondent No.3 for previous maintenance allowance is concerned, the lady has claimed her previous maintenance since October 2016 but remained unable to establish the fact that when, where, in whose presence and for what reason, she was forcibly expelled by the petitioner from his house. Respondent No.3 has also not specifically alleged that she was tortured by the petitioner.

When the lady was not residing with the petitioner and performing her matrimonial obligations, therefore, petitioner is not under obligation to maintain her for the said period. Therefore, both the courts below rightly held that respondent No.3 is entitled to recover maintenance only for Iddat period @ Rs.10,000/- per month.

8. As far as, the claim of respondent No.3 for recovery of dowry i.e. car and 12-tolas gold ornaments is concerned, the lady has claimed the said car and 12-tolas gold ornaments were given as dowry by her parents which were not returned by the petitioner and are still in his possession whereas the petitioner has denied this fact. Respondent No.3 herself appeared as PW.1 and supported her claim. PW.2 brother of respondent No.3 and Nasrullah Khan family driver PW.3 also deposed on the same lines. On the other hand, DW.1 special attorney of the petitioner did not specifically denied giving of car and gold ornaments rather evasively denied regarding the same.

During pendency of the suit, respondent No.3 filed an application for recording evidence of real mother of the petitioner, which was allowed and Mst. Balqees Bibi mother of the petitioner was summoned as CW.1 and her statement was recorded. She deposed in the manners as under:

There is no reason to disbelieve the real mother who has deposed against her own son. DW.1 did not opt to cross-examine the CW meaning thereby her statement was admitted by the special attorney of the petitioner. DW. 1 did not state any word that why CW.1 deposed against the petitioner. Neither any independent evidence was brought on record to prove that CW.1 had deposed against the petitioner due to some enmity nor any evidence was produced that the statement of CW was not a correct picture. Even petitioner himself has not appeared in the witness box whereas DW.1 his special attorney appeared in the court and deposed as under:

meaning thereby that special attorney was neither having full information about the events of marriage and about proceedings of the court.

DW did not state anything about the fact that the statement of CW was the result of some mis-understanding or it was deposed due to some reason. Anything which is produced in the evidence of PWs and was not negated by the petitioner's side, amounts to admission.

The petitioner filed application before learned Addl: District Judge to re-summon the CW.1 for cross-examination; such like application was filed before Family Court which was allowed but due to certain reason the lady could not appear in the court.

Learned Addl: District Judge, however, dismissed the application filed by the petitioner. CW.1 got recorded her statement on 29.04.2019 whereas the application for cross-examination was filed after a considerable period. Respondent No.3 produced her

evidence; statement of DW.1 was recorded on 05.05.2021 after two years of the statement of CW.1. Learned counsel for the petitioner focused on the point that Family Court cannot summon a witness as CW and claim of respondent No.3 cannot be decreed while relying, the statement of CW. The CW was summoned by the Court on the application of the petitioner who is real mother of the petitioner. There is nothing on the record to consider that CW made statement due to any dispute with the petitioner. She was put questions by the Court, she replied those, which shows she was making independent statement. Her statement cannot be said under the influence of anybody or within the meaning of tutored statement. Otherwise, the response/behavior of the petitioner to the application for summoning the CW reveals that statement of the CW was a correct picture.

The question whether CW can be called by the Family Court, can be assessed in the light of the spirit of the Family Courts Act, 1964.

The Family Court is empowered to adopt any way/procedure for the ends of justice which is not against the principles of natural justice to decide the matter. The ample provisions are with the Family court to call any witness at any stage necessary for decision of the case.

When DW.1 appeared in the court he did not raise any objection on the statement of CW, therefore, statement of CW is material evidence which not only can be read but also can be relied upon.

Reliance in this regard is placed on the case of

Ghulam Muhammad v. Zohran Bibi and others (2021 SCMR 19)

and Dr. Shahabdullah Khan and 2 others v. Mst. Sobia Mehrin and 2 others (2009 CLC 1188).

Both the courts have rightly read and relied upon the evidence of CW.

9. Even otherwise, there were concurrent findings of fact of two Courts below which cannot be disturbed in writ petition by this Court unless there is some jurisdictional error or defect pointed out by the petitioner.

However, decision made by the learned Courts below regarding is based on logic. Reappraisal of evidence is not permissible in writ jurisdiction. Reliance is placed on the cases reported as

Muhammad Habib v. Mst. Saila Bibi and others (2008 SCMR 1584),

Ashfaq Ahmad v. Judge, Family Court, Okara and another (2007 YLR 1550),

Muhammad Anwar v. Shamim Akhtar and others (2007 CLC 195)

and Rahman Gul v. Nizakat Bibi and another (2007 MLD 551).

10. In addition thereto, although the provisions of Qanun-e-Shahadat Order are not as such applicable to the proceedings of family cases, yet the Family Courts Act, 1964 empowers the court to make its own assessment.

In this regard reference can be made to the cases of

Shafique Sultan v. Mst. Asma Firdous and others (2017 SCMR 393),

Muhammad Farhan v. Mst. Samina Saddique and others (2019 MLD 1145)

and Muhammad Ahmad v. Additional District Judge and others (2019 CLC 89).

Article 129 of Qanun-e-Shahadat Order also gives powers to the Court to form an opinion about the evidence produced. Record shows that both the Courts below have critically examined the evidence on record and have rightly decided the matter in hand.

11. In view of what has been discussed above, instant writ petition having no merits stands dismissed. No order as to costs.

MHS/M-156/L Petition dismissed.

2022 M L D 2077

[Lahore]

Before Safdar Saleem Shahid, J

Mst. RAZIA SULTANA---Petitioner

Versus

JUDGE FAMILY COURT and others---Respondents

Writ Petition No.19392 of 2016, decided on 27th January, 2022.

(a) Family Court Act (XXXV of 1964)----

----S.5, Sched.---Execution of decree for return of dowry articles ---Alternate price of dowry articles awarded---Petitioner (wife) filed execution petition before Trial Court against respondent (husband); during the execution proceedings petitioner took stance that she was not ready to receive dowry articles, rather she was willing to receive the alternate price of said articles but Trial/Executing Court directed the petitioner to receive the dowry articles as per list annexed---Validity---Record revealed that during proceedings of the execution petition the decree holder refused to receive the gold ornaments on the ground that same was not pure---Judgement debtor gave an undertaking before the Executing Court to pay alternate price of gold ornaments to the extent of seven tolas and later on respondent paid the price of the said gold ornaments to the decree holder which was clear indication of the fact that judgement debtor had accepted the claim of decree holder to that extent---During the proceedings of the execution petition ,petitioner took a specific stance that her dowry articles were replaced with the original one and she claimed the price of said articles as alternative---Petitioner left the house of respondent in the year 2001 and never joined the respondent again and since then petitioner had not used the said dowry articles, rather, respondent had been using the dowry articles---Trial Court did not consider the worst condition of dowry articles, rather, directed the petitioner to receive all the dowry articles as per list annexed with the case in hand---In these circumstances, High Court had reason to believe that observation of Trial Court in the impugned order that alternate price could not be paid to the petitioner, rather, she was entitled to receive all the dowry articles as per list annexed with the case in hand, was not in accordance with the law, especially when the petitioner took a specific stance before the Executing Court that her dowry articles were replaced by the respondent with the original one and that respondent had also paid the price of the gold ornaments to the petitioner---Order passed by Trial Court

was set aside to the extent of observation of Executing Court, where by, petitioner was directed to receive the dowry articles as per list annexed with the file and declined the claim of the petitioner to hand over its alternate price---Constitutional petition was accepted.

Muhammad Akram v. Mst. Shahida Parveen and others PLD 2004 Lah. 249; Mst. Humaira Majeed v. Habib Ahmad and 2 others PLD 2012 Lah. 165 rel.

(b) Family Court Act (XXXV of 1964) ----

----Ss.5, 17 & Schd.---Civil Procedure Code (V of 1908), O.XX, R.10---Monetary value of dowry Article not mentioned in decree---Effect---Provisions of O.XX, R.10 of the C.P.C were not strict sensu applicable to a decree obtained in a family suit in view of S. 17 of the Family Courts Act, 1964---No provision existed in the Family Courts Act, 1964, similar or corresponding to O.XX, R.10 of the C.P.C---Decree passed under the Family Courts Act, 1964 for recovery of dowry articles including gold ornaments or other moveable property would be lawful and executable even if did not state the monetary value payable in the case moveable property was not delivered---- Constitutional petition was accepted.

Muhammad Akram through Special Attorney v. Mst. Bushra Begum and 2 others 2005 CLC 890 rel.

Muhammad Shahzad Ch. for Petitioner.

Zeeshan-ur-Rehman for Respondent No.2.

ORDER

SAFDAR SALEEM SHAHID, J.----Through this constitutional petition, the petitioner has challenged the validity of order dated 16.04.2016, whereby learned Judge Family Court Sialkot/Executing Court directed the petitioner to receive the dowry articles as per list annexed with the file and declined the claim of the petitioner to hand over its alternate price with the observation that " marriage was solemnized 25-years ago and no dowry articles of even high quality can remain in a good condition after such a long period. In this backdrop, alternate price could not be paid to the petitioner rather she was entitled only to receive all dowry articles as per list annexed with the instant file".

2. The brief facts of the family litigation are that Mst. Razia Sultana petitioner and Zafar Iqbal respondent No.2 were married on 20.11.1992. Out of this wedlock minor

Muhammad Anique was born. Differences between the parties arose and ultimately the petitioner filed the suit for recovery of dowry articles which was decreed in favour of the petitioner according to list Exh.P-2 or its alternate price i.e Rs.1,70,000/-; Being aggrieved by the said judgment and decree, the petitioner filed an appeal which was dismissed by learned appellate court vide judgment and decree dated 19.02.2009 and maintained the judgment and decree passed by learned trial court. Thereafter the petitioner challenged the judgments and decrees passed by both the courts below through Writ Petition No.1865 of 2010 before this Court, whereby the claim of the petitioner to the extent of recovery of dowry articles or its alternate price i.e. Rs.1,70,000/- was upheld by this Court. The petitioner filed an execution petition before the learned trial court in the light of judgment and decree which was transferred from District Lahore to District Sialkot for its execution in accordance with law as the respondent No.2 was the resident of District Sialkot and the dowry articles were lying in the house of respondent No.2 at Sialkot. During the proceedings of execution, the petitioner took stance that she was not ready to receive the dowry articles, rather she was willing to receive the alternate price of said dowry articles but the learned Executing Court directed the petitioner to receive the dowry articles as per list annexed with the instant file through the impugned order dated 16.04.2016 which has been challenged by the petitioner through this constitutional petition.

3. Arguments heard. Record perused.

4. The version of the petitioner is that marriage between the parties was solemnized 30-years ago and thereafter the petitioner left the house of respondent No.2 in the year 2001 and never joined the respondent No.2 again, and since then the petitioner had not used the said dowry articles, rather, respondent No.2 had been using the dowry articles. The learned Judge Family Court Sialkot while passing the impugned order did not consider the worst condition of the dowry articles, therefore, during the proceedings of execution, the petitioner was not ready to receive the dowry articles. She also took stance that dowry articles were replaced by the respondent No.2 with the original one. In such circumstances the petitioner/decree holder is entitled to the value of dowry articles as claimed in the plaint and as decreed. On the other hand, learned counsel for respondent No.2 contended that during the proceedings of the execution petition a Bailiff was appointed for handing over the dowry articles but the decree holder/petitioner refused to receive the dowry articles on the pretext that said dowry articles have been replaced with the original one and she claimed to pay the price of the

said dowry articles as alternative; that mere giving of an alternate remedy did not give the decree-holder an option of reusing to take the delivery of the property and of insisting upon the payment of money. Learned counsel for respondent No.2/judgment debtor also relied upon Order XX, Rule 10, C.P.C with the claim that since the judgment debtor has offered to return the dowry articles, the alternate prayer could not be allowed. The precise version of the judgment debtor/respondent No.2 was that when a decree is passed in terms of Order XX, Rule 10, C.P.C for restitution of moveable property, the option is with the respondent/judgment debtor as to whether he would deliver the moveable property concerned or pay the assessed value on the same; that Here I would like to reproduce Rule 10 (supra) as under:-

"Decree for delivery of moveable property.--- Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had."

There was no force in the submission advanced by learned counsel for the respondent No.2 that it is only the dowry articles which can be recovered by a decree holder and not its value as decreed. Record reveals that during the proceedings of the execution petition the decree holder refused to receive the gold ornaments on the ground that same was not pure. The judgment debtor gave an undertaking before the learned Executing Court to pay alternate price of the gold ornaments to the extent of 7-tolas and lateron he had paid the price of the said gold ornaments to the decree holder which is clear indicative of the fact that judgment debtor has accepted the claim of the decree holder to that extent. Perusal of impugned order dated 16.04.2016 reveals that learned Executing Court directed the judgment debtor/respondent No.2 to pay the alternate price of the said gold ornaments but surprisingly the learned Executing Court turned down the request of the petitioner to pay the alternate price of the dowry articles, rather, it was ordered to receive all the dowry articles as per list annexed with the instant file. During the proceedings of the execution petition, the petitioner took a specific stance that her dowry articles were replaced with the original one and she claimed to pay the price of the said dowry articles as alternative. In the case reported as Muhammad Akram v. Mst. Shahida Parveen and others (PLD 2004 Lahore 249) it has categorically been held by this Court that the decree holder can insist upon the value of the dowry articles and a certain amount of money should be allowed as an alternative if delivery of the chattel in dispute cannot be had; if the goods are capable of delivery, they must be delivered, if they are not capable of delivery then assessed damages should be paid. Keeping in view

the facts and circumstances of the case, this judgment prima facie supports the version of the petitioner that question of the enforcement and payment of the money as part of the decree in the instant case has arisen since the movable concerned/dowry articles have been found to be not capable of delivery. While seeking guidance from the case law reported as Mst. Humaira Majeed v. Habib Ahmad and 2 others (PLD 2012 Lahore 165) I am of the view that the provisions of Order XX, Rule 10, are not stricto sensu applicable to a decree obtained in a family suit in view of section 17 of the West Pakistan Family Courts Act, 1964. There is also no provision in the West Pakistan Family Courts Act, 1964, similar or corresponding to Order XX, Rule 10, C.P.C. Thus, a decree passed under the West Pakistan Family Courts Act, 1964, for recovery of dowry articles including gold ornaments or other movable property would be lawful and executable even if does not state the monetary value payable in case the movable property is not delivered. In the case law reported as Muhammad Akram through Special Attorney v. Mst. Bushra Begum and 2 others (2005 CLC 890 Lahore) wherein it has been observed as under:-

"In the present case it is admitted on the record that the original dowry articles were not in possession of the judgment-debtor and that his attempt to replace the same would amount to re-opening the case as the question regarding the quality and condition of the replaced dowry articles would always be open to question. It is in these circumstances, that where the petitioner had himself denied to be in possession of the dowry articles in his written statement, it was incumbent upon the Executing Court to straightaway execute the decree for money as alternatively decreed by the Judge Family Court".

I am also fortified in my view by the law by the Honourable Supreme Court of Pakistan in case titled "Muhammad Akram v. Mst. Shahida Parveen and others (PLD 2004 Lahore 249) has settled this matter as follows:-

"The contention of learned counsel for the petitioner that the Local commission who had been appointed was the counsel for the respondent appears to be an afterthought because no such objection was taken at the time when the appointment was made. Even at the time of inspection of the dowry articles, the petitioner did not take any such objection. He is a signatory to the three lists of dowry articles attached with the report of Local Commission. The exercise undertaken by the learned Executing Court appears to be for the satisfaction of the petitioner otherwise once the petitioner denied being in possession of any dowry articles of respondent No.1, there was no need for appointment

of any Commission. The learned Executing Court should have straightaway executed the decree for money".

Since the petitioner left the house of respondent No.2 in the year 2001 and never joined the respondent No.2 again, and since then the petitioner had not used the said dowry articles, rather, respondent No.2 had been using the dowry articles. The learned Judge Family Court Sialkot while passing the impugned order did not consider the worst condition of the dowry articles, rather, directed the petitioner to receive all the dowry articles as per list annexed with the instant file. It has further been noticed that petitioner filed Writ Petition No.1865 of 2010 before this Court wherein she challenged the judgments and decrees dated 28.07.2008 and 19.02.2009 passed by both the courts below respectively whereby her claim of gold ornaments or value thereof was declined. Vide judgment dated 28.05.2014 passed by this Court in the aforesaid writ petition, the petitioner was held entitled to recover the gold ornaments as detailed in the list of dowry articles from the respondent No.2 or in alternate their market price prevalent at the time of execution. In these circumstances, this Court has reason to believe that observation of learned trial court in the impugned order dated 16.04.2016 that alternate price could not be paid to the petitioner, rather, she was entitled to receive all the dowry articles as per list annexed with the instant file, is not in accordance with law, especially when the petitioner took a specific stance before the learned executing court that her dowry articles were replaced by the respondent No.2 with the original one and that respondent No.2 had also paid the price of the gold ornaments to the decree holder.

5. For what has been discussed above, instant petition is accepted and order dated 16.04.2016 passed by learned trial court is set aside to the extent of observation of learned Executing Court Sialkot, whereby, the petitioner was directed to receive the dowry articles as per list annexed with the file and declined the claim of the petitioner to hand over its alternate price.

MHS/R-13/L Petition accepted.

2022 P Cr. L J 1067

[Lahore (Multan Bench)]

Before Safdar Saleem Shahid, J

RIAZ AHMAD---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE/EX-OFFICIO JUSTICE OF PEACE ROJHAN DISTRICT RAJANPUR and 3 others---Respondents

Writ Petition No. 9343 of 2021, decided on 24th June, 2021.

(a) Punjab Healthcare Commission Act (XVI of 2010)---

----Ss. 19, 22 & 23---Criminal Procedure Code (V of 1898), Ss. 154, 22-A & 22-B---Medical negligence---Scope---Petitioner assailed order passed by Ex-officio Justice of Peace whereby SHO was directed to record version of the complainant under S. 154, Cr.P.C.---Allegation levelled by the complainant through his application was that his daughter aged three years had died due to the negligence of petitioner---Punjab Healthcare Commission Act, 2010 had provided that if there was any negligence on the part of any person relating to health, he would be dealt with under the Act---Under S. 19(b) of the Punjab Healthcare Commission Act, 2010, medical negligence meant a case where a patient sustained injury or died as a result of improper treatment in a healthcare establishment and, in case of death, determined on the basis of medical autopsy report---Punjab Healthcare Commission Act, 2010, barred prosecution of any person on the allegation of negligence---Daughter of complainant was a serious patient of brain tumor and negligence, if any, on the part of petitioner could not be prima facie fixed by the police through investigation and for that the complainant had to approach to the concerned forum---Constitutional petition was allowed and the order passed by Ex-officio Justice of Peace was set aside.

(b) Punjab Healthcare Commission Act (XVI of 2010)---

----Ss. 19, 22 & 23---Criminal Procedure Code (V of 1898), S. 154---Medical negligence---Information in cognizable cases---Special and general law---Scope---Special enactment always prevail over the general law and in presence of the special law to deal with the negligence of the practitioners being available, without exhausting the remedy, no criminal proceedings can be initiated---Once it is held by the Pakistan Medical and Dental Council that practitioner was guilty of negligence and professional

misconduct, criminal law as well as civil law can be set in motion against him by forwarding a complaint to the Council for proper legal action under the law without being prejudiced by any observation made by the police or the Court.

Shifa International Hospitals Ltd. Through Chairman and C.E.O. v. Pakistan

Medical and Dental Council (PMDC) and 3 others 2011 CLC 463 ref.

Ch. Umar Hayat for Petitioner.

Malik Aamir Manzoor Awan and Aziz-ur-Rehman for Respondent No.4.

Rao Abdul Khaliq, A.S.I.

ORDER

SAFDAR SALEEM SHAHID, J.---The instant petition is directed against the order dated 17.06.2021, whereby Ex-Officio Justice of Peace, Rojhan, while disposing of the application under sections 22-A/22-B, Cr.P.C. directed the SHO concerned to record version of the complainant/respondent No.4 as required under section 154, Cr.P.C. and proceed further strictly in accordance with law.

2. The allegation levelled by the complainant/respondent No.4 through his application was that his daughter namely Sonari Mai aged three years had died due to the negligence of the petitioner.

3. Arguments heard.

Record perused.

4. The Punjab Healthcare Commission Act, 2010 says that if there is any negligence on the part of any person relating to the health, will be dealt with under this Act.

In the interrogatory of this Act under section 1, it is clearly mentioned that it shall apply to all healthcare establishments, public or private hospitals, non-profit organizations, charitable hospitals, trust hospitals, semi-government and autonomous healthcare organizations.

Under section 19(b) of the Act, "medical negligence" means a case where a patient sustains injury or dies as a result of improper treatment in a healthcare establishment and, in case of death, determined on the basis of medical autopsy report.

Therefore, this Act bars to prosecute any person on the allegation of negligence.

5. The complainant/respondent No.4 has used the word 'negligence' in his application under sections 22-A/22-B, Cr.P.C. and the learned Justice of Peace, without keeping in view the wisdom of the statute, i.e. the Punjab Healthcare Commission Act, 2010, has wrongly passed the impugned order.

6. It was mentioned in the application that after treatment by the petitioner, daughter of the complainant/respondent No.4, also remained under treatment in Shaikh Zayad Hospital, Rahimyar Khan, for so many days and thereafter she died.

Daughter of the petitioner was a serious patient of brain tumor and negligence, if any, on the part of the petitioner cannot be prima facie fixed by the police through investigation and for that the complainant has approach to the concerned forum in view of the enactment of the Punjab Healthcare Commission Act, 2010.

Therefore, the order passed by the learned Ex-Officio Justice of Peace is against the law.

7. In the instant case complainant also filed an application before the Deputy Commissioner, which was marked to the Chief Executive Officer, District Health Authority, Rajanpur, where the inquiry remained pending, but on 05.04.2021 the complainant withdrew his complaint by stating that it was based on misunderstanding.

However, the learned Ex-Officio Justice of Peace also failed to consider this aspect of the case.

8. In view of the law laid down in the case of

Shifa International Hospitals Ltd. Through Chairman and C.E.O. v. Pakistan Medical and Dental Council (PMDC) and 3 others (2011 CLC 463), special enactment always prevail over the general law and in presence of the special law to deal with the negligence of the practitioners being available, without exhausting the remedy, no criminal proceedings could be initiated.

Once it was held by the Pakistan Medical and Dental Council that practitioner was guilty of negligence and professional misconduct, criminal law as well as civil law could be set into motion against them by forwarding a complaint to the Council for proper legal action under the law without being prejudiced by any observation made by the police or the Court.

9. For what has been discussed above, the instant petition is allowed and the order dated 17.06.2021 passed by the Ex-Officio Justice of Peace is set aside.

The complainant, however, can file his complaint before the appropriate forum under the Act, if so advised.

SA/R-13/L Petition allowed.

2022 P L C (C.S.) 956

[Lahore High Court (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

SHAHID MAHMOOD

Versus

ISLAMIA UNIVERSITY BAHAWALPUR and others

Writ Petition No.3972 of 2021, heard on 4th September, 2021.

Islamia University Bahawalpur Act (IV of 1975)---

----S.33---Constitution of Pakistan, Art.199---Constitutional petition---Quo warranto, writ of---Appointment of Registrar---Scope---Petitioner assailed appointment of respondent as Registrar of the University on the ground that he was appointed without advertising the post---Validity---Syndicate was fully authorized under S. 33 of the Islamia University Bahawalpur Act, 1975, to make rules to regulate any matter relating to the affairs of the University---Rules for appointment to the posts of Registrar, Treasurer and Controller of Examinations were approved and all the terms and conditions were settled by the Syndicate in its meetings on the basis whereof respondent was appointed---University had produced advertisements for the post of Registrar, previously advertised by them, which showed that there was no malice on their part to appoint the respondent as Registrar---As the University had to run all its administrative affairs through the Registrar and in case as a result of advertisement if no one qualified for that post, the Syndicate had no option but make Rules and appoint somebody on the said post in order to run the affairs of the University---No illegality was found in the appointment of respondent as Registrar of the University---Constitutional petition was dismissed.

Munawar Khan v. Niaz Muhammad and others 1993 SCMR 1287 = 1993 PLC (C.S.) 797 distinguished. Khushal Khan Khattak University through Vice-Chancellor and others v. Jabran Ali Khan and others 2021 SCMR 977 rel.

Jamshaid Akhtar Khokhar for Petitioner.

A.R. Aurangzeb for Respondents.

Date of hearing: 14th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through the instant petition the petitioner has assailed the notification dated 29.01.2021, whereby respondent No.3 has been appointed as Registrar of the Islamia University of Bahawalpur.

2. The petitioner is currently working as Additional Treasurer (BS-19) in the University as regular employee. According to the petitioner he being qualified and eligible, appeared twice before the Selection Board constituted for the post of Registrar (BS-20), but respondent No.1 in violation of the provisions of Islamia University of Bahawalpur Act, 1975 as well as Officers' Appointment Statute, 1977 and without advertising the post, has illegally issued the order of appointment of respondent No.3. The petitioner has challenged the said order with the following prayers:-

"I. It is therefore, humbly prayed that the impugned appointment of respondent No.3, appointment letter dated 29.01.2021 may kindly be declared illegal, mala fide, without lawful authority, violation of law and rules under the Islamia University Bahawalpur Act, 1975.

II. That the writ of Quo-warranto may kindly be issued by asking the respondent No.3 under what authority of law he is holding the post of Registrar BS-20 at Islamia University Bahawalpur, being not eligible and qualified without any experience.

III. That the direction also be issued to respondent University to act in accordance with law and fill the post of Registrar in fair manner, on merit as per Section 16 of the Islamia University BWP Act, 1975 after issuing the advertisement for the whole time appointment under Section 16 of the Islamia University Bahawalpur Act, 1975 in the best interest of justice."

3. Notices were issued to the respondents, who submitted the comments where they categorically replied all the objections and reservations shown by the petitioners in the petition. According to the comments the Syndicate of the Islamia University of Bahawalpur (IUB) is the Appointing Authority of the post of Registrar. It is mentioned that the post of Registrar was advertised a number of time in the last ten years, however, no suitable candidate, including the petitioner, was recommended for appointment by the Selection Board to the Syndicate IUB/Competent Authority. The matter was placed before the Syndicate Islamia University Bahawalpur under Section 32(2) of the Islamia University Bahawalpur Act, 1975. The Syndicate being competent authority under Section 33(2) of the Act ibid approved rules i.e. The Islamia University Bahawalpur Rules for the appointment of Registrar, Treasurer and Controller of Examinations, 2020, vide its 74th Meeting held on 04.07.2020. The appointment of Registrar is made by the Syndicate/Appointing Authority vide its 75th Meeting held on 02.01.2021 in accordance with Rule 6(1) & (2) of the Rules. Respondent No.3, who is duly qualified and eligible in accordance with the qualification and experience required under Rule 5 of the Islamia University Bahawalpur Rules for Appointment of Registrar, Treasurer and Controller of

Examinations, 2020, has been appointed by the Syndicate/Appointing Authority under Section 16 of the Islamia University Bahawalpur Act, 1975. The Registrar has been appointed by following the procedure as "whole time officer" of the University and he shall hold office for a term of three years as mentioned in the Act. Under Section 33 of the Act, the Syndicate is empowered to make rules to regulate any matter relating to the affairs of the University which are not statutorily provided by the rules or regulations.

4. The learned counsel for the petitioner argued that under the Rules the Department/ University was under obligation to fill the post of Registrar after advertisement in two newspapers but this procedure was bypassed in order to appoint a person of their own choice on political basis. Counsel in this regard referred to the case of Munawar Khan v. Niaz Muhammad and others (1993 SCMR 1287 = 1993 PLC (C.S.) 797) and argued that the petitioner was equally eligible and qualified for the post of Registrar, but he has been ignored and victimized by the University/ respondents, therefore, the appointment of respondent No.3 dated 29.01.2021 be declared null and void and the University be directed to advertise the post as required by law.

5. Learned counsel for the respondents, on the other hand, read out the provisions of Section 16 of the Islamia University Bahawalpur Act, 1975, and argued that Syndicate was fully empowered to appoint respondent No.3 as he was suitable candidate and qualified in all respects for the post. The whole procedure was adopted by the Syndicate, being legally authorized for appointment of Registrar. The petitioner has no lien and if he is aggrieved of any proceedings of the Syndicate he may approach to the Chancellor.

6. Arguments heard. Record perused.

7. Islamia University Bahawalpur has its own constitution and its all affairs/works are regularized through Islamia University Bahawalpur Act, 1975. Section 16 of the Act reads as under:-

"Registrar.- The Registrar shall be a whole-time officer of the University and shall be appointed by the Syndicate on such terms and conditions as may be determined by it.

He shall- (a) be the custodian of the common seal and the academic records of the University;

(b) maintain a register of Registered graduates in the prescribed manner;

(c) conduct elections of members to the various Authorities in the prescribed manner; and

(d) perform such other duties as may be prescribed."

8. Furthermore, the appointment has been made adopting the procedure. Syndicate was fully authorized under Section 33 of the Act to make rules to regulate any matter relating to the affairs of the University. Rules for appointment to the posts of Registrar, Treasurer and Controller of Examinations were approved and all the terms and conditions were settled in the Minutes of 74th and 75th meetings of Syndicate on the basis whereof respondent No.3 was appointed as Registrar. I would like to refer to the case of Khushal Khan Khattak University through Vice-Chancellor and others v. Jabran Ali Khan and others (2021 SCMR 977), wherein it is held as under:-

"Where a matter related to the internal working and procedures of the Syndicate, then in the absence of bias, partiality or lack of transparency on the part of a Committee (acting on instructions and authorization of the Syndicate) the same could not be interfered with. High Court in its constitutional jurisdiction cannot substitute the findings of the Syndicate without proof of mala fides, bias, illegality or lack of transparency."

9. Learned counsel for the respondents/University has produced advertisements for the post of Registrar, previously advertised by them, which show that there was no malice on their part to appoint respondent No.3 as Registrar. As the University has to run all its administrative affairs through the Registrar and in case as a result of advertisement if no one qualifies for that post, the Syndicate had no option but to make Rules and appoint somebody on the said post in order to run the affairs of the University under the relevant rules of the Act, 1975. The citation referred by the learned counsel for the petitioner Munawar Khan (supra) is not applicable to the case in hand. In the said judgment the appointment to the posts in the government offices has been discussed, but the University is an independent autonomous/statutory body which has its own constitution; and appointment of Registrar is regulated under Section 16 of the Islamia University Bahawalpur Act, 1975, where the Syndicate is empowered to make the appointment of Registrar. I do not see any illegality in the appointment of respondent No.3 as Registrar of the Islamia University Bahawalpur.

10. In the circumstances, there is no force in the writ petition. The same is accordingly dismissed.

SA/S-28/L Petition dismissed.

2022 P L C (C.S.) 999

[Lahore High Court (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

Hafiz MUHAMMAD KALEEM UD DIN

Versus

PROVINCE OF PUNJAB and others

Writ Petition No.3963 of 2021, decided on 13th September, 2021.

(a) Civil service---

----Constitutional petition---Pro forma promotion---Maintainability---Scope---Petitioner, a retired civil servant, sought direction to the department to promote him from his due date---Promotion of petitioner was deferred due to pendency of an inquiry against him and incomplete service record---Stance of petitioner was that the FIR lodged against him had been cancelled; that he had also provided the complete service record but still he was not promoted and that even junior officers were promoted---Validity---Retired employee had no other option but to knock the door of the Court under Arts. 199 & 204 of the Constitution---Undeniably, the petitioner was entitled to be considered for promotion to the next higher grade, however, due to pendency of inquiry petitioner was not considered for pro forma promotion---Mere pendency of inquiry was no ground to deprive the petitioner from his lawful right---Department had no right to withhold such right of petitioner---Writ petition was accepted and the department was directed to promote the petitioner from his due date.

Chief Secretary Government of the Punjab and others v. Muhammad Arshad Khan Niazi 2007 SCMR 1355; Shama Khan Zafar v. District Coordination Officer, Lodhran and others 2014 PLC (C.S.) 948 and Muhammad Amin v. Managing Director House Building Finance Corporation and 2 others 2016 PLC (C.S.) 569 ref.

Muhammad Akbar Khan Durrani v. Federation of Pakistan through Secretary Water and Power Government of Pakistan and 5 others 2017 PLC (C.S.) Note 31;

Arshad Ali v. WAPDA and others 2020 PLC (C.S.) 1226 and Secretary School of Education and others v. Rana Arshad Khan and others 2012 SCMR 126 rel.

(b) Civil service---

----Promotion---Pro forma promotion---Post retirement promotion---Scope---Right of promotion of a civil servant cannot be withheld merely on the ground of allegation---

Even after retirement, he can agitate his right of pro forma promotion which was available to him during his service time.

Arshad Ali v. WAPDA and others 2020 PLC (C.S.) 1226 and Secretary School of Education and others v. Rana Arshad Khan and others 2012 SCMR 126 rel.

Muhammad Naveed Farhan for Petitioner.

Sheharyar Ahsan Mehboob Assistant Advocate General, Punjab for Respondents.

Date of hearing: 13th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Hafiz Muhammad Kaleem ud Din petitioner has filed the instant writ petition with the following prayer:

"It is, thereby, humbly prayed that by accepting this writ petition, the respondents may kindly be directed to promote the petitioner from BS-18 to BS-19 from his due date, while considering his successive written and oral requests. The order dated 19.04.2021 may also be declared illegal unlawful and without lawful authority. They may also be directed to initiate and release the pensionary benefit to the petitioner. It is further prayed that a time limit direction to do the needful may also be directed to the respondents for the same."

2. Brief facts necessary for the disposal of instant writ petition are that petitioner was promoted from Pharmacist/Drug Inspector (BS-17) to Deputy Drugs Controller/Secretary District Quality Control Board (BS-18) on regular basis vide notification dated 01.06.2012. The next promotion of the petitioner was due in December, 2014 but deferred due to alleged pending inquiry and incomplete service record while the juniors of the petitioner were promoted. The petitioner approached the respondents who demanded from him NOCs and service record which petitioner produced before them. Thereafter, Director Anti-Corruption Establishment, Bahawalpur, sent for droppage of inquiry and preparation of cancellation report on 17.12.2016 which was agreed by the competent authority. The petitioner attained the age of superannuation but respondents did not consider his case for pro forma promotion. The petitioner then filed writ petition and vide order dated 12.01.2021 respondents were directed by this Court to decide the application of the petitioner as per law. Respondent No. 2 vide order dated 19.04.2021 refused to give promotion as well as pro forma promotion to the petitioner.

3. Report and parawise comments were requisitioned from respondents which have been submitted.

4. Learned counsel for the petitioner submits that there is no fault on the part of the petitioner and he well in time applied for his right of pro forma promotion to the authority but the case of the petitioner was not considered: from time to time petitioner has been sending applications/requests to the authority for pro forma promotion for which he was entitled but his case was not considered and even his juniors were promoted; there was no inquiry pending against the petitioner; even there was no complaint pending against the petitioner but in spite of that authority has not considered the case of the petitioner for pro forma promotion. Finally prays for acceptance of instant writ petition.

5. Learned Assistant Advocate General, on the other hand, argued that the impugned order has been passed quite in accordance with law and petitioner is not entitled for pro forma promotion; As per Rule 9(2) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, promotion/pro forma cannot be claimed as of right by any civil servant; under the provisions of the Punjab Civil Servants Act/Punjab Civil Servants (Appointment and Condition of Service) Rules, 1974, only a civil servant can be appointed on promotion and a retired civil servant is no longer in service, therefore, he ceases to be a civil servant; there is no delay on the part of the department in the case of promotion of the petitioner as department sent the case twice to the competent authority for consideration of promotion of the petitioner but the same was rejected by the authority; petitioner never applied for pro forma promotion; petitioner is a retired person and competent authority has not granted him regular promotion to the rank of Drugs Controller (BS-19) during his service; case of the petitioner cannot be considered for promotion as well as pro forma promotion under the act and rules. Prays for dismissal of instant writ petition.

6. Arguments heard.

Record perused.

7. It has been noticed that the petitioner was appointed in Health Department as Hospital Pharmacist on regular basis vide order dated 20.01.1990 and he was promoted from Pharmacist/Drug Inspector (BS-17) to Deputy Drugs Controller/Secretary District Quality Control Board (BS-18) on regular basis vide notification dated 01.06.2012. The next promotion of the petitioner was due in December, 2014 but deferred due to alleged pending inquiry and incomplete service record while the juniors of the petitioner were

promoted. While working as Secretary District Quality Control Board, Bahawalpur, an FIR No.25/13, dated 05.11.2013, was lodged against the petitioner by Inspector/Circle Officer, ACE, Bahawalpur on the charge of misconduct, inefficiency and corruption. The case of the petitioner from Deputy Drugs Controller (BS-18) to the rank of Drugs Controller (BS-19) was deferred due to pending inquiry and incomplete service record. Thereafter, the aforesaid inquiry was dropped by Director Anti-Corruption Establishment, Bahawalpur and cancellation report was prepared on 17.12.2016 which was agreed by the competent authority. On 11.12.2019 petitioner retired from Government service attaining the age of superannuation. The stance of the petitioner is that inquiry against him was dropped and he sent the copy of droppage of the inquiry to the concerned authority but without considering the facts on record, case of the petitioner was deferred. Even junior officers were promoted and were given pro forma promotion and case of the petitioner was deferred. The retired employ has no other option but to knock the door of the Court under Articles 199 and 204 of the Constitution of the Islamic Republic of Pakistan, 1973. Undeniably, petitioner was entitled to be considered for promotion to the next higher grade, however, due to pendency of the said inquiry petitioner was not considered for pro forma promotion.

It is settled law that mere pendency of the inquiry is no ground to deprive the petitioner from his lawful right. Even otherwise, petitioner cannot be kept waiting indefinitely for redressal of his grievance and deprived of his lawful right of promotion when inquiry against him has been dropped. Reliance in this regard is placed on the case of

Chief Secretary Government of the Punjab and others v. Muhammad Arshad Khan Niazi (2007 SCMR 1355).

Furthermore, the employee cannot be punished by denying his consideration for promotion without establishing any charge. Department has no justification to withhold said right of the petitioner. Non-considering the petitioner for pro forma promotion is not justified in any way. In this regard, reliance is placed on the cases of

Shama Khan Zafar v. District Coordination Officer, Lodhran and others (2014 PLC (C.S.) 948),

Muhammad Amin v. Managing Director House Building Finance Corporation and 2 others (2016 PLC (C.S.) 569) and Muhammad Akbar Khan Durrani v. Federation of Pakistan through Secretary Water and Power Government of Pakistan and 5 others (2017 PLC (C.S.) Note 31).

In case of Muhammad Akbar Khan Durrani (supra) the Hon'ble Division Bench of the High Court of Sindh has observed as under:

"7 ..It is well settled that mere issuance of letters of explanation or show-cause notice or initiation of departmental inquiry or even lodgment of any FIR against any Civil Servant, shall not deprive him from his next promotion, if he is otherwise qualified and meets all the requisite formalities for consideration to be promoted in next grade. Similarly, there is neither any bar nor any impediment upon the department to proceed further and simultaneously initiate disciplinary proceedings against any Civil Servant in accordance with law"

The reasons mentioned in the comments submitted by Secretary (Primary and Secondary Healthcare, Department), Lahore/respondent No.2 are not logical and sustainable. The right of promotion of a civil servant cannot be withheld mere on the ground of allegation.

Even after retirement, he can agitate his right of pro forma promotion which he was available during his service time. Reliance in this regard is placed on the case of Arshad Ali v. WAPDA and others (2020 PLC (C.S.) 1226) where it has been held as under:

"(a) Civil service---Promotion---Time scale upgradation---Non-convening of Time Scale Upgradation Board's meeting---Effect---Petitioner assailed the refusal of his application and sought direction to the authorities for granting him time scale upgradation along with pensionary benefits---Validity--Petitioner was eligible for promotion but he could not be granted time scale upgradation only because of non-convening of Time Scale Upgradation Board's meeting and having been retired in the meanwhile---Promotion policy of the department itself had provided that the meeting of the Board for the purpose of time scale upgradation would be held twice a year---Word 'shall' was used in the notification, which was a mandatory expression and manifest purpose of the rule/policy was that it must be acted upon as a general course--Petitioner also referred to an office order wherein benefit of time scale upgradation was given to those employees who were eligible for the same but were not allowed due to non-conducting of respective Board's meeting---Impugned order was set aside and the matter was remanded to the authorities to re-consider the plea of petitioner."

Further reliance is placed on the case of Secretary School of Education and others v. Rana Arshad Khan and others (2012 SCMR 126) wherein it has been held as follows:

"Punjab Civil Servants Act (VIII of 1974)---Ss. 2(g-a)(g-b), 5 & 8---Punjab Service Tribunals Act (IX of 1974), S.4--Constitution of Pakistan, Art. 212(3)--- Promotion---Working papers regarding appellants' promotion prepared before their retirement from service on attaining age of superannuation---Denial of promotion to appellants due to their retirement---Service Tribunal while accepting appeal directed department to prepare working papers regarding appellants' promotion and place same before Selection Board for consideration---Validity---Department had delayed matter of appellants' promotion without any justifiable reason, for which they could not be made to suffer---Appellants' promotion after retirement from service would be pro forma promotion---Supreme Court refused to grant leave to appeal in circumstances."

8. In view of what has been discussed above, instant writ petition is accepted, order dated 19.04.2021 is set aside and respondent/department is directed to promote the petitioner from BS-18 to BS-19 from his due date and give pensionary benefits accordingly.

SA/M-68/L Petition allowed.

P L D 2022 Lahore 55

Before Safdar Saleem Shahid, J

SAJID ALI---Petitioner

Versus

The STATE and 5 others---Respondents

Criminal Miscellaneous No. 50971-M of 2021, decided on 23rd August, 2021.

Criminal Procedure Code (V of 1898)---

----Ss. 174, 176 & 561-A---Cause of death, inquiry into---Locus standi---Sanctity of grave---Concurrent findings of facts by two Courts below---Petitioner was aggrieved of concurrent orders passed by Magistrate and Lower Appellate Court for exhumation/disinterment of dead body to determine cause of death---Plea raised by petitioner was that complainant had no locus standi to file such application and it would disgrace grave of the deceased---Validity---For passing order on application filed under S.176, Cr.P.C. nothing was necessary except that of satisfaction of Magistrate only to the extent that 'exhumation was necessary for knowing cause of death'---Such order was for the purpose to remove clouds of suspicion---Discretion needed to be exercised even if single reasonable circumstance/suspicion so justified---Determination of 'cause of death' would do nothing except setting criminal machinery into motion or otherwise---Such discretion should not be denied merely on account of request made by a stranger---Legal heirs were custodian of grave but when they themselves had come in sphere of suspicion, they would lose their such right---High Court declined to interfere in orders passed by two Courts below as disinterment of dead body of deceased was inevitable to determine cause of her death in order to inquire into allegations and suspicions levelled by complainant---Petition was dismissed, in circumstances.

Iqbal Bibi v. Additional Sessions Judge and others PLD 2017 Lah. 435; Ghulam Mustafa v. The State and 5 others 2015 YLR 2230; Muhammad Akram v. Additional Sessions Judge, Depalpur and 3 others 2014 PCr.LJ 1030; Mansab Ali v. Asghar Ali Faheem Bhatti, Additional Sessions Judge, Nankana Sahib and 3 others PLD 2007 Lah. 176; Muhammad Saleem v. State 2014 PCr.LJ 219; Mst. Iqra Faisal and 5 others v. Zubair Khan and 7 others PLD 2021 Sindh 118; Faryad Ali v. The State 2008 SCMR 1086; Mst. Shama v. The State and 3 others PLD 2017 Lah. 337; Syed Riaz-ul-Hassan Shah v. Additional Sessions Judge, Vehari and 3 others 2006 YLR 2953 and Begum Ali v. Additional Sessions Judge and others PLD 2020 Lah. 394 ref.

Malik Sajid Nawaz for Petitioner.

ORDER

SAFDAR SALEEM SHAHID, J.---Through instant Criminal Miscellaneous, filed under section 561-A, Cr.P.C., the petitioner has called in question the vires of order, dated 19.07.2021, passed by learned Magistrate 1st Class, Bhowana on an application moved by Naseem Akhtar/respondent No.3, for exhumation/disinterment of dead body of deceased Ghulam Bibi and order dated 12.08.2021, passed by learned Additional Sessions Judge, Bhowana in criminal revision moved by the petitioner, whereby both the learned courts below allowed the exhumation/ disinterment of dead body of deceased Ghulam Bibi by constituting a Medical Board.

2. Precisely, the facts necessary for the disposal of instant criminal miscellaneous petition are that Ghulam Bibi died allegedly in suspicious circumstances; she was buried and after sometime, Naseem Akhtar/ respondent No.3 filed an application before the learned Magistrate 1st Class, Bhowana for exhumation/post-mortem of her dead body with the assertions that deceased Ghulam Bibi married to her brother Waseem Akram/respondent No.4 with her free will and consent but against the wishes of her parents and started living with him in his house; due to this grudge, on 20.06.2021 at about 11:00 P.M., she was abducted by respondents Nos.2 to 6; Waseem Akram, husband of deceased, filed a petition under section 491, Cr.P.C., (hereinafter to be called 'the Code') before the learned Additional Sessions Judge, Bhowana for the recovery and production of his wife, wherein police submitted its report that deceased Ghulam Bibi had committed suicide by taking poison. It was further alleged in the application that in order to ascertain the real cause of death, no medical or post-mortem examination of deceased Ghulam Bibi was conducted. Further alleged that death of Ghulam Bibi was unnatural and prayed for conducting disinterment of her dead body in order to ascertain real cause of her death.

Learned Magistrate 1st Class, Bhowana, after hearing both the parties, vide order dated 19.07.2021, accepted the said application. Feeling aggrieved, the applicant/petitioner preferred Criminal Revision before the learned Additional Sessions Judge, Bhowana which was dismissed vide order dated 12.08.2021, hence the instant criminal miscellaneous.

3. Learned counsel for the petitioner submits that the learned Magistrate has neither conducted any inquiry into the matter as required under section 174, Cr.P.C. nor adopted due procedure of law while passing the impugned order; that the learned Magistrate has passed the impugned order in a slipshod and hasty manner; that Naseem Akhtar/respondent No.3 has sought direction qua disinterment of dead body of deceased

Ghulam Bibi by concealing true facts in order to save the skin of her brother, alleged husband of deceased; that father of deceased Ghulam Bibi had sworn an affidavit before the learned Magistrate deposing therein that deceased Ghulam Bibi had committed suicide due to family dispute with his husband Sajid Ali/petitioner and nobody had administered poison to her; that respondent No.3 being stranger had no locus standi to file an application before the learned Magistrate on the subject; that respondent No.3 had moved the application before the learned Magistrate just to disgrace and humiliate the family of the deceased; that the impugned orders passed by both the courts below are against the law and facts as they have not applied their independent judicial mind while passing the same. Learned counsel for the petitioner while referring to case laws reported as Iqbal Bibi v. Additional Sessions Judge and others (PLD 2017 Lahore 435), Ghulam Mustafa v. The State and 5 others (2015 YLR 2230) and Muhammad Akram v. Additional Sessions Judge, Depalpur and 3 others (2014 PCr.LJ 1030) submits that by accepting this petition, impugned orders dated 19.07.2021 and 12.08.2021 passed by both the courts below are liable to be set aside.

4. Arguments heard. Available record perused.

5. The matter in hand revolves around the applicability or otherwise of section 176, Cr.P.C., therefore, before proceeding further in the matter and discussing its merits as well as case-law on the subject, I feel it appropriate to look into the object of said section, which for convenience of reference is reproduced as under:--

176. Inquiry by Magistrate into cause of death.---(1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in section 174, clauses (a), (b) and (c) of subsection (1), any Magistrate so empowered may hold an inquiry into the cause of death either, instead of, or in addition to, the investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding, an inquiry into an offence. The Magistrate holding such an enquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) When such Magistrate considers it expedient to make an examination of the dead body of any person, who has been already interred, in order to discover the cause of his death, the Magistrate may, cause the body to be disinterred and examined.

A bare reading of subsection (1) of section 176 of the Code shows that it is in continuity of section 174 of the Code, whereby an information regarding one who:--

a) has committed suicide, or

b) has been killed by another, or by an animal, or by machinery, or by an accident, or

c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence

is to be made to the nearest Magistrate who, within the meaning of section 176 of the Code, shall be required to hold an inquiry for no other purpose but to know the 'cause of death'. The intention of the legislature behind insertion of sections 174 and 176 in the Code is indeed to secure the right of all, interested in knowing the 'cause of death' of their loved one. Moreover, it is the legitimate right of every single person to know the 'cause of death' of his loved one because sorrow of a natural death is much lighter than the pain of unnatural and sudden death. Taking notice of tragedy being faced by a person after the unnatural death of his/her loved one, the legislature has included proviso "c" in section 174 of the Code, whereby such inquiry can competently be conducted merely on existence of "reasonable suspicion". In this respect, I am fortified in my view by the judgment reported as Mansab Ali v. Asghar Ali Faheem Bhatti, Additional Sessions Judge, Nankana Sahib and 3 others (PLD 2007 Lahore 176) wherein it has been observed as under:--

"9. It may be noted that even on simple ground of suspicion, an application for disinterment can be moved, this is more so because a person should have a right to ascertain the real cause of death of his dear one...."

Such right to know about the cause of death has been protected even where the body has been interred, therefore, subsection (2), mentioned supra, was added in section 176 of the Code. A bare reading of sections 174 and 176 of the Code in juxtaposition, would show that for passing an order on an application filed under section 176 of the Code, nothing is necessary except that of satisfaction of the Magistrate only to the extent that 'exhumation is necessary for knowing the cause of death'. Since such order is always for the purpose to remove the clouds of suspicion, therefore, discretion needs to be exercised as such even if single reasonable circumstance/suspicion so justifies because determination the 'cause of death' would do nothing except setting the criminal machinery into motion or otherwise. This discretion even should not be denied merely on account of request being made by a stranger if, otherwise, circumstances so justifies because for bringing the law into motion the requirement of move by blood-relation is never insisted. At the same time, there can be no exception to the fact that even close blood relations are found involved in homicide of their beloved one, therefore, mere resistance by close relatives alone would not be a sufficient ground to deny such exercise if the other circumstances convince the Magistrate to exercise such discretion.

Reliance is placed on Muhammad Saleem v. State (2014 PCr.LJ 219) wherein it has been held as under:--

"15. It is constant view of the Superior Courts that exhumation of dead body could be ordered on the request of or on the information even a stranger for the purpose to know the actual cause of death so that criminal machinery be set in motion..."

Thus, it can safely be concluded that if there is even a single circumstance/suspicion, reasonably convincing the Magistrate that disinterment is necessary to know the cause of death then such discretion should be not avoided for the reason that the application is moved by a stranger and not by the legal heir/blood relative. Reliance is placed on case reported as Mst. Iqra Faisal and 5 others v. Zubair Khan and 7 others (PLD 2021 Sindh 118).

6. In the instant case, the learned Magistrate proceeded to pass the impugned order of exhumation/disinterment of dead body of deceased Ghulam Bibi after obtaining report from the concerned S.H.O. and hearing learned counsel for the parties including the legal heirs of deceased. It is well settled by now that application for exhumation of dead body of deceased can be moved on simple ground of suspicion and in this regard no time limit is fixed. The main objection raised by learned counsel for the petitioner is regarding locus standi of Naseem Akhtar/respondent No.3 to file the application before the learned Magistrate for exhumation of dead body of her deceased 'Bhabhi', who admittedly had no blood relation with her (Naseem Akhtar), thus, the moot point involved in this petition is whether an application for exhumation/disinterment of dead body of a deceased could be moved by her legal heir(s)/close relative(s) or anybody else/stranger.

7. Admittedly, respondent No.3 is the sister of husband of deceased Ghulam Bibi and suspected that she was not met with her natural death rather by administering poison by respondents Nos.2 to 6 in the application filed before the Magistrate and, thus, was interested in disinterment of her body in order to know the real cause of her death. It is apparent that during proceedings, father of deceased Ghulam Bibi, namely, Anwar Ali appeared before the learned Magistrate, sworn his affidavit deposing therein that his deceased daughter was married to Sajid Ali/petitioner on 11.04.2021 and performed her matrimonial obligation but later on due to some family dispute, committed suicide, whereas Naseem Akhtar/respondent No.3, in her application filed before the Magistrate, took entirely different stance by alleging that the deceased was married to his brother Waseem Akram.

8. The learned Magistrate, in the impugned order, has discussed each and every aspect of the case and no exception could be taken to such an order, which otherwise would help in removing the clouds over sudden death of a young lady under mysterious circumstances as it is the only way to know actual cause of death by conducting the post-mortem of deceased, whereafter the question on the death either it is natural or unnatural will be determined. At the same time, the medical examination of the deceased only shows the conformity with the question of death and does not itself implicates any person in the case. In this regard, I am guided by the judgment reported as Faryad Ali v. The State (2008 SCMR 1086).

9. So far as the objection of learned counsel for the petitioner that exhumation/disinterment of body of the deceased will disgrace of grave of deceased is concerned, no doubt the legal heirs are the custodian of grave but when they themselves came in the sphere of suspicion, then they loss their such right. Even otherwise, for the sake of arguments, if we exclude the locus standi of both the applicants, especially respondent No.3, even though it is the basic scheme of criminal law that an offence if committed must be , unearthed for which criminal machinery has to be set into motion. Section 176(2) of the Code does not place an embargo of locus standi to approach a Magistrate for exhumation of dead body. Reliance is placed on the cases reported as Mst. Shama v. The State and 3 others (PLD 2017 Lahore 337) Syed Riaz-ul-Hassan Shah v. Additional Sessions Judge, Vehari and 3 others (2006 YLR 2953) and Begum Ali v. Additional Sessions Judge and others (PLD 2020 Lahore 394) wherein it has been held that subsection (2) of Section 176 of the Code does not put any clog of locus standi upon an applicant to approach the Magistrate to undertake the exercise and the Magistrate even on his own accord or on information or any Stranger can file an application to ascertain the actual case of death.

10. For what has been discussed above, I am of the considered view that disinterment of the dead body of Ghulam Bibi is inevitable to determine the cause of her death in order to inquire into the allegations and suspicions levelled by respondent No.3. The findings of both the courts below seem to be just, legal and reasonable, which do not warrant any interference by this Court. No illegality, infirmity or procedural errors has, been observed in the orders so impugned by the petitioner, thus, by dismissing this petition in limine, the same are upheld.

MH/S-68/L Petition dismissed.

P L D 2022 Lahore 766

Before Safdar Saleem Shahid, J

ABDUL HAQ---Appellant

Versus

AKRAM-UL-HAQ and others---Respondents

Civil Revision No. 137 of 2017, decided on 26th October, 2021.

(a) Punjab Partition of Immovable Property Act, 2012 (IV of 2013)---

----S. 10---Civil Procedure Code (V of 1908), O. XXVI, R. 1---Private partition---Internal auction---Suit for declaration/partition---Privately partitioned property between the parties was prayed to be declared final---Respondent/plaintiff also filed a suit for partition of the disputed shop asserting that he and the petitioner were joint owners of the said shop and that the same shop be partitioned---Suit was concurrently decreed---Local Commission submitted his report proposing that the suit property was not partitionable and the same should be disposed of through auction---Both parties objected to the said report and Trial Court called for second report which was not objected to by the respondent but petitioner filed objections thereon which were declined by the Court---Trial Court decreed suit observing that the suit property was to be partitioned as per second report of the Local Commission---Petitioner filed appeal which was dismissed by the District Court---Validity---Second local commission was also appointed before the enactment of the provision of referee in Partition Act, 2012, therefore, the order of the Trial Court for the appointment of commission on second time was valid and legal---Admittedly, the suit property had been partitioned through family settlement 20 years ago, therefore, said private partition be declared final and the possession of the disputed property be handed over to the parties in accordance with the private partition---Report of local commission showed the disputed property as partitionable whereas Oversee Building Department (technical person) had submitted his independent report proposing the auction of the suit property for having found it not partitionable---Trial Court had not considered the objections raised by the petitioner and simply declined the objections without assigning any reason---Trial Court also did not consider the report of Overseer Building Department (technical person)---Courts below failed to appreciate the point that due to undividable partition, the value of the property in dispute and shares of the co-sharer would be diminished---Principles of natural

justice/equity including easement rights were not considered in view of the Arts. 4, 8, 9, 18, 23, 24 & 38 of the Constitution---High Court allowed revision petition and remanded the matter to Trial Court to decide the objections to the report of Local Commission.

Muhammad Ramzan v. Mst. Aisha and others 2014 SCMR 151 and Muhammad Ibrahim and others v. Muhammad Ismail and others 2002 MLD 879 rel.

(b) Punjab Partition of Immovable Property Act, 2012 (IV of 2013)---

----S. 4---Nature of proceeding---Duty of Court---Scope---Partition suits were different from the other civil suits as in partition suits parties had already established their right of ownership in the property---Main purpose of partition suit was to settle down the certain part/share of each sharer, according to their entitlement---Civil Court was responsible to see that nobody/share-holder be deprived in any way from his/her legal right.

(c) Punjab Partition of Immovable Property Act, 2012 (IV of 2013)---

----Preamble---Main purpose of enactment was to permanently settle the share of each sharer according to their entitlement---Such proceedings were to be processed speedily.

(d) Punjab Partition of Immovable Property Act, 2012 (IV of 2013)---

----Preamble---Essential considerations for passing a decree for partition of partitionable property---Court, in case of partitionable property, is bound to see that the proposed shares are equal in all respect: (i) Valuation of the property is equal of each sharer, accordingly to his/her share. (ii) Right of easement are equally available to all sharers. (iii) All sharers have the equal opportunity to utilize theirs shares. (iv) The future aspect of each sharer is equal in all respect.

Gulzar Ahmed Khan Durrani, Malik Shah Nawaz Kalyar, Mian Muhammad Shahid

Akhtar and Mian Kashif Saleem for Petitioner.

Aejaz Ahmad Ansari for Respondents.

Date of hearing: 26th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---The petitioner Abdul Haq has challenged the validity of judgments and decree dated 05.11.2015 passed by learned trial court as well as the judgment and decree dated 17.01.2017 passed by learned Addl. District Judge, Hasilpur, whereby suit of respondent No.1 Akram-ul-Haq for partition regarding the suit property as per report submitted on 19.10.2015 was decreed in his favour and against the petitioner.

2. Brief facts necessary for disposal of instant civil revision are that Abdul Haq petitioner filed the suit for declaration titled Abdul Haq v. Akram-ul-Haq etc. alleging therein that suit property is owned by the plaintiff-petitioner as well as defendants and has been privately partitioned between the parties. Through the instant suit, he prayed that their private partition be declared final.

3. Akram-ul-Haq respondent No.1 also filed suit for partition of the disputed property with the assertion that he along with Abdul Haq petitioner is joint owner of the disputed shop. He prayed that disputed shop be partitioned in accordance with law.

4. It is pertinent to mention here that vide order dated 11.05.2012 passed by learned trial court both the aforesaid suits were consolidated. The proceedings were conducted in the suit titled Akram-ul-Haq v. Abdul Haq. After recording of evidence of both the parties, learned trial court passed the preliminary decree with the following observations:--

"In view of my findings on the above said issues, both the suits of the plaintiffs are hereby partially/initially decreed in their favour to the extent of their ownership as per their respective determined shares in both the disputed properties of both the suits and to the extent of alleged family settlement/partition is hereby dismissed. Initial decree-sheet be prepared accordingly. To the extent of remaining claim of both the plaintiffs with regard to their possession according to their determined shares after legal partition over both the properties are hereby continued and both the parties are hereby directed to affix the requisite court fee Rs. 15000/- each as per rules and law in both the suits till the next date of hearing."

After passing of preliminary decree, learned trial Court vide order dated 28.03.2013 appointed Mr. Mushtaq Ahmad Advocate as local commission to suggest mode, in which, the suit property could be partitioned between Abdul Haq and Akram-ul-Haq, or, otherwise about its market value, in case, he finds it to be not partitionable. On 04.10.2013 the said local commission submitted his report, wherein, he proposed that

the suit property should be disposed of through action for not being partitionable. On the said report, objections were submitted by the petitioner as well as respondent No.1. During the pendency of objections, an application was submitted by the petitioner to conduct internal auction of the disputed property. Keeping in view the objections raised by the respondent No.1, vide order dated 17.07.2014 again appointed Mr. Mushtaq Ahmad Advocate as local commission who was directed to revisit the disputed property along with Overseer of Building Department (technical person) and ascertain whether disputed property is divisible or not. On 19.10.2015 the local commission submitted his 2nd report before the learned trial court. Respondent No.1 did not submit the objections on the 2nd report of local commission, however the petitioner filed objections on the report of said local commission which were declined by learned trial court vide order dated 04.11.2015. Vide judgment dated 05.11.2015 finally decreed the suit of respondent No.1 for partition and observed that property in dispute is to be partitioned between the parties to this suit as per report submitted on 19.10.2015. Being dissatisfied with the said judgment and decree of learned trial court, the petitioner filed civil appeal which was dismissed by learned Addl. District Judge Hasilpur and upheld the decision of learned trial court. Hence this civil revision.

5. Arguments heard. Record perused.

6. Partition suits are different in nature, than the other civil suits. In partition suits only those parties are joined, who already had established their right of ownership in the property. They have certain different shares in the property. The main purpose of partition suit is to settle down the certain part/share of each sharer, according to their entitlement. So, the responsibility of court is to see, that nobody/share-holder be deprived in any way from his/her legal right. According to the Partition Act 1893, the court was empowered to appoint local commission to ascertain certain facts. This local commission was to be appointed under Order XXVI, Rule 1, C.P.C. which says:--

1. Cases in which Court may issue commission to examine witness.---Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

The court ascertains the power, jurisdiction and specific task of the local commission and it was purely discretion of the Court. The local commission, if submits that the

property is partitionable, then it proposes the mode of the partition, the parties have right to file their objections, if not suits them, then the court has to decide these objections. If the commission submits, that the property is not partitionable, then the same was put to auction under the rules. The amended Punjab Partition of Immovable Property Act, 2012, also proposes, internal auction and external auction as required under sections 10 and 11 of said Act which reads:-

(10) Internal auction.--

If on the date fixed by the Court for the purpose, the co-owners fail to submit written agreement about partition of the immovable property through appointment of a referee or the referee is of opinion that the property is not partitionable or the Court finds that the proposal of the referee is in contravention of any law, the Court shall determine the reserve price of immovable property and direct sale of the property through internal auction on the next date of hearing. .

11 (Open Auction)

"If the co-owners refuse to participate in the internal auction or only one co-owner shows his willingness to participate in such auction or the internal auction under section 10 has failed, the court shall fix the reserve price of the immovable property and direct open auction of the property.

In case of partitionable property, the court is bound to see that the proposed shares are equal in all respect. (i) that the valuation of the property is equal of each sharer, accordingly to his/her share. (ii) Rights of easement are equally available to all sharers. (iii) All sharers have the equal opportunity to utilize theirs shares. (iv) The future aspect of each sharer is equal in all respect.

7. If the sharers, want to make improvement on their respective share it will neither affect the other sharers, nor there should be any hurdle or difficulty for any of the sharer. If objections are filed by the sharers, the court must settle these objections keeping in view the wisdom maintained in the Partition Act. The main purpose is to permanently settle the share of each sharer according to their entitlement. These proceedings should be processed speedily. The discretion of the court has been minimized in the amended Partition Act 2012, with the inclusion of the amendment regarding the appointment of referee. This suit for partition was filed under the Partition

Act, 1893 and commission was also appointed under the provision of said Act. Second local commission was also appointed before the enactment of the provision of referee in Partition Act, 2012. So, the order of the court for the appointment of commission on 2nd time was valid and legal.

8. Admittedly the petitioner and respondent No.1 are real brothers. Record reveals that petitioner filed the suit for declaration alleging therein that suit property has been partitioned through family settlement 20-years ago, therefore, said private partition be declared final and the possession of the disputed property be handed over to the parties in accordance with the private partition. It has been noticed that respondent No.1 Akram-ul-Haq also filed the suit for partition contending therein that he along with Abdul Haq petitioner is joint owner of disputed shop and disputed property be partitioned in accordance with law. Both the aforesaid suits were consolidated and preliminary decree was passed by learned trial court vide judgment and decree dated 27.02.2013. In the preliminary decree, the learned trial court dismissed the claim of the petitioner to the extent of family settlement/partition, however, both the suits of the plaintiffs (petitioner and respondent No.1) were partially/ initially decreed in their favour to the extent of their ownership as per their respective determined shares in both the disputed properties of both the suits. Thereafter the learned trial court in the light of report of local commission dated 19.10.2015 passed the final decree for partition and observed that property in dispute is to be partitioned between the parties which was upheld by learned appellate court.

9. Contention of learned counsel for the petitioner was that in the first report the local commission proposed that the suit property should be disposed of through auction as the same was not partitionable. Respondent No.1 filed objections over the said report of local commission on the ground that no technical person was associated by the local commission at the time of preparing report whereas petitioner also filed the objections with the stance to conduct internal auction, otherwise, to conduct open auction. The petitioner also raised objection that in the light of amendment dated 05.01.2013 in the Punjab Partition of Immovable Property Act, 2012 the matter of partition of suit property be decided. Vide order dated 17.07.2014 learned trial court again appointed the same local commission who revisited the disputed property along with Overseer of Building Department(technical person). The said local commission submitted his report 2nd report wherein it was concluded by him that the disputed property was partitionable

whereas Oversee Building Department (technical person) has submitted his independent report which is in contradiction with the report submitted by Mr. Mushtaq Ahmad Advocate, as he proposed auction of the suit property for having found it not partitionable. The objections were filed by the petitioner over the said report which were declined by learned trial court vide order dated 04.11.2015. The learned trial court while passing the impugned judgment and decree dated 05.11.2015 did not consider the objections raised by the petitioner and simply declined the objections without assigning any reason. Perusal of interim order dated 05.10.2015 passed by learned trial court reveals that on the said date (05.10.2015) the report of local commission was still awaited and a reminder was issued to Ch. Mushtaq Ahmad Advocate and to Overseer Building Department with the direction to appear in person along with their respective reports on the date fixed. The learned trial court also did not consider the report of Overseer Building Department (technical person) wherein it was proposed by him that auction of the suit property for having found it not partitionable and his report is contrary to the report submitted by Mushtaq Ahmad Advocate. Learned appellate court also did not consider this aspect of the matter and passed the impugned judgment without taking into consideration the objections raised by the petitioner; Both the courts failed to appreciate the point that due to undividable partition, the value of the property in dispute as well as shares of the co-sharer would be diminished. The basic principles of natural justice and equity including Easement Rights of the parties (co-sharers) attached with their respective owned properties/businesses was not considered in view of the Articles 4, 8, 9, 18, 23, 24 and 38 of the Constitution. Record reveals that the petitioner filed objections to the report but such objections were not dealt with by the learned trial court in accordance with law. Such vital aspects of the matter had not been taken into consideration by the learned appellate court. Reliance is placed on case law reported as Muhammad Ramzan v. Mst. Aisha and others (2014 SCMR 151). The court after considering objections, in the light of evidence was expected to determine if property could be partitioned and if not whether the same could be auctioned and also as to what were accounts. The court had to grant relief in matter of recovery, settlement and adjustment of rent and income of joint property, but all those important aspects of the matter were not attended by both the courts below. Reliance is placed on case reported as Muhammad Ibrahim and others v. Muhammad Ismail and others (2002 MLD 879, Lahore).

10. For what has been discussed above, instant civil revision is partly allowed and final judgments and decrees dated 05.11.2015 and 17.01.2017 passed by both the courts below are set aside. The case is remanded to learned Civil Judge who will decide the objections to the report of the Local Commission by allowing the parties opportunity of evidence and will pass a final decree after attending to the questions noted supra and also in the light of the observation made hereinabove. However, the preliminary decree is not disturbed. No order as to costs.

ZH/A-55/L Order accordingly.

P L D 2022 Lahore 833

Before Safdar Saleem Shahid, J

SAFIA BEGUM---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 7155 of 2021, decided on 3rd September, 2021.

Mental Health Ordinance (VIII of 2001)---

----Preamble & S. 37---Guardian certificate of person/property of mentally disordered child---Inventory of moveable and immovable properties, furnishing of---Petitioner/widow of police officer was declared by District Court as guardian of her daughter's person and property---Pension of petitioner's husband was allegedly sanctioned and in the total amount of Rs.32,67,678/-, share to her extent (25%) was lying in the bank account---Petitioners filed two applications: first for grant of permission to withdraw Rs.20,00,000/- from Bank Account for the purpose of construction of house and for medical treatment of her disabled daughter; and second, for submission of return/financial statement---Both applications had been dismissed by District Court on ground that petitioner had failed, even after lapse of two years, to furnish an inventory of all the properties/assets received on behalf of mentally disordered daughter together with statement of all claims/debt/liabilities due without any plausible excuse, which she had to submit within a period of three months---Held, that at the time of issuing guardian certificate, Court did not pass any order regarding submission of inventory of the movable/immovable property belonging to the ward/disabled daughter---Surety required by Court through the said order was submitted by the petitioner---Court did not issue any notice to the petitioner for filing of any statement/return---Mental Health Ordinance, 2001, was purely enacted for the welfare of the disabled person---Mere word 'shall' had been used in Ordinance, 2001, without recommending any penal clause---Court was under obligation to see the intent of the legislation---Court, being guardian of the minor/disabled persons, had not only to see/supervise but to take care of the rights of the minors/disabled persons---Court had to take into account the reason/need mentioned in the application by the petitioner for withdrawal of amount---No complaint was on record against petitioner/guardian that she was not taking care of her disabled daughter's person/property---Constitutional petition

was allowed and District Court was directed to entertain the inventory/statement of accounts and decide the application afresh.

Province of Punjab through Secretary Excise and Taxation Department, Lahore and others v. Murree Brewery Company Limited (MBCL) and another 2021 SCMR 305; Province of Punjab through Conservator of Forest, Faisalabad and others v. Javed Iqbal 2021 SCMR 328; State through Regional Director ANF v. Imam Bakhsh and others 2018 SCMR 2039; Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din & sons and others 2017 SCMR 1427; Adeel Ahmad Gaba v. Special Judge Rent and another PLD 2019 Lah. 268; Messrs Wazir Khan Store and others v. United Bank Limited through Authorized Attorney 2015 CLD 1729 and Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. 2012 CLD 337 rel.

Ch. Dilshad Ahmed for Petitioner.

Jam Muhammad Afzal Gasoora, A.A.G. on Court's call for Respondents.

ORDER

SAFDAR SALEEM SHAHID, J.---The instant petition is directed against the orders dated 09.04.2021 and 10.07.2021, whereby the learned Additional District Judge, Lodhran, dismissed two applications of the petitioner, first for grant of permission to withdraw Rs.20,00,000/- from A/c No.799591009536, MCB Bank, Lodhran and the other for submission of return/financial statement.

2. In the case in hand the petitioner applied for her appointment as guardian of the person and property of her real daughter namely Mst. Naseem Akhtar, who being mentally disabled was unable to perform any sort of routine affairs. According to the petitioner, after the death of her husband, who was employed in police department, Mst. Naseem Akhtar was residing with the petitioner, and she being mother was looking after her affairs. According to the petitioner, pension of husband of Mst. Naseem Akhtar was sanctioned and in the total amount of Rs.32,67,678/-, share to her extent (25%) was lying in A/c No.799591009536, MCB Bank, Lodhran.

3. The learned Additional District Judge, Lodhran through order dated 09.04.2019 accepted the application and appointed the petitioner as guardian of person and property of Mst. Naseem Akhtar, with the observation "the petitioner who is real mother of Mst.

Naseem Akhter as the appointment of the petitioner as her guardian is hereby declared as lawful guardian of the property and person of Mst. Naseem Akhtar. Resultantly instant petition is allowed, subject to furnishing surety bond in sum of Rs.17,27,276/- with one surety in the like amount to the satisfaction of this court. However, the amount shall not be disbursed without prior permission of this court."

4. The petitioner applied for withdrawal of an amount of Rs.20,00,000/- for the purpose of construction of house and for medical treatment of her disabled daughter, but the learned Additional District Judge, Lodhran, dismissed the same through order dated 09.04.2021, with the observation that the petitioner after her appointment as guardian was duty bound to furnish an inventory of the immovable as well as movable property and all other assets received on behalf of mentally disorder person together with statement of all claims due on and all debt and liabilities due by such a person within a period of three months but the same was not submitted during such a long period of two years. Thereafter, the petitioner through another application submitted the detail of the expenditures/inventory on 08.07.2021, but the Court did not accept the same with the observation that after a delay of two years without any plausible explanation the same was not acceptable and dismissed the application through order dated 10.07.2021.

5. Learned counsel for the petitioner argued that the petitioner is real mother of the ward. She is not only facilitating the ward regarding all aspects of life but also bearing all expenditures including medical treatment, therefore, she is in need of the amount. She has no house to live and she has no other source of income to expend the amount for medical treatment of disabled daughter, therefore, she be allowed to withdraw the said amount.

6. The petitioner was appointed guardian of the person and property of Mst. Naseem Akhtar through order dated 09.04.2019. It has been noticed that at the time of issuing the certificate for guardianship the Court did not pass any order regarding submission of detail of the movable and immovable property belonging to the ward/disabled daughter. The surety required through the order was submitted by the petitioner. After the issuance of certificate/acceptance of the application for appointment of guardian of person and property of Mst. Naseem Akhtar (disabled) the Court even did not issue any

notice to the petitioner for filing of any statement/return. Thereafter, the lady filed this application on 13.03.2021 after about two years of issuance of certificate, wherein she has mentioned in detail the requirements/need for withdrawing the amount lying in MCB, which was disallowed by the Court vide order dated 09.04.2021 on the ground that the lady has not deposited the required inventory/statement of accounts regarding the movable and immovable property of the disabled daughter which was mandatory under the law. I would like to reproduce the relevant statutory provision on the subject (Section 37 of the Mental Health Ordinance, 2001), as under:-

> "37. Furnishing of inventory of immovable property, etc.--- (1) Every manager appointed under this Ordinance shall, within a period of three months from the date of his appointment, deliver to the Court an inventory of the immovable property belonging to the mentally disordered person and of all assets and other movable property received on behalf of the mentally disordered person, together with a statement of all claims due on and all debts and liabilities due by such a person.

(2) All transactions under this Ordinance shall be made through a bank authorized by the Court.

(3) Every such manager shall also furnish to the Court within a period of three months of the closure of every financial year, an account of the property and assets in his charge, the sums received and disbursed on account of the mentally disordered person and the balance remaining with him.

(4) If any relative of a mentally disordered person impugns, by a petition to the Court, the accuracy of the inventory or statement referred to in subsection (1) or, as the case may be, any annual account referred to in subsection (3), the Court may summon the manager and summarily inquire into the matter and make such order thereon as it thinks fit.

(5) Any relative of a mentally disordered person may, with the leave of the Court, sue for an account from any manager appointed under this Ordinance or from any such person after his removal from office or trust, or from his legal representatives in the case

of his death, in respect of any property then or formerly under his management or of any sums of money or other property received by him on account of such property."

7. The learned lower Court while apprising the said Section itself, has not considered the philosophy behind the Ordinance that it was purely enacted for the welfare of the disabled person. Mere the word 'shall' has been used in the statute without recommending any penal clause. In that case, Court has to consider the application/scope of that provision. Reliance in this regard is placed on Province of Punjab through Secretary Excise and Taxation Department, Lahore and others v. Murree Brewery Company Limited (MBCL) and another (2021 SCMR 305), wherein it is held as under:-

> "The test to determine whether a provision is directory or mandatory is by ascertaining the legislative intent behind the same. The general rule expounded by this Court is that the usage of the word 'shall' generally carries the connotation that a provision in mandatory in nature. However, other factors such as the object and purpose of the statute and inclusion of penal consequences in cases of non-compliance also serve as an instructive guide in deducing the nature of the provision."

I also rely on the case reported as Province of Punjab through Conservator of Forest, Faisalabad and others v. Javed Iqbal (2021 SCMR 328), wherein it is held as follows:-

> "In order to determine whether a provision was directory or mandatory, the duty of the court was to try to unravel the real intention of the legislature. The ultimate test was the intent of the legislature and not the language in which the intent was clothed. The object and purpose of enacting the provision provided a strong and clear indicator for ascertaining such intent of the legislature. The intention of the legislature must govern and this was to be ascertained not only from the phraseology of the provision but also by considering its nature, its object, and the consequences which would follow from construing it one way or the other. This exercise entailed careful examination of the scheme of the Act in order to discover the real purpose and object of the Act. A provision in a statute was mandatory if the omission to follow it rendered the proceedings to

which it related illegal and void, while a provision was directory if its observance was not necessary to the validity of the proceeding.

One of the important test that must always be employed in order to determine whether provision was mandatory or directory in character was to consider whether the non-compliance of a particular provision caused inconvenience or injustice and, if it did, the court would say that that provision must be complied with and that it was obligatory in its character. There were three fundamental tests, which were often applied with remarkable success in the determination of this question. They were based on considerations of the scope and object, sometimes called the scheme and purpose, of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affected the performance of a public duty or related to a right, privilege or power in the former case the enactment was generally directory, in the latter mandatory."

Similarly, in the case of the State through Regional Director ANF v. Imam Bakhsh and others (2018 SCMR 2039), the specific provision has been discussed in detail, the operative part of which is as under:-

"The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man."

I also rely upon the case of the Collector of Sales Tax, Gujranwala and others v. Messrs Super Asia Mohammad Din & sons and others (2017 SCMR 1427), wherein it is held:-

> "While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself."

Reliance in this regard can also be placed upon the cases reported as Adeel Ahmad Gaba v. Special Judge Rent and another (PLD 2019 Lahore 268), Messrs Wazir Khan Store and others v. United Bank Limited through Authorized Attorney (2015 CLD 1729) and Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. (2012 CLD 337).

8. The Court was under obligation to see the intent of the legislation. The petitioner who is real mother of the disabled lady was appointed as guardian. She has mentioned the reason for obtaining/withdrawing the amount from the bank. The Court is also the guardian of the minors and disabled persons. The Court is not only to see and supervise but to take care of the rights of the minors and the disabled persons. Although the lady submitted the statement of expenditure too late and did not deposit/submit the inventory about the movable and immovable property related to the disabled person as required under Section 37 of the Ordinance, yet this was for the Court to take into account the reason/need mentioned by the petitioner for withdrawal of amount. The Court was under obligation to consider and entertain the statement of accounts/expenditures tendered by the lady. The other factor is that there was no complaint against lady/ petitioner/guardian that she is not taking care of the disabled lady (her person and property). In that case, the Court was under obligation to consider the need of the lady and to entertain the documents/statement of accounts/expenditures tendered by the petitioner and may also enquire about the correctness of the same, but the Court cannot refuse to entertain the same because the intent of the legislation is the welfare of the minor/disabled person.

9. In the circumstances, the instant petition is allowed, the impugned orders dated 09.04.2021 and 10.07.2021 are set aside and the case is remanded to the learned

Additional District Judge, Lodhran, with the direction to entertain the inventory/ statement of accounts submitted by the petitioner and decide the application afresh keeping in view the spirit of the statute which is purely for the welfare of the ward/disabled person. No order as to costs.

ZH/S-33/L Petition allowed.

PLJ 2022 Lahore (Note) 99

***Present*: SAFDAR SALEEM SHAHID, J.**

ABDUL QAYYUM BUTT--Petitioner

versus

FEDERATION OF PAKISTAN etc.--Respondents

W.P. No. 172672 of 2018, heard on 14.3.2022**.**

Government Servants (Efficiency & Discipline) Rules, 1973--

----R. 4(1)(b)(i)(a)--Railway Servants (Efficiency & Discipline) Rules, 1975, R. 1(3)--Charge of misconduct--Dismissal from service--Appeal before service tribunal--Accepted and direction to conducting of *de novo* inquiry--Fresh charge sheet was issued instead of *do novo* inquiry--Show cause notice--Retirement from service--Suspension period was treated as leave without pay-- Imposing of penalty for recovery--Direction to--When petitioner, after having been reinstated by FST, is no more in service and is only aggrieved of non-payment of his emoluments, objection of respondents regarding non-maintainability of instant petition does not have any basis--Respondents did not even start to conduct de novo proceedings, as directed by FST while setting aside orders passed against petitioner and have imposed penalties upon him which is against law and liable to be set aside--Rule clearly entitles petitioner to retire with lull pensionary benefits and period of suspension is bound to be treated as period spent on duty--Petition allowed.[Para 4, 6 & 7] B, C & D

2007 SCMR 855, 2006 SCMR 421, 2005 SCMR 1032 and 2011 PLC (CS) 1527 *ref.*

Constitution of Pakistan, 1973--

----Art. 212--Jurisdiction of High Court--Jurisdiction of Court is barred under Article 212 of Constitution of Islamic Republic of Pakistan. [Para 4] A

Mr. Riaz Ahmad Tahir, Advocate Petitioner.

Sh.Shahzad Ahmad, Advocate & *Mian Shahzad Khadim Manday*, Assistant Attorney General for Pakistan.

Date of hearing: 14.3.2022.

JUDGMENT

The petitioner through the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, has assailed the orders dated 02.04.2016 and 22.04.2016 passed by Respondent No. 3.

2. Brief facts necessary for decision of the instant petition are that the petitioner was serving in the Pakistan Railways as STE (BS-11) when he after having been proceeded against under the charge of misconduct was dismissed from service and recovery of Rs. 5,07.315/-was ordered on 08.10.2007. His appeal filed before the General Manager Pakistan Railways under Sections 9 & 10_of the Removal from Service Special Power Ordinance, 2000, was also rejected on 04.04.2008. Feeling aggrieved, he filed service appeal before the Federal Service Tribunal on 21.04.2008, which was accepted on 24.02.2010 with the following observation:

"In these circumstances we are left with no other alternative but to accept the appeal and order for de novo regular enquiry enabling the appellant to avail full opportunity to disprove the allegations alleged against him. Consequently the appeal is accepted and impugned orders dated 08.10.2007 and 04.04.2008 are set aside. The appellant is reinstated into service. However, the, question of recovery and payment of back benefits would depend upon the outcome of the de novo proceedings."

Thereafter instead of conducting de novo proceedings as directed by the Federal Service Tribunal through order dated 24.02.2010, a fresh charge sheet was issued with the same allegations on 19.07.2010 and thereafter the petitioner was served with a show cause notice dated 22.11.2010 along with statement of charges under Government Servant (E&D) Rules, 1973/75 by Respondent No. 4 for imposition of major penalty under Rule 4(1)(b) or lesser penalty under Rule 4(i)(a) of the said Rules. The petitioner submitted his defence and Respondent No. 4 remitted the proceedings before the Respondent No. 3, who dismissed the services of the petitioner through notice of imposition of penalty dated 17.11.2011. Appeal of the petitioner against the said Order was dismissed by Respondent No. 2 *vide* order dated 03.07.2012. Feeling aggrieved of the orders dated 17.11.2011 and 03.07.2012, the petitioner again filed appeal before the Federal Service Tribunal which was decided on 11.04.2013 in the following manner:-

"For the above mentioned reason, the impugned orders are set aside and the case is remanded to the respondents with the direction to complete *de novo* proceedings by conducting a regular inquiry under the Removal From Service (Special Powers) Ordinance, 2000. The appellant may be provided full opportunity to refute the allegations leveled against him. The appellant is reinstated in service to face the enquiry. The question of payment of back benefits shall depend upon the outcome of de novo proceedings."

In the meanwhile, the petitioner retired from service on attaining the age of Superannuation on 19.06.2015 through notice dated 13.06.2015. Thereafter through letter dated 02.04.2016, Respondent No. 3 informed regarding decision of application of the petitioner dated 24.02.2016 in the following manner:-

"The period involve from 20.09.2007 to 24.03.2010, 17.11.2011 to 22.05.2013 during which he remained out of service and suspension period from 25.09.2013 to 05.06.2015 is treated as Leave Without Pay (LWP)."

Thereafter Respondent No. 3 through a letter dated 22.04.2016 imposed penalty of Rs. 1,44,530/-upon the petitioner. Hence, the instant petition challenging the letters/orders dated 02.04.2016 and 22.04.2016. The respondents filed their parawise comments and raised certain preliminary objections.

3. Arguments heard. Recotd perused.

4. The main objection raised by the respondents is that since the petitioner is a civil servant and the matter involves terms and conditions of his service jurisdiction of this Court is barred under Article 212 of the Constitution of the Islamic Republic of Pakistan. The petitioner was an employee of Pakistan Railways and has since been retired on attaining the age of superannuation on 19.06.2015, *i.e*. before filing this petition, as such his case does not fall within the category of civil servant. Even otherwise, the petitioner's appeal before the Federal Service Tribunal against the orders dated 08.10.2007 and 04.04.2008 was accepted through order dated 24.02.2010; resultantly, the impugned orders were set aside and the petitioner was reinstated into service and de novo regular inquiry was ordered, however, the question

of recovery and payment of back benefits was left upon the outcome of the de novo proceedings, but the respondents instead of conducting de novo proceedings issued a fresh charge sheet against him. In the fresh proceedings services of the petitioner were ultimately dismissed and he was imposed a penalty of Rs. 5,07,315/-for the alleged misappropriation through order dated 19.01.2007. Appeal against the said order was also accepted by the Federal Service Tribunal through judgment dated 11.04.2013 and the impugned order was set aside, the case was remanded to the respondents with the direction to complete de novo proceedings by conducting a regular inquiry, the petitioner was reinstated in service and the question of payment of back benefits was left upon the outcome of de novo proceedings. The respondents again instead of conducting de novo proceedings, kept the matter pending till the time the petitioner retired from service on attaining the age of superannuation and thereafter passed the impugned orders for treating the period from 20.09.2007 to 24.03.2010, 17.11.2011 to 22.05.2013 during which he remained out of service and suspension period from 25.09.2013 to 05.06.2015 as leave without pay and imposition of recovery of Rs. 1,44,530/-. In this situation, when the petitioner, after having been reinstated by the Federal Service Tribunal, is no more in service and is only aggrieved of non-payment of his emoluments, objection of the respondents regarding non-maintainability of the instant petition does not have any basis and the citations relied upon by the respondents are not applicable in the instant case.

5. Even otherwise, since the respondents proceeded against the petitioner under the Railway Servants (Efficiency &. Discipline) Rules, 1975 inserted by S.R.O. 757(I)/75, dated the 7th July, 1975, he even at that time was not a civil servant as per Rule 1(3), which for ready reference is reproduced below:--

> "1(3) They shall apply to every person to whom the Pakistan Railways Establishment Code applies except a person who is a civil servant within the meaning of the Civil Servants Act, (LXXI of 1973)."

6. As regards the penalties imposed upon the petitioner it is important to mention here that appeal of the petitioner was accepted by the Federal Service Tribunal on 11.04.2013, the impugned orders were set aside and he was reinstated in service and the

case was remanded to the respondents with the direction to complete de novo proceedings through a regular inquiry by providing full opportunity to refute the allegations leveled against him. The question of payment of back benefits was, however, left upon the outcome of de novo proceedings. In view of the law laid down in the case of *Province of Punjab through Conservator of Forest Faisalabad and others vs. Javed Iqbal* (2021 SCMR 328), finalization of the departmental proceedings not later than two years of the retirement of the employee under the proviso to Section 21 of the Act is a mandatory provision and any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the above time period are void and have no legal effect. However, in the instant case the respondents did not even start to conduct de novo proceedings, as directed by the Federal Service Tribunal while setting aside the orders passed against the petitioner through judgment dated 11.04.2013, and have imposed penalties upon him which is against law and liable to be set aside.

7. As regards the order regarding treatment of period spent by the petitioner under suspension or out of service learned counsel for the petitioner in that behalf referred us to F.R.54-A which, for ready reference is reproduced below as inserted by S.R.O. 1143(I)/80 dated 10th November, 1980:-

> "54A. If a Government servant, who has been suspended pending inquiry into his conduct attains the age of superannuation before the completion of inquiry, the disciplinary proceedings against him shall abate and such government servant shall retire with full pensionary benefits and the period of suspension shall be treated as period spend on duty."

The above rule clearly entitles the petitioner lo retire with full pensionary benefits and period of suspension is bound to be treated as period spent on duty. Reliance in this regard is placed upon *Muhammad Hussain and others vs. E.D.O*. (Education) and others (2007 SCMR 855), *Sher Muhammad Shehzad and 22 others vs. District Health Officer and another* (2006 SCMR 421), *Binyamin Masih vs. Government of Punjab through Secretary Education Lahore and 4 others* (2005 SCMR 1032), *General Manager/Circle Executive Muslim Commercial Bank Limited and another* (2002 SCMR 1064) and *Parveen Javaid vs. Chairman WAPDA and 5 others* (2011 PLC (C.S.) 1527).

8. For what has been discussed above, the instant petition is allowed and the impugned orders dated 02.04.2016 and 22.04.2016 passed by Respondent No. 3 are set aside. Resultantly, the respondents are directed to recalculate the emoluments of the petitioner by treating him to be on duty during the period of his suspension. There shall be no order as to costs.

(Y.A.) Petition allowed.

PLJ 2022 Lahore (Note) 126

***Present*: SAFDAR SALEEM SHAHID, J.**

ABDUL AZIZ--Petitioner

versus

MUHAMMAD ISHAQ--Respondent

C.R. No. 2681 of 2011, decided on 2.3.2022.

Punjab Pre-emption Act, 1991 (IX of 1991)--

----S. 13--Pre-emption suit--Dismissal of suit--Suit was remand in appeal--Dismissal of suit in post remand proceedings--No date of proformance of talb-i-muahibat was mentioned in statement of plaintiff and witnesses--Notice was not served duly--Petitioner was failed to prove his preferential right--Challenge to--Duty of plaintiff--It is duty of plaintiff to prove exact date, month and year of performance of Talabs--Plaintiff and witnesses of Talabs did not mention place of performance of Talab-i-Muwathibat--Witness of Talab-i-Muwathibat was not consistent and his statement was not up to mark as required--Names of witnesses of notices are mandatory to be mentioned in plaint--Notice was not as such proved by petitioner and witnesses--Furthermore notice was not served to respondent because as per record postman had failed to contact defendant on given address--ADJ committed an error while forming his opinion on issues regarding Talabs, same is not sustainable in eyes of law--Trial Court while dismissing suit of plaintiff has rightly consolidated findings on issues regarding Talabs--Petitioner has failed to prove his preferential right--Civil revision dismissed. [Para 8 & 9] A, B, C, D, E, F & G

2008 SCMR 404 and 2007 SCMR 895 *ref.*

Mr. Ghulam Farid Sanotra, Advocate for Petitioner.

Mr. Shah Nawaz Khan Niazi, Advocate for Respondent.

Date of hearing 2.3.2022.

JUDGMENT

Through instant civil revision filed under Section 115, C.P.C, Abdul Aziz petitioner/plaintiff has challenged the validity of judgments and decrees dated 29.10.2010 & 28.04.2011 passed by both the Courts below respectively whereby the suit for possession through pre-emption filed by the petitioner/plaintiff was dismissed.

2. Brief facts necessary for disposal of instant petition are that respondent/defendant purchased the suit property measuring 10-Marals bearing Khasra No. 225, 227, Khata Khatuni No. 156/157 of the revenue estate of village Tara Chak Tehsil Shakargarh from the vendors through Mutation No. 146 dated 28.05.2004 for a consideration of Rs. 16,000/- but just to defeat the right of pre-emption showed the amount of consideration as Rs. 80,000/-; that the alleged sale came into knowledge of the petitioner/plaintiff on 18.06.2004 at 06:00 p.m through Muhammad Rafique when he was sitting in his shop situated at village Tara along with Munir Ahmed, Manzoor Ahmed and Khadim

Hussain, upon which he immediately raised his demand of pre-emption and on 19.06.2004 he obtained the copies of revenue record and sent a notice to the respondent on 28.06.2004 through registered A.D; that the respondent did not receive the notice which was returned to him; that the claim of the pre-emptor was as Shafi Shareek, Shafi Khalit and Shafi Jar.

3. The respondent/defendant contested the suit and denied the fact that the petitioner/plaintiff performed Talabs and also that petitioner/plaintiff has no superior right of pre-emption. Out of divergent pleadings of the parties, on 16.05.2005 nine issues were framed by the learned trial Court.

4. It is pertinent to mention here that earlier the suit was dismissed U/O 17 Rule 3 of C.P.C. In appeal the suit was remanded *vide* order dated 04.06.2009 by the learned appellate Court. However, the respondent/defendant did not appear before the learned trial Court after remand of the suit and was proceeded against *ex-parte*. Thereafter the evidence of the petitioner/plaintiff was recorded by the learned trial Court. After hearing the arguments of learned counsel for the petitioner/plaintiff, the learned trial Court dismissed the suit *vide* impugned judgment and decree dated 29.10.2010. Being aggrieved by the said judgment and decree, the petitioner filed Civil Appeal No. 328 of 2010 which was also dismissed by learned appellate Court *vide* judgment and decree dated 28.04.2011. Hence instant Civil Revision.

5. Learned counsel for the petitioner/plaintiff contended that the petitioner/plaintiff has preferential pre-emption right over the respondent/defendant; that the petitioner/plaintiff has proved through reliable evidence that Talab-i-Muwathibat was made properly and it was promptly announced Talab by the pre-emptor; that the required evidence regarding Talab-i-Ishhad was proved by the petitioner/ plaintiff and as such there is no discrepancy in the statements of the witnesses; that learned Civil Judge Shakargarh has not correctly apprised the evidence of the P. Ws, whereas the learned 1st Appellate Court has not decided the issue of preferential pre-emption right correctly, the document of proving the factor regarding preferential right *i.e* Aks Shajrah Exh.P5 was available on record but the issue was not correctly concluded by the learned Addl. District Judge Shakargarh. Thus, by accepting this petition, impugned judgments and decrees passed by both the Courts below be set aside and suit filed by the petitioner/plaintiff for possession through pre-emption be decreed in his favour.

6. Learned counsel for the respondent/defendant has vehemently opposed this petition on the grounds that petitioner/plaintiff was having no right of pre-emption when the respondent purchased the land and it is established that pre-emptor should have the right of pre-emption at all stages; that Talabs were not proved as per requirement of law; that regarding Talab-i-Muwathibat neither any of the witness stated about the exact date, time and place nor it is mentioned in the plaint or in the notice as required; that the petitioner/ plaintiff was failed to prove Talab-i-Muwathibat as required because neither there is any jumping demand from the petitioner/plaintiff nor any other requisite

requirement is fulfilled as required for Talab-i-Muwathibat. It was further argued that there is no need to further discuss about fulfillment of Talab-i-Ishhad by the petitioner/plaintiff when Talab-i-Muwathibat is not proved it would be of no useful to see that whether petitioner/plaintiff had fulfilled the Talab-i-Ishhad, however, this is an admitted fact that notice of Talab-i-Ishhad was not served to the respondent/defendant and that it was not proved regarding the service of notice of Talab-i-Ishhad; that address on the said notice was also wrongly mentioned; that according to scheme of law, if the notice is denied by the respondent/defendant, the petitioner/plaintiff was under obligation to prove the same which is lacking in this case. In the case reported as *Allah Ditta through L.Rs and others vs Muhammad Anar* (2013 SCMR 866) it was observed by the Court that it was the duty of the plaintiff to prove the notice of Talab-i-Ishhad inspite of the fact that the defendant had conceded its reception; that the petitioner/plaintiff was failed to prove Talab-i-Muwathibat and Talab-i-Ishhad in accordance with law.Thus, it is submitted that instant petition is liable to be dismissed.

7. Arguments heard. Record perused.

8. In the case reported as *Khyber Khan and others vs Haji Malik Amanullah Khan* (2007 SCMR 1036) the Hon'ble Supreme Court of Pakistan observed as under:

"S.13--Right of pre-emption, exercise of--Talb-i-Muwathibat--Non-mentioning of time and place of Talb-i-Muwathibat in plaint--Effect--Pre-emptor though had mentioned in plaint the date of making Talb-i-Muwathibat but he failed to specify in the plaint the time and place where Talb-i-Muwathibat was made--Omission to mention anyone of the three particulars in the plaint would result in dismissal of a pre-emption suit--Resolution of such question did not require any factual determination as the same was determinable from the bare reading of plaint--Plaint of pre-emptor having failed to meet the requirement set by Supreme Court, judgment and decree passed by trial Court and upheld by High Court was set aside and suit filed by the pre-emptor was dismissed".

It is settled law that it is the duty of the plaintiff/petitioner to prove the exact date, month and year of performance of Talabs. In the instant case the plaintiff and the witnesses of requisite Talabs were required to prove unanimously place of performance of Talabs. The plaintiff himself appeared in the witness box as P.W-1 and he produced Amin and Munir as P.W-2 & P.W-3 respectively before the learned trial Court. From the evidence of the plaintiff/petitioner, it appears that the plaintiff and witnesses of Talabs (P.W2 & P.3) did not mention the place of performance of Talab-i-Muwathibat. The P.Ws in their statements simply stated the shop of the plaintiff but they did not mention the name of shop and place where it was situated. The witness of Talab-i-Muwathibat namely Munir (P.W-3) is not consistent and his statement is not up to the mark as required. In this regard his words are restricted to say" the plaintiff said that he would get loss, so he would file a suit". The above remarks are not sufficient to prove performance of Talab-i-Muwathibat by the plaintiff. Although in para No. 6 of the plaint, the plaintiff took stance that on 19.06.2004 he obtained the copies of revenue

record from the Halqa Patwari and thereafter in presence of witnesses he sent a notice to respondent/defendant on 28.06.2004 through registered A.D but the petitioner/plaintiff had not mentioned the name of said witnesses in the plaint which speaks volumes. It is settled law that the names of witnesses of notices are mandatory to be mentioned in the plaint. Reliance is placed on the cases reported as *Sardar Muhammad Nawaz vs Mst. Firdous Begum* (2008 SCMR 404) and, *Bashir Ahmed and another vs Mushtaq Ahmed* (2007 SCMR 895). Neither the plaintiff and the witnesses of Talabs (P.W-2 & P.W-3) were confronted with a the notice of Talab-i-Ishhad nor the same was verified by them during the course of their evidence. From the evidence available on record it reveals that said notice was recovered from the postal envelop at the time of recording the statement of its scribe P.W-5 and prior to his deposition, the statements of P.W1 to P.W-3 had been recorded . In these circumstances, the notice was not as such proved by the petitioner/plaintiff and the witnesses. Furthermore the notice was not served to the respondent/defendant because as per record the postman had failed to contact the defendant on the given address. The original postman although was serving in Dubai but the person who appeared to make statement on behalf of the said postman, was legally not entitled to make the same as he had not worked with the said postman and he is not acquaintance with his writing. In these circumstances, the observation of learned appellate Court that the petitioner/plaintiff has proved the issue of Talabs or demand is not in accordance with law and same is against the record. The learned Addl. District Judge Shakargarh committed an error while forming his opinion on the issues regarding Talabs, therefore, same is not sustainable in the eyes of law. The learned trial Court while dismissing the suit of the plaintiff has rightly consolidated the findings! on the issues regarding the Talabs.

9. So far as the claim of the petitioner/plaintiff that he has preferential pre-emption right over the respondent/defendant is concerned but this fact was not proved by the petitioner/plaintiff. Although petitioner/plaintiff placed on record copy of Aks Shajrah as Exh.P.5, copy of Fard regarding the land in question to show that it comes in Khasra No. 227 and 225 and the copy of Fard of the petitioner/plaintiff to show that he owned the land in Khasra No. 226 and 228. Prima facie from the said documents it is not clear that whether the land of the petitioner/plaintiff is adjacent to the land in question with common passage and common water course. In these circumstances, the petitioner/plaintiff has failed to prove his preferential right. The findings of both the Courts below in this regard are quite in accordance with law and same do not suffer from any illegality or misreading or non-reading of evidence.

10. For what has been discussed above, instant civil revision having no merit stands dismissed. No order as to costs.

(Y.A.) Civil revision dismissed.

PLJ 2022 Cr.C. 321

[Lahore High Court, Multan Bench]

Present: **SAFDAR SALEEM SHAHID, J.**

REHAN-UD-DIN--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 2931-B of 2021, decided on 7.7.2021.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 161/467/468/471--Prevention of Corruption Act, 1947, S. 5(2)--Complainant stated before the court that he has affected compromise with the petitioner and has no objection on confirmation of ad-interim pre-arrest bail--Pre-arrest bail is allowed. [P. 322] A

Mr. Abdul Rehman Zauq, Advocate vice counsel with Petitioner.

Madam Asmat Parveen, Deputy District Public Prosecutor for State with *Syed Kausar Hussain Shah* Circle Officer ACE Multan.

Hafiz Muhammad Abu Bakar Ansari, Advocate for Complainant.

Date of hearing: 7.7.2021.

ORDER

Through this petition, Rehan ud Din petitioner seeks pre-arrest bail in case arising out of F.I.R. No. 13/2020, dated 19.09.2020 registered under Sections 467,468,471/161, PPC read with Section 5(2) Prevention of Corruption Act, 1947, at Police Station ACE District Multan.

2. At the very outset, learned counsel for the petitioner submits that Muhammad Ramzan complainant of this case has effected compromise with petitioner.

3. Muhammad Ramzan (complainant), present in Court, submits that he has effected compromise with the petitioner and has no objection on confirmation of ad-interim pre-arrest bail already granted to him. He has also submitted an affidavit in this regard which has been placed on record of instant petition as 'Mark-A'. He has also produced 'Iqrarnama' entered into between the parties which has also been placed on record of instant petition as 'Mark-B' comprising two pages.

4. Learned Deputy District Public Prosecutor has not vehemently opposed this petition.

5. Arguments heard. Record perused.

6. It has been noticed that Muhammad Ramzan (complainant) of the case has categorically stated before this Court that he has effected compromise, with the petitioner and has no objection on confirmation of ad-interim pre-arrest bail already granted to him. In view' of the fact that complainant of this case has effected compromise with the petitioner, instant petition filed by the petitioner for pre-arrest bail is allowed and ad-interim pre-arrest bail already granted to Rehan-ud-Din (petitioner) is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 100,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of learned trial Court.

(K.Q.B.) Bail allowed.

PLJ 2022 Cr.C. 336

[Lahore High Court, Multan Bench]

Present: **SAFDAR SALEEM SHAHID, J.**

SAMAR ABBAS--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 4641-B of 2021, decided on 13.7.2021.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Post arrest bail, grant of--Charas weighing 1380-grams was recovered from the ihata of one "I" but meanwhile informer (petitioner) managed to flee away from the spot--Police got recovered Charas weighing 1380-Grams from a paiti which was laying in the ihata of one "I" and same was not recovered from the exclusive possession of the petitioner--He is behind the bars since his arrest and is no more required by the police for further investigation-Bail accepted. [Pp. 336 & 337] A, B & C

Khawaja Qaiser Butt, Advocate for Petitioner.

Madam Asmat Parveen, Deputy District Public Prosecutor for State.

Date of hearing: 13.7.2021.

ORDER

Samar Abbas petitioner seeks post arrest bail in case FIR No. 269/2021 dated 21 06.2021 offence under Section 9-C of CNSA, 1997, registered at Police Station Siray Sidhu, District Khanewal.

2. Arguments heard. Record perused.

3. According to prosecution case, on 14.05.2021, on the basis of information provided by the petitioner, raid was conducted by the police and thereafter Charas weighing 1380-grams was recovered from the Ihatha of one Muhammad Imran but meanwhile informer (petitioner) managed to flee away from the sopt. During interrogation the respectables of the locality informed the police that alleged Narcotic substance was not belonging to said Muhammad Imran, rather same was kept in the house of Muhammad Imran in order to falsely implicate him in the case. Police got recovered Charas weighing 1380-grams from a Paiti which was lying in the Ihatha of one

Muhammad Imran and same was not recovered from the exclusive possession of the petitioner. The petitioner was not apprehended at the spot, therefore, serious question of identification is involved in this case. There is no evidence available on record that petitioner was previously known to the police. Petitioner was nominated in the instant FIR on the basis of information provided to the police by secret informer whose statement under Section 161, Cr.P.C. is not available on record. Veracity of such evidence against the petitioner would be adjudged by the learned trial Court after recording the prosecution evidence. Allegedly petitioner is not previously involved in such like cases and is first offender. He is behind the bars since his arrest and is no more required by the police for further investigation. No useful purpose would be served by keeping the petitioner in jail for an indefinite period. In view of above, case of the petitioner comes within the ambit of further inquiry. Reliance is placed on case titled "Sakina Bibi vs. The State" (2008 SCMR 1111).

4. For what has been discussed above, this petition is accepted and petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of learned trial Court However, it is clarified that the observations made hereinabove are tentative in nature and strictly confined to the disposal of this bail petition.

(K.Q.B.) Bail granted.

PLJ 2022 Cr.C. 348

[Lahore High Court, Multan Bench]

Present: **SAFDAR SALEEM SHAHID, J.**

IRSHAAD *alias* SHADAN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 4016-B of 2021, decided on 14.7.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324/365/452/337-A(i)/337-F(vi)/337-H(ii)/148/149, Bail dismissal of--Attempt of Qatl-i-Amd--Petitioner is nominated in FIR--Specific allegation of house trespass and inflicted injuries--Injury declared within the ambit of S. 337 F(vi) PPC and according to the report of X-ray there was comminuted fracture of proximal phalanx foot big toe--Offence 324, PPC comes within the prohibitory clause--Bail dismissed.

[P. 349] A, B & C

Mr. Abdul Rehman Ahmad Rizwan Sadozai, Advocate for Petitioner.

Madam Asmat Parveen, D.D.P.P for State.

Mr. Muhammad Atif Khan Mastoi, Advocate for Complainant.

Date of hearing: 14.7.2021.

ORDER

Irshaad *alias* Shadan petitioner seeks post arrest bail in a case registered against him *vide* FIR No. 20/2021 dated 12.01.2021 offences under Sections 324, 365, 452, 354, 337-H(ii), 337-A(i), 337-F(vi), 148, 149, PPC at police station Saddar, Dera Ghazi Khan.

2. Precise allegation against the petitioner as narrated by the complainant in the FIR was that on 12.01.2021 at about 11:30 a.m, Irshaad *alias* Shadan petitioner who was allegedly armed with pistol 30-bore trespassed into the house of the complainant and inflicted injuries on the person of wife of the complainant Mst Haseena Bibi which landed on her left foot. The allegations of severe beating and extending life threats are in addition to that. Hence instant FIR was registered.

3. After hearing the arguments of learned counsel for the parties and learned D.D.P.P, it has been noticed that petitioner is nominated in the FIR. There was specific allegation against the petitioner that he alongwith his co-accused persons criminally trespassed into the house of the complainant and while armed with pistol 30-bore inflicted injuries on the person of *Mst.* Haseena Bibi injured P.W which landed on her left foot. *Mst.* Haseena Bibi was medically examined by the doctor. Injury No. 1 was observed by doctor as firearm injury on her big toe of left foot. Injury No. 1 was declared as Ghayr Jaifah Munaqqilah by the doctor which comes within the ambit of Section 337-F(vi), PPC. According to the report of X-ray there was comminuted fracture of proximal phalanx let foot big toe. The ocular account furnished by the prosecution qua the allegation against the petitioner finds corroboration from the medical evidence of *Mst.* Haseena Bibi. The offence 324 PPC alleged against the petitioner comes within the purview of prohibitory clause of Section 497, Cr.P.C. During investigation pistol 30-bore was recovered from the possession of the petitioner and he was found guilty. Prima facie sufficient incriminating material is available on record connecting the petitioner with the commission of offences alleged against him.

4. For what has been discussed above, instant petition having no force stands ***dismissed.***

(K.Q.B.) Bail dismissed.

PLJ 2022 Lahore 446

Present: **SAFDAR SALEEM SHAHID, J.**

MUHAMMAD WAQAS etc.--Petitioners

versus

GOVERNMENT OF PUNJAB etc.--Respondents

W.P. No. 10572 & 10365 of 2021, decided on 9.7.2021.

Constitution of Pakistan, 1973--

----Art. 199--Non-issuance of roll number slips--Demand for deposit of late fee--Valuable right of petitioner--Negligence of college administration--Conducting of preliminary inquiry--Embezzlement by college administration--Petitioners are students of college and they cannot be penalized for negligence if committed by college administration--Petitioners cannot be deprived of their valuable rights to appear in up-coming examination schedule to be held on 10.07.2021--Lapse if any committed by College Administration or Board, petitioners cannot be penalized and their future carrier cannot be left at mercy of College and Board Administration which would definitely ruin future carrier of petitioners--Petition allowed.

[Pp. 447 & 448] A, B & C

Constitution of Pakistan, 1973--

----Art. 23--Fundamental rights--Fundamental rights enshrined by Constitution are most sacred rights which are far above ordinary rights conferred under law.

[P. 448] D

Constitution of Pakistan, 1973--

----Art. 8--Inconsistency in prevalent law--Any prevalent law in consistent with fundamental rights shall be void.

[P. 448] E

PLD 2009 Lahore 240 *ref.*

Qazi Muhammad Waseem Abbas, Advocate for Petitioners.

Mr. Muhammad Ayub Buzdar, Assistant Advocate-General for Respondents.

Mr. Allah Baksh Khan Kulachi, Advocate/Legal Adviser for Board of Intermediate and Secondary Education D.G Khan.

Date of hearing: 9.7.2021.

JUDGMENT

This judgment shall govern W.P. No. 10572 of 2021 and 10365 of 2021 as common question of law and facts are involved.

2. The version taken by the petitioners/students in the instant petitions are that they got admission in Government Decree College Jatoi in the year 2019 as regular students and since then they are getting education from the College.

The grievance of the petitioners/ students is that they have already deposited the admission fee/requisite dues being the regular students, with administration of the college, on the instructions of Respondent No. 5 within time and Respondent No. 5/ Administration of the college is responsible for the clearance of the petitioners/ students for the up-coming examination schedule to be held on 10.07.2021 but their Roll number slips have not been issued till yet by College Administration and the Board/ Respondent No. 3, rather, the respondents demanded from the petitioners/ students to deposit the fee/dues at the rate of Rs. 50,000/-as late admission fee.

Thus, it is submitted that by accepting these petitions a direction be issued to respondents to issue the Roll number Slips to petitioners/students so that they could appear in upcoming examination schedule to be held on 10.07.2021.

3. Learned Legal Adviser entered appearance before this Court on behalf of Board of Intermediate & Secondary Education D.G Khan with the version that if the petitioners/aggrieved students are ready to pay the requisite admission fee as per prescribed rules/ Notification issued by the Punjab Boards of Intermediate and Secondary Education Act 1976, the Roll number Slips would be issued to the Candidates/aggrieved students.

4. Arguments heard.

Record perused.

5. The documents attached with these petitions reveal that petitioners are the regular students of the college and as per their version, they have already deposited requisite fee in the office of the clerk of the college administration on the instructions of Respondent No. 1 within the prescribed time and it was the duty of the college administration to forward the applications /admission forms alongwith fee to the board/ Respondent No. 3

and there was no fault on the part of the students for not depositing the requisite examination fee.

The petitioners are the students of the college and they cannot be penalized for the negligence if committed by the college administration.

If the official of the college administration had not deposited the fee of the candidates in the office of board within due time, the students/candidates would not be liable for the act/omission done by the college Administration, rather, it is matter between the College Administration and the board.

In these circumstances, the petitioners cannot be deprived of their valuable rights to appear in the up-coming examination schedule to be held on 10.07.2021.

Record also reveals that after conducting a preliminary inquiry into the matter, three officials of the college administration who were allegedly involved in the alleged embezzlement have already been suspended by competent authority.

The competent authority after conducting a thorough inquiry into the matter, shall proceed against the delinquent in accordance with law.

As per settled principle, the lapse if any committed by the College Administration or Board, the students/ petitioners cannot be penalized and their future carrier cannot be left at the mercy of the College and the Board Administration which would definitely ruin the future carrier of the candidates/petitioners.

The impugned action of the respondents, if examined on the touchstone of article 23 of the Constitution it may be held that fundamental rights enshrined by the Constitution are the most sacred rights which are far above the ordinary rights conferred under the law and thus have special significance and sanctity attached thereto;

the importance of these rights can be gauged and spelt out from the provisions of article 8 of the Constitution which declares that any prevalent law in consistent with the fundamental rights shall be void.

Reliance in this regard is placed on case law reported as

"Ch. Muhammad Ishtiaq Advocate vs. Cantonment Executive Officer, Chunian District Kasur and another" (PLD 2009, Lahore 240).

6. As a result of above discussion, these petitions are allowed and Chairman Board, D.G Khan/Respondent No. 3 is directed to issue Roll number Slips to the petitioners/students immediately on depositing of ordinary fee by the petitioners/students without imposing any fine or penalty so that they could appear in the up-come examination schedule to be held on 10.07.2021.

(Y.A.) Petition allowed.

PLJ 2022 Cr.C. 509

[Lahore High Court, Multan Bench]

Present: **SAFDAR SALEEM SHAHID, J.**

NAZAR ABBAS @ BABO--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 4435-B of 2021, decided on 12.7.2021.

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

----S. 497(2)--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest, grant of--Further inquiry--Allegation of--Recovery of charas--According to prosecution case, petitioner was apprehended by police on suspicion and Charas weighing 5000-grams was recovered from his possession--Perusal of recovery memo prepared by complainant I.O. reveals that signatures of said witnesses are not available there which makes case of petitioner that of further inquiry--Prior to registration of instant FIR, petitioner filed harassment petition bearing W.P. against S.H.O. Multan and others wherein petitioner took stance that respondents are adamant to involve him in frivolous cases just to show their efficiency--In these circumstances, false involvement of petitioner in instant case on basis of *mala fides* on part of complainant on account of his personal grudge with petitioner cannot be ruled out--Case of petitioner comes within ambit of further-Inquiry--Petitioner is behind bars, since his arrest and is no more required by police for further investigation--No useful purpose would be served by keeping petitioner in jail for an indefinite period--Bail accepted. [P. 510] A & B

Mr. Mehroz Aziz Khan Niazi Advocate for Petitioner.

Madam Asmat Parveen, Deputy District Public Prosecutor for State.

Date of hearing: on 12.7.2021.

ORDER

Nazar Abbas @ Babo, petitioner seeks post arrest bail in case FIR No. 388/2021 dated 27.03.2021 offence under Section 9-C of CNSA, 1997, registered at Police Station Gulgasht District Multan.

2. The allegation against the petitioner is that on 27.3.2021, complainant along with other police officials on suspicion searched the petitioner and recovered *Charas* weighing 5000 grams from possession of the petitioner.

3. According to prosecution case, petitioner was apprehended by the police on suspicion and Charas weighing 5000-grams was recovered from his possession which was taken into custody by the I.O and prepared recovery Memo. It has been noticed that Safdar Mehmood 378/HC and Faisal Kiani 347/HC were the members of the reading team and they were present at the spot during recovery proceedings and their names were mentioned on the recovery Memo. as witnesses. Perusal of recovery memo. prepared by the complainant/ I.O. reveals that signatures of said witnesses are not available there which makes the case of the petitioner that of further inquiry. Prior to registration of instant FIR, petitioner filed harassment petition bearing W.P. 362-2020 against Station House Officer P.S. Gulgasht, Multan and others on 13.01.2012 wherein petitioner took the stance that respondents are adamant to involve him in frivolous cases just to show their efficiency. In these circumstances, false involvement of the petitioner in the instant case on the basis of *mala fides* on the part of the complainant on account of his personal grudge with the petitioner cannot be ruled out. In view of the above, case of the petitioner comes within the ambit of further inquiry. The petitioner is behind the bars, since his arrest and is no more required by the police for further investigation. No useful purpose would be served by keeping the petitioner in jail for an indefinite period. Reliance is placed on case titled *"Sakina Bibi vs. The State"* (2008 SCMR 1111).

4. For what has been discussed above, this petition is accepted and petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one lac only) with one surety in the like amount to the satisfaction of learned trial Court. However, it is clarified that the observations made hereinabove are tentative in nature and strictly confined to the disposal of this bail petition.

(A.A.K.) Bail accepted.

PLJ 2022 Lahore 573

***Present*: SAFDAR SALEEM SHAHID, J.**

RASHEED AHMED--Petitioner

versus

ADDITIONAL DISTRICT JUDGE etc.--Respondents

W.P. No. 27152 of 2013, heard on 25.1.2022.

Family Courts Act, 1964 (XXXV of 1964)--

----Preamble--West Pakistan Family Courts Act, 1964 has been enforced to make provisions for establishment of Family Courts for expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith. [P. 576] A

Family Courts Act, 1964 (XXXV of 1964)--

----Ss. 15 & 16--Provision of C.P.C. and Q.S.O.--Applicability--Powers of Family courts--Under Section 15 Family Courts are provided with power to summon witnesses whereas Section 16 enable them to proceed with contempt matters--Similarly, Family Court has power to adopt any procedure under law for summoning of witnesses or exhibiting documents--Procedures, provided in CPC and Qanun-e-Shahadat Order, are not applicable in *stricto sensu*--Wisdom behind scheme is to avoid technicalities so that matters could be resolved expeditiously and justice could be provided within very short span of time. [P. 576] B

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----S. 5--Jurisdiction--Family affairs--Proceedings of Family Courts--Procedure before1 Civil Court is very lengthy and painful, all matters relating to family affairs were made subject to Family Courts--Judges of Family Courts have been given vast power to regulate proceedings of family cases with wisdom that Family Courts can initiate to bring about compromise between spouses for their reunion and for their living together, during proceedings of case twice provision of reconciliation have been inducted in Court proceedings--Purpose behind whole exercise is to make efforts for reunion of spouses so to have a peaceful and good family future.

[P. 576] C

Nikah Form--

----Vital importance regarding resolution of disputes--Most of Nikah Khawn Nikah Registrars have no understanding with spirit of columns of Nikah Form especially in rural areas where literacy rate is very low and people do not understand meaning of some special terms--Nikah Khawn/Nikah Registrars while filling Nikah Form do not

keep in mind purpose of columns thereof that ultimately creates problems for spouses in case any dispute arises between them. [P. 577] D

Interpretation of Column No. 17 of Nikah Form--

----Nikah Form was written in petitioner's presence and signed over same but conditions were not written--Neither petitioner has filed an application before concerned union council for correction of entries if were wrongly filled in column 17 nor brought a suit before competent Court to get entries corrected, meaning thereby that Nikah Nama is an admitted document. [P. 577] E

Family Courts Act, 1964 (XXXV of 1964)--

----S. 5--Nikah form--Column No--17--Presumption of truth--Personal property and belonging of wife can be claimed by her at any time and matter is triable by Family Court--Since this property has not been fixed with any condition by husband, this will be taken as personal property and belonging of wife, which has been rightly decreed by Additional District Judge. [P. 579] F

Mr. Muhammad Iftikhar Ullah Dhilon, Advocate, for Petitioner.

Mr. Shan Saeed Ghumman, Advocate, for Respondents.

Date of hearing: 25.1.2022.

JUDGMENT

This petition calls into question the legality of the consolidated judgment and decree dated 18.02.2013, whereby the learned Additional District Judge, Sialkot, while dismissing the appeal filed by the petitioner, partly accepted the appeal filed by Respondent No. 3 and modified the judgment and decree dated 21.06.2012 passed by the learned Judge Family Court Sialkot, in the terms that the decree for recovery of Rs. 100.000/- as alternate value of dowry articles and pocket money/maintenance at the rate of Rs. 5000/- per month *w.e.f.*. 01.01.2010 till copletion of her period of Iddat passed in favour of Respondent No. 3 was maintained and her suit tor recovery of gold ornaments weighing eleven tolas or the current market price thereof was also decreed.

2. Brief facts giving rise to this petition are to the effect that Respondent No. 3 filed two suits one for recovery of dowry articles. gold ornaments and maintenance allowance and the other for recovery of dower in shape of gold ornaments weighing 14 tolas and pocket money at the rate of Rs. 5000/- per month as mentioned in the Nikah Nama, alleging that she was married with the petitioner on 20.11.2009, however, there was no issue out of the wedlock; she was given gold ornaments and dowry articles by her parents as per list attached with the plaint but in July 2010 she was ousted by the petitioner from his house, as Such she prayed for a decree for recovery of dowry

articles, gold ornaments, maintenance allowance, dower in the shape of gold ornaments weighing 14-lolas and Rs. 5000/- per month as pocket money as per condition of Nikah Nama. The petitioner contested the suit by filing written statement with certain preliminary objections.

3. The learned trial Court out of divergent pleadings of the parties, framed issues, recorded evidence of the parties, and after having gone through the same while dismissing the suit of Respondent No. 3 for recovery of dower in the shape of gold ornaments weighing 14-tolas and pocket money, partially decreed the suit for recovery of dowry articles to the extent of Rs. 100,000/- as alternate price thereof and maintenance allowance at the rate of Rs. 5000/- per month from January, 2010 till the period of her Iddat. Feeling aggrieved, both the parties preferred appeals, which were decided through a consolidated judgment and decree by the learned Additional District Judge in the terms recorded in para-1 above.

4. Arguments heard. Record perused.

5. Prior to the discussion on the legal aspects of the proposition regarding the interpretation of column 17 of the Nikah Nama, I would like to discuss the wisdom maintained in the scheme in object of the Family Court. The West Pakistan Family Courts Act, 1964 has been enforced to make provisions 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. That is why the application of the provisions of CPC and Qanun-e-Shahadat Order, 1984, have not been strictly made applicable to the family cases, rather the powers have been vested to the Family Courts to perform their functions. Under Section 15 the Family Courts are provided with the power to summon witnesses whereas Section 16 enable them to proceed with contempt matters. Similarly, the Family Court has the power to adopt any procedure under law for summoning of the witnesses or exhibiting the documents. The procedures, however, provided in CPC and Qanun-e-Shahadat Order, are not applicable in *stricto sensu*. Meaning thereby the wisdom behind the scheme is to avoid the technicalities so that the matters could be resolved expeditiously and justice could be provided within the very short span of time. That is why Section 5 of the Act provides "Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts .shall have exclusive jurisdiction to entertain, hear and adjudicate upon matter specified in the Schedule". Prior to introduction of this Act, some of the matters relating to the family affairs were subject to the Civil Courts and the Civil Court being the ultimate Court of jurisdiction was having the power to entertain those matters, but keeping in view the fact that the procedure before the Civil Court is very lengthy and painful, all the matters relating to the family affairs were made subject to the Family Courts. The Judges of the Family Courts have been given vast power to

regulate the proceedings of the family cases with the wisdom that the Family Courts can initiate to bring about compromise/settlement between the spouses for their reunion and for their living together, therefore, during the proceedings of the case twice the provision of reconciliation have been inducted in the Court proceedings. The purpose behind the whole exercise is to make efforts for the reunion of the spouses so to have a peaceful and good family future. This is not only beneficiary for the families but this will also help to build a healthy and beautiful society.

6. With the introduction of the Act, the Nikah Form has attained a very vital importance regarding the resolution of the disputes, if arise between the spouses. Nikah Form otherwise is very important document. It has been observed that unfortunately most of the Nikah Khawn/Nikah Registrars have no understanding with the spirit of the columns of the Nikah Form especially in the rural areas where the literacy rate is otherwise very low and people do not understand the meaning of some special terms. Nikah Khawn/Nikah Registrars while filling Nikah Form do not keep in mind the purpose of the columns thereof that ultimately creates problems for the spouses in case any dispute arises between them. Furthermore, in some matters it is very difficult for the Court to see the exact intention of the spouses regarding those columns at the time of Nikah. If Nikah Form is perused, its columns have very systematic sequence. From columns 1 to 6. it relates to the place of Nikah with the details of the spouses regarding their names, parentage, age and their matrimonial status *i.e*. bachelor or married, whereas columns 7 to 11 are regarding the requirements of a valid Nikah, wherein names of the witnesses and the name of Wakeel on behalf of the spouses, if any appointed, are mentioned. Column 12 is regarding the date of Nikah. Columns 13 to 17 relate to the fixation of dower. Now this head has been detailed in four different columns and every column has its own significance. While filling up these columns normally the person filling up does not care for the wisdom behind the said columns, which are very clear in their meanings. Column 17 is regarding "**خاص شرائط اگر کوئی ہوں**". According to the scheme of the form it reflects that this is a part of the dower and the conditions if having been imposed regarding the dower. It cannot be interpreted anywhere that this column is regarding the conditions after the divorce or in case of divorce, because Nikah Form clearly shows that column 18 starts from the subject of divorce and all the conditions regarding the divorce have been separately mentioned in two different columns.

7. The proposition in hand revolves around the interpretation of column 17 of the Nikah Form. Admittedly, the Nikah was performed between the parties on 20.1 1.2009, the document (photocopy of Nikah Nama) Mark-A is admitted by both the sides and there is no objection from any side regarding its execution. The petitioner has admitted that this Nikah Form was written in his presence and he signed over the same but he has further

stated that these conditions were not written. He, however, has not challenged these conditions independently before any forum. Neither the petitioner has filed an application before the concerned union council for correction of the entries if were wrongly filled in column 17 nor brought a suit before the competent Court to get the entries corrected, meaning thereby that Nikah Nama is an admitted document. The learned Judge Family Court while interpreting column 17 of the Nikah Mama observed as under:

> "In support of her version plaintiff lady has also produced a copy of her Nikah Nama as mark-A, perusal of which clearly reveals that in Column No. 17 of the same, following words are mentioned:
>
> **"17: خاص شرائط اگر کوئی ہوں:- چودہ تولے زیور طلائی کی صورت میں۔ پانچ ہزار روپے جیب خرچ"**
>
> Above mentioned words are so ambiguous that no clear picture of these words can be drawn. Plaintiff has stated that golden ornments mentioned in this column were agreed to be paid as her dower but perusal of Column No. 13 and 14 of Nikah Nama of the parties clearly shows that dower in the shape of 11-tolas golden ornaments was paid to the plaintiff at the time of her marriage. In these circumstances when dower has already been paid to the plaintiff, golden ornaments mentioned in Column No. 17 cannot be termed as dower of the plaintiff. It is also note worthy here that Column No. 17 of the Nikah Nama on the basis of which plaintiff lady has claimed the above mentioned 14-tolas golden ornaments etc, is completely silent about the status of these ornaments etc, mode of their payment/delivery so, in these circumstances this Court is of the view that on the basis of such an ambiguous column plaintiff lady cannot be held entitled to get these gold ornaments alongwilh Rs. 5000/- as per month pocket money in the shape of her Haq Mehr."

Whereas the learned Additional District Judge while dealing with the issue interpreted the said column otherwise and mentioned that it could be treated as deferred dower which the lady could claim under law. The wisdom of the judgment of Additional District Judge is backed by the case of *jehangir Khan through Attorney vs. Mst. Saeeda Begum and 2 others* (2020 YLR 2350), wherein column 17 was interpreted as under:

> "As far as petitioner's claim *qua* house is concerned, I have examined Column No. 17 of the Nikahnama dated 20.11.2009 Ex.PW-1/1, though it was not specifically mentioned that it was given to her either in lieu of dower or as gift, however, it was also not mentioned that it was given to her for residential purpose only. In the absence of such stipulation in the Nikahnama, the suit house given to the wife is conclusive in nature and may be construed as a part of dower or gift in consideration of marriage, therefore, it would be falling with

the exclusive jurisdiction of the Family Court as envisaged in Section 5 read with Part-1 of the schedule of the Family Courts Act, 1964 and it has become personal property of the Respondent No. 1."

Similarly, in the case of *Mst. Shehnaz Mai vs Ghulam Abbas and 2 others* (2018 CLC Note 104) column 17 of the Nikah Nama was also interpreted in the same way and the property mentioned therein was decreed in favour of wife and the said property was declared as deferred dower. There is no other view that presumption of truth is attached to the Nikah Nama. but at the same time, if the entries thereof are denied the same can be challenged and the party challenging the entries is under obligation to prove that those entries were not settled between the parties at the time of Nikah, but in this proposition there is no evidence regarding this aspect. Admittedly, the Nikah was performed in the Majlis and all the persons whose names are appearing on the Nikah Nama (Mark-A) including the petitioner signed over the same. Keeping in view the sequence of the scheme of Nikah Form, its column 17 is condition of dower which in other way can be interpreted as the property belonging to the wife after marriage and under Section 5 of the West Pakistan Family Courts Act, 1964, personal property and belonging of the wife can be claimed by her at any time and the matter is triable by the Family Court. Since this property/amount has not been fixed with any condition by the husband, therefore, this will be taken as the personal property and belonging of the wife, which has been rightly decreed by the learned Additional District Judge. The citations referred by the learned counsel for the petitioner are not as such applicable to the present proposition.

7. For what has been discussed above, the learned counsel for the petitioner has been unable to point out any exercise of excess of jurisdiction by the learned appellate Court. The learned counsel for the petitioner has similarly been unable to point out any illegality or material irregularity having been committed by the learned appellate Court. Under the circumstances this petition, having no merit, is dismissed and the judgment and decree passed by the learned appellate Court is upheld. There shall be no order as to costs.

(R.A.) Petition dismissed.

PLJ 2022 Lahore 580

***Present*: SAFDAR SALEEM SHAHID, J.**

SADIA IQBAL--Petitioner

versus

UMAR NASIM AHMED etc.--Respondents

W.P. No. 14646 of 2016, decided on 8.3.2022.

Family Courts Act, 1964 (XXXV of 1964)--

----Ss. 14 & 17--Jurisdiction of--Filing of objection application--Execution proceedings--Right of appeal--No provision of appeal or revision shall lie against an interim order--Provisions of C.P.C. and Qanun-e-Shahadat Order are not applicable to proceedings of Family Court--Only one right of appeal has been provided by Act against final order of Family Court, whereas no provision of appeal or revision shall lie against an interim order of Family Court--High Court has reason to believe that while assuming jurisdiction to entertain said appeal and passing impugned order, erred in law by setting aside interim orders passed by Executing Court. [P. 583] A, B & C

2002 SCMR 1950 *ref.*

M/s. Adnan Qureshi & Tanveer Hayat, Advocates for Petitioner.

M/s. Agha Abdul Hassan Arif & Nosheen Amber Bukhari, Advocates for Respondent No. 1.

Date of hearing: 8.3.2022.

ORDER

Through this constitutional petition, Mst. Sadia Iqbal petitioner has challenged the validity of judgment dated 11.03.2016 whereby learned Addl. District Judge, Lahore set aside the orders dated 23.05.2015 & 15.12.2015 passed by learned Executing Court Lahore, "*with the directions to learned Executing Court to determine/ ascertain the actual value of gold ornaments and not pure gold, prevailing at the date of satisfaction/execution of decree, when the judgment debtor had paid decretal amount, which was exact date of execution/satisfaction of decree, as per order of Hon'ble Lahore High Court, Lahore"*.

2. Perusal of order dated 06.05.2016 passed by this Court in the instant petition reveals that on the said date, learned counsel for the petitioner contended that Respondent No. 1 had filed an application before the learned Executing Court raising objection on the value of gold ornaments on 3rd June, 2015 which was dismissed *vide* order dated 11th June,2015. Thereafter, the Respondent No. 1 filed EFA No. 1366 of 2015 against the

said order, which he withdrew, after arguments, *vide* order dated 21.10.2015; that instead of availing appropriate remedy, he again moved an application with the same contents, pleadings and prayer seeking revaluation of the gold ornaments on 28.11.2015 which was also dismissed by the learned Executing Court *vide* order dated 15.12.2015. Thereafter, he preferred an appeal before the learned Lower Appellate Court which was taken up and decided *vide* impugned judgment dated 11.03.2016, despite the objection of learned counsel for the petitioner that appeal did not lie against the said interim order as per provisions of Section 14(3) and 17 of the West Pakistan Family Court Act 1964.

3. Arguments heard. Record perused.

4. The actual point involved in the instant petition was that whether learned first Appellate Court was having jurisdiction to entertain the appeal against the interim orders of learned Executing Court as per provisions of Section 14(3) and 17 of the West Pakistan Family Court Act 1964?. Here I would like to reproduce Section 14(3) & Section 17 (supra) as under:

> ***"Section 14(3) "No appeal or revision shall lie against an interim order passed by a family Court".***
>
> ***"Section 17 provisions of evidence Act and Code of Civil procedure not to apply.(1) save as otherwise expressly provided by or under this Act, the provisions of the (Qanun-e-Shahdat, 1984 (P.O No. 10 of 1984) and the Code of Civil procedure, 1908 (except Sections 10 & 11) shall not apply to proceedings before any Family Court (in respect of part I of Schedule)."***
>
> ***(2) Sections 8 to 11 of the Oaths Act, 1873, shall apply to all proceedings before the Family Courts.***

5. It has been noticed that Mst. Sadia Iqbal petitioner filed writ petition Bearing No. 29500 of 2013 before this Court. *Vide* order dated 12.06.2014 this Court observed as under:-

> ***"The respondent is held entitled for recovery of gold ornaments as prayed for or in alternate their market value which would be prevailing at the time of execution/satisfaction of the decree"***
>
> ***"From the above discussion, it has been established on record that both the learned Courts below erred in law while declining the prayer of respondent for recovery of deferred dower. The petitioner could not prove that he has paid the dower during the existence of marriage, therefore, respondent is held entitled to recover Rs. 1,00,000/- from the petitioner as deferred dower.***

Keeping in view the aforesaid observations passed by this Court, the learned Executing Court *vide* order dated 23.05.2015 had fixed the value of seventy tolas gold ornaments as Rs. 32,90,000/- and dower amount of Rs. 1,00,000/-, total decretal amount was calculated as Rs. 33,90,000/ and thereafter the learned Executing Court, Lahore directed the respondent/judgment debtor to present seventy tolas gold ornaments or its value ascertained hereinabove or Rs. 33,90,000/- as decretal amount. The respondent/judgment debtor filed an application seeking evaluation of correct price of gold ornaments and depositing of an amount of Rs. 3,00,000/- in lieu of decretal amount which was dismissed by learned Executing Court *vide* order dated 11.06.2015. Being aggrieved by the orders of learned Executing Court, the respondent/judgment approached this Court by filing EFA No. 1366 of 2015 which was dismissed by this Court *vide* order dated 21.10.2015 and that dismissal order was not assailed by the respondent /judgment debtor. It has further been noticed that respondent/judgment debtor also filed an application under Section 151 CPC read with Section 94 of CPC praying the Court to appreciate the actual direction of this Court given in para No. 13 of the judgment dated 12.06.2014 passed in W.P No. 12640 of 2013, which was also dismissed by learned Executing Court *vide* order dated 15.12.2015. Thereafter on 05.01.2016 against the orders dated 23.05.2015 & 15.12.2015 passed by learned Executing Court, the respondent/judgment debtor filed a family appeal before the learned Addl. District Judge, Lahore who set aside the aforesaid orders passed by learned Executing Court. The other question arises that whether interim order dated 23.05.2015 passed by learned Executing Court, during the execution of decree in question can be assailed through appeal which was allegedly filed by the respondent/judgment debtor on 05.01.2016 with the delay of more than seven months. The West Pakistan Family Courts Act, 1964 provides only one provision of appeal and in view of that whether appeal against other interim order dated 15.12.2015 is competent and maintainable before learned Ist Appellate Court. During the course of arguments learned counsel for respondent/judgment debtor took stance that an illegal order of the Court may be assailed in appeal before the Court of competent jurisdiction and as such the appeal before the learned appellate Court regarding the aforesaid orders passed by learned Executing Court was well maintainable before the said Court. It was further contended by learned counsel for the respondent that learned executing Court was bound to fix the market value of alleged gold ornaments keeping in view the spirit of judgment dated 12.06.2014 passed by this Court in W.P No. 12640 of 2013 which was not certainly followed by the learned Executing Court. In the case reported as *"Muhammad Sadiq vs Dr. Sabir Sultana"* (2002 SCMR 1950) the Hon'ble Supreme Court of Pakistan has observed as under:-

Ss.13 & 17--civil procedure Code (V of 1908),O.XXI, R. 54--Order of attachment and auction of property by the Family Court--Compliance of O.XX,R.54, C.P.C.--Necessity--Provisions of O.XXI, R.54, being not mandatory substantial compliance with the said provision is enough--Strict compliance with O.XXI,R.54 CPC may not be insisted upon as S.13 of the West Pakistan Family Courts Act, 1964 provides for the execution of a decree passed by the Family Court and application of O.XXI, R.54 C.P.C has been excluded by S.17 of the said Act.

The West Pakistan Family Courts Act 1964 is a special law and all the proceedings are conducted under the said act and when only one provision of appeal is provided that means there is philosophy behind the said provision of aforementioned Act and Family Court has been empowered to decide all the matters while observing the principle of law. The provisions of C.P.C and Qanun-e-Shahadat Order are not applicable to the proceedings of Family Court in order to decide the matters within the shortest possible time with permanent solution. This is why that only one right of appeal has been provided by the Act against the final order of the Family Court, whereas no provision of appeal or revision shall lie against an interim order of the Family Court, especially when the petitioner has taken a specific objection regarding the maintainability of appeal before the learned 1st Appellate Court, that matter should have been decided first in view of spirit of law. Keeping in view the facts and circumstances of the case, this Court has reason to believe that learned Addl. District Judge, Lahore while assuming the jurisdiction to entertain the said appeal and passing the impugned order, erred in law by setting aside the interim orders passed by learned Executing Court.

6. For what has been discussed above, instant petition is accepted and order dated 11.03.2016 passed by learned Addl. District Judge, Lahore is set aside.

(K.Q.B.) Petition accepted.

PLJ 2022 Lahore 636

***Present*: SAFDAR SALEEM SHAHID, J.**

MAZHAR ABBAS--Petitioner

versus

ADDITIONAL DISTRICT JUDGE KAMALIA DISTRICT TOBA TEK SINGH and 2 others--Respondents

W.P. No. 47295 of 2020, decided on 23.5.2022.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Evaluation of dowry articles--Nikah nama column No. 17 to 20--Compensation, damages for divorce--Recovery of maintenance allowance for iddat period--In view of admission of petitioner as well as his witness in their cross-examinations that custom of giving dowry to daughters was being followed in their society and prayer for restoration of judgment and decree of trial Court, it would be deemed to be an admitted fact that dowry articles were given to Respondent No. 3 by her parents at time of marriage as per list Exh.P.2 and this point need not be discussed any more--Appellate Court, while holding Respondent No. 3 entitled to a decree for recovery of Rs. 100,000/- on account of pronouncement of divorce, has erred in law.

[Pp. 638 & 642] A & E

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----S. 7--Code of Muslim Personal Law's 105--Muhammadan Law, Para 307--Talaq nama--Question of--Whether pronouncing of divorce by husband can be made conditional--Validity--A husband has an absolute right to divorce his wife and in this regard no condition is described in Sharia as well as in codified law. [P. 641] D

Muhammadan Law--

----Para 307--Talaq nama--Different forms of divorce--Un-covenanted powers--Marriage was dissolved through Talaq Nama produced on record as Mark-A by petitioner at his will without intervention of Court--The Respondent No. 3 sought for a decree for delivery of one and a half marla plot and recovery of Rs. 100,000/-in view of condition entered in columns 17 to 20 of Nikah Nama--It is an admitted fact that parties were married on 18.03.2013 and in view of terms entered in columns No. 17 to 20 of Nikah Nama Exh.P.4, petitioner (husband) was made liable to deliver possession of a plot measuring one and a half marla and to pay Rs. 100,000/-to Respondent No. 3 in case of divorce--In order to resolve controversy in hand, it would be expedient to have recourse to Divine Law (Quran)--With regard to imposition of clog on right of a husband qua pronouncing divorce, Allah Almighty in Holy Quran has delegated un-

covenanted powers to husband to pronounce Talaq to his wife in order to avoid any transgression of Islamic bounds. [P. 639] B & C

Ch. Muhammad Akram Khaksar, Advocate for Petitioner.

Mr. Muhammad Tariq Nadeem Mian, Advocate for Respondent-3.

Date of hearing: 23.5.2022.

JUDGMENT

This petition calls into question the legality of the consolidated judgment and decree dated 26.08.2020, whereby the learned Additional District Judge, Kamalia, while dismissing the appeal filed by defendant/petitioner, partly accepted the appeal filed by the plaintiff/Respondent No. 3 and modified the judgment and decree dated 03.12.2019 passed by the learned Judge Family Court, Kamalia, in the terms that the plaintiff/Respondent No. 3 was held entitled to recover maintenance allowance at the rate of Rs. 4000/-per month for her Iddat period, dowry articles as per list Exh.P.2 except articles mentioned at serial No. 1,15,17,19 and 20 or Rs. 2,75,000/-as alternate price thereof and Rs. 100,000/-as compensation/damages for divorce.

2. Brief facts giving rise to this petition are to the effect that on 13.02.2019 the plaintiff/Respondent No. 3 filed suit for recovery of maintenance allowance, dowry articles and residential land as well as Rs. 100,000/-as divorce damages, alleging that she was married with the defendant/petitioner on 18.03.2013; she was given dowry articles by her parents as per list attached with the plaint valuing Rs. 695,500/-; in the beginning attitude of the defendant/petitioner was cordial but thereafter his attitude was changed; that four months prior to the institution of suit the petitioner went to Faisalabad and took away three tolas gold ornaments gifted by parents of the plaintiff/ Respondent No. 3 with a promise to return the same after settlement of business, but thereafter he sent notice of Talaq-e-Salasa; that as' per condition of Nikah Nama the plaintiff/Respondent No. 3 was entitled to receive one and a half marla residential land and Rs. 100,000/-as damages; and that the petitioner having a monthly income of Rs. 40/50,000/-can easily pay maintenance allowance of Rs. l0,000/-per month, therefore, she prayed for a decree for grant of maintenance allowance, dowry articles and a residential plot measuring one and a half marla along with Rs. 100,000/-as damages. The defendant/ petitioner contested the suit by filing written statement, wherein he raised certain legal as well as factual objections.

3. The learned trial Court out of divergent pleadings of the parties, framed issues, recorded evidence of the parties, and after having gone through the same partially decreed the suit and held the plaintiff/Respondent No. 3 to be entitled to recover

maintenance allowance at the rate of Rs. 4000/-per month for her Iddat period, dowry articles as per list Exh.P.2 except the articles mentioned at Serial No. 01, 05, 07, 08, 11, 13, 14, 15, 17, 19 and 20 or alternate price thereof Rs. 1,10,000/-while dismissing the suit to the extent of recovery of damages, *vide* judgment and decree dated 03.12.2019. Feeling aggrieved, both the parties preferred appeals, which were decided through a consolidated judgment and decree by the learned Additional District Judge in the terms recorded in para-1 above.

4. Arguments heard. Record perused.

5. The petitioner did not dispute the findings of both the Courts below with regard to maintenance allowance awarded to Respondent No. 3 or the decree of the trial Court for recovery of dowry articles passed by the trial Court, as in the prayer clause judgment and decree of the trial Court has been sought to be restored by setting aside the judgment and decree of the appellate Court. It is important to note that in view of admission of the petitioner as well as his witness in their cross-examinations that custom of giving dowry to the daughters was being followed in their society and the prayer for restoration of the judgment and decree of the trial Court, it would be deemed to be an admitted fact that dowry articles were given to Respondent No. 3 by her parents at the time of marriage as per list Exh.P.2 and this point need not be discussed any more.

6. Now the point to be determined before this Court is with regard to evaluation of dowry articles. It is to be noted that both the Courts below having considered the list Exh.P.2, excluded articles mentioned at serial No. 15, 17, 19 and 20, as the same were clothes etc. and presumed to have been utilized by the parties. Articles mentioned at serial No. 01 being gold ornaments usually presumed to remain in the use of wife, were also excluded by both the Courts below. The leaned trial Court, however, excluded items mentioned at serial No. 5, 7, 8, 11, 13 and 14 of the list Exh.P.2 on the ground that the same were electronics and electrical appliances and were required to be proved to have been given through convincing evidence by giving detailed particulars thereof, ignoring the fact that the same being items of daily use, are usually given by the parents to their daughters and that too after holding in the earlier paragraph that dowry articles were given as per list Exh.P.2. In the circumstances, the learned appellate Court rightly observed that the said articles were proved to have been given to plaintiff/Respondent No. 3 by her parents at the time of marriage. As regards fixation of depreciated price it is noticed that the learned trial Court jointly assessed the value of the articles as Rs. 110,000/-, whereas the leaned appellate Court fixed the same by separately discussing the items and keeping in view the rehabilitation period, market value as well as element

of wear and tear. In the circumstances, it is observed that depreciated value of Rs. 2,75,000/-as assessed by the learned appellate Court is more appropriate and reasonable.

7. In the instant case, the marriage was dissolved through Talaq Nama produced on record as Mark-A by the petitioner (husband) at his will without intervention of the Court. The plaintiff/Respondent No. 3 sought for a decree for delivery of one and a half marla plot and recovery of Rs. 100,000/-in view of the condition entered in columns 17 to 20 of Nikah Nama which is reproduced as under:

1½ مرلے زمین میری بیوی کی ملکیت ہو گی ، اگر اپنی بیوی کہ بلا وجہ طلاق دونگا تو میں ایک لاکھ روپے ادا کروں گا ، ½ تولہ طلائی زیور میری بیوی کی ملکیت ہو گا ۔ اگر میری بیوی بلا وجہ طلاق لے تو وہ ایک لاکھ روپے ادا کرنے کی پابند ہو گی ۔ میں اپنی بیوی کو ماہوار خرچہ 2000 روپے ادا کروں گا ۔

8. The moot point involved in the instant case is as to whether pronouncing of divorce by the husband can be made conditional. In order to properly comprehend the matter in issue, it would be advantageous to first have a glance on the relevant facts, which form basis of the instant controversy. It is an admitted fact that parties were married on 18.03.2013 and in view of the terms entered in columns No. 17 to 20 of the Nikah Nama Exh.P.4, the petitioner (husband) was made liable to deliver possession of a plot measuring one and a half marla and to pay Rs. 100,000/-to the plaintiff/Respondent No. 3 in case of divorce. In order to resolve the controversy in hand, it would be expedient to have recourse to the Divine Law (Quran). With regard to imposition of clog on the right of a husband qua pronouncing divorce, Allah Almighty in Holy Qur'an has delegated un-covenanted powers to the husband to pronounce Talaq to his wife in order to avoid any transgression of Islamic bounds. In this regard I seek guidance from Ayat Nos.227-228 of Surah Al-Baqarah, which is as under:

اور اگر وہ طلاق دینے کا ارادہ کریں تو اللہ تعالی یقیننا سب کچھ سننے والا ، سب کچھ جاننے والا ہے ۔ اور طلاق یافتہ عورتیں اپنے آپ کو تین حیض تک رو کے رکھیں اور ان کے لیے جائز نہیں کہ وہ اس چیز کو چھپائیں جس کو اللہ تعالی نے ان کے رحموں میں پیدا کیا ہے ، اگر وہ اللہ تعالی اور آخرت کے دن پر ایمان رکھتی ہوں اور ان کے شوہر اس دوران میں انہیں واپس لینے کے زیادہ حق دار ہیں اگر وہ اصلاح کرنے کا ارادہ رکھتے ہوں اور عورتوں کے بھی معروف کے مطابق ویسے ہی حقوق ہیں جیسے ان کے اوپر حق ہے اور مردوں کا ان پر ایک درجہ ہے اور اللہ تعالی سب پر غالب ، کمال حکمت والا ہے ۔

Further in 01st Ayat of Surah At-Talaq, Allah Almighty says as under:

اے نبی ! جب تم عورتوں کو طلاق دو تو انہیں ان کی عدت میں طلاق دو اور عدت کو شمار کیا کرو اور اللہ تعالی سے ڈرو جو تمہارا رب ہے تم انہیں ان کے گھروں سے نہ نکالو اور نہ ہی وہ خود

نکلیں مگر یہ کہ وہ کھلی بے حیائی کریں اور یہ اللہ تعالی کی حدود ہیں اور جو اللہ تعالی کی حدود سے تجاوز کرتا ہے تو بلا شبہ اس نے خود پر ہی ظلم کیا ہے آپ نہیں جانتے اس کے بعد شاید اللہ تعالی کوئی نئی بات پیدا کر دے ۔

Section 105 Chapter XII of the Code of Muslim Personal Law (written by Dr. Tanzil-ur-Rahman, Ex-Judge of Sindh High Court, Volume 1) the Delegation of right of Divorce (Tafwid at-Talaq) is described which is reproduced as under: -

> "Delegation of the right of divorce: It is lawful for the husband to delegate to the wife the right of effecting divorce. In that event, however, his own right of effecting divorce shall not lapse."

Section 7(1) of the Muslim Family Laws Ordinance, 1961 deals with Talaq, in the following manner:-

> "7(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 notice in writing of his having done so, and shall supply a copy thereof to the wife."

Para 307 of Muhammadan Law by D.F. Mulla defines different kinds of divorce which reads as under:

> "**307. Different forms of divorce.--**The contract of marriage under the Muhammedan Law may be dissolved in any one of the following ways:-
>
> (1) by the husband at his will, without the intervention of a Court;
>
> (2) by mutual consent of the husband and wife, without the intervention of a Court;
>
> (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage, but she may, in some cases, obtain a divorce by judicial decree.
>
> When the divorce proceeds from the husband, it is called talak; when it is effected by mutual consent, it is called khula or mu-bara'at according to the terms of the contract between the parties."

9. From the perusal of afore-mentioned glorious references of Holy Quran as well as provisions of Section 105 of the Code of Muslim Personal Law, Section 7 of the Muslim Family Laws Ordinance, 1961, and Para 307 of the Muhammedan Law, a husband has an absolute right to divorce his wife and in this regard no condition is described in the Sharia as well as in the codified law.

10. In this regard, the Hon'ble Supreme Court in the case of Muhammad *Bashir Ali Siddiqui v. Mst. Sarwar Jahan Begum and another* (2008 SCMR 186), while dealing with the proposition in hand, held as under:

> "When confronted with the question as to whether parties could place restriction on their respective rights given to them by Shariat Law, Mr. Akhlaq Ahmed Siddiqui was unable to advance any plausible ground. 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 requires the parties to remain in marital ties in a peaceful and tranquil atmosphere and are not required to be bound by stringent conditions to remain in marriage bond."

11. After having an overview of judgment in the case of Muhammad Bashir Ali Siddiqui (Supra) there can be no second opinion that principles laid down by the Hon'ble Apex Court shall prevail in terms of Article 189 of The Constitution of Islamic Republic of Pakistan, 1973.

12. Reliance can also be placed on the cases of *Mst Zeenat Bibi vs. Muhammad Hayat & 2 others* (2012 CLC 837) and Muhammad Asif vs. *Mst.* Nazia Riasat & 2 others (2018 CLC 1844). As such, the judgment of the learned appellate Court to the extent of granting decree for recovery of Rs. 100,000/-to the plaintiff/Respondent No. 2 suffers from patent illegality and is liable to be set aside. Therefore, the findings to that effect are hereby reversed.

13. For the foregoing reasons, I am of the considered view that the learned appellate Court, while holding the plaintiff/Respondent No. 3 entitled to a decree for recovery of Rs. 100,000/-on account of pronouncement of divorce, has erred in law. Resultantly, this petition is partially allowed and the judgment and decree of the learned appellate Court to the extent of recovery of Rs. 100,000/-is set aside, while to the extent of maintenance allowance and dowry articles the same is upheld. There will be no order as to costs.

(Y.A.) Petition partially allowed.

PLJ 2022 Lahore 657

[Lahore High Court, Multan Bench]

***Present*: SAFDAR SALEEM SHAHID, J.**

RASHID ABBAS--Petitioner

versus

DEPUTY DIRECTOR FIRST INVESTIGATION AGENCY (FIA) MULTAN and 3 others—Respondents

W.P. No. 1688 of 2020, decided on 21.6.2021.

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

----S. 403--Constitution of Pakistan, 1973, Art. 13--Second FIR--Inquiry against same allegation imposed in earlier FIR--Petitioner challenged validity of notice, whereby petitioner was directed to join inquiry proceedings before FIA--Pertaining to instant occurrence, respondent No. 3 has already lodged criminal case u/s 380, PPC at ordinary police station--petitioner was arrested and was discharged by court of magistrate--said order was assailed and high court set aside said discharge order--Impugned notice was issued without taking into consideration of aforementioned facts by inspector FIA--FIA authorities are not competent to summon petitioner to join inquiry proceedings on basis of same allegations levelled by respondent no.3 in his application submitted before FIA--The petitioner cannot be vexed twice and prosecuted or punished for same offence--Writ petition is accepted. [Pp. 657, 658 & 659] A, B, C, D & E

PLJ 2018 SC 391; PLD 2000 Karachi 181; PLD 1999 Karachi 336 *ref.*

Khawaja Qaiser Butt, Advocate for Petitioner.

Syed Shensha Hussain, Assistant Attorney-General for State.

Mr. Muhammad Khalid Ashraf Khan, Advocate for Respondent No. 3.

Date of hearing: 21.6.2021.

ORDER

Through this constitutional petition, Rashid Abbas petitioner/ accused has challenged the validity of impugned notice No. E-22/2020 whereby he (petitioner) was directed to join the inquiry proceedings before Respondent No. 2/Sub-Inspector FIA, Multan on the basis of application submitted by Farasat Ali Qureshi Hashmi Respondent No. 3 before Deputy Director FIA, Mutan.

2. Brief facts of the case are that Respondent No. 3 got registered a case FIR No. 1462/2019 dated 08.11.2019 offence under section 380, PPC against the petitioner and bank officials at police station Gulgasht Multan with the allegation that he (petitioner) committed theft of car, motor-cycle, credit card as well as debt card and other articles from the house of the Respondent No. 3 and thereafter the petitioner with the connivance of bank officials misused the credit card and debit card. The petitioner was arrested by the police in the aforesaid case and was produced before the Learned Magistrate for seeking

his physical remand but he was discharged by the learned trial Court *vide* order dated 12.11.2019. The District Public Prosecutor challenged the said order through revision petition which was dismissed by learned Addl. Sessions Judge, Mutan *vide* order dated 05.12.2019. Being aggrieved by the said order, the Respondent No. 3 filed writ petition No. 19740 of 2010 before this Court; that during the proceedings of said writ petition, Respondent No. 3 filed an application with similar allegation before Deputy Director FIA, Multan and subsequently he was summoned through impugned notice No. E-22/2020 to join the inquiry proceedings before Respondent No. 2/ Sub-Inspector FIA, Multan which has been assailed by the petitioner through this constitutional petition.

3. Arguments heard.

Record perused.

4. It has been noticed that pertaining to instant occurrence, Respondent No. 3 has already lodged case FIR No. 1462/2019 dated 08.11.2019 offence under section 380, PPC against the petitioner and bank officials at police station Gulgasht Multan.The petitioner was arrested in the aforesaid case and he was produced by the police before the learned Magistrate 1st Class, Multan for seeking his physical remand but he was discharged by the said Court *vide* order dated 12.11.2019. Against the said order, the District Public Prosecutor filed revision petition which was dismissed by learned Addl. Sessions Judge, Multan *vide* order dated 5.12.2019. Thereafter the Respondent No. 3 approached this Court through writ petition No. 19740/2019. During the proceedings of said writ petition, the Respondent No. 3 regarding the same occurrence, submitted another application before Deputy Director FIA, Multan, and thereafter he was summoned through impugned notice No. E-22/2020 to join the inquiry proceedings before Respondent No. 2/ Sub-Inspector FIA, Multan without taking into consideration the aforementioned facts. The aforesaid writ petition (19740 of 2019) has been accepted by this Court *vide* order dated 27.05.2021 and orders of both the Courts below have already been set aside. While seeking guidance from cases law reported as *"Mst. Sushran Bibi vs. The State"* (PLJ2018 SC 391), *Rehmat Khan vs. D.G Intelligence and Investigation(Customs and Excise)* (PLD 2000 Karachi 181) and *Mark Mifsud Mrs. Rosemarie Morley and another vs. Investigating Officer, Customs, Karachi and 2-others* (PLD 1999 Karachi 336) I am of the considered view that, FIA authorities are not competent to summon the petitioner to join the inquiry proceedings on the basis of same allegations leveled by Respondent No. 3 in his application submitted by him before Respondent No. 1/Deputy Director FIA, Multan. The petitioner cannot be vexed twice and prosecuted or punished for the same offence.

5. For what has been discussed, instant petition is accepted and impugned notice No. E-22/2020 issued by Respondent No. 2/Sub-Inspector FIA, Multan, whereby petitioner was directed to join the inquiry proceedings before Respondent No. 2 is set aside.

(K.Q.B) Petition accepted.

PLJ 2022 Lahore 815

***Present*: SAFDAR SALEEM SHAHID, J.**

SAMIA ANWAR etc.--Petitioners

versus

NASIR HUSSAIN etc.--Respondents

W.P. No. 32224 of 2015, decided on 10.1.2022.

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----Ss. 9 & 10--Suit for recovery of maintenance allowance, delivery charges and dowry articles--Suit was partially decreed--Concurrent findings--Financial status of respondent--Challenge to--In cross-examination Petitioner No. 1 had admitted that Ali Hassan minor was born in a hospital through a normal delivery, suit to extent of recovery of delivery expenses was rightly dismissed by Courts below--Petitioner No. 1 admitted in her cross-examination that there was no proof with her regarding financial income of Respondent No. 1--In circumstances, Courts below decreed suit--Courts below have concurrently fixed maintenance allowance after giving due consideration to requirements of minor and by taking into account financial status of Respondent No. 1--Concurrent findings of facts recorded by Courts below do not suffer from any illegality, infirmity or perversity, which could convince to interfere in same while exercising constitutional jurisdiction of this Court--In case petitioners think rate of maintenance at lower side, they can move application before trial Court which is empowered to increase same after having considered financial status of Respondent No. 1--If maintenance allowance is fixed without considering financial status of person, who has been burdened with such future financial liability can file application for re-fixation of maintenance allowance in view of financial status of person is also entertainable under same analogy--Petition dismissed.

[Pp. 817 & 818] A, B, C, E & F

Family Courts Act, 1964 (XXXV of 1964)--

----S. 5--Jurisdiction--Under provision of section 5 of Family Courts Act, Family Court is vested with exclusive jurisdiction to entertain and adjudicate upon matter specified in schedule. [P. 818] D

M/s. S.M. Zeeshan Mirza, Rana Muhammad Majid, Zaheer Abbas, Tahir Mahmood Mughal and Naveed Khalid Rana, Advocates for petitioners.

Nemo for Respondent No. 1.

Date of hearing: 10.1.2022.

ORDER

This petition is directed against concurrent judgments and decrees dated 23.01.2015 and 04.05.2015 passed by the learned Judge Family Court and learned Additional District Judge, Gujrat.

2. Brief facts necessary for decision of the instant petition are that the petitioners filed a suit for recovery of maintenance allowance, delivery charges and dowry articles, alleging that Petitioner No. 1 was married with Respondent No. 1 on 23.07.2009 but behavior of Respondent No. 1 remained cruel and ultimately he ousted Petitioner No. 1 from his house in November, 2009, whereafter a son (Petitioner No. 2) was born out of the wedlock. It was claimed that Respondent No. 1 works in Dubai and also owns landed property and can easily pay maintenance allowance of Rs. 30,000/-per head per month. According to the petitioners Respondent No. 1 has pronounced divorce, but has refused to return the dowry articles given to Petitioner No. 1 by her parents at the time of marriage and has also refused to pay maintenance allowance and the delivery charges Rs. 40,000/-incurred by Petitioner No. 1. The suit was contested by Respondent No. 1 by filing written statement, wherein he alleged that Petitioner No. 1 left his house on 30.04.2013 and refused to rehabilitate as such on her demand he pronounced divorce on 20.05.2013 and that he is ready to return the dowry articles as per list attached with the written statement, which are lying with him.

3. Out of divergent pleadings of the parties, the learned trial Court framed issues, recorded evidence of the parties and after having gone through the same partially decreed the suit holding Petitioner No. 1 entitled to recover Rs. 7000/-per month as maintenance allowance from 30.04.2013 till the period of Iddat, whereas Petitioner No. 2 was held entitled to recover Rs. 7000/-per month as maintenance allowance from 30.04.2013 till his legal entitlement with the direction that the interim maintenance allowance already given shall be adjusted in his maintenance. The suit to the extent of recovery of delivery expenses was, however, dismissed, whereas to the extent of recovery of dowry articles the same was dismissed as withdrawn. Both the parties assailed the judgment by filing their respective appeals, but both the appeals were dismissed by the learned Additional District Judge.

4. Despite repeated calls no one appeared on behalf of Respondent No. 1, hence he is proceeded against ex parte. The case has been taken up for hearing with the assistance of the learned counsel for the petitioner.

5. The petitioners have filed the instant petition with the prayer that by setting aside the judgments and decrees of both the Courts below, their suit be decreed as prayed for.

Matter regarding recovery of dowry articles was settled during the pendency of the suit, whereas since in her cross-examination Petitioner No. 1 had admitted that Ali Hassan minor was born in a hospital through a normal delivery, the suit to the extent of recovery of delivery expenses was rightly dismissed by the Courts below. As regards prayer for grant of maintenance allowance, Petitioner No. 1 admitted in her cross-examination that there was no proof with her regarding financial income of Respondent No. 1. In the circumstances, learned Courts below decreed the suit holding the petitioners entitled to recover the maintenance allowance at the rate of Rs. 7000/-per month each for the periods mentioned against each of them. Courts below have concurrently fixed the maintenance allowance after giving due consideration to the needs/requirements of the minor and by taking into account the financial status of Respondent No. 1. Besides, the concurrent findings of facts recorded by the Courts below do not suffer from any illegality, infirmity or perversity, which could convince to interfere in the same while exercising constitutional jurisdiction of this Court. In this regard reliance can be placed upon the case of *Syed Hussain Naqvi and others vs. Mst. Begum Zakara Chatha through L.Rs. and others* (2015 SCMR 1081), wherein it has been held as under:

> "15. There are concurrent findings of fact recorded by the learned Courts below against the appellants. This Court in Muhammad Shafi and others v. Sultan (2007 SCMR 1602) while relying on case-law from Indian jurisdiction as well as from the Pakistani jurisdiction has candidly held that this Court could not go behind concurrent findings of fact "unless it can be shown that the finding is on the face of it against the evidence or so patently improbable, or perverse that to accept it could amount to perpetuating a grave miscarriage of justice, or if there has been any misapplication of principle relating to appreciation of evidence or finally, if the finding could be demonstrated to be physically impossible." No such thing could be brought on record to warrant interference by this Court."

6. Furthermore, legislature has established the Family Courts for expeditious settlement and disposal of the disputes relating to marriage, family affairs and the matters connected therewith. Under the provision of section 5 of the Family Courts Act, the Family Court is vested with the exclusive jurisdiction to entertain and adjudicate upon the matter specified in the schedule. The matter of maintenance is at serial No. 3 in the schedule. Thus, the Family Court has exclusive jurisdiction relating to maintenance allowance and the matters connected therewith. Once a decree by the Family Court in a suit for maintenance is granted thereafter, if the granted rate for per month allowance is insufficient and inadequate, in that case, according to scheme of law, institution of fresh

suit is not necessary rather the Family Court may entertain any such application and if necessary make alteration in the rate of maintenance allowance.

7. In the circumstances, in case the petitioners think the rate of maintenance at lower side, they can move application before the learned trial Court which is empowered to increase the same after having considered financial status of Respondent No. 1. It is statutory provision, that for enhancement of maintenance allowance on behalf of the minors, the application can be filed by the person, having custody of the minors; similarly if the maintenance allowance is fixed without considering the financial status of the person, who has been burdened with such future financial liability can file application for re-fixation of maintenance allowance in view of financial status of the person is also entertainable under the same analogy.

8. The learned counsel for the petitioner has been unable to point out any exercise of excess of jurisdiction by the learned Courts below or indeed that their decisions are perverse. The learned counsel for the petitioner has similarly been unable to point out any illegality or material irregularity having been committed by the learned Courts below. Under the circumstances this petition fails and is accordingly dismissed with no order as to costs.

(Y.A.) Petition dismissed.

2022 Y L R 93

[Lahore]

Before Safdar Saleem Shahid, J

MUHAMMAD ISMAIL NADEEM---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, JHANG and 2 others---Respondents

Writ Petition No. 39842 of 2016, heard on 31st May, 2021.

(a) Punjab Rented Premises Act (VII of 2009)---

----S. 19---Limitation Act (IX of 1908), Art. 181---Suit for specific performance of agreement to sell---Limitation---Ejectment petition of landlord/ petitioner was concurrently dismissed because of pendency of suit filed by the tenant/ respondent---Validity---Held, that when the date was fixed in the agreement to sell, limitation for filing the suit for specific agreement fell within purview of Art. 181 of the Limitation Act, 1908, which was three years---Respondent/ tenant had filed suit for specific performance after about fourteen (14) years of alleged execution of agreement to sell---High Court set aside impugned orders and judgments passed by both the Courts below and allowed ejectment petition filed by the petitioner/landlord---Constitutional petition was accepted, in circumstances.

(b) Punjab Rented Premises Act (VII of 2009)---

----S. 19--- Eviction of tenant---Relationship of landlord and tenant---Scope---Two agreements to sell were produced by the tenant/respondent; only one agreement was admitted by the landlord/petitioner---Ejectment petition was concurrently dismissed declaring that through admitted agreement parties had agreed to terminate their previous relationship of landlord and tenant; and to sell suit property to the tenant---Held, that although one agreement sell was admitted by both parties , however, the other agreement sell was not admitted by the executor/petitioner or not proved by the claimant/respondent; therefore, no authenticity could be given to said document---No such word or sentence had been used in said admitted agreement that with execution of said document ,relationship of landlord and tenant between the parties had come to an end---High Court set aside impugned orders and judgments passed by both the Courts below and allowed ejectment petition filed by the petitioner/landlord---Constitutional petition was accepted, in circumstances.

(c) Punjab Rented Premises Act (VII of 2009)---

----S. 19--- Ejecment petition---Maintainability---Pendency of civil suit for specific performance of agreement before the filing of ejectment petition---Effect---Default in

payment of rent---Scope--- Ejectment petition was concurrently dismissed holding the same as not maintainable---Held, that mere agreement to sell did not create any title---Payment of alleged agreement to sell was yet to be proved---Admission of the tenant, regarding relationship of landlord and tenant between the parties, in agreement to sell exhibited by him, was established---Tenant-respondent had also admitted the default for payment of rent---Both the Courts below had committed serious error---High Court set aside impugned orders and judgments passed by both the Courts below and allowed ejectment petition filed by the petitioner/landlord--- Constitutional petition was accepted, in circumstances.

Muhammad Hanif Abbasi v. Imran Khan Niazi and others PLD 2018 SC 189; Muhammad Ibrahim and 44 others v. Fateh Ali and 30 others 2005 SCMR 1061; Mst. Rasheeda Begum and others v. Muhammad Yousaf and others 2002 SCMR 1089 and Hayat Muhammad and 8 others v. Tajuddin and another 1994 SCMR 1188 ref.

Ali Masood Hayat for Petitioner.

Sajid Hussain Qureshi for Respondents.

Date of Hearing: 31st May, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This judgment shall dispose of instant writ petition (W.P. No.39842 of 2016) as well as connected C.R. No.2186 of 2016 as property in question and the parties are same.

2. Through the instant constitutional petition, the petitioner has called into question the legality of the judgment dated 06.01.2016 passed by the learned Special Judge (Rent), Jhang, whereby ejectment petition filed by the petitioner was dismissed. Against the aforesaid judgment, petitioner filed an appeal before learned Additional District Judge, Jhang, which was also dismissed vide judgment dated 26.10.2016.

3. Brief facts of the case necessary for the disposal of instant writ petition are that present petitioner filed an ejectment petition on 01.12.2012 against respondent No.3 contending that on the basis of sale deed dated 17.12.1981, property measuring 2-marlas 138 sq. property No.1251, plot No.232/S became in his ownership. After purchase of the said plot, two shops along with a vacant shed were constructed. One shop along with shed was rented out to respondent No.3 on the basis of oral rent deed dated 15.03.1992 @ Rs.1000/- per month with the annual increase of 10% for a period of four years, in presence of witnesses namely Mukhtar Ali and Arshad Ali. It was contended that after expiry of four years on the request of respondent No.3, petitioner continued with the

tenancy of respondent No.3. In June, 2010, respondent No. 3 stopped paying rent. Petitioner filed ejectment petition on the ground of personal need, repair of shop and shed and default of payment of rent since, June, 2010.

4. Respondent No.3 while filing application for leave to contest averted that the plot No.232/S, property No.1251, Chak Junubi, District Jhang, has been purchased by him on the basis of agreements to sell dated 18.06.1998 and 03.11.1998, amount has been paid in presence of witnesses and possession also has been delivered to him. It was further contended that present petitioner failed to perform the agreements, therefore, suit for specific performance titled 'Muhammad Latif v. Muhammad Ismail' has been filed in the Civil Court, Jhang. Respondent No.3 specifically denied the relationship of landlord and tenant between the parties. The petitioner filed reply to the application for leave to contest wherein he mentioned that out of two agreements to sell only one was executed by him but respondent No.3 failed to perform his part, therefore, his earnest money was forfeited. Regarding other agreement to sell and receipt of payment was denied being bogus and fabricated. Learned Special Judge(Rent) vide order dated 05.11.2013 allowed application for leave to contest and framed the following issues:--

1. Whether there exists relationship of landlord and tenant between the parties? OPA.

2. Whether respondent is liable to be ejected from the disputed property? OPA.

3. Relief.

Documentary and oral evidence was adduced from both the sides. Learned Special Judge (Rent) vide judgment dated 06.01.2016 dismissed the ejectment petition. Petitioner being aggrieved from said order, preferred appeal before learned Additional District Judge, which was also dismissed vide judgment dated 26.10.2016.

5. Learned counsel for the petitioner argued that learned Special Judge (Rent) has not appreciated the document even produced by the respondent; admittedly Ex.R-1 agreement to sell was executed between the parties and this document was produced by the respondent where respondent has admitted his possession as tenant on the shop; agreement to sell Ex.R-1 was to be executed till 15.10.1998 whereas it was written on 18.06.1998; learned Special Judge (Rent) has not considered the legal aspect of the admission on the part of the respondent that he conceded his status as tenant on the shop in Ex.R-1 whereas the plea of the respondent was admitted correct that no relationship of landlord and tenant exist in between the parties since the year 1998; the suit for specific performance of the said agreements dated 18.06.1998 and 03.11.1998 was filed on 26.09.2012 after lapse of 16 years of the said agreements; Ex.R-1 is mere agreement to sell which does not confirm any right of ownership to the respondent and his status as

tenant will remain same; this is settled principle that a tenant is always a tenant and mere execution of agreement to sell will not change its status unless the same is legally completed. Learned counsel for the petitioner has argued that in the constitutional jurisdiction concurrent findings of the courts below can be interfered if these are proved perverse or as a result of arbitrariness. In this regard, learned counsel has referred the case law reported as 'Mst. Surraya Jabin v. Mst. Hajran Bibi and others' (2013 CLC 122), 'Khadim Hussain and 12 others v. Gul Hassan Tiwano and 3 others' (2013 CLD 981), 'Inayat Begum and 9 others v. Shah Muhammad and others' (2014 YLR 1797), 'Muhammad Zahid Aslam v. Haji Dilbagh and 7 others' (2015 YLR 1886) and 'Mst. Sharaf Elahi v. Additional District Judge and 2 others' (2011 MLD 1855). Learned counsel further argued that agreements to sell entered into between the landlord and tenant after execution of the tenancy agreement, the words 'landlord' and 'tenant' used in Section 10 of the Punjab Rented Premises Act, 2009, presupposed the existence of the relationship of tenancy between the parties, agreement to sell that Section 10 of the Act referred to were, therefore, the ones entered into between existing landlord and tenants subsequent to their tenancy agreement and during the subsistence thereof, which was entirely different from those cases where there was no relationship of landlord and tenant from the very beginning. Reliance has been made on the esteemed citations 'Mian Umar Ikram ul Haque v. Dr. Shahida Hasnain and another' (2016 SCMR 2186). Learned counsel further referred case laws reported as 'Haji Jumma Khan v. Haji Zarin Khan' (PLD 1999 Supreme Court 1101) that till the time tenant was able to establish his claim for specific performance on the basis of alleged sale agreement, the landlord would continue to enjoy the status of being owner and landlord of the premises. Learned further referred the case laws reported as 'Syed Tafsir Hussain v. Muhammad Rashid Janjua' (2013 MLD 1648), 'Iqbal and 6 others v. Mst. Rabia and another' (PLD 1991 Supreme Court 242), 'Khusro Alam Hydri v. Mst. lqbal Begum' (1981 CLC 347) and it was argued that section 53-A of Transfer of Property Act, has no bar to the ejectment of the tenant willfully defaulting in making payment of rent to landlord notwithstanding tenant having an agreement for sale of property in his favour and having done some act in furtherance thereof unless tenant shown to be continuing in possession in part of performance of contract. Protection of section 53-A Transfer of Property Act, is not available to the tenant. Reliance is made on the case law reported as 'Mian Muhammad Abdullah v. District Judge, Sahiwal and 6 others'. (PLD 1985 Lahore 467). It was argued that the both the court below have not considered the legal aspect of the document Ex.R-1 which has been produced by the respondent himself.

6. Learned counsel for the respondent, on the other hand, has opposed this petition while referring the case law reported as 'Muhammad Shafi v. Noor Nabi' (2020 CLC 1480).

7. Arguments heard. Record Perused.

8. The point of determination in the controversy between the parties is whether in presence of admitted document Ex.R-1 by both the parties learned Special Judge (Rent) has rightly answered issue No.1 regarding existence of relationship of landlord and tenant between the parties. It is observed with deep concern that Ex.R-I was admitted by the parties. This document was produced by the respondent. The completion date of agreement was fixed as 15.10.1998. When the date is fixed in the agreement, limitation for filing the suit for specific performance come within purview of Article 181 of Limitation Act and that is three years whereas the other document is Ex.R-4 which is also agreement to sell tendered by the respondent but not admitted by the executor or proved by the claimant, therefore, no authenticity can be given to the said document. The view of learned Special Judge (Rent) drawn in paragraph No.18 is wrong that "meaning thereby through admitted agreement Ex.R-1 parties agreed to terminate their previous relationship of tenant and land lord and as per terms of agreement Ex.R-1 from 18.06.1998 petitioner agreed to sell suit property to respondent." This view is totally against the basic law. In Ex.R-1, there is mentioning of relationship of land lord and tenant between the parties but there is no such word or sentence used that with the execution of Ex.R-1 relationship of land lord and tenant between the parties has come to an end, therefore, learned Special Judge (Rent) has committed a severe mistake by holding this fact. Respondent if was willing for completion of Ex.R-1 could have filed the suit for specific performance within three years from the date of execution of the same but he filed suit for specific performance in the year 2012. The subsequent agreement to sell even if it is proved will no effect the legal aspect of Ex.R-1. The assertion of respondent that after the execution of Ex.R-1 he stopped payment of rent as there exist no relationship of landlord and tenant between the parties, is admission on his part and is default for payment of rent. Learned Special Judge (Rent) has committed an error while holding that after the execution of Ex.R-1 and Ex.R-4, there remained no relationship of landlord and tenant between the parties. Learned Special Judge (Rent) has formed his opinion on the analogy that since respondent filed the suit for specific performance of agreement dated 18.06.1998 on 20.06.2012 whereas petitioner filed this petition later in time on 01.12.2012 to pursue his rights. Just it can be presumed that the petitioner was sleeping over his rights. Moreover, since 1998 till the filing of petition in the year 2012, the petitioner never agitated his rights with respect to suit property at any forum and this shows some sort of contentment on behalf of the petitioner. This sort of view may be considered, if there had been no admission on the part of respondent No.3 regarding the admission of relationship of tenant and land lord and also admission regarding non-payment of rent as obvious in the statement of respondent No.3. Learned

Additional District Judge, Jhang, also has committed an error while holding that since the suit for specific performance of agreement is pending in between the parties and ejectment petition was filed afterwards, therefore, application filed by the petitioner was not maintainable. Both the courts below have committed serious error while appreciating the documents on record. It is settled principle that mere agreement to sell does not create any title. In this regard reliance is placed on the case law reported as 'Muhammad Hanif Abbasi v. Imran Khan Niazi and others' (PLD 2018 Supreme Court 189), 'Muhammad Ibrahim and 44 others v. Fateh Ali and 30 others' (2005 SCMR 1061), 'Mst. Rasheeda Begum and others v. Muhammad Yousaf and others' (2002 SCMR 1089) and 'Hayat Muhammad and 8 others v. Tajuddin and another' (1994 SCMR 1188). The payment of alleged agreement to sell is yet to be proved. Admission in Ex.R-1 regarding relationship of land lord and tenant between the parties is established one. Admission of respondent No.3 regarding his default for payment of rent is also admitted one.

9. In view of what has been discussed above, instant writ petition is accepted, orders of both the courts below are set aside and application filed by petitioner for ejectment is allowed. Respondent No.3 is directed to deposit rent @ Rs.1000/- per month from June 2010 till its eviction from the premises with the enhancement of 10% annual increase. Respondent No.3 is directed to vacate the premises within three months from today.

10. As far as connected C.R. No.2186 of 2016 is concerned, learned trial court in suit for specific performance of the agreement regarding property in question filed by respondent, granted interim injunction vide order dated 12.10.2015 restraining the petitioner to interfere into possession of the suit land and to further alienate the same. Feeling aggrieved of the said order, petitioner filed an appeal before learned Additional District Judge, which was also dismissed vide judgment dated 14.01.2016. Both the courts below relied upon the agreement to sell dated 18.06.1998 and subsequent agreement to sell dated 03.11.1998. Writ petition filed by the petitioner has been accepted and orders of learned Special Judge (Rent) and learned Additional District Judge, have been set aside and respondent No.3 (in writ petition) has been directed to vacate the premises within three months from today. In view of the decision of W.P.No.39842/2016, the instant C.R. No.2186 of 2016 is allowed. The parties shall follow the directions mentioned above. No order as to costs.

MQ/M-129/L Petition allowed.

2022 Y L R 169

[Lahore]

Before Safdar Saleem Shahid, J

WAQAR SHAUKAT---Petitioner

Versus

DEPUTY COMMISSIONER, DISTRICT FAISALABAD and 3 others---Respondents

Writ Petition No. 50002 of 2021, decided on 12th August, 2021.

(a) Punjab Land Revenue Act (XVII of 1967)---

----S. 30--- Power of Revenue Officers to enter upon any lands or premises for purpose of measurements, etc.---Pendency of civil suit---Scope---Petitioner sought direction to the Revenue Officer not to demarcate the land, subject matter of the suit filed by him before the Civil Court---Contention of petitioner was that since status quo order was already in field, the steps being taken by Revenue Officer for demarcation of the property were illegal and that he had filed an application before the Revenue Officer requesting him not to demarcate the property in dispute till decision of the suit but the Revenue Officer was bent upon to demarcate the property against the law---Validity---Stay order granted in the suit filed by the petitioner was still in field and if there was any violation thereof, the petitioner had the remedy to move before the Trial Court---As per report of the Local Commission both the parties had encroached upon the land belonging to the Development Authority---Although the report of Local Commission was not binding upon the court, the parties were free to raise objection there against, and if there was anything irregular or illegal about the report, the same could easily be unearthed during the course of cross-examination---Adequate alternate remedy being available, the Constitutional petition was not maintainable---Constitutional petition was also not maintainable because it did not agitate the acknowledged grounds of judicial review i.e. illegality, irrationality, procedural impropriety or proportionality---Constitutional petition was dismissed.

Muhammad Ikram Chaudhry and others v. Federation of Pakistan and others PLD 1998 SC 103 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Alternate remedy---Scope---Resort and recourse to writ jurisdiction can only be made if there is no other adequate remedy available to the petitioner.

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

----O. XXVI, R. 10---Procedure of Local Commission---Report and depositions to be evidence in suit---Local Commission may be examined in person---Scope---Rule 10 of O.XXVI, C.P.C. provides that the report of Local Commission and evidence taken by him shall form part of the record in a suit and any of the parties to the suit may examine the Local Commission personally in open court touching any of the matters referred to him or mentioned in his report with the permission of the court.

Haji Sharaf Hussain and 5 others v. Haji Tor Gul and 7 others 2011 CLC 543; Abdul Khaliq and 3 others v. Additional District Judge, Minchinabad and 4 others 2011 MLD 1632 and Kh. Abdul Rehman (deceased) through Legal Heirs and others v. Muhammad Farooq Mirza and 5 others 2019 CLC 596 rel.

(d) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction---Discretionary--- Scope--- Constitutional jurisdiction is equitable and discretionary in nature and cannot be invoked to defeat the provisions of validly enacted statutory provision.

President, All Pakistan Women Association, Peshawar Cantt. v. Muhammad Akbar Awan and others 2020 SCMR 260 ref.

Ch. Asif Raza Koli for Petitioner.

Syed Shadab Hussain Jafri, Addl. A-G., on Court's call.

ORDER

SAFDAR SALEEM SHAHID, J.---Through the instant writ petition the petitioner seeks a direction to respondent No.3 not to demarcate the land subject matter of the suit filed by the petitioner before the Civil Court, Faisalabad.

2. Brief facts of the case are that the petitioner filed a suit for declaration and permanent injunction to the effect that he is owner in possession of the land falling in square No.24, Khewat Nos. 199/148, Khatoni No.221, Khasra Nos.13/3, 14/2/1, 17/3, 18/1, 23/2, 24/1, measuring 23-kanal 16-marlas and square No.45, Khewat No.199, Khasra Nos.8/2, 8/1, 3/2 and 13 measuring 31-kanal 16-marlas, situated in Chak No.07/JB-FDA City, Main Sargodha Road, which has been acquired by the Government of the Punjab. It was prayed that respondent No.4 be restrained to take over possession of the said land and the wall constructed thereon or chalking his name on the said wall, or claiming the consideration amount of the land in dispute. Respondent No.4 contested the suit by

filing written statement. However, on an application filed by the petitioner the learned trial Court appointed a local commission with the following tasks:-

1. To visit the suit property in question and note that whether defendants have mentioned their names on wall which is exclusively the ownership of plaintiff.

2. Local commission shall also determine that whether wall in question is in possession of plaintiff or not?

3. Local commission shall also submit his report regarding demarcation already made by the FDA.

3. The local commission visited the spot on 06.03.2021 and submitted his report to the following effect:--

a) The name of the defendant-Chaudhry Liaquat Ali has been mentioned on the wall on large size on the wall chalking style. Photograph of the same is annexed herewith.

b) The wall in question is in the possession of the defendant.

c) FDA has made out a fresh demarcation with regard of its property. According to the demarcation, the FDA has declared its 130 feet front while both the parties (Plaintiff and the defendant) have encroached into the area of 07 feet each from left and right side of FDA property.

4. The petitioner without first approaching the trial Court, has filed the instant petition with the contention that since status quo order is already in field, the steps being taken by respondent No.3 for demarcation of the property in question are illegal and unlawful. Contends that on 23.06.2021 the petitioner also filed an application before respondent No.3 requesting not to demarcate the property in dispute till the decision of the suit in question, but despite the fact that the public functionaries are bound under Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, to redress the grievances of the public, but the respondent/ department is bent upon to demarcate the property against the law.

5. Arguments heard. Record perused.

6. Under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 resort and recourse to writ jurisdiction can only be made if there is no other adequate remedy available to the petitioner. The relevant portion of Article 199 of the Constitution of Islamic Republic of Pakistan is reproduced as under:-

"(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,---

(a) on the application of any aggrieved party, make an order---

(i)

(ii) ."

7. Stay order granted in the suit filed by the petitioner is still in field and if there is any violation thereof, the petitioner has the remedy to move before the trial Court. In the instant case, as per report of the local commission both the parties have encroached upon the land belonging to FDA. Although the report of local commission is not binding upon the Court, the parties are free to raise objection there-against, make the local commission stand in the witness box and to cross-examine him during the trial and if there is anything irregular or illegal about his report, the same can easily be unearthed during the course of cross-examination. Hence, an adequate alternative remedy being available, the present petition is not maintainable.

8. Furthermore, the petition is also not maintainable because it does not agitate the acknowledged grounds of judicial review i.e. illegality, irrationality, procedural impropriety or proportionality. The Hon'ble Supreme Court of Pakistan in the case reported as Muhammad Ikram Chaudhry and others v. Federation of Pakistan and others (PLD 1998 SC 103) has categorically held that just because there is no further remedy afforded by law in a matter does not mean that recourse can be made to constitutional jurisdiction if other postulates and grounds envisaged by Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 are not met.

9. The instant issue has been addressed in the case reported as Haji Sharaf Hussain and 5 others v. Haji Tor Gul and 7 others (2011 CLC 543) in the following terms:--

"The relevant provision relating to the subject-matter is provided in Order XXVI of C.P.C. are very clear in its stipulation that the reason for constitution of a local commission is for the court to decide a tactual controversy, which requires physical inspection of the court through the agent of the court. It is also to be taken into account that there is no clear provision for any objection being filed in writing by any party to the proceedings regarding the commission report. However, the principles of natural justice and the practice of the court is that the same is considered under Rule 10 of Order XXVI, C.P.C. The fact that the objections of a party were not decided prior to rendering a judgment would not hold the legal ground in cases where the court while passing the final judgment addressed all the objections raised by a party and rendered definite findings on the same.

In the present case, the courts below have not effectively addressed all the objections of the present petitioners; hence their case is surely prejudiced and requires judicial interference of this court."

10. Another judgment reported as Abdul Khaliq and 3 others v. Additional District Judge, Minchinabad and 4 others (2011 MLD 1632) also provides guidance in respect of the present matter and holds that Rule 10 of Order XXVI, C.P.C. provides that the report of local commission and evidence taken by him shall form part of the record in a suit and any of the parties to the suit may examine the local commission personally in open court touching any of the matters referred to him or mentioned in his report with the permission of the court. Hence, Rule 10 of Order XXVI, C.P.C. provides sufficient safeguards for the rights of the parties so as for them to utilize or challenge any such report of the local commission taken as evidence.

11. This Court also in the judgment reported as Kh. Abdul Rehman (deceased) through Legal Heirs and others v. Muhammad Farooq Mirza and 5 others (2019 CLC 596) clinches the matter as follows:-

"7. In the instant case the local commission after conducting proceedings submitted his report dated 18th September, 2015 which was objected by respondent No.1 through an objection petition. The learned Additional District Judge, while proceeding with the objections dismissed the same way of impugned order. He, however, summoned the local commission as court witness for recording his statement. It is well settled principle of law that report of local commission is not perse admissible. Such a report could not be termed as findings but only proceedings of an inquiry for information and assistance of the court, who appointed such commissioner. Even the report of local commission is not binding on the court. The report prepared by the local commission in terms of reference was a piece of evidence but it cannot be termed as admissible unless tendered as such in the proceedings. The report of local commission, statement recorded by him and other material collected by the local commission though would form part of record but same could not be called as evidence of the suit, unless same was tendered in evidence as per prescribed law.

Order XXVI, Rule 10(2) of "C.P.C." authorizes the court to examine the commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the matter in which he has made the investigation. Even a party to the suit may examine the commissioner as such with the permission of the court. The purpose of such exercise is always to unearth the hidden aspects of the matter in controversy and to elucidate the intricacy relating to the facts of the case. On

receipt of a report of a local commission each of the party is equipped with a right to object the same which relates to the pre-admission stage of the report of local commission. Despite receipt of objections on the report from any of the parties and discarding the same court cannot be precluded to examine the commissioner personally with regard to the matters mentioned in sub-rule (2) of rule 10 ibid. As already observed that report of the commissioner would only become a valid piece of evidence if it is tendered in evidence through prescribed mode. For the said purpose, the examination of the commissioner is necessary."

12. Furthermore, the Constitutional jurisdiction is equitable and discretionary in nature and cannot be invoked to defeat the provisions of a validly enacted statutory provision. Reliance in this regard is placed on the case reported as President, All Pakistan Women Association, Peshawar Cantt. v. Muhammad Akbar Awan and others (2020 SCMR 260).

13. In the circumstances, the instant petition fails and is accordingly dismissed in limine.

SA/W-4/L Petition dismissed.

2022 Y L R 833

[Lahore]

Before Safdar Saleem Shahid, J

MOAZZAM ALI and 2 others---Petitioners

Versus

LIAQAT ALI and 7 others---Respondents

Civil Revision No. 333 of 2013, decided on 9th June, 2021.

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

----O. XLI, R. 27---Constitution of Pakistan, Art. 10A--- Appellate jurisdiction---Suit pending before District Court--- Revenue records--- Official witness, production of--- Additional evidence, application for--- Refusal, grounds of---Held, that the spirit of O. XLI, R. 27, C.P.C. was to provide an opportunity of fair trial to the parties---Application for additional evidence could only be refused if it had been filed to introduce some new witnesses and to fill in the lacunas, but if list of witnesses was submitted within time in the Court and the diet money was also deposited in the Court, then presumption could not be drawn against the applicant irrespective of the fact that at what stage they filed the application for additional evidence---Suit was solely regarding the revenue record, therefore, the revenue officers/ officials were necessary witnesses to enable the Court to reach at a right conclusion---High Court allowed revision petition and directed the appellate court to summon the witness, record evidence and proceed with the appeal in accordance with law.

Muhammad Dawood v. Superintending Engineer, Operation Circles, WAPDA, Quetta and 2 others 1990 SCMR 1252; Mst. Bashir Bibi v. Aminuddin and 9 others 1972 SCMR 534; Hakim Habibul Haq v. Aziz Gul and others 2013 SCMR 200; Abdul Ghani and another v. Mst. Nur Jahan and others 1989 MLD 3055; Muhammad Younas v. Pirzada MA. Qureshi and others 1993 MLD 336; Muhammad Nazar Qureshi Hashmi v. Shaukat Ali and 3 others PLD 1994 Lah. 374; M.S. Rawalpindi General Hospital v. Raja Muhammad Fareedon and 3 others 2005 MLD 1057; Saleem-ud-Din and others v. Government of the Punjab through Secretary Education and others 2009 MLD 635; Haji Muhammad Riaz-ul-Hassan and 9 others v. WAPDA through Chairman, WAPDA, Lahore and 4 others 2011 CLC 1916; Shahida Parveen and others v. Rizwana Shaheen and others 2012 CLC 548 and Asifa Ayaz Toosy v. Additional District Judge and others 2019 CLC 362 rel.

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

----S. 105 & O. XLI, R. 27---Appeal from orders---Continuation of suit in appeal-Accepting application under O. XLI, R. 27, C.P.C., during appeal would not mean to re-open the case as the appeal was continuation of the suit.

Nawab-ur-Rehman Mian and Ms. Nayab Karim for Petitioners.

Bashir Ahmad Mirza for Respondents.

Date of hearing: 9 June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This revision petition is directed against the order dated 30.11.2012, whereby the learned District Judge, Hafizabad, dismissed the application of the petitioners for additional evidence.

2. Brief facts of the case are that respondents Nos.1 to 5 filed a suit for declaration against the petitioners and respondents Nos.6 to 8 alleging that Mst. Amin Bakht was owner of land measuring 105-kanal and 8-marlas, situated at Jandraka, Tehsil Pindi Bhattian, District Hafizabad. The said Mst. Amin Bakht died on 26.03.2000. According to the plaint, the petitioners procured sale mutation No.2670 regarding the land owned by Mst. Amin Bakht and also got included therein the land measuring 105-kanal and 7-marlas owned by Zamurd Fatima respondent No.5, who was of unsound mind, in collusion with respondents Nos. 6 to 8. This mutation was incorporated in the register on 01.02.2000. However, the revenue officer (respondent No.7) rejected the said mutation on 13.07.2000, but the appeal preferred by the petitioners was accepted and mutation No.2670 was attested on 23.10.2001. The said mutation was challenged in the suit. The petitioners contested the suit by filing written statement and it was alleged that Zamurd Fatima was not of unsound mind and that the suit was not maintainable. The learned trial Court framed issues, recorded evidence of the parties and after hearing the arguments partially decreed the suit in favour of respondents Nos.1 to 4 and to the extent of respondent No.5 the suit was taken off. The present petitioners preferred an appeal against the judgment and decree dated 31.03.2012. During the pendency of appeal the petitioners filed an application for additional evidence. The learned District Judge, vide order dated 30.11.2012 dismissed the appeal of the petitioners.

3. The learned counsel for the petitioners argued that the witnesses required to be summoned were either marginal or official witnesses who were associated with the proceedings of mutation in question. The said witnesses were duly mentioned in the list

of witnesses which was presented before the Court along with diet money as their statements are necessary to resolve the controversy. Spirit of Order XLI, Rule 27, C.P.C. is very much clear, relevant portion of which is being reproduced as under:-

> "(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if---
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> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

4. Learned counsel for the petitioners has relied upon the cases reported as Mst. Fazal Jan v. Roshan Din and 2 others (PLD 1992 SC 811), Zar Wali Shah v. Yousaf Ali Shah and 9 others (1992 SCMR 1778), and Hassan and another v. Hussain (1996 CLC 650).

5. Out of the above referred three citations, two relates to the inheritance matters and in the third case Hassan and another (supra), vires of a mutation in the revenue record was challenged on the ground that the same was collusive, therefore, void and ab initio. The legislation in its wisdom enacted Order XLI, Rule 27, C.P.C. with a view to enable the appellate Court to record additional evidence which in its view is necessary to enable it to pronounce judgment. The Court has to pronounce a judgment in accordance with law with a view to achieve justice and the afore-referred enabling provision has a nexus with the ultimate purpose i.e. a just decision. The additional evidence which is sought to be adduced should have a direct bearing on the point in issue and the test whether a permission should be granted or not is as to whether a just decision could be arrived at without the additional evidence which is sought to be produced.

6. In the case of Mst. Fazal Jan (supra) suo motu power under Order XLI, Rule 27, C.P.C. was upheld, as in absence of that exercise it would have led to miscarriage of justice. In the case of Zar Wali Shah (supra), the Hon'ble Supreme Court has justified the exercise of this power with a view to support substantial justice and it was observed that concept of bar against filling the gaps was no more available and the law including the precedent law on Islamic principles, which are being made applicable progressively to the proceedings before the Courts and other forums which are required to record/admit evidence.

7. Learned counsel for the respondents, on the other hand, resisted the arguments on the ground that when the learned Civil Judge refused to summon the witnesses. By that time the petitioners did not avail the remedy, by filing appeal before the appellate forum. Now this remedy is not available to the petitioners at appeal stage, but in order to fill in the lacunas the petitioners moved application before the appellate Court, which has rightly been dismissed by the learned District Judge.

8. Arguments heard. Record perused.

9. The spirit of the Order XLI, Rule 27, C.P.C. is to provide an opportunity of fair trial to the parties. The request for additional evidence can only be refused if it has been filed to introduce some new witnesses and to fill in the lacunas, but if already under the order of the Court the list of witnesses is submitted within time in the Court and the diet money is also deposited in the Court, with the order of the Court, then this presumption cannot be drawn against the applicants irrespective of the fact that at what stage they filed the application for additional evidence. The names of the witnesses have been mentioned in the list submitted in the Court, at the proper time as directed by the Court and now it is for the Court to summon the official witnesses, as the private parties are not in a position to summon them at their own. That is why their diet money is to be deposited. The parties are to follow the orders/instructions of the Court regarding submission of list of witnesses and diet money. As per record the petitioners had submitted the notices and deposited the diet money. It was objected by the respondents' side that it (diet money) was deposited very late. Rule is that list of witnesses is submitted with the plaint and written statement or when the issues are framed and the Court directs, whereas at the evidence stage when summoning process is issued for the official witnesses, the application is filed with the Court, where Court allows it and the same is sent to Nazir, who according to settled schedule fixes the diet money, which is to be deposited by the party, who is requesting for the summoning of the official witnesses. Official witnesses, if allowed to be summoned by the Court, and if they do not turn up to record their evidence, unless not given up by the party, their evidence is to be recorded by the Court, the Court may adopt other means for summoning of the witnesses; or Court has to specifically mention the reasons that why the official witnesses are not being recorded. This procedure having been adopted by the petitioners, there is no ground to consider that this could be an afterthought effort to file the application for additional evidence. In a case reported as Muhammad Dawood v. Superintending Engineer, Operation Circles, WAPDA, Quetta and 2 others (1990 SCMR 1252), the Hon'ble Supreme Court held as follows:-

> "We have gone through the original record of the case in the presence of the counsel for the parties and find that one of the witnesses, in fact the main witness in the case having custody of all the record, had been summoned through the Court for which the process fee and diet money had been deposited and the note of Ahlmad shows that the process had issued to him for 21.11.1983. However, we do not find any note as to what happened to that summons and what was the reason for non-service or non-appearance of the official witness. On the facts and in the circumstances of the case, it would be too much to burden the plaintiff with the responsibility of producing the official witness and getting produced the official record. The plaintiff, it appears had done all that was legally within his power or was his responsibility. It was, therefore, a case where the presence of the official witness should have been secured and the trial Court having not done it, the High Court should have attended in more meaningful manner to the application for producing additional evidence and the circumstances in which it was filed."

In this regard further reliance is placed on the cases reported as Mst. Bashir Bibi v. Aminuddin and 9 others (1972 SCMR 534), Hakim Habibul Haq v. Aziz Gul and others (2013 SCMR 200), Abdul Ghani and another v. Mst. Nur Jahan and others (1989 MLD 3055), Muhammad Younas v. Pirzada MA. Qureshi and others (1993 MLD 336), Muhammad Nazar Qureshi Hashmi v. Shaukat Ali and 3 others (PLD 1994 Lahore 374), M.S. Rawalpindi General Hospital v. Raja Muhammad Fareedon and 3 others (2005 MLD 1057), Saleem-ud-Din and others v. Government of the Punjab through Secretary Education and others (2009 MLD 635), Haji Muhammad Riaz-ul-Hassan and 9 others v. WAPDA through Chairman, WAPDA, Lahore and 4 others (2011 CLC 1916), Shahida Parveen and others v. Rizwana Shaheen and others (2012 CLC 548) and Asifa Ayaz Toosy v. Additional District Judge and others (2019 CLC 362).

10. The appeal filed by the petitioners is in continuation of the suit and is still pending before the learned District Judge. The learned District Judge has not correctly appreciated the wisdom of Order XLI, Rule 27, C.P.C. and has committed an error while disallowing the application. Since the case of the petitioners is solely regarding the revenue record, therefore, the revenue officers/ officials are in a way necessary witnesses to enable the Court to reach at a right conclusion.

11. Another aspect of the proposition, that with the acceptance of the application under Order XLI, Rule 27, C.P.C., the case will be re-opened, is not a correct view. As it is

mentioned in the above paragraph that appeal is continuation of the suit. Furthermore, it is not a de novo trial. All the remaining witnesses have been recorded by the Court. No need to examine them. Neither it is the spirit of the Order XLI, Rule 27, nor, it is the desire of the petitioners. In addition to the already evidence, the application for recording of additional evidence is filed and the purpose behind is to enable the Court to reach at a right decision. Reliance in this regard is placed on the cases reported as Amir Khan v. Muhammad Taj (2017 CLC Note 94), Muhammad Yasin v. Judge Family Court, Shakargarh and another (2017 MLD 2010) and Ameer Abbas Sial v. Province of Punjab (2020 CLC 792).

12. In the circumstances, this revision petition is allowed and the order dated 30.11.2012 passed by the learned District Judge, Hafizabad, is set aside. Resultantly, the application of the petitioners for additional evidence stands accepted. The learned appellate Court shall summon the witnesses, record evidence and then proceed with the appeal in accordance with law.

ZH/M-139/L Revision allowed.

2022 Y L R 894

[Lahore]

Before Safdar Saleem Shahid, J

MUHAMMAD BOOTA---Petitioner

Versus

KHALID ZIA ULLAH---Respondent

Civil Revision No. 1918 of 2013, heard on 16th June, 2021.

Punjab Pre-emption Act (IX of 1991)---

----S. 13---Suit for pre-emption---Death of original pre-emptor during pendency of suit---Scope---Defendant assailed judgment and decree passed by Appellate Court whereby the suit of plaintiff for possession through pre-emption was decreed and the judgment and decree passed by Trial Court was set aside---Validity---Plaintiff did not have superior right of pre-emption to file the suit---Even otherwise on account of death of original pre-emptor the plaintiff had stepped into his shoes and had become pre-emptor---Such was important for pre-emptor to have superior right on three stages of pre-emption, at the time of sale, at the time of filing of the suit and at the time of decree, certainly that aspect went against the plaintiff---Even on the point of inheritance, if his status as pre-emptor was admitted as correct he did not qualify to make statement to establish Talb-i-Muwathibat---Plaintiff's evidence regarding Talb-i-Muwathibat was hearsay evidence which was inadmissible---Neither the plaintiff was present at the time of making Talb-i-Muwathibat nor was present at the time of notice of Talb-i-Ishhad, his evidence was not in accordance with law, as required under S. 13 of Punjab Pre-emption Act, 1991---Other witnesses of Talb-i-Muwathibat were also not consistent and they were not sure about time, date and place---Postman although had died but the person who had appeared to make statement on his behalf was not legally entitled to make the same---Suit of the plaintiff was dismissed.

Muhammad Ishaq v. Muhammad Sadiq 2007 SCMR 1478; Sardar Ali and others v. Muhammad Ali and others PLD 1988 SC 287; Baldeo Misir v. Ramlangan Shukul AIR 9124 Allahabad 82; Bilal Ahmad and another v. Abdul Hameed 2020 SCMR 445; Muzaffar Hussain v. Mst. Bivi and 7 others PLD 2012 Lah. 12; Mir Muhammad Khan and 2 others v. Haider and others PLD 2020 SC 233; Muhammad Anwar v. Safeer Ahmed and 5 others 2017 SCMR 404; Mst. Kaneez Begum v. Muhammad Asghar and others 2014 MLD 1179; Mst. Rooh Afza v. Aurangzeb and others 2015 SCMR 92; Mian Pir Muhammad and another v. Faqir Muhamamd through L.Rs and others PLD 2007 SC 302; Faqir Muhammad and 8 others v. Abdul Momin and 2 others PLD 2002 SC 594; Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of

Revenue and others 2014 SCMR 914; Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105; Basharat Ali Khan v. Muhammad Akbar 2017 SCMR 309 and Allah Ditta through L.Rs and others v. Muhammad Anar 2013 SCMR 866 ref.

Ghulam Hussain v. Muhammad Rasheed and 6 others 2018 MLD 117 and Sultan v. Noor Asghar 2020 SCMR 682 rel.

Mehmood Ahmad Bhatti for Petitioner.

Mian Javed Iqbal Arian for Respondent.

Date of hearing: 16th June, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision is directed against the judgment and decree dated 17.07.2013 passed by learned Addl. District Judge Sambrial whereby suit of the respondent/ plaintiff was decreed by setting aside the judgment and decree dated 06.07.2012 passed by learned Civil Judge Ist Class, Sambrial.

2. Brief facts of the case are that petitioner/defendant purchased land measuring 32-K 16-M situated in village Gudiala Tehsil Sambrial District Sialkot vide registered sale deed dated 05.05.2004 in consideration of Rs. 29,05,000/-. One Ghulam Rasul (the original plaintiff since dead) alleged that he got the information of sale on 21.05.2004 after Esha prayer from Khurshid Ahmad P.W-4 and immediately announced to pre-empt the sale in the same Majlis. Notice of Talb-i-Ishhad was allegedly issued on 26.05.2004. The suit for pre-emption was then filed by said Ghulam Rasul; that during the pendency of the suit and before the framing of issues, Ghulam Rasul pre-emptor died and learned trial Court directed to file the amended plaint in this regard vide order dated 21.07.2005. Initially, all the legal heirs 13-in number were impleaded as plaintiffs but subsequently the other legal heirs withdrew themselves from the suit in favour of Khalid Zia, one of the legal heirs; that fresh amended plaint was filed mentioning Khalid Zia as the sole plaintiff who is now the respondent in this civil revision; that the claim of the pre-emptor was as Shafi Shareek, Shafi Khalit and Shafi Jar;

3. The petitioner/defendant contested the suit and denied the fact that the respondent/plaintiff performed Talbs and also that respondent/plaintiff has no superior right of pre-emption.

Out of pleadings of the parties, the following issues were framed by learned trial court vide order dated 08.10.2008.

ISSUES:

1. Whether deceased plaintiff Ghulam Rasool has got superior right of pre-emptive qua the defendant in respect of subject price of land measuring 32-Kanals 16-Marlas?OPP.

2. Whether the deceased plaintiff has properly made requisite Talbs of pre-emption? OPP

3. Whether the sale incorporated in registered sale deed No.1917 dated 05.05.2204 is ostensible sale price Rs.29,5000/- if so its effect ?OPP

4. Whether the deceased plaintiff estopped by his word and conduct to file the instant suit?OPD

5. Whether the suit has been filed within limitation ?OPP

6. Whether the defendant is entitled to recover miscellaneous expenditures in case the suit be decreed in favour of the plaintiff and if so, to what extent?OPD.

7. Whether the suit of the plaintiff has not been properly valued for the purpose of jurisdiction and court fee? OPD

8. Relief.

that since all the legal heirs of the original plaintiff withdrew their alleged right of the suit in favour of the respondent/ plaintiff Khalid Zia, hence the petitioner claimed that the suit was hit by the principle of partial pre-emption, thus issue No.7-A was also framed; that learned trial Court vide judgment and decree dated 09.04.2011 dismissed the suit on issue No.7-A while treating it preliminary issue; that the respondent/ plaintiff challenged the said judgment and decree through appeal which was accepted by learned Addl. District Judge Sambrial vide judgment and decree dated 28.06.2011 and the case was remanded to learned trial Court to decide the same on merits afresh; thereafter the parties led their evidence; that the learned trial Court vide judgment and decree dated 06.07.2012 dismissed the suit; that being aggrieved by the said judgment and decree, the respondent/plaintiff filed an appeal before learned Addl. District Judge Sambrial who reversed the findings on the issues and decreed the suit of the plaintiff/respondent vide judgment and decree dated 17.07.2013 which has been challenged by petitioner/ defendant through instant Civil Revision on the ground that learned Addl. District Judge did not apprise the evidence of the parties and even on the law point the proposition was not correctly consolidated.

4. Learned counsel for the petitioner argued that right of pre-emption is not inheritable; that legal heirs of Ghulam Rasul were not legally authorized to be inserted in the suit as plaintiffs/pre-emptors as a replacement of Ghulam Rasul deceased; in this regard he

relied on cases reported as "Muhammad Ishaq v. Muhammad Sadiq (2007 SCMR 1478), Sardar Ali and others v. Muhammad Ali and others (PLD 1988 Supreme Court 287), Baldeo Misir v. Ramlangan Shukul (AIR 9124 Allahabad 82), Bilal Ahmad and another v. Abdul Hameed (2020 SCMR 445); It was argued that if the legal heirs of the pre-emptor inherited the rights of pre-emption, all the legal heirs are legally bound to appear in the witness box to prove the Talb-i-Muwathibt. Reliance is placed on case law reported as Muzaffar Hussain v. Mst. Bivi and 7 others (PLD 2012 Lahore 12). It was further argued that it has been held by the Court that if any of the legal heir does not appear before the Court to prove, Talb-i-Muwathibat, the suit would be dismissed; counsel further argued that respondent/ plaintiff was having no right of pre-emption when the petitioner purchased the land and it is established that pre-emptor should have the right of pre-emption at all stages. It was further argued that these were the legal aspect of the case that the respondent/plaintiff was having no right to become the plaintiff after the death of said Ghulam Rasul ; that the withdrawal of rights of the other legal heirs in favour of present respondent/plaintiff was also not legal, so-far-as other legal aspect of the proposition is concerned Talbs were not proved as per requirement of law; that regarding Talb-i-Muwathibat neither any of the witness stated about the exact date, time and place nor it is mentioned in the plaint or in the notice as required; that the most important factor was that respondent had not made Talbs so how he could be the witness of Talb-i-Muwathibat and he had not stated anything regarding that fact; Reliance is placed on the cases reported as Mir Muhammad Khan and 2 others v. Haider and others (PLD 2020 Supreme Court 233), Muhammad Anwar v. Safeer Ahmed and 5 others (2017 SCMR 404), Mst. Kaneez Begum v. Muhammad Asghar and others (2014 MLD 1179, Lahore); It was further argued that the witnesses were not sure and they are not truthful witnesses as it is evident from their statements; that Khurshid Ahmed P.W-4 who imparted the information to Ghulam Rasul pre-emptor regarding the sale states that, it was Issha time but he was unable to point out the exact time in this regard; that Muhammad Akhtar P.W-5 is the witness of Talb-i-Ishhad and his evidence is also contradictory and he does not qualify as a truthful witness. It was further contended that if there is difference of time of 10/15-minutes in performance of Talb-i-Muwathibat, same is fatal to the pre-emption right. Counsel relied upon the case reported as Mst. Rooh Afza v. Aurangzeb and others (2015 SCMR 92), Mian Pir Muhammad and another v. Faqir Muhamamd through L.Rs and others (PLD 2007 Supreme Court 302); that Talb-i-Muwathibat was not proved in any way because the respondent/ plaintiff does not claim to be a witness of performance of Talb-i-Muwathibat for which he has narrated the story in the suit, donating it to his grand-father and same is hearsay evidence and anything in the statement beyond pleadings is not admissible in evidence. Counsel relied upon the cases Faqir Muhammad and 8 others v. Abdul Momin and 2

others (PLD 2002 SC 594), Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others (2014 SCMR 914). It was further argued that respondent/plaintiff was failed to prove Talb-i-Muwathibat as required because neither there is any jumping demand from the respondent/plaintiff nor any other requisite requirement is fulfilled as required for Talb-i-Muwathibat. It was further argued that there is no need to further discuss about fulfilment of Talb-i-Ishhad by the respondent/plaintiff, when Talb-i-Muwathibat is not proved it would be of no useful to see that whether respondent/plaintiff had fulfilled the Talb-i-Ishhad, however, this is an admitted fact that notice of Talb-i-Ishhad was not served to the petitioner/ defendant; that it was not proved regarding the service of Talb-i-Ishhad as postman had died and the witness who has been produced in the witness box on behalf of the postman to prove that notice was served to the petitioner, had denied to identify the signatures of the deceased postman and the witness also mentioned that he had not worked with the deceased postman; that the address on the said notice was also wrongly mentioned.; that according to scheme of law if the notice is denied by the defendant/petitioner, the respondent/ plaintiff was under obligation to prove the same. Counsel relied upon the cases reported as Muhammad Bashir and others v. Abbas Ali Shah 2007 SCMR 1105), Basharat Ali Khan v. Muhammad Akbar (2017 SCMR 309); In case reported as Allah Ditta through L.Rs and others v. Muhammad Anar (2013 SCMR 866) it was observed by the Court that it was the duty of the plaintiff/respondent to prove the notice of Talb-i-Ishhad inspite of the fact that defendant had conceded its reception; that the pre-emptor has to stand on his own legs and all requirements are to be fulfilled by the pre-emptor; that the respondent/plaintiff was failed to prove Talb-i-Muwathibat and Talb-i-Ishhad in accordance with law; that learned Civil Judge while dismissing the suit of the plaintiff/respondent has rightly consolidated the findings on the issues regarding the Talbs; counsel argued that the P.Ws are not truthful , their evidence regarding Talb-i-Muwathibat and Talb-i-Ishhad is not up to the mark; that the respondent/plaintiff himself is not a witness of Talb-i-Muwathibat and he is not entitled to pre-empt for this transaction; that learned Addl. District Judge has not correctly apprised the evidence of the P.Ws. Thus, by accepting this petition, impugned judgment passed by learned Addl. District Judge Sambrial be set aside and suit filed by the respondent/plaintiff for possession through pre-emption be dismissed.

5. The learned counsel for the respondent/plaintiff on the other hand resisted the arguments advanced by learned counsel for the petitioner/ defendant and argued that under the new law of pre-emption, the right of pre-emption is inheritable and there is no legal bar for the legal heirs to become a pre-emptor if their predecessor-in-interest who had filed the suit for pre-emption passed away; that minor discrepancies in the

statements of witnesses will not affect the pre-emption right; that the respondent/ plaintiff has preferential pre-emption right over the petitioner/ defendant; that the respondent/plaintiff has proved through reliable evidence that Talb-i-Muwathibat was made properly and it was promptly announced Talb by the original pre-emptor ; that Khalid Zia respondent is one of the legal heirs of Ghulam Rasul who has been given the rights by the other legal heirs to pre-empt the suit land. It was further contended that the status as pre-emptor of the respondent is not bar by any way; that the required evidence regarding Talb-i-Ishhad was proved by the respondent/plaintiff and as such there is no discrepancy in the statements of the witnesses; that learned Addl. District Judge while deciding the case has rightly apprised the evidence of the parties ; that there was no illegality or irregularity in the judgment passed by learned Addl. District Judge. Hence instant petition is liable to be dismissed.

6. Arguments heard. Record perused.

7. It is pertinent to mention here that after framing the preliminary issue No.7-A, and hearing the arguments of the parties, the learned Civil Judge dismissed the suit of the respondent/plaintiff vide judgment and decree dated 09.04.2011. Being aggrieved by the said judgment, the respondent/plaintiff filed an appeal before learned Addl. District Judge who vide judgment and decree dated 28.06.2011 remanded the case to learned trial Court for decision afresh and said judgment was not challenged by the respondent/plaintiff, therefore, now at this stage he cannot take that objection regarding issue No.7-A already decided. However, it is important that whether the present respondent/ plaintiff had fulfilled Talb-i-Muwathibat or not at the time of sale. The respondent/ plaintiff was not having superior right of pre-emption to file the suit. Even other-wise on account of death of original pre-emptor the present respondent/plaintiff stepped into shoes of Ghulam Rasul and become pre-emptor as it has been discussed in the preceding paragraph and it is important for pre-emptor to have superior right on three stages of pre-emption, at the time of sale, at the time of filing of the suit and at the time of decree, certainly this aspect goes against the respondent/plaintiff. Even on the point of inheritance, if his status as pre-emptor is admitted as correct he does not qualify to make statement to establish Talb-i-Muwathibat. His evidence regarding Talb-i-Muwathibat is hearsay evidence which is inadmissible. Neither the respondent/ plaintiff was present at the time of making Talb-i-Muwathibat nor was present at the time of notice of Talb-i-Ishhad, his evidence is not in accordance with law, as required under section 13 of Punjab Pre-emption Act 1991. Reliance is placed on case law reported "Ghulam Hussain v. Muhammad Rasheed and 6 others" (2018 MLD 117, Lahore) wherein it has been observed by this Court as under:--

----S.13---Suit for pre-emption---Death of original pre-emptor during pendency of suit---Non-appearance of all the legal heirs in witness box---Effect---Name of a legal heir/witness of deceased pre-emptor not mentioned in pleadings---Statement of a legal heir/witness beyond the plead-ings--- Admissibility--- Applicant/ defendant contended that the statement of only one legal heir as a witness, without power of attorney on behalf of other legal heirs, was inadmissible and said witness was not present at the time making of Talb-e-Muwathibat as his name was mentioned neither in the plaint nor in the notice of Talb-e-Ishhad--- Respondent/plaintiff contended that first appellate Court had wrongly modified the judgment of trial Court by giving equal rights of pre-emption to both the co-sharers---Validity--- In order to succeed a suit for possession on the basis of pre-emption, it was mandatory and imperative as well as essential to prove the performance of Talbs in accordance with law as elaborated under S.13 of the Punjab Pre-emption Act, 1991 and when Talbs were not proved as per dictates and requirement of law, the same was fatal to the suit----In the present case, only one legal heir/son 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 ---said witness deposed that he was present at the time of making of Talb-i-Muwathibat by his deceased father, but the plaint as well as alleged notice of Talb-i-Ishhad was silent in that regard as neither in the plaint nor in the notice of Talb-i-Ishhad his name emerged, whether name of other witnesses including the informer appeared; meaning thereby that the statement of said legal heir was beyond the pleadings and the same was inadmissible -Right to acquire suit property by exercising right of pre-emption accrued on the date of sale but when at that time the legal heirs did not have such right, coupled with non-appearance at the time of making Talb-i-Muwathibat, the suit was liable to be dismissed on such single score, as making of Talb-i-Muwathibat had not been proved by the respondent/ plaintiffs in accordance with law--- Even if right of pre-emption of respondent/plaintiffs was presumed, even then non-appearance of all legal heirs turned fatal to the respondent/ plaintiff, as right of pre-emption was a personal right which could be exercised personally, which was missing in the present case--- respondent/ plaintiff had failed to prove performance of Talb-i-Muwathibat, as per mandate of law, the question of subsequent Talbs lost their value and no decree for possession through pre-emption could be passed in their favour--- Two courts below had failed to appreciate evidence on record and impugned judgments were set aside being not sustainable in the eye of law--

The other witnesses of Talb-i-Muwathibat are also not consistent and his statement is not up to the mark as required. The witnesses were not sure about time, date and place. Furthermore only one witness of notice is examined in the witness box whereas as per

law two witnesses are required to prove a document and the witness who appeared, has made a contradictory statement. Reliance is placed on case reported as "Sultan v. Noor Asghar (2020 SCMR 682) wherein Hon'ble Supreme Court observed as under:-

---S. 13(3)--- Suit for pre-emption---Talb-i-Ishhad, notice for-proof-pre-emptor/ appellant had not produced the postman to prove the service or refusal of the notice of Talb-i-Ishhad allegedly issued through registered acknowledgement due---Vendee had not admitted that he had received a notice of Talb-i-Ishhad, duly attested by two truthful witnesses issued within two weeks from the alleged date of knowledge--- Statement of vendee in Court made it evident that the notice was served after filing of the suit, and the notice was issued by the Court-Further, even the original notice of alleged Talb-i-Ishhad had not been produced and got exhibited in the documentary evidence---Suit filed by pre-emptor was rightly dismissed---

The notice was not as such proved by the respondent/plaintiff. The postman although has died but the person who appeared to make statement on behalf of the postman, was legally not entitled to make the same as he had not worked with the deceased postman and he is not acquaintance with the writing. Furthermore the notice was not served to the petitioner/ defendant, therefore, the respondent/ plaintiff was unable to prove Talb-i-Muwathibat and Talb-i-Ishhad. Keeping in view the case laws referred above by learned counsel for the petitioner/ defendant, the respondent/ plaintiff remained failed to establish his right of pre-emption and to prove his claim. The learned Addl. District Judge has certainly committed an error while apprising the evidence of the parties and while forming his opinion on the issues regarding Talbs. It is settled law that when Talbs are not proved there is no pre-emption right.

8. The upshot of above discussion is that petitioner/defendant has proved that learned Addl. District Judge Sambrial has committed an error while passing the impugned judgment and decree dated 17.07.2013, whereas the judgment and decree dated 06.07.2012 passed by learned Civil Judge Sambrial was in accordance with law. Thus, instant petition is accepted, judgment and decree dated 17.07.2013 passed by learned Addl. District Judge Sambrial is set aside and judgment and decree dated 06.07.2012 passed by learned Civil Judge Sambrial is upheld. Resultantly the suit of the respondent/plaintiff for possession through pre-emption is dismissed. No order as to costs. However, the respondent/plaintiff is at liberty to withdraw the amount of Zar-i-Punjam deposited by him, in accordance with law.

SA/M-144/L Revision allowed.

2022 Y L R 1616

[Lahore]

Before Safdar Saleem Shahid, J

FIAZ AHMAD and another---Petitioners

Versus

MUHAMMAD RIZWAN and 2 others---Respondents

Writ Petition No.134475 of 2018, heard on 27th May, 2021.

(a) Specific Relief Act (I of 1877)---

----S. 9--- Qanun-e-Shahadat (10 of 1984), Arts. 117 & 118---Punjab Land Revenue Act (XVII of 1967), S. 52---Suit for possession was filed by respondents claiming that they had possession of suit land since long; that their names were mentioned in revenue record; that prior suit of respondents for permanent injunction was disposed of on the statement of counsel for one of the petitioners that petitioners and others armed with weapons illegally/ forcibly occupied the suit land; that FIR was lodged against them---Suit was dismissed by Trial Court---Respondents' appeal was allowed by District Court---Petitioners contended that name of respondent was mistakenly mentioned in some previous revenue record; that entries of said record were corrected on application of petitioners; that petitioners were in possession of the suit land form the very beginning and the land under the possession of respondents was some other portion adjacent to suit land---Validity---Possession of respondents was clear from admission of one of the petitioners and his counsel in prior suit filed by the respondents that they would not dispossess the respondents without due course of law---Court document had authenticity in the eye of law---Name of respondents were appearing in the column of possession in last jamabandi---Procedure was not adopted while making entries in revenue record of rights---Revenue Officer was not produced as witness---Court could presume about the regularity of the official acts performed by the Revenue Officer and not that the same were performed correctly as well---Respondents had proved that they were dispossessed from the land without their consent---First Information Report was a vital document to prove the said claim---Constitutional petition was dismissed accordingly.

(b) Specific Relief Act (I of 1877)---

----S. 9---Suit for possession---Proof---Essentials---Claimant had to prove its possession; such possession must have been dispossessed; such dispossession must be from immoveable property without consent of person in possession, without due course of law; and suit was to be filed within six months of such dispossession.

(c) Punjab Land Revenue Act (XVII of 1967)---

----S. 52---Revenue entries---Proof---Presumption of correctness---Scope---Entries in revenue record were not foundation of title---Presumption of correctness was attached to entries in record of rights but such was a rebuttable presumption---In case of dispute, non-production of Revenue Officer who attested the mutation or any other witness testing the factum of transaction would certainly diminish the evidentiary value of the entries in the revenue record---Evidentiary value of entries in record of rights would depend on circumstances of each case---Party relying on admission recorded in the order of Revenue Officer about the identity of the maker or the contents of the statement attributed to him had to prove the same like any other fact in issue.

Muhammad Bakhsh v. Zia Ullah and others 1983 SCMR 988; Mst. Bibi Mukhtiar v. Mst. Amrezan and another PLD 1968 Pesh. 169 and Muhammad and others v. Sardul PLD 1965 Lah. 472 rel.

(d) Qanun-e-Shahadat (10 of 1984)---

----Arts.117 & 118---Suit for possession---Revenue record--- Onus to prove---Scope---Onus lies on the person who wants to establish the genuineness of the transfer.

(e) Punjab Land Revenue Act (XVII of 1967)---

----S. 52---Revenue record---Presumption of correctness---Scope---Presumption can only be raised as to regularity in the form and procedure adopted in performance of official/judicial act, but it cannot be raised about the correctness of decision taken by the Revenue Officer.

Mst. Ghulam Sughran and others v. Sahibzada Ijaz Hussain and others PLD 1986 Lah. 194 rel.

Mian Ijaz Yousaf for Petitioners.

Sajjad Asghar for Respondents.

Date of hearing: 27th May, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Through the instant constitutional petition, the petitioner has called into question the legality of the judgment and decree dated 22.12.2017 passed by the learned Additional District Judge, Gojra District Toba Tek

Singh, whereby civil revision filed by the respondents was allowed and judgement and decree dated 26.11.2016 passed by the learned trial court was set aside.

2. Brief facts of the case necessary for the disposal of instant writ petition are that respondents Nos.1 and 2 filed a suit for possession under Section 9 of Specific Relief Act, claiming that they are in possession of Ihatas Nos. 191 and 192 measuring 2-Kanals 2-Marlas and they had possession over the suit land since long and their names were mentioned in the revenue record. Petitioners tried to dispossess the respondents Nos.1 and 2 from the land. Respondent Nos. 1 and 2 filed suit for permanent injunction which was disposed of on the statement of learned counsel for one of the petitioners vide order dated 14.07.2012. On 12.03.2013 at about 11:00 a.m. petitioners along with other unknown persons while armed with weapons came at the suit property and made firing, injured father of respondents Nos. 1 and 2 and destroyed Toka Machine and illegally and forcibly occupied the suit land. FIR regarding this, incident was also lodged. Respondents Nos.1 and 2 then filed suit for possession under Section 9 of Specific Relief Act. The petitioners contested the suit and filed their written statement, where they have taken many preliminary objections including that the property was owned by the Provincial Government and suit was bad due to non-joinder of the necessary parties. Out of divergent pleading of the parties learned trial Court framed the following issues:--

1. Whether plaintiffs were forcibly dispossessed from the suit property? OPP.

2. If above issue is proved in affirmative whether the plaintiffs are entitled to decree as prayed for? OPP.

3. Whether the plaintiffs have no cause of action to file this suit? OPD.

4. Whether plaintiffs have approached the court with un-clean hands? OPD.

5. Whether the suit property is owned by the Provincial Government and it is bad due to non-joinder of necessary parties? OPD.

6. Whether this court has no jurisdiction to try this suit? OPD.

7. Whether the suit has been filed in connivance with Revenue officials to obtain possession from the defendant? OPD.

8. Whether plaintiff is liable to be rejected under section VII, Rule 11, C.P.C.? OPD.

9. Relief.

Evidence was then advanced by the parties. Learned trial court dismissed the suit of the respondents. This judgment and decree was assailed before learned Additional District Judge in revision petition who after hearing the parties and examining the record, set aside the judgment and decree passed by learned trial court. Hence, this writ petition.

3. Learned counsel for the petitioners argued that learned Addl. District Judge has mis-read the documents and has not appreciated the evidence on record properly. All the documents and oral evidence produce by the petitioners support them. The name of respondents Nos.1 and 2 was mistakenly mentioned in, some previous revenue record but on the application of the petitioners, with the order of DDOR revenue officer/ Patwari corrected the entries in the revenue record but in-fact petitioners were in possession of the suit land from the very beginning and court has not correctly analyzed the evidence on the record. Further argued that name of the petitioners were appearing in the revenue record since long and they are continuously having possession of the land. Land under the possession of the respondents was some other portion adjacent to that land.

4. To rebut this, learned counsel for respondents, Nos.1 and 2 referred the case laws reported as 'Riaz and others v. Razi Muhammad' (1982 SCMR 741) and 'Late Mst. Majeedan through Legal Heirs and another v. Late Muhammad Naseem through Legal Heirs and another (2001 SCMR 345) and argued that revenue record shows that at the time of event i.e. dis-possession, name of the respondents, were appearing in the previous Jamabandi for the year 2007-2008 and on that date respondents Nos.1 and 2 were in possession of the suit land. It was argued that all the ingredients is mentioned in the above citations are fulfilled. Learned Additional District Judge, after examining the record decided the matter rightly Patwari, was not authorized to make such statement in the Court. Learned Addl. District Judge has also rightly pointed that Patwari did not bring the relevant record and there is no note of the learned trial court on Ex.C-1 to Ex.C-5 mentioning therein that Ex.C-1 to Ex.C-5 were compared with original record.' These Ex.C-1 to Ex.C-5 were tendered in evidence under objection and learned trial court did not decide the said objection at the time of final, judgment, therefore, learned Addl. District Judge held that these documents cannot be led in absence of relevant record, so, these were de-exhibited by the Court. The court also decided the matter of Ex.C-1 keeping in view Article 76 of Qanun-e-Shahadat, Order, 1984.

5. Arguments heard. Record Perused.

6. This is suit for possession under section 9 of Specific Relief Act, and there are certain special provisions on the basis of which the suit can be proceeded. Firstly, claimant has to prove its possession and his possession must have been dis-possessed and such dispossession must be from immoveable property and such dis-possession must be without consent of the person. The said dis-possession must be otherwise i.e. without cue course of law and within six months of the dispossession suit is to be filed. According to respondents Nos.1 and 2, they were dis-possessed from the suit land on 12.0,3.2013 and on 30.04.2013 they filed the suit. The possession of the respondent Nos. 1 and 2 is clear from the admission of one of the petitioner namely Aitzaz Ahmad and his learned counsel made statement in a suit filed by the respondent Nos. l and 2 before Civil Court it, Toba Tek Singh, regarding the possession of the respondents Nos.1 and 2 who stated that they will not dis-possess the respondents Nos.1 and 2 without due bourse of law. This statement was made on 14.07.2012 and this document has authenticity in the eye of law as it is a court document. The aforesaid statement was made before the court of competent jurisdiction. Furthermore, in the documents and in the last Jamabandi name of respondents Nos. l and 2 has been appearing in the column of possessors. CW2 did not adopt the procedure and violated Section 39 of Record of rights and Documents while making entries in the revenue record. Entries, in the revenue record are hot foundation of title. Presumption of correctness though is attached to entries in record of rights but it is rebuttable. In case of dispute the non-production of Revenue Officer who attested the mutation or any other witness testing the factum of transaction would certainly diminish the evidentiary value of the entries in the revenue record. In this regard, reliance is placed on the case law reported as 'Muhammad Bakhsh v. Zia Ullah and others' (1983 SCMR 988), 'Mst. Bibi Mukhtiar v. Mst. Amrezan and another' (PLD 1968 Pesh. 169), 'Muhammad and others v. Sardul' (PLD 1965 Lah. 472). The Revenue Officer shall note briefly the presence of the parties interested, the persons examined and the facts to which they deposed. The entries in the record-of-rights are no doubt admissible in evidence but their evidentiary value depends on the circumstances of each case. A party who relies on an admission recorded in the order of the Revenue Officer, sanctioning mutation, about the identity of the maker or the contents of the statement attributed to him, has to prove, same like any other fact in issue. The onus lies on the person who wants to establish the genuineness of the transfer. The Court can only presume about the regularity of the official acts performed by the Revenue Officer and not that the same were performed correctly as well. Presumption can only be raised as to regularity in the form and procedure adopted in performance of official and judicial act, but it cannot be raised about the correctness of decision taken by the Revenue Officer.

In this regard reliance is placed on the case law reported as Mst. Ghulam Sughran and others v. Sahibzada Ijaz Hussain and others (PLD 1986 Lah. 194). So-far-as, the contention of petitioners regarding the documents Ex.C-1 to Ex.C-5 is concerned, learned Addl. District Judge, rightly observed that these documents were neither tendered in accordance with law nor their authenticity was established and proved. The respondents were already on record, their names ere appearing in the revenue record as possessors. The admission on the part of one of the petitioner is admitted through his statement before the Court. The Court was to just see the possession of the property at the time of alleged event. The suit for possession under section 9 of Specific Relief Act was filed within time. The respondents proved that they were dispossessed from the land without their consent. FIR in this regard is a vital document. Learned counsel for the petitioners was unable to point out any illegality or irregularity in the order of learned Addl. District Judge. The learned District Judge decided the matter in accordance with law keeping in views the evidence on record.

7. In view of what has been discussed above, petitioners have failed to point out any infirmity on the basis of which this Court could interfere in the impugned judgment. Hence, instant writ petition is dismissed. No order as to costs.

ZH/F-18/L Petition dismissed.

2022 Y L R 1803

[Lahore]

Before Safdar Saleem Shahid, J

MUHAMMAD AKHTAR and others---Petitioners

Versus

NIAZ AHMAD and others---Respondents

Civil Revision No. 356-D of 2000, decided on 20th October, 2021.

Civil Procedure Code (V of 1908)---

----Ss. 12(2), 151 & O. XLI, R. 21---Pre-emption---Maxim "a man who seeks equity must come with clean hands"---Grant of permission to re-deposit pre-emption amount---Suit for possession filed by respondent/pre-emptor (deceased) was concurrently decreed---Petitioners/ defendants filed revision petition before High Court which was dismissed for non-prosecution vide order dated 26.10.2000---Respondent filed execution petition and during its pendency he filed application on 08.12.2020 before the Trial Court claiming that since the revision petition had been dismissed, stay order issued on 20.07.2000 stood infructuous---Executing Court issued warrant of possession and concerned revenue officials completed the proceedings in compliance; report was submitted to Tehsildar; Assistant Commissioner verified the said proceedings; report was presented before executing Court and possession of the land was handed over to the decree holders---Petitioners/ defendants had filed application on 23.04.2001 for restoration of civil revision which was dismissed due to non-prosecution; vide order dated 31.01.2006 notice was issued to respondents (legal heirs of real respondent); on 27.08.2002 legal counsel appeared on behalf of the respondents and thereafter the case was not fixed, rather it was fixed on 22.06.2011 and on the said date counsel of the petitioners appeared and main civil revision of the petitioners was restored to its original number---During the proceedings of civil revision the respondents were proceeded against ex-parte---On 24.04.2012 High Court allowed the civil revision ex-parte and set-aside judgments/decrees passed by both the courts below and dismissed the respondent's suit with costs throughout---During the period in between dismissal of civil revision due to non-prosecution and the restoration of the same, the petitioners/vendees filed application before Trial Court for withdrawal of pre-emption amount which was allowed and same was withdrawn and received by the petitioners according to their respective shares---Petitioners remained silent for long time and then filed an applications for restoration of possession on 24.04.2015 and thereafter also filed the applications for re-depositing the sale consideration amount which was withdrawn by them earlier---Respondents / pre-emptors filed applications before High Court seeking rehearing of main civil revision wherein respondent was proceeded against ex-parte---High Court dismissed such applications on 05.05.2020 holding that the same had been

filed in year 2015 not being within limitation period of 60 days from 24.04.2012---High Court also dismissed the application filed by the petitioners regarding the deposit of sale consideration amount which they had withdrawn from the learned Trial Court and application for restoration of possession was also turned down---Respondents assailed the orders of High Court in Supreme Court which remanded the case on 22.09.2020---Petitioners/ judgment debtors filed application for restoration of civil revision after six months of the dismissal of the civil revision and after four months of the proceedings of warrant of possession---In the said application petitioners did not mention anything regarding the proceedings of warrant of possession of the suit land---Record showed that they were present in such proceedings---Proceedings of the warrant of possession were completed by the revenue officials in accordance with law---Petitioners had not revealed the record of the application filed by them before the Civil Court for withdrawal of pre-emption amount---Conduct of petitioners/vendees showed that they had not come to the Court with clean hands---Relief (discretionary or otherwise) would not be available to a person who came to court with unclean hands---Application for rehearing of civil revision should be converted into the application under S.12(2) of Civil Procedure Code, 1908 because law is based on equity, the discretionary relief would be available to a person who comes to court with clean hands---Petitioners had impliedly accepted the claim of the pre-emptors and withdrew the pre-emption amount from the court and in that regard their application for restoration of civil revision had become infructuous---Applications filed by the respondents for re-hearing of civil revision were converted into the application under S.12(2) of C.P.C. read with S.151 of C.P.C. under the constitutional jurisdiction of High Court which were accepted---Constitutional petitions were disposed of accordingly.

Mirza Nazeer Ahmad Baig v. Additional District Judge, Kasur and 2 others 1996 CLC 1616 and Niaz Muhammad v. Mst. Noori 1997 MLD 406 ref.

Sh. Karim-ud-Din and Sh. Arfan Karim-ud-Din for Petitioners.

Aejaz Ahamd Ansari and Aqeel Ahmad Ansari for Respondents/ defendants.

Date of hearing: 29th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This judgment shall dispose of C.Ms. Nos.2752 and 2753 of 2015, W.P. No.10718 of 2017 (for grant of permission to re-deposit of the pre-emption amount) and W.P. No.10145 of 2017 (for restoration of possession) as common orders/judgments and decrees have been assailed therein.

2. The august Supreme Court of Pakistan remanded the aforesaid petitions with the following observations:-

" For the reasons stated above, the impugned orders dated 05.05.2020 passed in Writ Petition No.10145 of 2017 BWP, Writ Petition No.10716/BWP, Writ Petition No.10515 of 2017/BWP, Writ Petition No.10718 of 2017/BWP and C.M. No. 2752 of 2015 in C.R. No.355-D of 2020 and C.M. No. 2753 of 2015 in C.R. No.356-D of 2020 are set aside. The above stated writ petitions and applications shall be deemed to be pending hearing before the High Court, and after providing opportunity of hearing to the parties, the same are to be decided afresh, in the light of findings recorded hereinabove, We are sanguine, the High Court would appreciate the delay in the resolution of the dispute before the courts, and decide the remanded matter within a period of sixty days.

3. Brief history of the case is that Niaz Ahmad deceased/respondent No.1 filed suit for possession on the basis of pre-emption against Muhammad Saleem and others/petitioners/defendants which was decreed by learned trial court vide judgment and decree dated 23.11.1995. Being aggrieved by the said judgment and decree, the petitioners/defendants filed an appeal which was dismissed by learned Addl. District Judge Bahawalnagar vide judgment and decree dated 20.05.2000 and upheld the findings of learned trial court. The petitioners/defendants approached this Court through instant civil revision and lateron instant civil revision was dismissed on account of non-prosecution vide order dated 26.10.2000. The respondent No.1/plaintiff Niaz Ahmed deceased had filed execution petition which was pending adjudication before the learned trial court. During the proceedings of said petition he filed an application on 08.12.2020 before the learned trial court and produced the attested copy of order dated 26.10.2000 on the ground that instant civil revision has been dismissed for non-prosecution, hence stay order issued on 20.07.2000 stands infructuous. The decree holders also filed an affidavit along with said application contending therein that said civil revision was dismissed on 26.10.2000 due to non-prosecution and till yet no application has been filed for its restoration. Vide order dated 08.12.2000 the learned executing court issued warrant of possession and concerned revenue officials in compliance with order of warrant of possession vide order dated 19.12.2000 completed the proceedings and submitted his report to Tehsildar who transmitted the same to concerned Assistant Commissioner on 03.01.2001 who verified the said proceedings. Thereafter the report was presented before the learned executing court on 09.01.2001 and possession of the land in dispute was handed over to the decree holders.

4. It is pertinent to mention here that Niaz Ahmed respondent No.1/ deceased filed two different suits for possession through pre-emption one against Muhammad Saleem etc and other against Muhammad Tufail etc. Muhammad Saleem, one of the defendants entered into compromise with the plaintiff/respondent No.1 Niaz Ahmed deceased and got transferred his land 16-Kanal vide decree dated 20.06.1995 whereas others petitioners/defendants remained in contest with Niaz Ahmad plaintiff/respondent No.1.

The petitioners/ defendants filed C.M No. 603 of 2001 for restoration of civil revision which was dismissed on 26.10.2000 by this Court due to non-prosecution. This C.M. was filed on 23.04.2001 and vide order dated 31.01.2006 notice was issued to respondents/plaintiffs. Record reveals that on 27.08.2002 Ijaz Ahmad Chaudhry, Advocate appeared on behalf of the respondents and thereafter the case was not fixed, rather it was fixed on 22.06.2011 and on the said date counsel of the applicants/petitioners appeared before the Court and main civil revision of the petitioners/defendants was restored to its original number. During the proceedings of civil revision the respondents/plaintiffs were proceeded against ex-parte. Vide judgment dated 24.04.2012 passed by this Court instant civil revision was allowed ex-parte and judgments and decrees passed by both the courts below were set-aside and suit filed by the respondent/plaintiff Niaz Ahmad stands dismissed with costs throughout. However, in the said judgment, it was held by this Court that during the pendency of suit Muhammad Saleem one of the defendants entered into compromise with the plaintiff-respondent and got transferred his land 16-Kanal vide decree dated 20.06.1995, therefore, this order would not effect the compromise between the parties. During this period in between dismissal of civil revision due to non-prosecution on 26.10.2000 and restoration of the same vide order dated 22.06.2011 the vendees filed an application before the learned trial court for withdrawal of pre-emption amount which was allowed by the learned trial court and same was withdrawn and received by the vendees/ petitioners according to their respective shares. The vendees/petitioners remained silent for long time and then filed an applications under order 144/151, C.P.C. for restoration of possession on 24.04.2015 and thereafter also filed the applications for re-depositing the sale consideration amount which was withdrawn by them earlier. The pre-emptor/plaintiffs filed C.Ms Nos. 2752 and 2753 of 2015 under Order XLI, Rule 21 read with section 151 of C.P.C. before this court seeking rehearing of main civil revision which was decided ex-parte by this court vide judgment dated 24.04.2012 wherein Niaz Ahmed respondent/plaintiff was proceeded against ex-parte. The aforesaid CMs were dismissed by this Court vide order dated 05.05.2020. In the said order it was held by this Court that Article 171 of the Limitation Act 1908 provides period of 60-days for filing such like applications by the legal representative of the deceased plaintiff or defendant for setting aside an order or judgment made or pronounced in his absence from the date of order or judgment but in the present case, the instant application has been filed beyond the said period as the impugned judgment and decree was passed on 24.04.2012 and the said application was filed in the year 2015 i.e 26.06.2015 as is evident from the date mentioned over it. As such the application in hand is also beyond the period of limitation. So on this ground of limitation C.M. filed by the legal heirs of Niaz Ahmad deceased-plaintiff/pre-emptor was turned down. The C.M. filed by the vendees regarding the deposit of sale consideration amount which they had withdrawn

from the learned trial court and for restoration of possession was also turned down by this Court. The order passed by this Court in the aforesaid applications was assailed by the applicants/ legal heirs of the deceased Niaz Ahmed through Civil Petitions Nos.1982, 1983, 1984, 1985, 1986 and 1987. The Hon'ble Supreme Court of Pakistan vide order dated 22.09.2020 decided the aforesaid civil petitions with the following observations:--

"The original vendees of the disputed pre-empted property, after obtaining the order of the High Court in setting aside the decrees passed in favour of the pre-emptors, approached the civil court with four applications, seeking to relief; firstly to redeposit the pre-emption money, which they had withdrawn in Civil Suits Nos.482 and 484 of 1992; and secondly, they moved for the restitution of the possession of the disputed property. The claim of the original vendees of the disputed pre-empted property for the redeposit of withdrawn pre-emption money was rejected by the trial court for having become functus officio after passing of the pre-emption decrees in 1995. While other claim for seeking possession was not positively considered as the pre-emptors had moved applications for the rehearing of two revision petitions, which were then pending before the High Court (C.Ms. Nos.2752 and 2753 of 2015). The appellate court confirmed the decision of the civil court which on the challenged before the High Court in its constitutional jurisdiction (Writ Petitions Nos. 10716 of 2017/BWP and Writ Petition No.10716 of 2017/BWP) was maintained in one of its impugned judgment dated 05.05.2020, in terms that: "the present petition relates to the matter pertaining to C.R No.356-D of 2000, wherein miscellaneous petitions for setting aside the judgment and decree dated 24.04.2012 passed by his Court in the said revision petition, have been decided today; thus there is no need to further dilate upon the instant petition. After consultation, the petitioners may approach the learned trial court afresh by moving application in his regard so as to get their grievance redressed, which will decide the same on merits without being prejudiced by the earlier orders. Disposed of accordingly."

The decree-holder/pre-emptors on the other hand, moved applications for rehearing of the ex-parte judgment of the revisional court (C.Ms. Nos.2752 and 2753 of 2015) which were dismissed vide the order common impugned order of the High Court dated 05.05.2020.

In the said order it was also observed by the Hon'ble Supreme Court of Pakistan that "the conduct of the original vendees of the disputed pre-empted property qua their withdrawing the pre-emption money and at the same time pursing the restoration of their civil revisions before the High Court, and not informing the revisional court regarding the same was not attended by the revisional court in the impugned decisions

of 05.05.2020 . In the circumstances a very important question of fact has escaped the attention of the High Court, while passing the impugned orders in its constitutional and revisional jurisdictions. This warrant is positive consideration of this court. When the worthy counsel for the parties were confronted to the said legal position, they were unable to controvert the same, and agreed for remand of the matter to the High Court for rehearing and decision afresh" With these observations Supreme Court remanded the matter to this Court with the direction that all the decisions passed by this Court through order dated 05.05.2020 in CMs and writ petitions shall remain set aside. The C.Ms filed in civil revisions and writ petitions would be deemed to be pending for hearing before this Court and it was further directed that after hearing the parties the matter be decided afresh.

5. Learned counsel for the applicants/legal heirs (in C.Ms Nos.2752 and 2753 of 2015) of the deceased Niaz Ahmed pre-emptor argued that after withdrawal of pre-emption amount, the claim of the vendees has become redundant and they have no connection with pre-empted land as possession was delivered to the pre-emptor and in lieu of that vendees had withdrawn their pre-emption amount from the court. It was further argued that vendees did not mention any thing before the learned trial court at the time of withdrawal of pre-emption amount regarding the pendency of any civil revision before the High Court, otherwise, the amount could not be disbursed to them; that this mala fide on the part of the vendees is absolutely clear when they filed applications for restoration of civil revision before Hon,ble High Court wherein they did not mention anything regarding the warrant of possession issued by learned executing court which was completed on 09.01.2001; that proceedings of learned trial court in execution of warrant of possession clearly shows that vendees were also present at the time of getting the possession of the land in dispute by the decree holder but the vendees did not mention this fact while filing applications for restoration of civil revision before this Court. The fact of withdrawal of pre-emption amount was also not mentioned by the vendees in the aforesaid application, even they did not disclose this fact at the time of advancing the arguments on the aforesaid application , otherwise order dated 22.06.2011 whereby civil revision was restored to its original number might could not have been passed as such. It was further contended that applicants/legal heirs of the deceased pre-emptor came to know about the factum of impugned ex-parte judgment passed in civil revision on the date when the application for restoration of possession was filed by the vendees/ judgment debtor and thereafter immediately the applicants filed the C.Ms. for re-hearing of civil revision; that prior to that neither the vendees/ judgment debtor disclosed the matter regarding the acceptance of civil revision by this Court nor any notice was received to applicants in this regard whereas purposely the vendees/judgment debtor had been concealing the factum of proceedings of possession

taken by the pre-emptor/applicants and withdrawal of pre-emption amount by them (vendees) from the court . It was further argued that this is also evident from the record that when civil revision was filed on 20.07.2000 after passing the decrees by the both the courts below, C.M. was also filed along with the said civil revision wherein interim relief was granted to the effect that status quo would be maintained regarding the possession of the pre-empted land whereas when the application for restoration of civil revision was filed on 23.04.2001 no such application was filed by the vendees/ defendants; that the grounds taken by the vendees/defendants are very strange which have no relevancy regarding the facts and no document was filed in support of ground taken by the vendees/defendants; It was further argued that applications for rehearing of civil revision may be converted into the application under section 12(2) of C.P.C. because the judgment dated 24.4.2012 has been obtained by the vendees/ defendants by concealing the factual position and the real facts from the court as the application for restoration of civil revision had become infructuous when the vendees/ defendants had withdrawn the pre-emption amount from the court.

6. On the other hand, learned counsel for the vendees/defendants contended that withdrawal of pre-emption amount from the court had no effect to the status for filing the application for restoration of civil revision because any illegal order may be called by this court at any time ; that no solid ground has been agitated by learned counsel for the applicants/legal heirs of deceased pre-emptor Niaz Ahmad for setting aside the impugned judgment and decree as the same has been passed in accordance with the law; that even otherwise the revisional court can exercise revisional jurisdiction without intervention of either of the party when it finds that the learned courts below have committed material illegality and irregularity or have failed to exercise vested jurisdiction or have exercised a jurisdiction not vested in them by law as is provided in sub-clause (1) of section 115 of the Code of Civil Procedure, 1908; that this court while passing the impugned judgment and decree has acted in accordance with law even in absence of the applicant's predecessor. It was further argued that since impugned judgments and decrees passed by both the courts below were totally against the law and facts, therefore, it will not disturb the defendants/vendees that they had withdrawn the pre-emption amount deposited in the court ; that impugned judgment has been passed by this court in accordance with law after discussing the whole material available on record and suits of the pre-emptors were rightly dismissed by this Court and vendees were unable to file an application for restoration of the possession of the suit land and they are ready to deposit the pre-emption amount which they had already withdrawn from the court. It was further argued that there was no need to mention the fact of withdrawal of pre-emption amount before this Court as it has no effect on the merits of

the case because anything which has been passed against the law can be reversed by the court even without filing of the application of the effectee.

7. Arguments heard. Record perused.

8. There are so many questions in this proposition. This is an admitted fact that till the filing of the civil revision, both the courts below decreed the suit for possession through pre-emption in favour of the pre-emptor Niaz Ahmed. Against the judgments and decrees passed by both the courts below the judgment debtor/ vendees filed civil revision before this Court. One of the vendees namely Muhammad Saleem made compromise with the pre-emptor/deceased Niaz Ahmed and to his extent he also received sale consideration amount. The rest of the defendants/vendees filed civil revision and when this civil revision was dismissed due to non-prosecution the decree holder who had already filed an execution petition before the learned trial court submitted the copy of the order of the court for dismissal of civil revision and got warrant of possession in their favour and subsequently they got the possession of the suit land . Now six months after the dismissal of the civil revision and after four months of the proceedings of warrant of possession the vendees/judgment debtor filed an application for restoration of civil revision . In the said application they did not mention anything regarding the proceedings of warrant of possession of the suit land whereas record shows that they were present in the said proceedings and it was mentioned by the revenue officials regarding the status of possession as they asked them whether they had any stay order regarding the property in dispute or not and on their denial from the same, proceedings of the warrant of possession were completed by the revenue officials in accordance with law. The vendees/defendants had moved the application for withdrawal of pre-emption amount from the court and as per procedure all the vendees signed over the application and received their respective shares. The learned counsel for the defendants/vendees was specifically asked that whether he had record of the application which the vendees/defendants had filed before the Civil Court for withdrawal of pre-emption amount he straightway replied that he had no document in this regard, rather that application was handed over to the Nazir of Civil Court when it was allowed by the concerned court and that record perhaps is not available. The logic mentioned by counsel for the vendees/defendants that vendees did not deem it necessary to inform the court regarding the withdrawal of amount or mentioning the taking over the possession of the decree holder is very strange because if such situation had been mentioned before the court, the situation would have been different. Conduct of the respondents/defendants-vendees shows that they had not come with clean hands and any discretionary relief or even relief would not available to a person who comes to court with unclean hands. Reliance is placed on cases reported as Mirza Nazeer Ahmad Baig v. Additional District Judge, Kasur and 2 others (1996 CLC 1616) and Niaz Muhammad

v. Mst. Noori (1997 MLD 406). In my view, in the application the applicants/legal heirs of the deceased Niaz Ahmed pre-emptor has mentioned the reason that impugned judgment dated 24.04.2012 was obtained by the defendants/vendees by concealment of facts from the court, falls within the provision of section 12(2) of C.P.C. because it fulfills the required ingredients of section 12(2), C.P.C. which is reproduced as under:-

12. Bar to further suit. ---(1) Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such case of action in ay court to which the Code applies.

{(2) Where a person challenges the validity of a judgment decree or order on the plea of fraud, mis-representation or want of jurisdiction, he shall seek his remedy by making an application to the court which passed the final judgment, decree order and not by a separate suit).

The applicants have filed the C.M. and also annexed the affidavit with the said C.M. but that C.M. was just treated as rehearing of civil revision under Order XLI, Rule 21 read with section 151 of C.P.C. which was turned down by this Court vide order dated 05.05.2000. After perusing the contents of the said application and hearing the arguments of both the learned counsel for the parties I am of considered view that instant application for rehearing of civil revision should be converted into the application under section 12(2) of C.P.C. because law is based on equity, the discretionary relief would be available to a person who comes to court with clean hands. The main point of determination in this proposition was that what was the procedure for withdrawal of deposited pre-emption amount in the court. Under the Rule 29 Chapter 8-D Volume II of the Lahore High Court Lahore a person files an application for withdrawal of amount wherein he mentions that the suit had been decided and no litigation is pending, the court obtains a report from the office/Civil Nazir regarding the deposit of amount and verifies the contents of the application and then allows the same. Prima facie it seems that when the vendees filed an application in the court they mentioned that there was no further litigation pending and they sought permission for withdrawal of the amount which was allowed meaning thereby that they concealed the factum of the filing of the application for restoration of civil revision before this Court. Infact they impliedly accepted the decision of the courts below and in this regard their case is at the same footing as that of Muhammad Saleem vendee who effected compromise with the pre-emptor and got the pre-emption amount as per his share. The other important factor is that when the order for restoration of civil revision was passed on 22.06.2011 the vendees did not file any application before any court for restoration of the possession or for depositing of the pre-emption amount which they had already withdrawn from the court, immediately, rather it was filed after elapse of more than

three years after restoration of civil revision which itself reflects mala fide on their part. So in my view the vendees were not in the field and they had accepted the claim of the pre-emptors and withdrew the pre-emption amount from the court and in this regard their C.M for restoration of civil revision had become infructuous, therefore, the order which has been obtained by way of concealment of facts is not sustainable in the eyes of law. This is also important that pre-emptor has preferential pre-emptive right qua the vendees being owner of the adjacent land with the property in dispute and it was proved, secondly he followed all the orders of the court regarding the deposit of Zare-Soim as well as deposit of remaining decretal amount within stipulated period granted by the court, therefore, a person who has respect for law deserves grace and certainly the discretionary relief can also be awarded to such a person who has respect for law . It is settled principle that a man who seeks equity must come with clean hands. Law only favours those, who come with clean hands. On the other hand the defendants/vendees have concealed the material facts from the court, hence they are not entitled for any discretionary relief from the court.

9. The crux of above discussion is that the CMs filed by the applicants/legal heirs of deceased Niaz Ahmed pre-emptor for re-hearing of civil revision are hereby converted into the application under section 12(2) of C.P.C. read with section 151 of C.P.C. under the constitutional jurisdiction of this Court which are accepted and it is declared that impugned judgment and decree dated 24.04.2012 passed by this Court was obtained by concealment of facts, therefore, same is not sustainable in the eyes of law, hence judgment and decree dated 24.04.2012 is set aside. With these observations the suit for possession through pre-emption which had already been decreed in favour of Niaz Ahamd deceased/plaintiff/pre-emptor by the both the courts below stands in field. The application filed by the respondents / defendants-vendees for restoration of civil revision was not maintainable, as they had no lien to file the same, with the withdrawal of the consideration amount from the court, they had no right to file the application, hence the said application is dismissed.

10. In view of above decision, W.P. No.10718 of 2017 (for grant of permission to re-deposit of the pre-emption amount) and W.P. No.10145 of 2017 (for restoration of possession) having become infructuous are disposed of.

ZH/M-246/L Revision dismissed.

2023 C L C 301

[Lahore]

Before Safdar Saleem Shahid, J

SURIYA NAFEES----Petitioner

Versus

MUHAMMAD RAMZAN SHAHID and 2 others----Respondents

Writ Petition No.9545 of 2016, heard on 18th January, 2022.

Family Courts Act (XXXV of 1964)---

----S.5, Sched.---Suit for recovery of articles belonging to wife---Maintainability---Scope---Question before High Court was whether Family Court had jurisdiction to entertain the suit where contention of the wife was that the articles purchased by her during marriage were retained by her husband at the time of separation---Held; as per Schedule attached to the Family Courts Act, 1964, the Family Court was empowered to hear such suits but those were also subject to proof---Both the courts below had erred in law and had committed illegality while dismissing the suit---Petitioner could not be ousted on the point of jurisdiction---Constitutional petition was accepted, impugned orders were set aside and the suit was remanded for decision on merits.

Khalil Ahmad Maan, Rana Naveed Khalil and Ch. Saif Ullah Khata for Petitioner.

Respondent No.1: Proceeded against ex-parte vide order dated 31-5-2018.

Date of hearing: 18th January, 2022.

JUDGMENT

SAFDAR SALEEM SHAHID, J.----Through instant petition, petitioner has called in question the legality of order dated 09.01.2014 passed by learned Judge Family Court and judgment dated 18.02.20216 passed by learned Additional District Judge, whereby claim of the petitioner for recovery of personal belongings valuing Rs.21,19,000/- was dismissed.

2. Brief facts necessary for decision of instant writ petition are that Suriya Nafees petitioner was married with respondent No.1 in consideration of 10-tolas gold as dower but no issue was born out of this wedlock. Petitioner was serving as Nurse and she after her marriage purchased one kanal land and constructed Maternity Home over

it along with necessary equipment/articles valuing Rs.21,19,000/-. Thereafter, the petitioner was ousted from her aforesaid property and the same is in possession of respondent No.2. The petitioner filed a suit for recovery of her personal belongings before Judge Family Court (concerned) which was contested by respondent No.1 by filing written statement and raising many factual objections. After hearing the parties, learned Judge Family Court dismissed the aforesaid suit vide order dated 09.01.2014 by holding that the suit is not family suit in nature and same is not maintainable in its present form. Feeling aggrieved, petitioner preferred an appeal before learned Addl: District Judge which was also dismissed by the said court vide judgment dated 18.02.2016. Hence, this writ petition.

3. Learned counsel for the petitioner contended that impugned order and judgment have been passed by both the courts below while ignoring the relevant law and facts of the case, therefore, same are not sustainable in the eyes of law; claim of the petitioner needs to be proved after recording of evidence of the parties but suit of the petitioner has illegally been dismissed by the learned Judge Family Court being not maintainable; as per amended Schedule of Family Courts Act, 1964, suit for recovery of personal property and belongings of a wife falls within the category of family suit which is maintainable before Judge Family Court (concerned).

4. Notice was issued to respondent No.1 but no one has turned up on his behalf despite service effected upon him, therefore, he was proceeded against ex-parte vide order dated 31.05.2018.

5. Arguments heard.

Record perused.

6. It has been noticed that claim of the petitioner is that she was serving as Nurse and after her marriage she purchased one kanal land and constructed Maternity Home over it along with necessary equipment/articles valuing Rs.21,19,000/- which was in possession of respondent No.1. The question before this Court is that whether Family Court has jurisdiction to entertain the suit where contention of the lady is that these articles/belongings were purchased by the lady herself after the marriage which were in possession of the husband at the time of separation between the parties. Section 5 of the

Family Courts Act, 1964, says that the following matters fall within the jurisdiction of Family Court:-

1. Dissolution of marriage [including Khula].

2. Dower.

3. Maintenance.

4. Restitution of conjugal rights.

5. Custody of children [and the visitation rights of parents to meet them]

6. Guardianship.

7. Jactitation of marriage.

8. Dowry.

9. Personal property and belongings of a wife.

Rule 6 of the Act ibid deals with the jurisdiction of the court to try the suit under the Act.

Learned Judge Family Court straight away refused to entertain the suit with the observation that the subject matter of the instant suit is not mentioned in the Family Courts Act, 1964, as the property alleged to have been purchased or made after the marriage and most of the articles mentioned in the list are relating to the health center.

The order passed by learned Judge Family Court when assailed before learned Addl: District Judge, he maintained the same by mentioning some different reasons that in the earlier suits filed by the petitioner and her mother mostly the same articles were mentioned in the list and said suits have already been decided by the competent courts.

This was particularly not the question before the 1st appellate court because in-fact said learned court was bound to decide the matter regarding jurisdiction of the Family Court (concerned) to the effect that whether a suit filed by the lady regarding personal belongings or personal property which have been allegedly purchased by her after marriage while residing with her husband comes within the jurisdiction of the Family Court or not.

As per Schedule mentioned above, the Family Courts Act, 1964, clearly empowers the Family Court to hear such suits but those are also subject to prove. On this legal point, both the courts below have erred in law and committed illegality.

Primarily petitioner cannot be ousted on the point of jurisdiction by the Family Court (concerned). Both the Courts below have not rightly passed the impugned order and judgment.

7. In view of what has been discussed above, instant writ petition is accepted, impugned order and judgment passed by both the courts below are set aside and the case is remanded to the learned District Judge, Faisalabad, for its entrustment to the court of competent jurisdiction for trial afresh. However, as this writ petition was filed in the year 2016 whereas the matter in hand pertains to the year 2012, therefore, learned Judge Family Court seized with the matter shall decide the same expeditiously.

SA/S-17/L Case remanded.

2023 C L C 673

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

Mst. SHARIFAN BIBI (DECEASED) through L.Rs. and others----Petitioners

Versus

Mst. IRSHAD BIBI and others----Respondents

Civil Revision No.13-D of 2009, decided on 6th September, 2021.

(a) Colonization of Government Lands (Punjab) Act (V of 1912)---

----Ss.19, 19A, 20, 30 & 36---Civil Procedure Code (V of 1908), S.9---Inheritance mutation---Suit for declaration with permanent injunction was filed by respondent being daughter of the deceased ("H") claiming that mutations in favour of the brother ("J") of her deceased father was illegal/based on fraud; that "H" was allotted the land in 1934 but died before the grant of proprietary rights; that as the sole daughter of "H", she was entitled to grant of proprietary rights; that "J" got the inheritance mutation sanctioned in his favour in 1952 when respondent was aged 2 years; that petitioner/defendant was widow of both "H" and "J" as she contracted second marriage with "J" after death of "H"---Suit was concurrently decreed---Petitioner contended that after death of "H", "J" had paid all the dues regarding he land; that conveyance deed was also issued by the Government in favour of "J"; that respondent's suit was barred by the time as the same was filed after more than 6 years; that respondent admitted that she had the knowledge of all the transactions of property for the last 35 years; that under S.36 of the Colonization of Government Lands (Punjab) Act, 1912 the jurisdiction of Civil Court was barred; that at the time of opening of the inheritance of "H" in 1948, amended S.19A of the Colony Act was not available; that "J" was allotted the land under the order of the Collector which order was not challenged and the same was not even brought on record; that Trial Court had not given any finding on the said point despite the fact that specific issue was framed in that regard; that against grant of proprietary rights and Pata-Malkiyat, specific remedy was available under Section 30 of the Act, 1912---Validity---Land was originally owned by the Provincial Government and by notification, the same was allotted to "H" who cultivated the same till his death---Admittedly, after the death of "H", "J" had been cultivating the land---"H" had not been paying the dues/rent, the allotment might have been cancelled by the Government/District Collector which was not the fact---Under Act, 1912, the tenancy shall devolve upon the heirs in accordance with the Islamic Law---Section 19A of the Act, 1912, was enacted in 1951, that is why, the same was not applicable at the time of death of "H"---"J" died after a long time of the death of "H"---After the death of "H",

the property was to devolve upon his widow and daughter under S.20 of the Act, 1912, until she would die/remarry/lose---After the death of "H", the land was to be devolved under S.20 of the Act, 1912, to the widow (respondent) and the daughter (petitioner) of the deceased/allottee till their entitlement---Neither the District Collector made any inquiry before issuance of Pata Malkiyator grant of proprietary rights as required under the Act, 1912, nor the predecessor-in-interest of the petitioners disclosed the fact that under which capacity he was claiming the proprietary rights---At the time of sanctioning of mutation, "J" being predecessor-in-interest of the parties concealed regarding the legal heirs available at the time of death of "H"---Civil Court was competent to hear the matter where the title was involved and the inheritance was specifically agitated because the revenue authorities were not having jurisdiction to decide the matter of inheritance---Collector had no discretion to grant proprietary rights to any other person in presence of the legal heir---Collector's order confirming the proprietary rights of "J" and sanctioning mutation was rightly declared null and void by the courts below---Revision petition was dismissed accordingly.

Saeed-ud-Din and others v. Hafeez Begum and others 2013 SCMR 1133; Khan Muhammad through L.Rs. and others v. Mst. Khatoon Bibi and others 2017 SCMR 1476; Manzoor Ahmad v. Mst. Salaman Bibi and others 1998 SCMR 388; Abdul Ghafoor and others v. Muhammad Shafi and others PLD 1985 SC 407 and Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi PLD 1990 SC 1 rel.

Mst. Noor Begum and 6 others v. Muhammad Akram and 17 others 2013 MLD 1323 distinguished.

(b) Inheritance---

----Mutation---Limitation---Applicability of---Scope---In case of inheritance mutation, the limitation would not run, especially when there was an evidence that the same was sanctioned by concealment or the other side had been compensating the legal heir with the produce or in shape of money.

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

----S.115---Revisional jurisdiction of High Court---Scope---Jurisdiction of High Court is narrow under S.115 of Civil Procedure Code and the concurrent findings of fact could not be disturbed in revisional jurisdiction unless courts below while recording the findings of fact has either misread the evidence or has ignored any material piece of evidence or those were perverse and reflect some jurisdictional error.

Noor Muhammad and others v. Mst. Azmat-e-Bibi 2012 SCMR 1373 rel.

Muhammad Naveed Farhan for Petitioners.

Rao Nasir Mehmood Khan for Respondents Nos.1, 2(c), (d), and (f).

Mirza Ahmad Nadeem Asif for Respondent No.2(e).

Ex-parte through order daed 20-4-2021 for Respondents Nos.2(b-i) to 2(b-ix).

Date of hearing: 6th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision has been directed against the judgments and decrees dated 31.07.2008 and 12.01.2009, passed by the learned Civil Judge, Yazman and the learned Additional District Judge, Bahawalpur, Camp at Yazman, whereby suit for declaration filed by respondent No.1 was decreed and the appeal of the petitioners was dismissed, respectively.

2. Brief facts necessary for disposal of the revision petition are that respondent No.1 filed a suit for declaration with permanent injunction to the effect that the mutation of inheritance No.26 dated 16.11.1952 in favour of Jalal Din (defendant No.1) and then mutation No.84 dated 28.02.1958 to bestow the proprietary rights on defendant No.1, pursuant to the conveyance deed and Mutation Nos.2 to 5 and mutation No.7 dated 30.01.1992 by petitioner No.1/defendant No.2 in favour of petitioners Nos.2 and 3/defendants Nos.3 and 4 and mutation No.8 dated 25.02.1992 in favour of petitioner No.4/defendant No.5 are illegal, without lawful authority and result of fraud. It was claimed by respondent No.1 that her father Hakim Ali was allotted land measuring 200-kanals in 1934. The said Hakim Ali died in the year 1948 leaving behind Mst. Irshad Bibi (respondent No.1) as his sole daughter and Mst. Sharifan Bibi (petitioner No.1/defendant No.2) as his widow. Mst. Sharifan Bibi (petitioner No.1/defendant No.2) later on contracted marriage with Jalal Din, who was real brother of Hakim Ali (deceased). In 1952 Jalal Din (defendant No.1) got sanctioned mutation of inheritance No.26 dated 16.11.1952 in his favour when respondent No.1/plaintiff was only two years old. Then superstructure was raised in the form of conveyance deed by the Government for grant of proprietary rights and gifts, excluding the plaintiff/respondent No.1 altogether. Respondent No.1/plaintiff filed suit to claim her right with the averments that she being an illiterate and Parda Nasheen lady could not get knowledge of the fraud and misrepresentation committed by Jalal Din defendant No.1 with the help of staff of the revenue department.

3. The petitioners/defendants Nos.1 to 5 contested the suit by filing their written statement while Qasim Ali defendant No.5/respondent No.2 filed conceding written

statement. Out of the pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether the plaintiff has any cause of action against the defendants to file this suit? OPD

2. Whether the suit is not maintainable as the basic order dated 12.10.1952 has not been challenged? OPD

3. Whether the suit is barred by law of limitation? OPD

4. Whether the suit is false, frivolous, vexatious and defendants are entitled to recover special costs under section 35-A of C.P.C.? OPD

5. Whether the suit is hit by section 36 of Colonization of Government Lands Act, hence court lacks jurisdiction to try the suit? OPD

6. Whether the plaintiff and defendant No.1 being legal heirs of Hakim deceased are entitled to get their respective shares in the suit property? OPP

7. Whether the plaintiff has been receiving her shares out of the suit property from the defendants Nos.2 to 5? OPP

8. Whether the inheritance mutation No.26 dated 16.11.1952 and subsequent mutation No.84 dated 28.2.1958 and gift mutation No.215 dated 28.5.1976 and later mutation No.7 dated 30.01.1992 and mutation No.8 dated 25.2.1992 all in respect of suit land are illegal, void, ab-initio to the extent of plaintiff and defendant No.1 and the same are liable to be declared as such? OPP

9. Relief.

4. Both the parties led evidence, oral as well as documentary, in support of their respective claims. The learned Civil Judge while dealing with issues Nos.5, 6 and 8 observed that inheritance mutation No.26 dated 16.11.1952 was not sanctioned in accordance with law and decided the said issues in favour of respondent No.1/plaintiff. Since, in view of the findings on issues Nos.6 and 8, respondent No.1/plaintiff was found to be the legal heir of Hakim Ali deceased and entitled to receive her share in the inheritance, issues Nos.1, 2, 3, 4 and 7 were also decided against the petitioners and in favour of respondent No.1/plaintiff and as a result decreed her suit through judgment and decree dated 31.07.2008. The appeal filed against the same was dismissed by the learned Additional District Judge, through judgment and decree dated 12.01.2009.

5. Learned counsel for the petitioners argued that since after the death of Hakim Ali, who was originally allotted the land, Jalal Din had paid all the dues regarding the land

in question, therefore, mutation No.26 was rightly sanctioned in his favour in the year 1952 and conveyance deed was also issued by the Government in his favour. Learned counsel argued that under Section 120 of the Limitation Act, such a suit was to be filed within six years and as such the same being barred by time was liable to be dismissed. Added that the plaintiff/respondent No.1 through her oral assertion admitted that she had the knowledge of all the transactions of property for the last 35 years but she never challenged the same and this point of limitation was not considered and answered correctly by the Courts below. Further argued that under Section 36 of the Colonization of Government Land (Punjab) Act, 1912, the jurisdiction of the Civil Court was barred. Added that father of the plaintiff/respondent No.1 died in the year 1948 and succession was opened as a custom and at that time Section 19-A of the Colony Act was not available at Bahawalpur State and it was enforced in the year 1951. Learned counsel for the petitioners argued that Jalal Din predecessor-in-interest of the petitioners was allotted the land under the order of the Collector dated 12.10.1952 as a result of which mutation No.26 was sanctioned in his favour. The order of the Collector dated 12.10.1952 was not challenged and even not brought on record by the respondent and despite the fact that a specific issue was framed, the learned Courts below did not give any findings on this point. Learned counsel argued that against the order granting proprietary rights and Pata Malkiyat a specific remedy under Section 30 of the Colonization of the Government Lands (Punjab) Act, 1912, is available and under Section 36 of the Act, the jurisdiction of the Civil Court is specifically ousted.

6. Learned counsel for the respondents, on the other hand, argued that admittedly Hakim Ali was allotted land measuring 200-Kanals in the year 1934, but before transfer of proprietary rights he died leaving behind Mst. Sharifan Bibi (widow) and Mst. Irshad Bibi (daughter). Jalal Din and Qasim Ali were the brothers of deceased Hakim Ali. After the death of Hakim Ali the property was to be devolved upon the legal heirs. Jalal Din contracted marriage with Mst. Sharifan Bibi widow of Hakim Ali. In the year 1952 the mutation was attested in favour of Jalal Din against the principle of law of inheritance and Mst. Irshad Bibi (plaintiff/respondent No.1), Mst. Sharifan Bibi (petitioner No.1) and Qasim Ali (respondent No.2) were deprived of their lawful Shari share. Thereafter, Jalal Din and Mst. Sharifan Bibi in collusion with each other transferred the property to petitioners Nos.2 to 4. It was the contention of the respondents that the property was to be devolved in accordance with Sharia instead of custom. The learned counsel argued that the limitation never runs in inheritance cases, specially when Jalal Din the predecessor-in-interest of the petitioners had been compensating respondent No.1 by paying her share. Learned counsel argued that Exh.P.3 mutation No.26 shows that it was an inheritance mutation

executed in favour of Jalal Din predecessor-in-interest of the petitioners, meaning thereby that he got the same executed concealing about the other legal heirs and presenting himself to be the sole heir of Hakim Ali with mala fide intention. Further argued that admittedly Hakim Ali had no male issue/descendant son or grandson, therefore, under Section 20 of the Colonization of Government Lands (Punjab) Act, 1912, the property was to be devolved upon the widow as limited owner until she remarried or died. Further argued that after the death of Hakim Ali his widow Mst. Sharifan Bibi got married with Jalal Din, therefore, her right of limited ownership also extinguished and now the property was to be devolved upon unmarried daughter of Hakim Ali until she married or died. It was argued that admittedly at the time of remarriage of Mst. Sharifan Bibi, her daughter Mst. Irshad Bibi (plaintiff/respondent No.1) was of two years and as per law she was entitled to inherit her father's estate as limited owner. Learned counsel for the respondents relied upon the case reported as Mst. Imam Bibi v. Allah Ditta and others (PLD 1989 SC 384), to argue that the Colonization of Government Lands (Punjab) Act, 1912 was extended to Bahawalpur on the 2nd of May, 1926 with a number of amendments. Since Section 19-A of the Act having been introduced in the Punjab by Act III of 1951 on 20.01.1951, after the remarriage of Mst. Sharifan Bibi widow of Hakim Ali with Jalal Din, the property was to be devolved upon Mst. Irshad Bibi respondent No.1 as limited owner. She was entitled to hold the same till her death or marriage. It was contended that respondent No.1 had proved that inheritance was to be devolved upon her as limited owner after the death of Hakim Ali, the original allottee of the land and the provisions of the Colonization Act being applicable at that time, the mutation of inheritance was to be sanctioned in accordance with Section 20 of the Act. It was argued that respondent No.1 was deprived of her right and the learned Courts below have rightly declared mutation No.26 as illegal, void and ineffective upon her right.

7. Arguments heard. Record perused.

8. Through this revision petition, the petitioner has raised some legal and factual objections which need determination:-

i. Allotment was confirmed in the name of Jalal Din as he paid all the installments and satisfied all the terms and conditions required.

ii. Mutation No.26 was rightly sanctioned under the order of District Collector dated 12.10.1952, which was not challenged by respondent No.1, therefore, mutation No.26 will have no negative effect in case the order dated 12.10.1952 is intact.

iii. Against issuance of Pata Malkiyat and proprietary rights a specific remedy under Section 30 of the Colonization of Government Lands (Punjab) Act, 1912 was available, which was not exercised by respondent No.1 and under Section 36 of the Act jurisdiction of the Civil Court is specifically barred.

iv. Limitation is the main legal aspect that knowingly all the transactions and mutations respondent had not challenged those will in time. Therefore, respondent No.1 was not entitled to any relief.

9. Since the matter relates to the interpretation of the provisions of Colonization of Government Lands (Punjab) Act, 1912, and its applicability, therefore, I will quote first the relevant Sections. Section 4 of the Act, says:-

"This Act shall, unless the Provincial Government otherwise directs, apply to land to which the provisions of the Government Tenants (Punjab) Act 1893, have been applied and to any other land to which the [Provincial Government] may by notification in the Official Gazette apply it and which at the time of the notification was the property of the Provincial Government."

10. The land is originally owned by the Provincial Government and by notification it was allotted to Hakim Ali the predecessor-in-interest of respondent No.1 in 1934. He cultivated the land till his lifetime and according to the record he died in 1948. Thereafter Jalal Din his brother was cultivating the land and his name is appearing in Column No.8 (Kasht) of Jamabandi continued to cultivate the land. Neither the Government cancelled the allotment in the name of said Hakim Ali nor it was alleged by the petitioners through written statement filed. But it is admitted fact that in continuation of the allotment of Hakim Ali, after his death Jalal Din, the predecessor-in-interest of the petitioner had been cultivating the land. There is a question that if the said Hakim Ali had not been paying the rent under the terms and conditions or had not been fulfilling the conditions, the allotment might have been cancelled by the Government/District Collector. But neither it is the stance of the petitioners nor anything regarding this had been brought on record, meaning thereby that it is admitted and established fact that originally the land in question was allotted to Hakim Ali, the predecessor-in-interest of respondent No.1.

11. Section 19 of the Colonization of Government Lands (Punjab) Act, 1912, says:-

"Except as provided in section 17, none of the rights or interests vested in a tenant by or under the Government Tenants (Punjab) Act, III 1893, or this Act, shall, without the consent in writing of the ["Executive District Officer (Revenue)"], or of such- officer as he may be written order empower in this behalf, be transferred or charged by any sale,

exchange, gift, will, mortgage or other private contract, other than a sub-lease for not more than one year in the case of a tenant who has not acquired a right of occupancy, and seven years in the case of a tenant who has acquired a right of occupancy. Any such transfer or charge made without such consent in writing shall be void, and if (after the commencement of this Act) the transferee has obtained possession, he shall be ejected under the orders of the Collector."

Then in view of Section 19, if it is read with Section 19-A, which is about succession to the tenancy and reads as under:-

"When after the coming into force of the Colonization of Government Lands (Punjab) (Amendment) Act, 1951, any Muslim tenant dies, succession to the tenancy shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat), and nothing contained in sections 20 to 23 of this Act shall be applicable to his case."

12. The bare reading of both the Sections establishes that under this Act the tenancy shall devolve upon the heirs in accordance with the Muslim Law. This is important that Section 19-A was enacted in 1951. Prior to that Section 20 was applicable to the succession of tenants acquiring otherwise than by succession. The contention of the petitioner is that Section 19-A of the Act was not applicable at the time when Hakim Ali died, whereas Jalal Din died after a long time of the death of Hakim Ali deceased. Under Section 20 of the Colonization of Government Lands (Punjab) Act, 1912, the property was to devolve upon the widow of the tenant until she dies or remarries or loses her rights under the provisions of this Act; the unmarried daughters of tenant until they die or marry or lose their rights under the provisions of this Act. After the death of Hakim the allottee the land was to be devolved under Section 20 of the Act to the widow and the daughter till their entitlement. It has been noted with great concern that neither the District Collector made any inquiry before issuance of Pata Malkiyat or grant of proprietary rights as required under this Act, nor the predecessor-in-interest of the petitioners disclosed the fact that under which capacity he was claiming the proprietary rights.

13. Admittedly, the land in question measuring 200-Kanals was allotted to Hakim Ali in 1934, but before issuance of proprietary rights he died in 1948 and thereafter the proprietary rights were given to Jalal Din his brother. It has been noted that at the time of sanctioning of mutation No.26 Jalal Din predecessor-in-interest of the petitioners concealed regarding the legal heirs available at the time of death of Hakim Ali the original allottee of the land. Case of the petitioners is supported by a consistent plea of all the DWs that since Jalal Din had paid the instalments, therefore, he was rightly

confirmed the proprietary rights of the land, but a perusal of mutation No.26 (Exh.P.3) shows that it was an inheritance mutation and that was to be devolved in accordance with Section 20 of the Colonization of Government Lands (Punjab) Act, 1912. Reliance in this regard is placed on the case of Saeed-ud-Din and others v. Hafeez Begum and others (2013 SCMR 1133), wherein it was held as under:-

"According to section 20 of the Colonization Act, reproduced above, upon the death of the original tenant the tenancy was to devolve upon the persons mentioned therein. The first in line is the male lineal descendants. The categories mentioned in the clauses "(b) to (e)" can only be considered upon failure of the original tenant to be survived by the male lineal descendants. There is no dispute that under section 20(a) the tenancy granted to Lal Din was to devolve upon his five sons and this was accordingly done when the Patwari prepared his report in the year 1946. Section 19-A was added by the Punjab Act III of 1951, making a substantial departure from the provisions of section 20, regarding succession to the tenancy under the Act. By this addition where the Muslim tenant dies after the coming into force of section 19-A the tenancy shall devolve upon the heirs in accordance with the Muslim Personal Law; the provisions of section 20 has been excluded from the application of section 19-A. This additional provision has been made applicable to those tenancies where the Muslim tenant dies after the coming into force of the amendment in the Act 1951. Lal Din had died in the year 1945 before the coming into force of section 19-A. His tenancy rights were thus to be regulated by section 20 and not section 19-A of the Act. The High Court had erred in holding that the crucial time for the application of section 19-A would be the acquisition of ownership by sons of Lal Din in the year 1956. Section 19-A read with section 20 does not admit of such construction.

Section 15 of the Colonization Act provides that a purchase from the Government under the Act shall be deemed to be tenant until full payment of the purchase money. Upon payment of the entire installments the sons who till then were tenants became full owners in the year 1956. They had thus become owners in their own right under the provision of the Act and not as legal heirs of Lal Din. The High Court has therefore erred in holding that the tenancy, or for that matter the ownership of the property, was subject to distribution under the Islamic Law of Inheritance. In Mst. Ghulam Bano v. Mst. Noor Jehan (ibid) the daughters of the original tenant under the Colonization Act claimed share in the legacy of their father on the basis of section 19-A of the Act as well as section 2-A of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962. The contention on their behalf was repelled and it was held that where the Muslim tenant had died before the year 1951, his daughters could neither claim the benefit of

section 19-A nor section 2 A of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962."

Further reliance is placed upon the case of Khan Muhammad through L.Rs. and others v. Mst. Khatoon Bibi and others (2017 SCMR 1476), wherein it is held:-

"While reverting back to the facts and circumstances of the case in hand, it is admitted and established on the record that the propositus of the parties died in the year 1944 leaving behind his only son Sadiq alias Sadu and the two widows and a daughter of his pre-deceased son namely Rajada. In view of the introduction of section 2-A to the Act V of 1962, Sadiq alias Sadu though inherited as legal heir but also became full owner. His inheritance devolved upon his son to the extent of 1/2 share and the remaining 1/2 share went to the two widows as limited estate holders. Their limited estate got terminated after promulgation of the Act V of 1962 and by the time section 4 of the Ordinance VII of 1961 was very much in field so was applicable in their case. The above referred situation tallies on all fours to the case of Sardar (supra) entitling the legal heirs of pre-deceased son i.e. the two widows and the daughter i.e. the plaintiff according to their respective shari shares i.e. 1/8 to the two widows, 1/2 to the daughter (plaintiff) whereas the remaining would go to the son Sadiq alias Sadu as residuary, full brother.

Since the status of parties to the lis is admittedly of occupancy tenants under section 10(2) of the Act V of 1912 so their succession would no doubt be dealt with under section 19-A of the said Act. Since the appellants and the second widow namely Mst. Aisha of pre-deceased son after depositing the requisite fee under the scheme have become full owners so the plaintiff and her mother namely Mst. Fatima, the first widow of pre-deceased son, be also dealt with accordingly and the same principle was laid down in the case of Mst. Ghulam Bano alias Gulab Bano and others v. Mst. Noor Jehan and others (2005 SCMR 658)."

Further reliance is placed on the case of Manzoor Ahmad v. Mst. Salaman Bibi and others (1998 SCMR 388), which holds as under:-

"When after the coming into force of Colonization of Governments is Lands (Punjab) Amendment Act, 1951, any Muslim Tenant dies, succession to the tenancy shall devolve on his heirs in accordance with the Muslim Personal Law (Shariat), and nothing contained in sections 20 to 30 of this Act shall be applicable to his case;"

We are of the opinion, however that the correct view has been taken in the cases referred to earlier, namely, that the nomination merely confers a right to collect the money or to "receive the money". It does not operate either as a gift or as a will and,

therefore, cannot deprive the other heirs of the nominator who may be entitled thereto under the law of succession applicable to the deceased."

"As regards the status of the Member of the Society vis-a-vis the Government and the grant, it has to be noted that the proprietary interest had been conferred on Fazal Shah not by the Cooperative Society but by the State under the Colonization of Government Lands Act. Therefore, notwithstanding his Membership of the Society, it was ultimately to devolve as a State grant on a Member. Membership of the Society is a matter altogether different from succeeding to the estate of the deceased Daulat Shah. So far as the question of succession is concerned that stands resolved by the decision of this Court in Mst. Amtul Habib's case which has been followed by all the three Courts dealing with this case."

8. In view of the afore-referred dictum laid down by the Hon'ble Supreme Court the import of law of succession cannot be frustrated by the act or omission of a functionary of the State and the so-called allotment made in favour of Sher Muhammad predecessor-in-interest of the petitioner-defendant was void ab initio and cannot stand the test of judicial scrutiny. There is no mis-reading or non-reading of evidence to merit indulgence. The two concurrent findings of the learned Courts below do not reflect any jurisdictional defect to warrant interference in the revisional jurisdictional of this Court."

Reliance in this regard can also be placed upon the cases of Ali Muhammad v. Allah Ditta and others (1985 CLC 2817) and Province of Punjab through Collector Jhang, District Jhang v. Lal Khan (1993 CLC 2444).

14. The case law referred by the learned counsel for the petitioners i.e. Mst. Noor Begum and 6 others v. Muhammad Akram and 17 others (2013 MLD 1323) has different facts and the principle laid down in the said citation is as such not applicable to the present proposition. There was no need to challenge the order of the District Collector dated 15.12.1952. Furthermore, the Civil Court was competent to see such issues where the matter of title is involved and the matter of inheritance is specifically agitated because the revenue authorities are not having jurisdiction to decide the matter of inheritance. Section 30 of the Act is regarding the correction of the allotment record which is not the subject matter of this proposition.

15. It is further noted that respondent No.1 was admittedly legal heir of deceased Hakim Ali and under Section 20 of the Colonization of Government Lands (Punjab) Act, 1912, the Collector has no discretion to grant proprietary rights to any other person in presence of the legal heirs, therefore, his order confirming the proprietary rights to Jalal

Din and sanctioning mutation No.26, was rightly declared null and void by the learned Courts below.

16. The Islamic law was also applicable in Bahawalpur State prior to 1948. The objection raised by the learned counsel for the petitioners regarding limitation is also not a valid ground in the matter of inheritance. Reliance in this regard is placed on the cases reported as Abdul Ghafoor and others v. Muhammad Shafi and others (PLD 1985 SC 407) and Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi (PLD 1990 SC 1). It is settled rule that the limitation in inheritance cases would not run, specially when there is an evidence that the inheritance mutation was sanctioned by concealment or the other side had been compensating the legal heirs with the produce or in shape of money. Both the Courts have addressed every issue according to its merits. The legal heirs of deceased Hakim Ali were Jalal Din, Mst. Sharifan Bibi, Qasim Ali and Mst. Irshad Bibi and they would have inherited the land of deceased Hakim Ali as per their share. In the circumstances, the learned trial Court, while setting aside mutation No.26 (Exh.P.3) and subsequent mutations Nos.7 and 8 (Exh.P.6 and Exh.P.7) rightly kept mutation No.215 (Exh.P.5) intact to the extent of share of Jalal Din in favour of Mst. Sharifan Bibi.

17. Even otherwise, there is no cavil to the proposition that the jurisdiction of High Court under section 115, C.P.C. is narrower and that the concurrent findings of fact cannot be disturbed in revisional jurisdiction unless courts below while recording findings of fact had either misread the evidence or have ignored any material piece of evidence or those are perverse and reflect some jurisdictional error. Reliance in this regard is placed on the case of Noor Muhammad and others v. Mst. Azmat-e-Bibi (2012 SCMR 1373).

18. Upshot of the above discussion is that the petitioners have failed to point any illegality in the judgments of both the Courts below, calling for interference in the revisional jurisdiction of this Court. The petition, therefore, fails and is accordingly dismissed with no order as to costs.

ZH/S-35/L Petition dismissed.

2023 M L D 362

[Lahore]

Before Safdar Saleem Shahid, J

FAISALABAD ELECTRIC SUPPLY COMPANY LTD. (FESCO) through Chief Executive Officer---Appellant

Versus

GALAXY TEXTILE MILLS LIMITED (GTML) through General Manager (Finance)---Respondent

F.A.O. No. 597 of 2014, heard on 17th March, 2022.

(a) Punjab Civil Courts Ordinance (II of 1962)---

----S. 18---Forum of appeal---Determination---Scope---Respondent filed an application under S. 20 of Arbitration Act, 1940---Application was accepted by the Civil Judge---Appeal filed by appellant before the District Judge was returned on the ground that since the subject matter exceeded the pecuniary limits of the Court, therefore, it had no jurisdiction to hear the appeal---Validity---Respondent had not provided any valuation in its application but had claimed an amount to be outstanding against the appellant, which could only be said to be the disputed amount and could not be presumed to be the value of the subject matter---Appellant had rightly approached the District Judge by filing appeal---Impugned order was set aside and the District Judge was directed to decide the appeal on merits.

Muhammad Younas v. Suiya Bibi and another 2003 MLD 168; Nigar Bibi and others v. Salah-ud-Din and others 2012 MLD 604 and Jan Son Construction through Saida Jan v. Government of Khyber Pakhtunkhwa and others 2013 CLC 127 ref.

Muhammad Ayub and 4 others v. Dr. Obaidullah and 6 others 1999 SCMR 394 rel.

(b) Punjab Civil Courts Ordinance (II of 1962)---

----S. 18---Forum of appeal---Determination---Expression "value of the original suit"---Scope---Forum of appeal is to be determined on the basis of original value of the suit and pecuniary jurisdiction of the District Judge is always to be derived from valuation mentioned in the plaint---Meaning ascribed to the expression "value of original suit" in S. 18(1) of the Punjab Civil Courts Ordinance, 1962, is confined to the valuation given in the plaint.

Sh. Muhammad Ali and Maryam Asad for Appellant.

Barrister Aun Ali Raza for Respondent.

Date of hearing: 17th March, 2022.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---The instant first appeal under section 39(1)(iv) of the Arbitration Act, 1940, is directed against the order dated 15.07.2014, whereby the learned Civil Judge, Faisalabad, accepted the application under section 20 of the Arbitration Act, 1940, filed by the respondent; appointed an arbitrator to proceed with the matter in accordance with the law and terms of Section 10.2 of Power Purchase Agreement (PPA).

2. Brief facts of the case necessary for disposal of the instant appearance that an application under section 20 of the Arbitration Act, 1940 was filed on behalf of the respondent Galaxy Textile Mills Limited (GTML), a public limited company, through its General Manager Muhammad Arshad Iqbal, alleging that in the year 2009 the Pakistan Electric Power Company (Private) Limited (PEPCO) under the Ministry of Water and Power, Golernment of Pakistan, approved and issued a policy framework for New-Captive Power Producers (N-CPPs), whereupon the respondent offered to establish a gas-fired generation facility and sell the surplus capacity of 11.6 MW through its letter No.GTML/LIIR/2010/2011/166 dated 11.03.2011 and the appellant under the recommendations of National Transmission and Dispatch Company (NTDC) vide letter No.CPPA/DT-11/17-67/2690-92 dated 25.03.2011, confirmed its interest in purchasing gas based power on 11 KV Bus Bar at the nearest Grid Station from the proposed generating facility offered by the respondent through letter No.26470 dated 11.06.2011. Resultantly, pursuant to the decision of BOD, FESCO, dated 23.07.2011 power purchase agreement (PPA) setting out the terms and conditions of sale and purchase of 11.6 MW electric power was executed between the parties on 22.08.2011. Pursuant thereto on 25.05.2012 the respondent successfully established a gas fired electric power generation plant after huge investment and started performing its obligations as per PPA, but the appellant after making regular payments in accordance with the terms of PPA, for initial two months against the invoices of May and June, 2012, stopped payments of Financial Cost Component (FCC) from July, 2012, resulting in default of total FCC outstanding up to December, 2012 as Rs.87,951,193/-, hence the application under the arbitration clause of PPA seeking recovery of the unpaid amount and all the investments including the total outstanding debt and equity made in establishment and commissioning of power generation plant together with loss of profits etc.

3. The appellant contested the application, inter alia, on the grounds that neither constitution nor duly verified resolution of the respondent; that procedure laid down in PPA has been followed; that except for section 10.2 of PPA there is no independent arbitration agreement between the parties; that the application is premature as neither requisite notice has been given nor any attempt to resolve the dispute amicably in accordance with the timeframe work set out in section 10 of PPA; that grievance of the respondent is mainly against the subsequent determination of tariff by NEPRA approved through notification dated 28.02.2013.

4. The learned Civil Judge after hearing the arguments of the learned counsel for the parties, accepted the application under section 20 of the Arbitration' Act, 1940, filed by the respondent and appointed an arbitrator to proceed with the matter in accordance with the law and terms of section 10.2 of Power Purchase Agreement (PPA).

5. The appellant challenged the above order by filing an appeal before the District Court. However, the respondent filed an application under Order VII, rule 10, C.P.C., for return of the appeal on the ground that since the subject matter exceeded the pecuniary limits the said Court had no jurisdiction to hear the appeal. The learned appellate Court accepted the application and returned the appeal to the appellant for filing before this Court through order dated 14.10.2014.

6. Arguments heard. Record perused.

7. Instead of dealing with the contentions of the parties with regard to merit or other wise of the main case, it is to be noted that the appeal filed by the appellant was returned with the observation that since the outstanding amount upto December, 2012 was Rs.87,951,191/-, in view section 18(2) of the Punjab Civil Courts Ordinance, 1962, the said Court had no jurisdiction to hear the appeal. However, the forum of appeal was to be determined on the basis of original value of the suit and pecuniary jurisdiction of the District Judge was always to be derived from valuation mentioned in the plaint. The meaning ascribed to the expression "value of original suit" in section 18(1) of the Ordinance is confined to the valuation given in the plaint. A perusal of the application filed under section 20 of the Arbitration Act reveals that the respondent had not provided any valuation therein but claimed an amount to be outstanding against the appellant, which can only .be said to be the disputed amount and cannot be presumed to be the value of the subject matter. In the circumstances, the appellant had rightly approached the District Court by filing an appeal and the view of the learned Additional District Judge was not in accordance with the provisions of the relevant law. Reliance in

this regard can be placed on the case of Muhammad Ayub and 4 others v. Dr. Obaidullah and 6 others (1999 SCMR 394), wherein it is held "that the forum of appeal is to be determined according to the value of the suit as mentioned in the plaint and the fixation of the price of the disputed property by the trial Court is totally irrelevant". Reference in this regard can also be made to the cases of Muhammad Younas v. Surya Bibi and another (2003 MLD 168), Nigar Bibi and others v. Salah-ud-Din and others (2012 MLD 604) and Jan Son Construction through Saida Jan v. Government of Khyber Pakhtunkhwa and others (2013 CLC 127).

8. The appellant has also filed an application under section 5 of the Limitation Act seeking condonation of delay occurred in filing the instant appeal with the explanation that the appeal before the lower Appellate Court was required to be filed within thirty (30) days and the appellant instituted the said appeal within twenty-one (21), which remained pending for sixty-six (66) days, whereas the appellant filed the instant appeal within six days and as the limitation for approaching this Court was ninety (90) days and as such the total period spent for filing the instant appeal comes to 102 days and if period of eight (8) days spent for obtaining copies for both the appeals is excluded, the instant appeal is barred by time for four (4) days, which has been occurred only due to filing appeal before the lower forum in the first instance and as such is liable to be condoned. However, since it has been held that the appellant had rightly approached the District Court to challenge the impugned order, the point of limitation in filing the appeal before this Court need not to be discussed any more.

9. For what has been discussed above, the instant appeal is allowed with the observation that the learned Additional District Judge erred in law while passing the order dated 14.10.2014 whereby the appeal filed by the appellant was returned. Resultantly, the said order is set aside, the appeal of the appellant before the learned Additional District Judge shall be deemed to be pending and shall be decided on merits in accordance with law. There shall be no order as to costs.

SA/F-15/L Appeal allowed.

2023 M L D 511

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

RAB NAWAZ and others---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 2067 of 2019, decided on 18th October, 2021.

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

----Ss. 12(2), 151, O. IX, Rr. 9, 13, O. X, Rr. 17, 19, 20 & O. XLIII, R. 1(d)---Constitution of Pakistan, Art. 10A---Specific Relief Act (I of 1877), S. 42---Limitation Act (IX of 1908), S. 3---Constitutional petition---Suit for declaration by ancestors of the petitioners was decreed by Civil Court ex-parte against respondent and implemented in the revenue record by attestation of mutations and further partly transferred the land in the name of subsequent purchasers---Respondent filed civil suit against the petitioners after 25 years of the said decree/mutation challenging the said ex-parte decree/mutation; claimed ownership of the said land, which suit was dismissed for non-deposit of process fee by respondent for service of petitioners---Respondent filed application for setting aside ex-parte decree on the ground of lack of knowledge, non-service of summons, violation of O. X of Civil Procedure Code, 1908, which application was dismissed by Civil Court---Respondent filed a revision petition which was accepted by District Court setting aside the ex-parte decree of 1987 on 21.02.2019---Petitioners contended that order was appealable but respondent did not file appeal knowingly as it was time barred and filed revision petition which was not maintainable; that necessary parties were not joined in the application under O. IX, R. 13 of Civil Procedure Code, 1908, although they were made party in the civil suit filed by respondent; that application was filed after 25 years of passing the decree without mentioning any justification---Held, that relevant documents i.e. copy of proceedings of the Court/order sheet with present petition were based on the basic proceedings of the trial Court but the petitioners had not annexed the relevant documents---Such documents were necessary to be examined to see the nature of the original suit, how it proceeded and specially to see the point of limitation---Even if the respondent was proceeded against ex-parte the Court was bound to see about the maintainability of the suit and that whether the claim of the plaintiff was proved---Petitioners were claiming that they had the possession of the property under the sale agreement but no revenue record was tendered in the Court regarding the same---Procedure required for proceeding ex-parte against any person had not been carefully adopted by the Trial Court---High Court observed that provisions of O. X of Civil Procedure Code, 1908 were not carefully examined by the Trial Court---Trial Court had to apply the proper law and to see whether summons issued by the Court had

been properly, correctly and legally effected upon the person to whom those had been sent---Respondent was seriously prejudiced by the act of the court and court should have considered said fact while dealing with the application filed under O. IX, R. 13 of Civil Procedure Code, 1908---Matters should be decided on merits and no one should be condemned unheard---Technicalities should not be hurdle in the way of justice---No example or the precedents existed that a revision petition could be converted into appeal and appeal could be converted into revision---Limitation period was not applicable to the illegal order of the Court because when initial order was void and against the mandatory provision of law, then subsequent superstructure could not stand---Constitutional petition was dismissed accordingly.

Muhammad Hanif and others v. Muhammad and others PLD 1990 SC 859 and Muhammad Ramzan v. Fatima and 30 others PLD 2004 Lah. 17 rel.

(b) Specific Relief Act (I of 1877)---

----Ss. 9 & 42---Primary duty of the Court was that when suit was instituted/entrusted to the court, the court should examine the suit, its form and make its opinion regarding maintainability of the same---Suit for declaration where oral agreement to sell is claimed, could not be entertained as an ordinary suit---Requirements of settlement of agreement to sell, the payment of consideration amount must be mentioned in the suit---Possession if claimed, also be mentioned in detail that how, when and in whose presence it was given and why it was not incorporated in revenue record, if the same was not mentioned there---Suit for agreement to sell without prayer of possession, was not maintainable under the law.

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

----O. IX, Rr. 9 & 13---Only on the basis of ex-parte proceedings, a suit cannot be decreed when it does not fulfill the other legal requirements.

(d) Constitution of Pakistan---

----Art. 199---Civil Procedure Code (V of 1908), S. 151---Conversion of proceedings---Under O. IX, R. 13, C.P.C., as per law can be converted into application under S. 12(2), C.P.C. and under Constitutional jurisdiction of High Court.

(e) Limitation Act (IX of 1908)---

----S. 3---Limitation period against illegal/void order against illegal order there is no limitation and time will not run against a void order.

Muhammad Hussain and 2 others v. Mst. Zarina Akbar and 6 others 2017 CLC 1426 rel.

Sardar Muhammad Hussain for Petitioners.

Murad Ali Malik and Mian Muhammad Shahid Akhtar for Respondent No. 2.

Date of hearing: 18th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---Through instant constitutional petition, petitioners have assailed the judgment dated 21.02.2019 passed by learned Additional District Judge, Rahim Yar Khan whereby order dated 24.01.2017 passed by learned trial Court was set aside resulting into acceptance of application under Order IX, Rule 13, C.P.C. filed by respondent No.2 and setting aside the impugned judgment and decree dated 04.05.1987.

2. Brief facts necessary for decision of instant writ petition are that ancestors of the petitioners namely Abdul Nawaz Khan and Tajamal Hussain Khan filed a suit for declaration and permanent injunction against respondent No.2 regarding agricultural land in the Civil Court, Rahim Yar Khan. The suit remained pending till 04.05.1987 when learned trial Court decreed the same against respondent No. 2 ex-parte. The decree was implemented in the revenue record by attestation of mutation No. 1216 dated 26.12.1987 in the name of decree holders and afterwards further partly transferred in the name of subsequent purchasers. Respondent No.2 did not challenge the decree for a long time and after 25 years filed a civil suit against the petitioners before Senior Civil Judge, Rahim Yar Khan on 13.06.2012 through which he challenged the ex-parte decree dated 04.05.1987 and mutations attested thereafter and claimed ownership of the said land and in the said suit respondent No. 2 mentioned his address as Mouza Bhong Tehsil Sadiqabad. The said suit was dismissed on 25.10.2012 for non-deposit of process fee by respondent No. 2 for service of defendants/petitioners. It was asserted by respondent No.2 in the suit that he came to know regarding the ex-parte decree three years prior to filing of the suit. The respondent No.2 did not challenge the order dated 25.10.2012 before any forum whereby suit filed by him was dismissed. After almost one month of dismissal of the above suit, on 21.11.2012 respondent No. 2 filed an application under Order IX, Rule 13, C.P.C. in Civil Court Rahim Yar Khan to get decree dated 04.05.1987 set aside on the ground of lack of knowledge, non-service of summons, violation of Order X, C.P.C. Learned trial Court dismissed said application filed by respondent No.2 vide order dated 24.01.2017. Respondent No.2 kept silent for 48 days after the dismissal of his application despite the fact that he got copy of the judgment and instead of filing of appeal as provided under Order XLIII, C.P.C. filed a revision petition under section 115, C.P.C. before learned Additional District Judge assailing the order of the learned trial Court. Learned Additional District Judge, entertained the revision petition, summoned the petitioners and after hearing the parties,

accepted the same and set aside the ex-parte decree dated 04.05.1987 vide judgment dated 21.02.2019 which has been assailed through instant writ petition.

3. Learned counsel for the petitioners contended that order dated 24.01.2017 passed by learned trial Court was appealable under Order 43, Rule 1(d), C.P.C. but respondent No. 2 did not file appeal knowingly as it was time barred and filed revision petition under section 115, of C.P.C which was not maintainable; necessary parties were not joined in the application filed by respondent No.2 under Order IX, Rule 13, C.P.C. although they were made party in the civil suit filed by respondent No. 2, therefore, it was a case of non-joinder of necessary parties and it is settled principle that nobody should be condemned unheard; the limitation provided under section 164 of Limitation Act, is 30 days whereas the Court has ignored this fact that the application was filed by respondent No. 2 after 25 years of passing the decree without mentioning any justification for that; the Court has exceeded from the jurisdiction vested in it and legal aspect of the proposition has not been properly appreciated, therefore, impugned judgment is not sustainable in the eyes of law. Reliance is placed on the cases of Mansab Ali v. Amir and 3 others (PLD 1971 Supreme Court 124), Rashid Ahmad v. The State (PLD 1972 Supreme Court 271), Muhammad Ashraf Butt and others v. Muhammad Asif Bhatti and others (2012 AC 180), Hazratullah and others v. Rahim Gul and others (PLD 2014 Supreme Court 380) and Subeh Sadiq v. Mst. Rajan through Legal Heirs (PLD 2006 Lahore 585).

4. Learned counsel for respondent No.2 on the other hand argued that impugned judgment dated 21.02.2019 has been passed by learned Additional District Judge quite in accordance with law and discussing the facts of the case; this is duty of the Court to apply correct law if any provision of law has been wrongly mentioned or quoted and it will not make any difference; application filed by respondent No.2 may be considered under section 12(2), C.P.C. as contents of the application clearly mentioned the same. Reliance in this regard is placed on the case of Fateh Muhammad Naeem v. Mst. Imam Sain and 10 others (2006 YLR 1126) and Ghulam Qasim Khan v. Abdul Saleem and others (2011 YLR 2859), ancestors of the petitioners had deliberately concealed the correct address of respondent No.2, therefore, proposition falls within the ambit of section 12(2), C.P.C. and the decree was passed on the basis of concealment of facts and against the spirit of law; when the decree has been passed under the wrong interpretation of law, no time limitation will run against the such proposition. Reliance is placed on the case of Malik Khawaja Muhammad and 24 others v. Marduman Babar Kahol and 29 others (1987 SCMR 1543); any decree which has been passed in violation of law, against that no time period runs and specifically limitation against such decree will start from the date of knowledge and not from the date of passing that order/decree. Reliance is placed on the case of Messrs National Highway Authority v. The Province

of Punjab and others (2014 CLC 1578); original suit was filed by the petitioners for declaration and declaration was sought on the basis of oral agreement where no ingredient of any agreement were mentioned, established and proved by the petitioners; suit for oral agreement does not give any title or right to a person unless the same is not complied with under the law. Reliance is placed on the case of Muhammad Siddique v. Abdul Rauf and 10 others (2012 CLC 1734); ex-parte decree was not passed in accordance with law as proper evidence was not discussed rather it was passed in violation of Order XX, C.P.C., therefore, such order cannot be considered valid, legal and on the basis of limitation effectee party cannot be de-suited. Reliance is placed on the case of Water and Power Development Authority through Chairman and 3 others v. Mir Khan Muhammad Khan Jamali and others (2006 CLC 92); a suit for declaration cannot be decreed on the basis of agreement specially where agreement is oral one and sale cannot be considered valid unless conditions of sale are mentioned and those are found legal and executable. Reliance is placed on the case of Mst. Farhat Begum and others v. Said Ahmad Shah and others (2002 CLC 1956), Bashir Ahmad and 21 others v. Shah Muhammad and others (2010 CLC 734). Further argued that void and illegal order do not create any right or title and that order can be challenged in accordance with law within time when it comes into the knowledge of the effectee; suit for declaration on the basis of oral agreement where no condition, no detail for the settlement of the agreement for the payment of consideration amount has been mentioned, such suit cannot be decreed specially when same has been passed ex-parte; against such a decree which has been obtained by way of fraud no limitation runs specially when there is specific allegation of fraud or misrepresentation and precious rights of the effectee are involved on the score of limitation, the effectee cannot be non-suited and limitation under such circumstances will be considered three years for filing such application under Order IX, Rule 13, C.P.C. and 151, C.P.C.; record shows that service of the summons in the original suit was not effected properly and knowingly as the correct address of the respondent No. 2 was not mentioned by the petitioners; substitute service was also not ordered by the Court, therefore, on the basis of such ex-parte proceedings no suit can be decreed ex-parte. Reliance is placed on the case of Farid Khan v. Muhammad Khurshid and others (2018 CLJ 368), Nouroz Khan v. Haji Qadoor (2005 SCMR 1877) and Muhammad Shafiq and another v. Maqsood Ahmad and 2 others (2002 CLC 1372); revision may be converted into appeal and there is no bar in this regard; the purpose of the Court is to resolve the controversy between the parties and mere on the basis of technicality a person who has right in the property should not be non-suited, therefore, learned Additional District Judge, has rightly decided the proposition and writ petition is not maintainable which be dismissed.

5. Arguments heard. Record perused.

6. There are many legal questions involved in this proposition such as regarding maintainability of the suit that whether suit for declaration where the prayer for oral agreement to sell is claimed is maintainable. This is primary duty of the Court that when suit is instituted and entrusted to the court, the court should examine the suit, its form and make its opinion regarding maintainability of the same. The suit for declaration where oral agreement to sell is claimed cannot be entertained as an ordinary suit. All the requirements of settlement of agreement to sell, the payment of consideration amount must be mentioned in the suit. The possession if claimed, also be mentioned in detail that how, when and in whose presence it was given and why it was not incorporated in revenue record, if the same is not mentioned there. The suit for agreement to sell without prayer of possession, is not maintainable under the law. Both the relevant points were not considered by the Courts below. The 'form' of the suit and 'prayer' of the suit respectively are reproduced as under:-

Before going to that merits of the case, I would like to mention here that petitioners have filed this writ petition while assailing the judgment dated 21.02.2019 passed by learned Additional District Judge and the grounds taken in order to assail the said judgment the relevant documents i.e. copy of proceedings of the Court/order sheet with instant petition are based on the basic proceedings of the trial Court but the petitioners have not annexed the relevant documents. These documents were necessary to be examined to see the nature of the original suit, how it proceeded and specially to see the point of limitation regarding the petition filed by respondent No. 2. The objection of the respondent was that the ex-parte proceedings against him were initiated without observing and fulfilling the legal formalities. This could have been observed only after perusal of the record of trial Court but same has not been annexed. Copy of ex parte evidence has been produced before the Court on the basis of which the suit for declaration for specific performance was decreed by the trial court. The trial Court ignored the basic principle that even if ex-parte is proceeded against the respondent, the Court was bound to see about the maintainability of the suit and that whether the claim of the plaintiff is proved. Only on the basis of ex-parte proceedings, a suit cannot be decreed when it does not fulfill the other legal requirements. The petitioners were claiming that they had the possession of the property under the sale agreement but no revenue record was tendered in the Court regarding the same.

7. Another aspect of the proposition in hand is that judgment of learned Additional District Judge is very much clear on the point that on filing of the suit, summons were first issued which were not returned to the Court and without awaiting the first summons, fresh summons were ordered to be issued and according to the record those summons were also not returned in the Court. Then affixation of summons was ordered and on the report of affixation of summons ex-parte proceedings were initiated. Learned

trial Court has not recorded the statement of process server qua the affixation of summons. The procedures required for proceeding ex-parte against any person has not been carefully adopted by the learned trial Court. The version of the petitioners that respondent No. 2 himself has mentioned his address which was given by the petitioners in the suit is no ground to consider that respondent No.2 was served. Respondent No.2 has clearly mentioned that he had shifted his residence a long time prior to the institution of the suit in Islamabad. This matter requires evidence but the learned trial court has not considered this point. The provisions of Order X of C.P.C. were not carefully examined by the learned Civil Judge. The case of respondent No. 2 certainly attracts provisions of Order X, Rules 17, 19 and 20 of C.P.C. The learned Additional District Judge, categorically answered all those objections raised by the petitioners through the judgment. It is for the Court to apply the proper law and to see whether summons issued by the Court have been properly, correctly and legally effected upon the person to whom those have been sent. Learned trial Court has not observed that defendant/respondent No. 2 or his agent has ever refused to accept the summons. It was also not got satisfied by the Court that summonses were affixed at the house of the respondent No.2. This was the duty of the court to make effort to effect service of defendant/ respondent No. 2 through registered post A.D. as required under the law. The Court has not made any observations that such efforts have not been made as no such service was available in the village where defendant/respondent No. 2 resides. So, in such situation, respondent No. 2 was seriously prejudiced by the act of the court and court should have considered this fact while dealing with the application filed under Order IX, rule 13 of C.P.C. There is a legal proposition that matters should be decided on merits and no one should be condemned unheard. It is also settled principle that technicalities should not be hurdle in the way of justice. In this regard I would rely on the case of Muhammad Hanif and others v. Muhammad and others (PLD 1990 Supreme Court 859) wherein it has been held as under:-

"---Office of the Court represents the Court, no party should be allowed to suffer because of its wrong act/objection so long as the harm can be prevented."

It has been further held in the aforesaid esteemed case law as follows:

"---O. XLI, R.1 [as amended by Lahore High Court] Conversion of revision into appeal---Effect---Relevant date on which the second appeal should be deemed to have been filed would be the date on which misconceived revision petition is instituted or the date the request is made for its conversion or the date the request is allowed---As to what further conditions were to be satisfied after conversion would depend upon the circumstances of each case and ordinarily, subject to such conditions, conversion had to be from the date the revision was initially instituted."

Now I will seek guidance from the case of Muhammad Ramzan v. Fatima and 30 others (PLD 2004 Lahore 17), that revision can be converted into appeal and likewise appeal can be converted into revision in the better interest of justice. So, there is no other view that a revision petition can be converted into appeal and appeal can be converted into revision. As it has been observed that this was the duty of the Court to apply proper law as nobody should be prejudiced from the wrong application of law by the Court, therefore, application under Order IX, Rule 13, C.P.C. as per law can be converted into application under section 12(2), C.P.C. and under Constitutional jurisdiction of this Court, application under Order IX, Rule 13, C.P.C. filed by the petitioner is converted into application under section 12(2), C.P.C. As discussed above, application under section 12(2), C.P.C. filed by respondent No.2 was well within time especially keeping in view the fact that suit filed by ancestors of the petitioners required strict scrutiny.

8. So-far-as, matter of limitation is concerned, there are chain of authorities that against illegal order there is no limitation and time does not run against a void order. Reliance in this regard is placed on the case of Muhammad Hussain and 2 others v. Mst. Zarina Akbar and 6 others (2017 CLC 1426) wherein it has been held that 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. The suit for declaration was filed on the basis of oral agreement without disclosing the detail of the said agreement and it was for the learned trial Court to see all the matter keeping in view the fact that precious rights of respondent No.2 are attached with the proposition and there was sufficient material to consider that the original suit was ex parte decreed without appreciating the concerned law and said ex parte decree is not sustainable in the eyes of law. Learned Additional District Judge, has rightly appreciated the record and concerned law while passing the impugned judgment. There was no question of jurisdictional error and misapplication of law by the said court. Learned counsel for the petitioners remained unable to point out any illegality or irregularity in the impugned judgment passed by learned Additional District Judge calling for interference by this Court.

9. In view of what has been discussed above, instant writ petition being without merits stands dismissed.

ZH/R-10/L Petition dismissed.

2023 M L D 541

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

JIND WADA and others---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 7450 of 2016, heard on 21st September, 2021.

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

----S. 151 & O. XXIII, R. 1---Restoration of suit---Suit for declaration was instituted by the petitioners claiming that they were owners of the agricultural land on ground of inheritance; that registered sale-deed in favour of respondent/defendant was fictitious, forged, fraudulent, illegal; and that mutation sanctioned on basis of the said deed was also illegal---Petitioners made statement in the Trial Court that since duplicate of lost Part Sarkar had been allowed, so, there was no need for the present suit; and that and in case of emergence of the need, the suit would be filed again---Trial Court, on basis of such statement, dismissed the suit as withdrawn---Petitioners filed application under S. 151 of C.P.C., asserting that some other property was also the part of the claim; that their suit dismissed as withdrawn be restored; and that regarding remaining claim, the decision should be made upon merit---Said application was concurrently dismissed---Held, that necessary requirement was that notice be given to other party as to see whether the application of withdrawal of suit would fall within the domain of R. 1 of the O. XXIII, C.P.C.---Merely recording of statement of plaintiff allowing withdrawal of suit with permission to file fresh suit on the basis of same cause of action on payment of cost was not sufficient---No application was filed by the petitioner for withdrawal of the suit---Order sheet annexed with the petition reflected that no person from the defendant side was present on that date of recording statement---Respondent had joined the proceedings of the suit, filed his written statement and was present on all the previous dates---Neither the Court issued any notice to the respondent, nor mentioned regarding his presence in the order sheet---Permission for filing fresh suit could not be given under such circumstances---Petitioner did not claim that the statement was made due to some mistake or because of some coercion or any other technical reason---Application of S. 151, C.P.C. was alien to the proposition of petitioners' case---Constitutional petition was dismissed accordingly.

Mrs. Afroz Shah and others v. Sabir Qureshi and others PLD 2010 SC 913 and Doctor Raza Muhammad Khan v. Principal, Ayub Medical College, Abbottabad and 3 others 2004 CLC 1511 rel.

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

----O. XXIII, R. 1---Expression "on such terms as it thinks fit" means an order after affording opportunity of hearing to the other party which is going to be effected by such permission of withdrawal of the suit---Accordingly the permission shall be contingent on such terms as the Court thinks fit as a natural corollary.

Abdul Malik v. Muhammad Urfan and another 1989

CLC 2363 rel.

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

----O. XXIII, R. 1---Conditional withdrawal of the suit---Scope---Suit could be withdrawn by the plaintiff conditionally or unconditionally---If the petitioner wanted to withdraw the suit conditionally on the basis of some reason for filing the fresh suit, then the petitioner would be bound to specifically mention that defect in the earlier suit for which he was going to withdraw---Simple withdrawal could be allowed by the Court at any stage.

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

----S.151---Inherent powers of the Court, invoking of---Requirements---Court was bound to mention the reasons for invoking the provision of S. 151 of Civil Procedure Code, 1908---Court could only exercise its inherent powers in case when there was no prohibition in law regarding its jurisdiction to exercise the inherent powers---When there was express provision in C.P.C., a Court could not exercise that authority to defeat/circumvent such express provision---Expression "Court" in S. 151 meant each Civil Court in which the lis was pending---Inherit jurisdiction of Court could be invoked when there was no other specific provision to deal with the issue.

Azhar Nadeem Chaudhry for Petitioners.

Muhammad Akmal for Respondents.

Date of hearing: 21st September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---The petitioners have filed this constitutional writ petition while assailing the order of the learned Civil Judge dated 24.04.2015 and order of learned Additional District Judge dated 27.05.2015, vide which, the application under section 151, C.P.C. was dismissed by the learned trial Court for restoration of suit and

the revision petition filed was dismissed by the learned Additional District Judge against the same order.

2. Brief facts necessary for disposal of the writ petition are that the petitioners along with their late brother Pir Bakhsh filed a suit for declaration along with prayer of permanent injunction against respondent No.3 Ghulam Hussain in the Court of Civil Judge, Khanpur on 09.02.2009 alleging that the predecessor of the petitioners namely Buddha son of Nibahoo was owner in possession of agricultural property measuring 45-Kanal 11-Marla situated in different Khata of Dakhli Mouza, Kot Shahan, Tehsil Khanpur. After the death of predecessor, the petitioners became owner in possession of the said land being legal heirs. It was alleged that the registered sale deed dated 22.05.1976 allegedly made by predecessor in interest of the petitioners in favour of defendant which was entered at book No.1, page No.203 at serial No.839 in volume No.5 is fictitious, forged, fraudulent, illegal and inoperative on the rights of the petitioners and mutation No.75 sanctioned on 15.08.1990 is also illegal and inoperative. The respondent No.3 appeared and filed written statement. During the course of trial, the petitioner No.2 Nibahoo along with counsel of the petitioners appeared in Court and counsel for the petitioners made the statement on 28.10.2013 that since duplicate of lost Part Sarkar has been allowed, so, there is no need for the present suit. It was stated by counsel for the petitioners that for the time being he withdraws the suit and in case of emergence of the need, the suit would be filed again and with the statement. The Court on the statement of the petitioners, dismissed the suit as withdrawn. On 02.01.2014, the petitioners presented application under section 151, C.P.C. to the learned trial Court for restoration of the suit alleging therein that the suit withdrawn was not only consist on the impugned property which is part of the lost document of mutation, but some other property was also the part of the claim. So, regarding remaining claim, the decision should be made upon merit. Since in their statement of withdrawal, it has been mentioned that if the need arises, the petitioner/plaintiff would file a fresh suit. The application under section 151, C.P.C. was dismissed by the learned Civil Judge vide order dated 24.04.2015. Petitioners filed civil revision petition and the civil revision was dismissed by the learned Additional District Judge vide order dated 27.05.2015.

3. Counsel for the petitioners argued that both the learned trial Courts had not properly appreciated the legal aspect of the proposition. The statement was made regarding some part of the property and it was also mentioned in the statement that the petitioners would file the suit in case of the need. Therefore, the application under section 151, C.P.C. has been wrongly dismissed by the Court. The Court has not exercised its jurisdiction in

accordance with law. Counsel argued that this was the right of the petitioners to withdraw the suit to the extent of the lost document. And on the availability of the same, the petitioners withdrew the suit to that extent.

4. Counsel for respondent No.3, on the other hand, resisted the arguments and argued that if the statement dated 28.10.2013 made by the petitioners and the counsel is perused, the application under section 151, C.P.C. is not maintainable. The petitioner has made the statement that in case of the need, they would file a fresh suit. Although, the permission by the Court was not given in the order for filing the fresh suit, but maximum the petitioners would have file a fresh suit in that regard in view of the statement made before the Court. The provision of section 151, C.P.C. is not applicable to present proposition. Even if the application filed by the petitioner is perused, it clearly speaks that it was withdrawal request, and this comes within the definition of Order XXIII, Rule 1, C.P.C. The suit was dismissed by the Court without mentioning the order for allowing the petitioners to file a fresh suit. Because the spirit of Order XXIII, Rule 1, C.P.C. is clear. The petitioners have not mentioned any defect in the suit that why they were withdrawing the suit. The only reason mentioned is that lost Part Sarkar is since sanctioned, therefore, the suit is withdrawn. Neither any specific defect is mentioned to file fresh suit, nor it has been requested the Court to give permission to file fresh suit. It was argued that the wisdom behind the law is that the parties cannot be left free to contest their matter for unlimited period. The withdrawal permission only can be given conditionally if the same is highlighted by the party and the Court after analyzing the reason mentioned by the party would allowed the party to withdraw the suit with permission to file a fresh suit. Both the Courts below has passed the order in accordance with law. The Court was competent to pass the order and there is no jurisdictional error.

5. Arguments heard. Record perused.

6. The petitioners filed the suit for declaration claiming themselves the owner in possession of the land mentioned in the plaint. The petitioner further challenging the mutation sanctioned in favour of respondent Ghulam Hussain. The suit was filed on 09.02.2009 where the registered sale deed dated 22.05.1976 and mutation No.75 sanctioned on 15.09.1980 had been challenged. During the course of proceedings on 28.10.2013, the petitioner No.3 Nibahoo son of Jam Buddha appeared before the Court along with his counsel Mr. Moin-ud-Din Qureshi Advocate and made the statement. Here is the proceedings of that very date i.e. 28.10.2013 which was pen down by the Court as under;-

Thereafter, on 02.01.2014 after more than 02 months, the petitioners filed this application under section 151, C.P.C. where they mentioned the reason for withdrawal of the suit with the following version;

"that the statement was made because of misunderstanding. Actually the statement of withdrawal of the suit was made to the extent of the property the "Part Sarkar", which was lost and not for the remaining property."

It is noticed that this application under section 151, C.P.C. was filed through same counsel, who was present on the date, when statement was made for withdrawal of the suit. This counsel also signed the order sheet. The moot point necessary to be resolved in this proposition is;

1. Whether the matter of withdrawal of suit is covered under Order XXIII, Rule 1, C.P.C., or

The provision of section 151, C.P.C. alone, is applicable to the present proposition?

I would like to code Order XXIII, Rule 1, C.P.C.;-

1. Withdrawal of suit or abandonment of part of claim"

(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

Reliance is placed on case law reported as "Mrs. Afroz Shah and others v. Sabir Qureshi and others" (PLD 2010 Supreme Court 913), it was held;

The provision of law as contained sub-rule (1) of Rule 1 of Order XXIII, C.P.C. are substantive as well as procedural. These provisions legislatively recognize the right and privilege innate in a plaintiff. He has undisputable, indefeasible and absolute right to file and to withdraw his suit "at any time". It is the privileged domain of the plaintiff to exclusively decide:-

(i) To bring the suit and continue it;

(ii) To withdraw the suit;

(iii) To withdraw the suit unconditionally or conditionally;

(iv) When to withdraw the suit;

(v) Whether to withdraw part of the claim or whole of the claim in the suit; and

(vi) Against which of the defendants to withdraw the suit in case of plurality of the defendants.

The plaintiff thus enjoys the choice of the time and stage of withdrawal as well. A plaintiff is also vested with the right to partly withdraw his claim or wholly as against all or any of the defendants. Sub-rule (3), however, exposes him to two consequences (i) liability to pay costs if awarded and (ii) bar/preclusion to bring a fresh suit on the same cause of action/subject-matter.

No other person or suit party or even the court has such a right or power to withdraw the suit or force a plaintiff to withdraw from the suit. It is in this respect that plaintiff has an unqualified absolute right.

Attached with the absolute and unconditional right to withdraw the suit is the power to exercise such right. The right to withdraw is governed and regulated by the law. Exercise of such right is thus also to be regulated and governed by the principles of law.

Expression "on such terms as it thinks fit", means an order after affording opportunity of hearing to the other party which is going to be effected by such permission of withdrawal of the suit. Accordingly the permission shall be contingent on such terms as the Court thinks fit as a natural corollary. Reliance is placed on case law reported as "Abdul Malik v. Muhammad Urfan and another" (1989 CLC 2363).

It is necessary that notice is given to other party to see whether the application of withdrawal of suit do fall within the domain of this Rule. Merely recording of statement of plaintiff allowing withdrawal of suit with permission to file fresh suit on the basis of same cause of action on payment of cost is not sufficient and such an order is in

violation of provision of Rule 1 of this Order, and as such not sustainable. Reliance is placed on case law reported as "Doctor Raza Muhammad Khan v. Principal, Ayub Medical College, Abbottabad and 3 others" (2004 CLC 1511).

It is also to be considered whether it was date of hearing and other party was present on that date or joined the proceeding of recording the statement of the plaintiff for withdrawal of suit. It has been noticed that no application was filed for withdrawal of the suit. The order sheet annexed with the petition reflects that no person from the defendant side was present on that date i.e. 28.10.2013. They had been joining the proceedings of suit on all the previous dates. They had submitted the written statement, but neither the Court issued any notice to the respondent/defendant nor mentioned regarding their presence in the order sheet. Therefore, the provision of Order XXIII, Rule 1, C.P.C. will be applicable to this extent that the plaintiff was entitled to withdraw the suit. But the permission for filing fresh suit cannot be given under the circumstances when specific notice was not issued to the other side and they were not present before the Court.

7. The statement was made by Nibahoo plaintiff No.3 with his free consent in the company of his counsel. And this was not the stance of the petitioner that the statement was made due to some mistake or because of some coercion or any other technical reason. But specific reason mentioned in the application is that the statement was made due to some misunderstanding and the petitioners now wanted to get restored the suit. The provision of Order XXIII, Rule 1, C.P.C. clearly mentions that the plaintiff at any stage, can withdraw the suit. The suit can be withdrawn by the plaintiff conditionally or even unconditionally. But in case, if the petitioner wants to withdraw the suit conditionally on the basis of some reason for filing the fresh suit. Then the petitioner/plaintiff is bound to mention that defect in the earlier suit which he was going to withdraw otherwise simple withdrawal can be allowed by the Court at any stage. The spirit of section 151, C.P.C. is altogether different. No doubt the Court has the inherent powers to make such order as may be necessary for the ends of justice or to prevent the abuse of process of the Court. But for that the Court will have to mention the reasons for invoking the said provision of law. The Court can only exercise the inherent powers in case when there is no prohibition in law regarding its jurisdiction to exercise the inherent powers. Secondly, when there is express provision in Code, Court cannot exercise that authority to defeat or circumvent such express provision. Thirdly, expression "Court" in section 151, C.P.C. means each Civil Court in which the lis is pending. Inherit jurisdiction of Court can be invoked when there is no other specific

provision to deal with the issue. In this proposition, the provision of Order XXIII, Rule 1, C.P.C. is there which is applicable to the present proposition. The statement of the counsel and petitioner No.2 is there. Where petitioner No.2 signed over the statement, he made before the Court, so there is nothing to consider that there could be any mistake in the statement regarding its understanding. The Court pen down the statement which was signed by petitioner No.2, his counsel also signed the same in token of correctness of the statement, the petitioner No.2 made before the Court. So, maximum application of provision of Order XXIII, Rules 1 and 2, C.P.C. was applicable to the proposition. The application of section 151, C.P.C. was alien to the said proposition. The learned Courts below has correctly decided the proposition. The learned trial Court decided the application in view of the statement of the petitioners, whereas, the revisional Court has rightly decided the matter that there was no illegality or irregularity in the order. The petitioners are failed to make a case of writ jurisdiction in this regard because they have not availed the legal remedy available to them under the law.

8. In view of what has been discussed above, instant writ petition being devoid of force stands dismissed.

ZH/J-4/L Petition dismissed.

2023 P Cr. L J 456

[Lahore]

Before Safdar Saleem Shahid, J

Dr. SHAFI-UR-REHMAN AFRIDI---Petitioner

Versus

The STATE and 2 others---Respondents

Criminal Miscellaneous Nos. 77754-B, 78287-B, 77224-B and 77245-B of 2021, decided on 1st February, 2022.

Criminal Procedure Code (V of 1898)---

----S. 497---Oil and Gas Regulatory Authority Ordinance (XVII of 2002), S. 25---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Prevention of Corruption Act (II of 1947), S. 5 (2)---Anti-Money Laundering Act (VII of 2010), Ss. 3 & 4---Federal Investigating Agency Act, 1974 (VIII of 1975), S. 3---Cheating, using forged document, misconduct and money laundering---Bail, grant of---Non-schedule offence---Federal Investigating Agency---Jurisdiction---Illegal gratification---Proof---Accused persons were arrested for issuing provisional license to Oil Marketing Company, who sold fossil fuel through its different retail outlets---Validity---Provisions of Oil and Gas Regulatory Authority Ordinance, 2002 was not part of scheduled offences and it had provided a complete mechanism for filing of complaint and had overriding effect over other laws---Sentence was provided in S. 25 of Oil and Gas Regulatory Authority Ordinance, 2002, and Federal Investigating Agency Act, 1974 was only dealing with matters of scheduled offences---Federal Investigating Agency had no jurisdiction to deal with such matters and only Oil and Gas Regulatory Authority has jurisdiction---Oil Marketing Company had already paid fine and the matter was still to be decided by Oil and Gas Regulatory Authority---Federal Investigating Agency lodged FIR against accused persons which spoke volumes---While performing functions under Oil and Gas Regulatory Authority Ordinance, 2002, authorities were immune from prosecution---In FIR there was no allegation against accused persons that they received any illegal gratification from any manner---No direct evidence was available on record against accused persons in order to establish that they made tempering in record or committed fraud or deprived any person from his valuable property---Accused persons declared their assets in their income tax returns and nothing was concealed---No cogent evidence was collected by investigating officer that petitioners were involved in commission of offence falling within the purview of Anti-Money Laundering Act, 2010---Case against accused persons required further inquiry, who were behind the bars for a period of about three months and were no more required by Federal Investigating Agency for the purpose of

further investigation---No useful purpose would be served by keeping accused persons in jail for an indefinite period---Bail was allowed in circumstances.

Oil and Gas Regulatory Authority through Secretary v. Sui Southern Gas Company Limited and others 2018 SCMR 1012 rel.

Ahsan Bhoon for Petitioner (in Criminal Miscellaneous Nos. 77754-B and 78287-B of 2021).

Ch. Sultan Mahmood and Mudassar Naveed Chatha for Petitioner (in Criminal Miscellaneous Nos. 77224-B and 77245-B of 2021).

Mian Shahzad Khadim Manday assistant Attorney-General for Federation of Pakistan.

Malik Waris Deputy Director FIA, Nasir Awan Assistant Director, FIA, Javed Sultan Assistant Director FIA and Altaf Wattoo, Assistant Director FIA with record.

ORDER

SAFDAR SALEEM SHAHID, J.---Dr. Shafi-ur-Rehman Afridi petitioner through Criminal Miscellaneous No. 77754-B of 2021, Dr. Abdullah Ahmed Malik petitioner through Criminal Miscellaneous No.77245-B of 2021, Imran Ali Abro petitioner through Criminal Miscellaneous No. 77224-B of 2021 and Nadeem Butt petitioner through Criminal Miscellaneous No.78287-B of 2021 seek post arrest bail in a case registered against them vide FIR No.81 of 2021 dated 29.10.2021 offences under sections 420, 468 , 471, 109, P.P.C. read with section 5(2) of Prevention of Corruption Act, 1947 and sections 3/4 of Anti-Money Laundering Act 2010 at Police Station Anti-corruption Circle, FIA, Lahore.

2. As the aforesaid bail petitions are outcome of one and same FIR, hence, are being decided through this single order.

3. Brief facts of the case are that as per provisional license issued by OGRA to Fossil Energy Pvt. Ltd on 18.09.2017, the OMC was under legal obligation to complete their infrastructure, including construction of storages and retail outlets, but in clear disregard to the terms of provisional license, M/S Fossil Energy Pvt. Ltd failed to deliver on its plan to complete its infrastructure. Instead of taking note of this failure, OGRA by abusing their official position illegally granted permission for marketing of petroleum products to the OMC on 19.09.2019. Fossil Energy (OMC) was granted illegal permission to import in the Product Review Meeting (PRM) for the month of March held on 11.03.2020, under the Chairmanship of DG Oil MoEPD, a total of 1000 MTs of MS petrol. Fossils Energy Pvt. Ltd was allocated 4700 MTs import quota in different PRMs and they uplifted 21,000 MTs from local refineries from February 2020 to September 2020 at that point in time the OMC had no retail outlets at all as per record of OGRA and Explosives Department. In total, they

sold 32-million liters of MS Petrol and HSD, despite having no retail outlets while gaining a profit of at least Rs.90 million illegally (based on OMC margin as per pricing formula). These facts manifestly demonstrate that Messrs Fossils Energy Pvt. Ltd. Committed these flagrant illegalities in collusion and collaboration with concerned officers/officials of MoEPD which resulted into unlawful gains by the OMC and deprived the rightful OMSs. The above mentioned illegalities explicitly reflect the abuse/misuse of official position by the concerned public servants of OGRA, MoEPD along with Messrs Fossils Energy Pvt. Ltd (the beneficiary in obtaining unlawful gain as abettor). During the proceedings, it has also emerged that Messrs Fossils Energy Pvt. Ltd has since long been in practice of maintaining fudged supply figures, the crime proceeds so obtained are being used in money laundering by the management of Messrs Fossil Energy Pvt Ltd. On the basis of aforementioned illegalities the instant case was registered against the petitioners and co-accused.

4. Arguments heard. Record perused.

5. As per allegation, Dr. Shafi-ur-Rehman Afridi petitioner being D.G Oil, Ministry of Energy (Petroleum Division) (MoEPD) illegally allocated 4700 MTs import quota to Fossil Energy Pvt. Ltd (OMC) in the different Product Review Meetings (PRM) for the import of petroleum products. The allegation against Dr. Abdullah Ahmed Malik petitioner in the FIR was that he was appointed as Member Oil of OGRA and while performing his duties, he issued Provisional Operational license to Messrs Fossils Energy Pvt. Ltd. without getting verification the financial statements submitted by Oil Marketing Companies (OMCs). As per allegation, Imran Ali Abro petitioner was performing his duties as Research Officer in Ministry of Energy (Petroleum Division) (MoEPD) and he facilitated Fossil Energy Pvt. Ltd. (OMC) for illegal permission to import petroleum products in the Product Review Meetings (PRMs) whereas allegation against Nadeem Butt petitioner in the FIR was that he was the Director of Messrs Fossil Energy Pvt. Limited (OMC) and he illegally applied for Provisional License of Fossil Energy Pvt Ltd and he kept on marketing the refined petroleum products unlawfully as marketing license is granted by OGRA unlawfully to Fossil company. His company is alleged for illegal import and illegal sales of oil products.

6. It has been noticed that Federal Government constituted an inquiry commission under "Inquires Commission Act 2017". This inquiry commission was consisted of seven members out of which two members refused to join the proceedings of the commission and later on said two members were replaced with two other members who also remained absent. Under section 3 of the Inquiry Act, 2017 only the Federal Government was authorized to appoint members of the commission and this Act did not envisage any right of the Federal Government to delegate that power over to any subordinate body. It has been held repeatedly by the superior Courts that members of the commission cannot be

substituted. Record reveals that on receipt of report of Inquiry Commission on shortage of Petroleum products, the Federal Government constituted a Ministerial Committee under the chairmanship of two Ministers. The said committee made recommendation to the Federal Cabinet who referred the matter for forensic investigation to FIA to unearth evidence/proof of criminal act/intent, with the direction to submit its report within 90-days. The FIA did not follow the observations made by the committee, rather, FIA registered the case on the basis of findings of the commission. Dr. Shafi-ur-Rehman Afridi petitioner was serving as D.G Oil in the Ministry of Energy Petroleum Division (MoEPD) whereas Imran Ali Abro petitioner was working as Research Officer in the said Ministry when Oil shortage crisis emerged in June 2020. The role of the petitioner (Dr. Shafi-ur-Rehman Afridi) was to finalize the import quota under Rule 30-B of the Petroleum Rules of 1971. From the evidence available on record it transpired that Dr. Shafi-ur-Rehman petitioner with the assistance of Imran Ali Abro petitioner allocated the Quota to import the petroleum products on the recommendations of Oil Companies Advisory Committee (OCAC). The Director-General Oil under the aforesaid Rule holds Product Review Meetings and decides the matters relating to import of Petroleum products and allocates the quota on the recommendations of the Oil Companies Advisory Committee (OCAC). The Ministry of Energy Petroleum Division relies on the record of OCAC for allocation of Import Quota. The Inquiry Commission also concluded that Oil Companies Advisory Committee (OCAC) has a pivotal role in the collection and determination of Import Quota and the Inquiry Commission through its report also recommended to curtail the role of OCAC in the collection of Data and import of quota. According to Petroleum Rules, 2016 every authorized importer can import petroleum products and can sell the petroleum products to its retail outlets and its authorized dealer or bulk purchasers and institutional consumers. Prima facie the petitioners had no legal role in the instant matter. Dr. Abdullah Ahmad Malik petitioner had issued provisional license for the period of three years to Messrs Fossil Energy Pvt. Ltd. (OMC) which was allegedly running by Nadeem Butt petitioner and other Oil Marketing Companies under Rules 35(2) and 35 (3) of the Pakistan Oil (Refining, Blending, Transportation, Storage and Marketing) Rules, 2016 framed under the OFRA Ordinance, 2002 which are reproduced as under:-

35(2) The Authority after examining the application made under rule 34 shall initially issue a licence for a period of three years during which marking infrastructure i.e storages, detail outlets and filling stations etc., as given in the work program, shall be completed in accordance with laid down technical standards. In case of failure to complete the aforesaid marketing infrastructure within the stipulated period of provisional licence, the authority may refuse the extension of the license or, depending on the nature of non-compliance and subject to penalties under the Ordinance and the rules, may grant extension on such terms and conditions and for such period as deemed appropriate.

(3) Upon satisfactory completion of the work program subject to the certification by third party inspector confirming the compliance of technical standards the authority shall grant licence to an oil marketing company for a maximum period of 30-years subject to renewal, from time to time, on making of fresh application at least two years prior to the expiry of the existing licence along with certification by third party inspector confirming the compliance of technical standards. A licence renewed shall be valid for a maximum period of fifteen years at a time.

Allegedly Nadeem Butt petitioner was Director of Messrs Fossil Energy Pvt. Limited. He was granted Provisional license on 18.09.2017. Messrs Fossil Energy Pvt. Limited (OMC) was allowed marketing on 19.09.2019. The Messrs Fossil Energy (Pvt.) Limited constructed the storage Depots in compliance with the License dated 18.09.2017. Through letter dated 15.03.2019, Oil and Gas Regulatory Authority allowed the petitioner Nadeem Butt (Messrs Fossil Energy Pvt. Limited) to operate new oil storage at Gatti, Faisalabad and to initiate marketing/sale in the Punjab Province. Record further reveals that during the inquiry proceedings, Messrs Fossil Energy Pvt. Limited through letter dated 10.08.2021 submitted the requisite documents regarding the detail outlets of the company which were functioning at that time. The Oil Marketing Company (OMC) also submitted the relevant documents regarding sale invoices for each month, detail of Oil storage, terminals at Gatti and Mehmood Kot, statements of Bank Accounts, record of shipments received at Karachi port and delivery notes. During the course of inquiry proceedings the petitioner Nadeem Butt (Messrs Fossil Energy Pvt. Limited) also produced the certificate along with pictures of OGRA Enforcement officials who allegedly visited the Terminal situated at Gatti and made inspection of storage capacity of the stocks. The detail of the aforesaid documents is available on the file which prima facie supports the version of the petitioners. Nazia Malik co-accused who was allegedly shareholder in the Fossil Energy (Private) Limited (OMC) was declared innocent by the FIA. Furthermore, Fossil Energy (Pvt.) Ltd. filed Writ Petition No.70346 of 2021 before this Court. Vide order dated 03.12.2021 a direction was issued to FIA authorities not to cause any illegal harassment to petitioner and the Bank authorities were directed to unfreeze the banks accounts of the petitioners. It has further been notice that order dated 25.06.2021 passed by Hon'ble Chief Justice in W.Ps. Nos. 25669 and 26868 of 2020 whereby aforesaid petitions were disposed with certain direction to the Cabinet Division of the Government, was challenged through different I.C.As. Nos. 70578 of 2021, 47386 of 2021, 68441 of 2021 and 70581 of 2021 wherein the respondents/FIA were restrained from taking any adverse action against the petitioners and the Companies. In I.C.A. No.47386 of 2021 the Hon'ble Division Bench of this Court has made observations that " the OMSs are the listed companies with shares listed in stock exchange and action of the respondents, without following the proper procedure of law,

is against the spirit of Article 18 of the Constitution and without involving the Regulator/OGRA and such action of the respondents lacks confidence of the investors and shareholders which weakens the economy of the Country". It has further been noticed that OGRA Ordinance, 2002 is not part of the scheduled offences and it provides a complete mechanism for the filing of the complaint and has overriding effect over the other laws. The sentence is provided in section 25 of Oil and Gas Regulatory Authority Ordinance, 2002. Reliance in this regard is placed on case of Oil and Gas Regulatory Authority through Secretary v. Sui Southern Gas Company Limited and others (2018 SCMR 1012). Whereas the FIA Act, 1974 is only dealing with the matters of scheduled offences. Prima facie, the FIA has no jurisdiction to deal with such matters and only the OGRA has the jurisdiction and allegedly the petitioner (Fossil Energy (Pvt.) Ltd. (OMC) has already paid fine and the matter is yet to be decided by the OGRA. Surprising the FIA has lodged the instant FIR against the petitioners which speaks volumes. Furthermore, while performing the functions under the OGRA Ordinance, the authorities are immune from prosecution. In the FIR there was no allegation against the petitioners that they received any illegal gratification from any manner. No direct evidence is available on record against the petitioners in order to establish that they made tempering in the record or committed fraud or deprived any person from his valuable property. The petitioners had declared their assets in the income tax returns and nothing was concealed. No cogent evidence was collected by the I.O that petitioners were involved in the commission of offence falling within the purview of Anti-Money Laundering Act, 2010. Keeping in view the facts and circumstances of the case, the applicability of offences alleged against the petitioners require further inquiry. The petitioners were arrested in this case on 29.10.2021 and they are behind the bars for a period of about three months and are no more required by the FIA for the purpose of further investigation. No useful purpose would be served by keeping the petitioners in jail for an indefinite period.

7. For what has been discussed above, case of the petitioners comes within the ambit of further inquiry, therefore aforesaid petitions (Criminal Miscellaneous Nos. 77754-B of 2021, 77245-B of 2021, 77224-B of 2021 and 78287-B of 2021) are accepted and petitioners (Dr. Shafi-ur-Rehman Afridi, Dr. Abdullah Ahmed Malik, Imran Ali Abro and Nadeem Butt) are admitted to post arrest bail subject to their furnishing bail bonds in the sum of Rs.5,00,000/- (Rupees five lacs only) each with one surety each in the like amount to the satisfaction of the learned Trial Court.

MH/S-18/L Bail allowed.

PLJ 2023 Lahore (Note) 65

[Multan Bench, Multan]

Present: **SAFDAR SALEEM SHAHID, J.**

MUHAMMAD KHALID *alias* SEEN and another--Petitioners

versus

DEPUTY DIRECTOR FIA and 4 others--Respondents

W.P. No. 5180 of 2022, decided on 29.6.2022.

Federal Investigation Act, 1974 (VIII of 1974)--

----S. 5(5)--Anti Money Laundering Act, (VII of 2010), S. 3/4--Constitution of Pakistan, 1973, Art. 34(1)--Freezing of bank accounts--Order was set aside--During course of inquiry it transpired that petitioner had accumulated massed wealth and property through crime and notorious business of Narcotics-- Criminal record is fragrant manifestation showing their shoddy character--After completion of enquiry competent authority accorded permission to register a case--Criminal case was registered against petitioners with allegations that they had acquired properties through crime proceed and subsequently accounts maintained by petitioners were freezed--Admittedly no clue is found about provision of law under which it is issued-- Investigating officer had an opportunity to approach appropriate authority for getting seizure order but he failed to do so which speaks volumes--Powers could not be exercised by Inspector under subsection (5) of section 5 and alleged accounts could have been freezed only after an order of seizure had been obtained from appropriate authority--A member of FIA should not frequently or freely resort to use of power under section 5(5) of FIA Act but such powers should be exercised with restraint and caution--No person shall be compulsorily deprived of his property saved in accordance with law--No proceedings were conducted by FBR against petitioners regarding their illegal means--Appeal accepted.

[Para 2, 7 & 9] A, B, C, D, G, H, I, J

PLD 1984 Karachi 71, PLD 1996 Karachi 475, 2011 PCr. LJ 434 *ref.*

Federal Investigation Act, 1974 (VIII of 1974)--

----S. 5(5)--Powers of members--Members of Agency (FIA) throughout Pakistan have powers to search, make arrest of persons and seize property, and such duties, privileges and liabilities as officers of a Provincial Police have in relation to investigation of offences--Omission to fulfill prerequisite of mentioning opinion and reasoning in writing is violative of section 5(5) of Act of 1974--A member of Federal Investigation Agency can directly pass a seizure order in terms of section 5(5) of Act of 1974 only if he apprehends that before approaching appropriate authority, property will be removed or disposed of. [Para 7] E, F

Khawaja Qaisar Butt Advocates, for Petitioners.

Malik Muhammad Siddique Dogar, Assistant Attorney-General for Federation of Pakistan.

Date of hearing: 29.6.2022.

ORDER

Muhammad Khalid and Naveed Shehzad petitioners have filed the instant constitutional petition with the following prayer:

Whereof, it is most respectfully prayed that the titled writ petition may kindly be accepted and the impugned order passed by the Respondent No. I/Deputy Director FIA for freezing of the accounts of the present petitioners, Account No. 0005010101171596 Meezan Bank Nawan Shehr Branch of Muhammad Khalid (2) Account No. 0005170105899167 Meezan Bank Willayatabad Branch, Multan of Naveed Shehzad may kindly be set aside in the supreme interest of justice.

It is further prayed that the managers of the Meezan Banks/Respondents No. 4 & 5 may kindly be directed to defreeze/open the bank accounts of both the petitioners above mentioned in the supreme interest of justice.

Any other relief/remedy which this kind Court deems fit may also is bestowed in the interest of justice.

2. Brief facts behind filing of instant writ petition are that during the course of enquiry No. 1343/2021 of FIA Commercial Bank Circle Multan, it transpired that Muhammad Khalid *alias* Seen (petitioner) R/O House No. 86 near Imam Bargah VIP Colony Suraj Miani Multan, CNIC No. 36302-33631879 and Naveed Shehzad (petitioner) s/o Muhammad Nawaz R/O Mohallah Basti Miani Ahmed Pur Siyal District Jhang CNIC No. 33204-043 8864-7 had accumulated massed wealth and property through crime and notorious business of Narcotics. The criminal record is fragrant manifestation showing their shoddy character. It is evident that they had massed huge amount through crime proceed. After completion of enquiry the competent authority accorded permission to register a case against Muhammad Khalid *alias* Seen and Naveed Shehzad (petitioners). Accordingly case FIR No. 52 of 2021 dated 11.11.2021 offence under Section 3/4 of Anti-Money Laundering Act 2010 was registered against Muhammad Khalid *alias* Seen and Naveed Shehzad petitioners and subsequently the impugned ordered was passed by Deputy Director/FIA Multan whereby the accounts maintained by the petitioners/ accused were ordered to be freezed. The action of the respondents No. 1 to 3/FIA has been challenged in the present constitutional petition.

3. Learned counsel for the petitioners contended that impugned order is not sustainable in the eyes of law because no grounds on basis of which the impugned order was passed against the petitioners was communicated to them (petitioners); that Respondent No. 1 on the recommendations of respondents No. 2 & 3 had issued directions to the Meezan Bank for freezing of the accounts maintained by the accused/petitioners without affording an opportunity of hearing to petitioners as they (petitioners) have never been indulged in any anti-social activities; that impugned order has been passed by Respondent No. 1 against the petitioners merely on the basis of information provided to him by respondents No. 2 & 3 which is against the spirit of law; that there was no material with the Respondent No. 1 to pass the impugned order against the petitioners; that Respondent No. 1 has mechanically accepted the request of respondents No. 2 & 3 without applying his own independent mind to the material placed before him; that Account No. 0005010101171596 Meezan Bank Nawan Shehr Branch in respect of Muhammad Khalid and Account No. 0005170105899167 Meezan Bank Willayatabad Branch, Multan of Naveed Shehzad have no nexus with case FIR No. 52 of 2021 and the FIA in terms of Section 5 (5) of the FIA Act, 1974 could not issue such notice/direction; that it was alleged by the FIA that petitioners had previous criminal history and many criminal cases have been registered against them at different police stations and same has been made basis for freezing the accounts of the petitioners which is not a valid ground. Thus, it is submitted that by accepting instant petition impugned order passed by Respondent No. 1 is liable to be set aside.

4. Report/para-wise comments were requisitioned from Respondents No. 1 to 3, according to which during investigation it came on record that the petitioners/accused have acquired properties through illegal business have generated crime proceed, therefore, their accounts were freezed by the FIA in order to finalize the investigation on merits.

5. Learned Law Officer has vehemently opposed this petition on the grounds that case FIR No. 52 of 2021 dated 11.11.2021 offence under Section 3/4 of Anti-Money Laundering Act 2010 was registered against the petitioners with the allegations that they had acquired properties through crime proceed which falls with the domain of Anti-Money Laundering Act 2010, therefore, accounts maintained by the petitioners/accused were freezed by the FIA/Respondent No. 1 in order to finalize the investigation.

6. Arguments heard. Record perused.

7. It has been noticed that a criminal case FIR No. FIR No. 52 of 2021 dated 11.11.2021 offence under Section 3/ 4 of Anti-Money Laundering Act 2010/was registered against the petitioners with the allegations that they had acquired properties through crime proceed which falls with the domain of Anti-Money Laundering Act 2010 and

subsequently the accounts maintained by the petitioners were freezed by the Respondent No. 1 on the basis of report submitted by respondents No. 2 & 3. The contents of impugned order passed by Deputy Director FIA, Multan are reproduced as under:-

"The subject case has been registered against Muhammad Khalid alias Seen R/o House No. 86 near Imam Bargah VIP Colony Suraj Miani Multan CNIC No. 36302-33631879 and Naveed Shehzad S/o Muhammad Nawaz R/o Mohallah Basti Miani Ahmad Pur Siyal District Jhang CNIC No. 33204-0438864-7 on the allegations that they had acquired properties through crime proceed which falls with the domain of Anti-Money Laundering Act, 2010.

In this connection detail of accounts maintained by accused persons against following CNICs may be provided to this office so that investigation of the cases may be finalized on merits. Furthermore, said accounts may also be freezed till further order under intimation to this office.

1. Muhammad Khalid alias Seen R/o House No. 86 near Imam Bargah VIP Colony Suraj Miani Multan CNIC No. 36302-33631879

2. Naveed Shehzad S/o Muhammad Nawaz R/o Mohallah Basti Miani Ahmad Pur Siyal District Jhang CNIC No. 33204-0438864-7

(Zahid Mehmood)
Deputy Director/
FIA, Multan

From the perusal of impugned order, it comes on record that admittedly no clue is found about the provision of law under which it is issued. The question of primary consideration arises that whether the FIA officials have jurisdiction to pass any such direction or order. For the convenience, sub-sections (1) and (5) to Section 5 of FIA Act, 1974 are reproduced hereunder:

*"**5. Powers of the members of Agency.**--(1) Subject to any order which the Federal Government may make in this behalf, the members of the Agency shall, for the purpose of an inquiry or investigation under this Act, have throughout Pakistan such powers, including powers relating to search, arrest of persons and seizure of property, and such duties, privileges and liabilities as the officers of a Provincial Police have in relation to the investigation of offence under the Code or any other law for the time being in force.*

(5) If in the opinion of a member of Agency conducting an investigation, any property which is the subject-matter of the investigation is likely to be removed, transferred or otherwise disposed of before an order of the appropriate authority for its seizure is obtained, such member may by order in writing direct the owner or any person who is, for the time being in possession thereof, not to remove, transfer or otherwise dispose of such

property in any manner except with the previous permission of that member and such order shall be subject to any order made by the Court having jurisdiction in the matter".

Bare perusal of Section 5 (5) of the FIA act shows that the members of the Agency (FIA) throughout Pakistan have powers to search, make arrest of persons and seize property, and such duties, privileges and liabilities as the officers of a Provincial Police have in relation to the investigation of offences. As a necessary consequence, it can be held that the opinion so formed by the member of Agency is to be expressed in writing along with the reasoning and accordingly it is to be incorporated in the case diary. The omission to fulfill prerequisite of mentioning the opinion and reasoning in writing is violative of Section 5 (5) of the Act of 1974, thus renders the order of seizure nothing but a nullity in the eye of law. Similarly an FIA official cannot be cleared from his obligation of mentioning the grounds which persuaded him to draw an opinion in terms of Section 5 (5) of FIA Act. It is evident the investigating Officer did not bother to mention even a single word in his case diary about forming the required opinion. It has further been noticed that seizure order was not obtained from the Court of competent jurisdiction. A member of Federal Investigation Agency can directly pass a seizure order in terms of Section 5 (5) of the Act of 1974 only if he apprehends that before approaching the appropriate authority, the property will be removed or disposed of. In this background I have perused the record of instant case which shows that instant FIR No. 52 of 2021 offence under Section 3/4 of Anti-Money Laundering Act 2010 was registered on 11.11.2021 whereas impugned seizure order was passed with a considerable delay. The Investigating Officer had an opportunity to approach the appropriate authority for getting the seizure order but he failed to do so which speaks volumes. In *Muhammad Muslim vs Federal Investigation Agency* (PLD 1984 Karachi 71) learned Division Bench of Hon'ble Sindh High Court *inter alia* was seized of a similar issue and while deciding the matter, it observed as follows:

"The comments clearly show that there was sufficient time available with F.I.A for obtaining an order of seizure from the appropriate authority. However, this was not done and the concerned Inspector decided to exercise the powers under subsection (5) of Section 5 of the F.I.A. Act, 1975. In our view in these circumstances, the powers could not be exercised by the Inspector under subsection (5) of Section 5 and the goods could have been detained only after an order of seizure had been obtained from the appropriate authority. We have also been informed by the learned standing counsel as observed earlier that uptil now no order has been passed by any authority or Court about the seizure and detention of the goods by the Inspector of F.I.A. The order passed by the Inspector F.I.A. for detention of the goods was, therefore, illegal and without any authority."

It is evident from the record that there was sufficient time available with the FIA for obtaining an order of seizure from the appropriate authority. However, this was not done and concerned FIA Inspector decided to exercise the powers under subsection (5) of Section 5 of the FIA Act, 1974. I am of the view that the powers could not be exercised by the Inspector under subsection (5) of Section 5 and alleged accounts could have been freezed only after an order of seizure had been obtained from the appropriate authority. Learned Law Officer has frankly conceded that no order has been passed by any authority or Court about the seizure and freezing of the accounts by the Inspector FIA. The order passed by the Inspector FIA for freezing of accounts maintained by the petitioners was therefore illegal and without any authority. I am also of the opinion that a member of FIA should not frequently or freely resort to the use of power under Section 5 (5) of the FIA Act but such powers should be exercised with restraint and caution as its use may sometime result in the infringement of Article 24(I) of the Constitution, 1973 which guarantees that no person shall be compulsorily deprived of his property save in accordance with law. Reliance is placed on the cases reported as *Fazal Mahmood vs Sardar Khan and 3-others* (PLD 1996 Karachi 475) and *Mst. Azra Sultana vs Ghulam Asghar Jatoi and others* (2011 PCr.LJ 434). The petitioners have placed on file the record of FBR which shows that the petitioners had declared their assets in the income tax returns and nothing was concealed. No proceedings were conducted by the FBR against the petitioners regarding their illegal means. Report and para-wise comments were requisitioned from respondents No. 1 to 3 which were submitted according to which the petitioners were involved in 58-criminal cases and same has also been made basis for freezing the accounts of the petitioners which is not a valid ground for seizure of bank accounts. statedly the petitioners have been acquitted in some criminal cases whereas, most of the criminal cases registered against petitioners at different police stations pertain to years 1992-93, 1997-98, 2002-03, 2012-13 & 2014-15. In report/para-wise comments the Respondents No. 1 to 3 have mentioned the charge sheet in the shape of previous criminal history of the petitioners which does not reflect that accounts maintained by the petitioners, allegedly freezed by the FIA has any nexus or relevance with the previous criminal cases registered against the petitioners at different police stations.

9. For what has been discussed above, instant petition is accepted and impugned order passed by Respondent No. 1/Deputy Director FIA, Multan, whereby the bank accounts maintained by the petitioners were ordered to be freezed, is set aside.

(K.Q.B.) Petition accepted.

PLJ 2023 Lahore (Note) 73

***Present*: SAFDAR SALEEM SHAHID, J.**

HAMNA BINT SHEHZAD--Petitioner

versus

ADDITIONAL DISTRICT JUDGE, LAHORE etc.--Respondents

W.P. No. 1043 of 2015, decided on 14.1.2022.

Family Courts Act, 1964 (XXXV of 1964)--

----S. 14--Constitution of Pakistan, 1973, Art. 199--Suit for recovery of maintenance allowance, dower and dowry articles--Decreed--Appeal--Partially accepted--Snatching of dower by father of Respondent No. 2--Jurisdiction of Family Court--Challenge to--Petitioner has proved her claim that dower given to her was snatched by father of Respondent No. 2, dower remains as dower, neither its nature would be changed nor it would be transformed into a civil liability even if it was snatched by father of respondent No. 2. Family Court has jurisdiction to entertain and decide such matters and petitioner has remedy to recover snatched dower 30 tolas gold ornaments by filing a suit before Family Court--The 1st appellate Court has erred in law while holding that claim of petitioner regarding recovery of jewelry 30 tolas gold ornaments or its value is not competent before family Court and petitioner should have filed a suit before civil Court for recovery of same--Petition accepted. [Para 6] A, B & C

2010 MLD 1118 *ref.*

Mr. Altaf Ahmad Hanjra, Advocate for Petitioner.

Mr. Mamoon Nisar Ghazi Advocate for Respondent No. 2.

Date of hearing: 14.1.2022.

JUDGMENT

Through instant petition, petitioner has called in question the legality of judgment and decree dated 20.05.2014 passed by learned Additional District Judge, Lahore, whereby claim of the petitioner to the extent of recovery of 30-tolas gold ornaments given to the petitioner as dower was dismissed.

2. Brief facts necessary for decision of instant writ petition are that Hamna Bint Shehzad petitioner was married with Respondent No. 2 on 04.01.2008 in lieu of gold ornaments weighing 30 tolas which were handed over to her at the time of Nikah. Thereafter, the relations between the spouses became strained and petitioner was

ousted from the house of Respondent No. 2 and afterwards was divorced whereas said gold ornaments were snatched from her at that time. The petitioner filed suit for recovery of dower, dowry articles and maintenance allowance which was contested by Respondent No. 2 by filing written statement. After hearing the parties, learned Judge Family Court decreed the suit to the extent of recovery of maintenance allowance and dower *vide* judgment and decree dated 15.09.2011. Feeling aggrieved, Respondent No. 2 preferred an appeal before learned Addl: District Judge and the said Court while partially accepting the appeal set aside the judgment and decree passed by learned Judge Family Court to the extent of recovery of dower 30 tolas gold ornament. Hence, this writ petition.

3. Learned counsel for the petitioner contended that impugned judgment and decree by setting aside the claim of the petitioner to the extent of recovery of dower has been passed by learned 1st appellate Court while ignoring the relevant law and facts of the case, therefore, same is not sustainable in the eyes of law; petitioner proved her case through cogent and reliable evidence and learned trial Court rightly decreed the suit of the petitioner to the extent of dower; learned 1st appellate Court failed to exercise its jurisdiction in a lawful manner and held that snatching of gold ornaments given as dower will transform into a civil liability against the law. Prays for acceptance of instant petition.

4. Learned counsel for the Respondent No. 2 defended the impugned judgment and decree passed by learned 1st appellate Court and argued that learned 1st appellate Court rightly exercised its jurisdiction by holding that after satisfaction of dower debt the matter comes within the jurisdiction of civil Court; once the dower was paid to the petitioner the liability of Respondent No. 2 was over and after snatching of the same, the issue in hand comes within the jurisdiction of civil Court concerned. Prays for dismissal of instant writ petition.

5. Arguments heard. Record perused.

6. It has been noticed that petitioner was married with Respondent No. 2 in lieu of gold ornaments weighing 30 tolas which were handed over to her at the time of Nikah. Thereafter, the said gold ornaments were snatched from her forcibly when she was ousted from the house of Respondent No. 2. The suit was filed by the petitioner for recovery of dower, dowry articles and maintenance allowance which was decreed by learned Judge Family Court to the extent of recovery of maintenance allowance and dower. Respondent No. 2 preferred an appeal before learned Addl: District Judge which

was partially accepted and said Court set aside the judgment and decree passed by learned Judge Family Court to the extent of recovery of dower 30 tolas gold ornament. The question before this Court is that whether Family Court has jurisdiction to entertain the suit where contention of the lady is that although the 30 tolas gold ornaments were given to her at the time of Nikah yet the same were snatched by father of Respondent No. 2 when she was ousted from their house. Admittedly, 30 tolas gold ornaments were fixed as dower at the time of marriage and the same were handed over to the petitioner but as per contention of the petitioner these were snatched by father of Respondent No. 2. To prove her contention, petitioner appeared as PW.1 and during her cross-examination she categorically deposed that she was expelled in wearing cloths and at that time, father of Respondent No. 2 inquired about ornaments and in presence of Respondent No. 2 and his mother she handed over the same which were checked by them and found the ornament complete and then petitioner was ousted from their house. PW.2 and PW.3 also supported the version of the petitioner and their testimony could not be shaken regarding snatching of the gold ornaments during cross-examination. Respondent No. 2 has not rebutted the stance of the petitioner with regard to snatching of gold ornaments 30 tolas by his father. Even there is no denial from the Respondent No. 2 that such incident/event did not occur in his and his mother's present. The petitioner has proved her case to the extent of snatching of gold ornaments 30 tolas given to her as dower. Now the fact remains that if 30 tolas gold ornaments given to the petitioner as dower were snatched, the matter comes within the jurisdiction of the Family Court or it is to be entertained by civil Court concerned. It would be seen that the West Pakistan Family Courts Act, 1964, has been enforced to make provisions for the establishment of family Courts for the expedious settlement and disposal of disputes relating to marriage and family affairs. Section 5 of the Act ibid provides that subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the Conciliation Courts Ordinance, 1961, the Family Court shall have exclusive jurisdiction to entertain, hear and adjudicate matter specified in the schedule which is reproduced as follows:

1. *Dissolution of marriage [including Khula].*
2. *Dower.*
3. *Maintenance.*
4. *Restitution of conjugal rights.*
5. *Custody of children [and the visitation rights of parents to meet them]*

6. *Guardianship.*

7. *Jactitation of marriage.*

8. *Dowry.*

9. *Personal property and belongings of a wife.*

It is worth mentioning here that when the petitioner has proved her claim that dower given to her was snatched by father of Respondent No. 2, the dower remains as dower, neither its nature would be changed nor it would be transformed into a civil liability even if it was snatched by father of Respondent No. 2. Although dower was paid by Respondent No. 2 to the petitioner but thereafter the same was snatched by father of Respondent No. 2 from her would restore his liability to repay the same and it shall remain as dower due to the wife. The Family Court has jurisdiction to entertain and decide such matters and the petitioner has remedy to recover the snatched dower 30 tolas gold ornaments by filing a suit before Family Court. Reliance in this regard is placed on the case reported as *"Mehdi Khan vs. Mst. Armoos Begum and 2 others"* (2010 MLD 1118). The 1st appellate Court has erred in law while holding that claim of the petitioner regarding recovery of jewelry 30 tolas gold ornaments or its value is not competent before family Court and petitioner should have filed a suit before civil Court for the recovery of the same.

7. In view of what has been discussed above, instant writ petition is accepted, judgment and decree dated 20.05.2014 passed by learned Additional District Judge to the extent of recovery of 30 tolas gold ornaments or its value, given to the petitioner as dower, is set aside and judgment and decree dated 15.09.2011 passed by learned Judge Family Court, Lahore, is upheld. No order as to costs.

(Y.A.) Petition accepted.

PLJ 2023 Lahore 154

***Present*: SAFDAR SALEEM SHAHID, J.**

***Mst.* FARIDA BIBI etc.--Petitioners**

versus

JUDGE FAMILY COURT etc.--Respondents

W.P. No. 18625 of 2016, heard on 13.1.2022.

Muslim Family Laws Ordinance, 1961 (VIII of 1961)--

----S. 9--Constitution of Pakistan, 1973, Art. 199--Suit for recovery of maintenance allowance--Decreed--Deprivation from previous maintenance allowance--Suckling baby--Modification in judgment--Entitlement of petitioner for maintenance allowance for period of feeding of minor--Enhancement in maintenance allowance--Challenge to--After separation, lady can live in house of her ex-husband for purpose of feeding in case she had a suckling baby, within limits prescribed by Almighty Allah--Maintenance of mother who had been feeding a child cannot be stopped in any way--Neither child nor lady can be deprived from maintenance allowance in any away--Judgment and decree passed by Judge Family Court, is modified to extent that Plaintiff No. 1 is held entitled for maintenance allowance for period in which she had been feeding minor--Plaintiff had been feeding minor till 13.07.2014 and for that period Respondent No. 2 is duty bound to pay maintenance allowance to plaintiff--Judge Family Court has rightly fixed maintenance allowance of plaintiffs--Petition partially allowed.

[Pp. 159 & 160] A, B, C, D & E

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

----S. 151--Jurisdiction of Family Court--Family Court has exclusive jurisdiction to pass an order on application for enhancement of maintenance allowance even after passing final judgment and decree. [P. 160] F

SCMR 1821 *ref.*

Miss Kashwar Naheed, Advocate for Petitioners.

Ex-parte for Respondent.

Date of hearing: 13.1.2022.

JUDGMENT

Through instant constitutional petition, the petitioners seek enhancement of maintenance allowance, partly decreed by learned Judge Family Court, Sheikhupura, *vide* judgment and decree dated 15.09.2015.

2. The brief facts of the family litigation are that *Mst.* Farida Bibi Petitioner No. 1 and Muhammad Shahid Respondent No. 2 were married on 24.03.2011, Out of this wedlock

Ammara Shahid Petitioner No. 2 was born. Differences between the parties arose and ultimately the petitioner filed the suit for past and future maintenance allowance at the rate of Rs. 30,000/- per head per month. The respondent appeared before the Court and submitted his contesting written statement. Consequently, learned trial Court *vide* judgment and decree dated 15.09.2015 partly decreed the suit for recovery of maintenance allowance and Petitioner No. 1 was held entitled to maintenance allowance at the rate of Rs. 15000/- only for the period of "Iddat" whereas Petitioner No. 2/minor was held entitled to maintenance allowance at the rate of Rs. 5,000/- per month from the date of effectiveness of divorce between the spouses till marriage of Respondent No. 2 (minor) with 10% annual increase. Against the said judgment and decree the petitioners preferred instant writ petition before this Court for enhancement of maintenance partly decreed by learned Judge Family Court Sheikhupura. Hence instant writ petition.

3. The issues No. 1 & 2 were relating to maintenance allowance of the minor and the lady regarding the past as well as future period which were inter-related and inter-connected, hence the same were decided by learned trial Court simultaneously. The learned trial Court discussed the evidence of the parties and apprised that since the lady had left the house of the respondent alongwith minor out of her own will, therefore, she was not entitled to recover the past maintenance allowance. It was further held by the learned trial Court that the petitioner/lady has neither mentioned any specific ground nor mentioned specific date or month when she was expelled and the respondent had not been giving the monthly allowance to her. Relying on these observations, the lady was deprived from her previous maintenance allowance however, she was held entitled the maintenance allowance only for the period of "Iddat" as she was divorced by the respondent and divorce was effected between the spouses on 30.06.2014 *vide* Exh.D-4. The learned trial Court fixed the maintenance allowance of the minor at the rate of 5000/- per month from the date of divorce between the spouses till the marriage of Respondent No. 2 (minor) with 10% annual increase. The petitioner/plaintiff agitated the judgment and decree in question through instant writ petition as no other remedy was available to the petitioner with the version that the learned Judge Family Court has not decided the issues in accordance with law. It was argued by learned counsel for the petitioner/plaintiff that non-mentioning of exact date of desertion would not disentitle the petitioner from her past maintenance allowance as well as of the minor daughter of the petitioner. It was further argued by learned counsel that maintenance allowance of the minor has not been fixed by the learned trial Court in view of financial status of the respondent as the respondent was serving in Saudi Arabia and he was earning more than Rs. One lac and in this regard the petitioner produced cogent evidence regarding his source of income. It was further contended that the minor is now grown up and studying in a school and her average monthly expenditure on account of school fees, uniform, Qari Sahib fee, transport, foods and other necessities etc are higher than the maintenance allowance due to rise in inflation.

4. The respondent was summoned through summons in accordance with law but inspite of the same he did not appear; consequently he was proceeded against *ex-parte*.

5. Arguments heard. Record perused.

6. It has been noticed that there are many legal as well as Shari questions before this Court which are being discussed as under:-

1. Whether the lady/plaintiff having a suckling baby with her can be deprived from the maintenance allowance?

2. Whether the maintenance allowance of the minor can be waived by the mother or any of the blood relative?

Since very important Shari questions were involved in the instant case, therefore, learned Assistant Advocate-General was appointed as amicus curiae in order to assist this Court.

7. Perusal of record reveals document Exh. D-I is available on file which shows that an agreement/Punchayat Nama was entered into between the parties where the father of the Petitioner No. 1 had signed the said document in view of its correctness. The contents of said agreement/Punchayatnama is reproduced as under:

یہ کہ میں مسماۃ فریدہ بی بی دختر شاہ محمد حلفیہ بیان کرتی ہوں کہ میں بچی عمارہ دختر محمد شاہد کے کسی قسم کے خرچہ کا مطالبہ نہ کرونگی. عمارہ کو رو برو گواہان محمد شاہد کی والدہ سے حاصل کر لی ہے .مورخہ 16.03.2004

The aforesaid document was written on 16.03.2015 which was signed and thumb marked by the father of the petitioner namely Shah Muhammad. The petitioner/plaintiff in her statement while appearing as PW-1 has specifically refused that she had ever signed any such document.. During cross-examination she deposed that she had no knowledge regarding execution of Exh. D-1 however, she had signed and thumb marked a blank paper. She further deposed that her father Shah Muhammad had signed the document Exh. D-1 and also thumb marked. The right of the minor cannot be waived by the mother or any of the blood relative. Allah has specifically fixed the responsibility of the minor (suckling baby) to the father. The mother has been given responsibility of feeding the child, whereas the father, if the father is not alive or in a position not to pay the maintenance, then the responsibility will be shifted to mother, if can bear it or to the other family members as given in Section 370 of Muhammadan Law which is reproduced as under:

***370. Maintenance of Children and Grand Children.**--(1) A Father is bound to maintain his sons until they have attain the age of majority. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (Section 352) does not relieve the*

father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and incapable of earing by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the petitioner is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Even this particular document Exh. D-1 will not disentitle the minor from her Shari right of maintenance allowance. Here *I will quote the Verse 233 of Surah Al-Baqara*:

اور مائیں دودھ پلائیں اپنے بچوں کو (ف۴۶۶) پورے دو برس اس کے لئے جو دودھ کی مدت پوری کرنی چاہئے (ف۴۶۷) اور جس کا بچہ ہے (ف۲۲۸) اس پر عورتوں کا کھانا پہننا ہے حسب دستور (ف۴۶۹) کسی جان پر بوجھ نہ رکھا جائے گا مگر اس کے مقدور بھر ماں کو ضر ر نہ دیا جائے اس کے بچہ سے (ف۴۷۰) اور نہ اولاد والے کو اس کی اولاد سے (ف۴۷۱) یاماں ضرر نہ دے اپنے بچہ کو اور نہ اولاد والا اپنی اولاد کو (ف۴۷۲) اور جو باپ کا قائم مقام ہے اس پر بھی ایساہی واجب ہے پھر اگر ماں باپ دونوں آپس کی رضا اور مشورے سے دودھ چھڑانا چاہیں توان پر گناہ نہیں اور اگر تم چاہو کہ دائیوں سے اپنے بچوں کو دودھ پلواؤ تو بھی تم پر مضائقہ نہیں جب کہ جو دینا ٹھہرا تھا بھلائی کے ساتھ انہیں ادا کر دو ،اور اللہ سے ڈرتے رہو اور جان رکھو کہ اللہ تمہارے کام دیکھ اللہ رہا۔ (233)

The wisdom mentioned in the aforesaid Verse of Surah Al-Baqara is that father is solely responsible to maintain the minor as well as the lady who is feeding his child. The document Exh. D-1 could be used for any other purpose but not to deprive the minor from her maintenance allowance and the lady who had been feeding the minor. It is legal as well as moral right of every minor/child that he be brought up in healthy atmosphere and be brought up with the feelings of self-respect alongwith educational necessities and it is duty of the father to bring up his children as per his financial status. Although learned Judge Family Court has not relied upon the document Exh. D-I but on the other hand, the learned Judge Family Court had deprived the lady/ mother of the minor from the maintenance allowance regarding the period of feeding of the minor. It is settled principle of law that nobody/parents or any blood relative can waive the right of any minor regarding his maintenance allowance which has been given by 'Shariah'. So the document Exh. D-I has no legal value in the eyes of law and same is against the spirit of Islamic Rules, therefore, it would not create a hurdle for the fixation of maintenance allowance for the past and future of the minor as well as to the lady. Admittedly the marriage between the parties was solemnized on 24.03.2011 whereas minor daughter was born on 13.01.2012. According to the version of the petitioner/lady taken by her in plaint, she left the house of the respondent one year prior to the institution of the suit. The suit was filed on 24.07.2014, meaning thereby the lady left the house of the respondent on 24.07.2013. Mark DB dated 24.03.2014 is an important document (Talaq Nama) which was tendered by the respondent wherein it was admitted by the respondent that six months prior the lady had gone to her parents house, if said

period is calculated, it means that the petitioner/lady had left the house of the respondent on 24.09.2013 whereas the petitioner/lady has claimed that she had left the house of her husband on 24.07.2013. So there is no a big difference in the dates regarding the leaving of the house of the petitioner from her husband's house/respondent. It is clear indicative of the fact that she was residing with her parents after the aforesaid dates and during the said period neither she was paid the maintenance allowance nor the minor. The question before this Court is that a disobedient lady living separately without any reason should be refused to pay the maintenance allowance for that period she had not performed her matrimonial obligations but here this is a different situation. She had been feeding the minor during the said period. In these circumstances, the father of the minor was under obligation to provide the maintenance to the lady who was feeding his child as per Holly *Verse 233 of Surah Al-Baqara:* So the learned Judge Family Court has not kept in view the entitlement of the lady for having the previous maintenance allowance on this score which was very important. In all circumstances, the welfare of the miner is the supreme, though she had left the house herself or she was expelled from the house as she had been feeding the minor and maintaining his suckling baby. As per 'Sharia' the father is duty bound to maintain his wife who was feeding his child. This principle is established from the traditions of Arabic societies where the children were handed over to the ladies (foster mothers) for feeding and they were paid penny/reward for feeding purpose. It is also a principle that even after separation, the lady can live in the house of her ex-husband for the purpose of feeding in case she had a suckling baby, within the limits prescribed by Almighty Allah. Meaning thereby, the maintenance of the mother who had been feeding a child cannot be stopped in any way, however, after that period the Court can assess the evidence adduced by the parties and then can pass the appropriate order regarding the maintenance allowance. In the instant case, the lady had been feeding the child, therefore, neither the child nor the lady can be deprived from the maintenance allowance in any away. This Court has reason to believe that the learned Judge Family Court has not taken into consideration this aspect of the matter. The judgment and decree dated 15.09.2015 passed by learned Judge Family Court, Sheikhupura is modified to the extent that the Plaintiff No. 1 *Mst.* Farida Bibi/lady is held entitled for maintenance allowance for the period in which she had been feeding the minor. Under the Islamic Rules, the feeding period has been fixed by the Fiqa as 2½ years. Prima facie, the Plaintiff No.1/lady had been feeding the minor for the period of 2½-years. Ammara Shahid minor was born on 13.01.2012 and if the aforesaid period is calculated, then it comes on record that the plaintiff/lady had been feeding the minor till 13.07.2014 and for that period the Respondent No. 2 is duty bound to pay the maintenance allowance to the plaintiff/lady. As discussed above the admitted dates of desertion of plaintiff-lady from the house of the respondent was noted as 24.07.2013 & 24.09.2013, therefore, the plaintiff-lady is held entitled for the past maintenance allowance at the rate of Rs. 5,000/- per month (which was fixed by learned

Judge Family Court for minor) *w.e.f* 24.07.2013 to 13.07.2014 with 10 % annual increase. The maintenance allowance of the plaintiff-lady for the period of Iddat fixed by learned Judge Family Court is upheld. So far as contention of learned counsel for the petitioners that maintenance allowance of the plaintiffs/petitioners was not fixed by the learned trial Court keeping in view the financial status of the respondent is concerned, I have gone through the whole evidence which shows that no such reliable document regarding the monthly income of the respondent was produced before the learned trial Court. Keeping in view the evidence available on record, the learned Judge Family Court has rightly fixed the maintenance allowance of the plaintiffs. As far as the contention of learned counsel for the petitioners for enhancement of maintenance allowance on the ground of daily growing requirement of the minor is concerned, suffice it to say that the Family Court has exclusive jurisdiction to pass an order on the application for enhancement of the maintenance allowance even after the passing the final judgment and decree. Reliance in this regard can be placed on the case titled *Lt. Col. Nasir Malik vs Additional District Judge Lahore* (2016 SCMR 1821) in which the Hon'ble Supreme Court of Pakistan held as follows:

"Family Court had exclusive jurisdiction relating to maintenance allowance and the matters connected therewith.

Once a decree by the Family Court in a suit for maintenance (for minors) was granted, thereafter, if the granted rate for monthly allowance was insufficient and inadequate, in that case, institution of fresh suit was not necessary rather the Family Court may entertain any such application (under S.151,C.P.C) and if necessary make alteration in the rate of maintenance allowance"

In these circumstances, the petitioners may move the application for enhancement of maintenance allowance of the minor before the Court of competent jurisdiction.

8. For what has been discussed above, instant petition is partly accepted and impugned judgment and decree dated 15.09.2015 passed by learned Judge Family Court is modified to the extent that the plaintiff-lady is held entitled for the past maintenance allowance at the rate of Rs. 5,000/- per month (which was fixed by learned Judge Family Court for minor) *w.e.f* 24.07.2013 to 13.07.2014 with 10% annual increase. The maintenance allowance of the minor and the plaintiff-lady for the period of Iddat fixed by learned Judge Family Court is upheld. There is no order as to costs.

(Y.A.) Petition partially allowed.

2023 Y L R 37

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

Syed QALANDAR HUSSAIN SHAH---Appellant

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 9653 of 2019, heard on 29th September, 2021.

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

----O. XVI, R.1---List of witnesses---Matter to be decided on merit---Respondent/ plaintiff filed suit for specific performance of contract on basis of oral agreement to sell against petitioner/ defendant---Issues were framed and parties were directed to submit their list of witnesses within seven (7) days but petitioner/defendant had no knowledge about the said order---When evidence of respondent/plaintiff was closed then it came into knowledge of petitioner/ defendant that list of witnesses was not submitted by petitioner within time---Petitioner/defendant filed an application before Civil Court for submitting list of witnesses which was dismissed---Petitioner filed a civil revision before Revisional Court which was also dismissed---Held, that order sheet appended with the petition revealed that on 10..03.2016 application filed by respondent for temporary injunction was allowed and after farming of issues Trial Court directed the parties to submit list of witnesses and certificate for readiness to produce evidence within seven (7) days, said order was passed by Trial Court in presence of both parties---Suit was adjourned on many dates for recording of evidence of the plaintiff and evidence of respondents witnesses was recorded and counsel for the petitioner conducted cross-examination upon them---Plaintiff produced his documentary evidence and then the case was fixed for evidence of petitioner/defendant---Counsel for the petitioner filed an application before Trial Court for submitting list of witnesses at belated stage which was dismissed by Trial Court, which mean that counsel for the petitioner had been appearing in the Court but did not file application for submitting list of witnesses---Counsel for the petitioner requested for only one opportunity to submit list of witnesses, even on payment of costs as valuable rights of the petitioner were involved in the matter---Petition was allowed by High Court and Trial Court was directed to grant only one opportunity and fixed a date for submitting list of witnesses by the petitioner and if the cost imposed was not paid or list of witnesses was not submitted on the fixed date as directed, Trial Court should proceed with the matter in accordance with law.

(b) Administration of justice---

----Technicalities of procedure ought to be avoided and matter should be decided on merits---Petition was allowed.

Mst. Bundi Begum v. Munshi Khan and others PLD 2004 SC 154; Syed Sharif ul Hassan through LRs. v. Hafiz Muhammad Amin and others 2012 SCMR 1258 and Zohra Bibi and another v. Haji Sultan Mahmood and others 2018 SCMR 762 rel.

Raja Khizar Hayat for Petitioner.

Sheikh Karim ud Din for Respondent No. 3.

Date of hearing: 29th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---The instant constitutional petition is directed against the order dated 15.07.2019 passed by learned Civil Judge, Bahawalnagar, whereby application filed by the petitioner seeking permission to submit list of witnesses was dismissed and the judgment dated 12.11.2019, whereby the learned Additional District Judge, Bahawalnagar, dismissed his revision petition.

2. Brief facts necessary for disposal of the instant writ petition are that Muhammad Zulfiqar Ali respondent No.3 filed a suit for specific performance of contract on the basis of oral agreement to sell against the petitioner. In the suit, issues were framed on 10.03.2016 and parties were directed to submit their list of witnesses within 7 days but the petitioner had no knowledge about the said order. When evidence of respondent No.3 was closed then it came into the knowledge of the petitioner that list of witnesses was not submitted by him within time. The petitioner filed an application before learned Civil Judge (concerned) for submitting list of witnesses which was dismissed vide order dated 15.07.2019. Against the said order, petitioner filed a civil revision before learned Additional District Judge, which was also dismissed vide judgment dated 12.11.2019.

3. Learned counsel for the petitioner argued that the orders of both the Courts below have been passed ignoring the relevant law and facts of the case, therefore, same are not sustainable in the eyes of law; on 10.03.2016 petitioner was not present in Court whereas his learned counsel was busy in other direction cases and it was not in the knowledge of the petitioner regarding direction of the learned trial Court to submit list of witnesses within the stipulated period; valuable rights of the petitioner are involved in the matter and he has to prove his case through production of evidence; the matters

should be decided on merits and no body can be knocked out on the basis of technicities.

4. Learned counsel for respondent No. 3 on the other hand resisted the arguments and submitted that orders of both the Courts below have been passed quite in accordance with law; petitioner could not submit list of witnesses within time as per direction of the learned trial Court, therefore, his application was rightly dismissed.

5. Arguments heard. Record perused.

6. It has been noticed that Muhammad Zulfiqar Ali respondent No.3 filed a suit for specific performance of contract on the basis of oral agreement to sell against the petitioner. After framing of issues, parties were directed to submit their list of witnesses within stipulated period but petitioner could not file the same in time. Thereafter petitioner filed an application before learned Civil Judge, for submitting list of witnesses which was dismissed vide order dated 15.07.2019. Against the said order, civil revision filed by the petitioner also met with the same fate. Perusal of order sheet appended with the petition reveals that on 10.03.2016 application filed by respondent No.3 for temporary injunction was allowed and after framing of issues learned trial Court directed the parties to submit list of witnesses and certificate for readiness to produce evidence within 7 days. The order dated 10.03.2016 was passed by the learned trial Court in presence of both the parties. Thereafter, suit was adjourned on so many dates for recording the evidence of the plaintiff. The evidence of respondents' witnesses was recorded and learned counsel for the petitioner conducted cross-examination upon them. On 08.11.2018 plaintiff produced his documentary evidence and then the case was fixed for evidence of the petitioner/ defendant. On 23.01.2019 learned counsel for the petitioner filed an application before the learned trial Court for submitting list of witness at a belated stage which was dismissed by learned trial Court on 15.07.2019. It means that learned counsel for the petitioner had been appearing in the Court but did not file application for submitting list of witnesses. However, learned counsel for the petitioner requested for only one opportunity in order to submit list of witnesses, even on payment of costs as valuable rights of the petitioner are involved the matter. In the circumstances, keeping in view the request of the learned counsel for the petitioner and the settled principle of law that technicalities of procedure ought to be avoided and matters should be decided on merits as held in the case of Mst. Bundi Begum v. Munshi Khan and others (PLD 2004 SC 154), Syed Sharif ul Hassan through

LRs. v. Hafiz Muhammad Amin and others (2012 SCMR 1258) and Zohra

Bibi and another v. Haji Sultan Mahmood and others (2018 SCMR 762), 1 think that it will meet the ends of justice if the petitioner is granted one opportunity for submitting list of witnesses, subject to payment of costs of Rs.10,000/-.

7. In view of what has been discussed above, the instant petition is allowed, the impugned order dated 15.07.2019 and judgment dated 12.11.2019 are set aside subject to payment of costs of Rs.10,000/-. The learned trial Court is directed to grant only one opportunity and fix a date for submitting list of witnesses by the petitioner. It is, however, clarified that if the costs imposed is not paid or list of witnesses is not submitted on the date fixed as directed, the learned trial Court shall proceed with the matter in accordance with law.

MHS/Q-7/L Petition allowed.

2023 Y L R 193

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

MUKHTAR AHMAD---Appellant

Versus

DISTRICT JUDGE and others---Respondents

Writ Petition No. 7446 of 2020, heard on 14th October, 2021.

Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Prompt or deferred dower--- Meaning--- Presumption of correctness attached to Nikahnama---Wife filed suit for recovery of dowry articles and dower through different suits---Both the suits were contested by the petitioner (husband)---Petitioner also filed separate suit for restitution of conjugal rights---Trial Court partially decreed the suit of wife and also decreed the suit for conjugal rights subject to the payment of dower---Husband filed appeal before Appellant Court, which was dismissed---Held, that there was no denial regarding the existence of Nikah---However, husband had shown his reservations regarding column No.16 of the Nikah Nama that land mentioned in that column was not settled as dower but it was written in the Nikah Nama just to show off---Amount of prompt dower was Rs.1000 which was mentioned in column No.13 of Nikah Nama which was payable on demand, whereas, in column No.16 of the Nikah Nama the property mentioned as 16 kanal was a deferred dower which could only be payable either in case of separation between the husband and wife or in case of death of the husband---Ten tolas gold ornaments were mentioned in Nikah Nama but nothing was mentioned whether the same was prompt or deferred, thus according to law it would be considered that 10 tola gold ornaments were to be paid on demand, because if the same had been paid by the petitioner as per his claim ,there must be mentioning of the same in the Nikahnama---Husband had admitted that Nikahnama was executed and all mentioned on Nikahnama in the column of witnesses had signed over the same---Witnesses who appeared in support of the husband's contentions had not shown any reservation about the genuineness of Nikahnama----However, husband had not produced any independent reliable confidence inspiring evidence regarding the property mentioned in column No.16 as just a show-off---Two witnesses produced for such purpose were closely related to the husband---Petitioner could have produced the Nikahkhwan who had solemnized the Nikah and had filled all the columns of Nikhanama to prove his version, if it was so settled---Version of the husband that it was for the lady to prove that the same was written as dower, was not a correct approach because Pert Nikah had the authenticity of correctness---If the petitioner had any reservation then it was for him to prove the same---Nikahnama was exhibited in evidence without objection, meaning thereby, all it's contents were correct and

admissible to the husband---Trial Court although had not correctly interpreted the statement of the petitioner regarding handing over of gold ornaments ,yet the meaning of the sentence was that the husband had not proved with the evidence that gold ornaments were paid at the time of Ruksati to the wife---No receipt for the purchase of gold ornaments was produced, neither any independent evidence was produced in this regard that at the time of Ruksati gold ornaments was given to the lady as owner, as mentioned in column No. 16 of the Nikahnama---Word " " was not used in Islamic or Arabic dictionary for dower, so such word in Nikahnama might then be interpreted as deferred---Right interpretation of said entry was that such dower was payable but as deferred, which was a premature demand of the lady at present stage---So to that extent the prayer of the wife was not correctly decreed by Trial Court and Appellant Court---Constitutional petition was partly allowed to the extent that the dower of 10 tola gold ornaments had been correctly decreed in favour of wife and the dower of 16 kanal land would be treated as deferred dower and to that extent the claim of the wife was pre-mature and findings of Trial Court and Appellant Court were reversed, in circumstances.

Shabir Ahmad Malik for Petitioner.

Khurshid Ahmad Bhatti for Respondent No.3.

Date of hearing: 14th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---The petitioner has assailed the concurrent findings of both the courts below recorded in the judgment and decree dated 28.11.2019, passed by the Family Court, Bahawalpur and judgment and decree dated 11.09.2020, passed by the learned Additional District Judge, Bahawalpur.

2. Brief facts necessary for disposal of the writ petition are that respondent No.3 filed the suit for recovery of dowry articles and dower through two different suits. Both the suits were contested by the petitioner by raising preliminary legal and factual objections. The petitioner also filed separate suit for restitution of conjugal rights. After failure of pre-trial reconciliation efforts between the parties, both the suits were consolidated and following consolidated issues were framed;-

1. Whether the plaintiff is entitled to get the decree for recovery of agricultural land measuring 16-Kanal situated in Chak No.8/BC and golden ornaments weighing 10-tolas or alternate its price? OPP

2. Whether plaintiff Tehmina Bibi is entitled to get a decree for recovery of dowry articles Rs.8,61,500/-? OPP

3. Whether the suit of the plaintiff is not maintainable in its present form and same are liable to be dismissed? OPD

4. Relief.

Whereafter, the parties produced their evidence. Respondent No.3 herself appeared as PW-1, whereas, no other witness was produced by respondent No.3. From the petitioner side, the petitioner himself appeared as DW-1 and got examined two witnesses Muhammad Zulfiqar as DW-2 and Muhammad Siddique as DW-3. Whereas, Ex.P-2 was submitted in the statement of learned counsel for respondent No.3, while respondent No.3 in her statement had not submitted any document. The affidavits from both sides were tendered in the affirmative evidence. Finding the evidence of Respondent No.3 more convincing the learned Civil Judge decided the issue No.1 in favour of respondent No.3 and decreed 16 Kanal land mentioned in Ex.P-2 against column No.16 and also decreed 10 tolas gold ornaments or alternate market value of the same. Whereas, issue No.2 was decreed to the extent of dowry articles amounting to Rs.4,50,000/-. The suit for restitution of conjugal rights of the petitioner was decreed subject to payment of dower. This judgment and decree was assailed before the court of learned Additional District Judge and the learned Additional District Judge maintained the judgment and decree passed by the learned Family Judge and finding that all the issues have been decided according to its merits, dismissed the appeal of the petitioner. Against both the judgments and decrees, the present constitutional writ petition has been filed.

3. It was argued by counsel for the petitioner that both the courts have not properly read the evidence of the parties. The stance of the petitioner has not been properly appreciated. In support of the fact that the petitioner's stance was very clear in the written statement, no issue regarding the same was framed by the court. The evidence tendered by the petitioner was not properly read and discussed by the court. The court has also not kept in view the point that respondent No.3 was to prove her demand but respondent No.3 had failed to prove anything regarding her demand. There is no corroboration to the statement of respondent No.3. Ex.P-2 i.e. has not been correctly interpreted by both the courts below. It was argued that in column No.16, it has been mentioned that the said property is to be given in dower as deferred dower, but the court below has wrongly interpreted the wording of the said column, specifically there is mentioning of word dower but the court has interpreted that since word has been written along with therefore, it will be read as prompt/on demand dower. It was argued that the petitioner has produced all the relevant witnesses. Both the courts below have not taken the notice of the evidence produced by the petitioner. The stance of the petitioner from the very beginning was that the land was mentioned in column No.16 just on the asking of the father of respondent No.3, factually, that land was not fixed as dower of the lady. The witnesses have proved this fact but the court below has not properly appreciated the

evidence of the petitioner. It was argued that it was deferred dower which cannot be interpreted in any way as prompt dower and the lady is not entitled at this stage to claim the same as marriage is intact between the parties. It is premature claim/demand of the respondent. It was further argued that the court has misread the evidence. The learned Civil Judge in his judgment has mentioned that DW-1/petitioner has stated that he had paid cash to respondent No.3/plaintiff. It was argued that no such statement was made by the petitioner. The court itself has assumed regarding the same and the same is the position with the judgment of the learned Additional District Judge. Neither this statement was made by the petitioner nor any of his witness has made such a statement regarding the payment of anything, therefore, the findings of both the courts below on issue No.1 are contrary to the evidence, therefore, the impugned judgment and decree to this extent be set-aside.

4. Counsel for respondent No.3, on the other hand, resisted the arguments and argued that (Ex.P-2) is an admitted document. The petitioner has not challenged the contents of the same before any forum. The statement made by the petitioner is in a way of admission on his part that the same property mentioned in column No.16 was written in . The other version taken by the petitioner is not proved as no such evidence is produced by the petitioner. Regarding the payment of the ornaments, no proof has been given by the petitioner, court has correctly observed that neither any receipt nor any witness for giving the said ornaments has been produced by the petitioner. It was argued that in Ex.P-2 against column No.16, it is not mentioned that said gold ornaments have been paid at the time of or marriage. Therefore, the contention of respondent No.3 is correct and has been correctly observed by both the courts below that respondent No.3 was entitled for the gold ornaments mentioned in Ex. P-2. There is no such misreading or non-reading of evidence. The issues have been settled on its merits. Respondent No.3 herself has appeared in the witness box and she has stated her claim, whereas, in cross-examination, the petitioner was unable to bring on record that any of the claim of respondent No.3 was false.

5. I have heard counsel for the parties, record has been perused.

6. There is no denial regarding the existence of Ex.P-2. However, the petitioner had shown his reservations regarding column No.16 of Ex.P-2 that this land i.e. 16 Kanal was not settled as dower but it was written in the just to show-off. There are two questions before this court;

(i)- Whether the learned Judge Family Court has properly appreciated the evidence and whether there is any element of non-reading or misreading of the evidence as pointed out by the petitioner.

(ii)- Whether that interpretation of the court that no amount was paid as against the ornaments can be considered as the ornaments were not paid by the petitioner. Secondly, the status of mentioning dower in column No.16 and beside that the word can it be interpreted as prompt or it is a premature demand of respondent No.3.

Muhammadan Law confirms in paragraph No.290 that defines prompt and deferred dower as;-

290. "Prompt" and "deferred" dower.---(1) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred" which is payable on dissolution of marriage by death or divorce.

In "Saadia Usman and another v. Muhammad Usman Iqbal Jadoon and another" (2009 SCMR 1458) it is hold that;

"----S. 5---Muslim Family Laws Ordinance (VIII of 1961), S.9---Constitution of Pakistan (1973), Art. 185(3)---Leave to appeal was granted by Supreme Court to consider the correct import of 'deferred dower' and whether it could become prompt if and when demanded; whether Family Court could not grant maintenance which instead could be granted by Arbitration Council as mentioned in S.9 of Muslim Family Laws Ordinance, 1961; whether amount of maintenance decree commensurated with status and income of husband; whether restitution of conjugal rights could be allowed subject to condition of separate living of wife with husband abroad; and whether restitution of conjugal rights could be subjected to payment of maintenance."

The amount of of Rs.1,000/- dower is mentioned in column No.13 of Ex.P-2 which is payable on demand, whereas, in column No.16 the property mentioned 16 kanal is a deferred dower which can only be payable either in case of separation between the spouses or death of either the husband or wife. So far as 10 tola gold ornaments is mentioned, there is nothing mentioned in Ex.P-2 whether the same is prompt or deferred, then according to law, it will be considered that this 10 tola gold ornaments are to be paid on demand, because if the same had been paid by the petitioner as per his claim, there must be the mentioning of the same in Ex.P-2. The petitioner has admitted that Ex.P-2 was executed and all the mentioned persons on Ex.P-2 in the column of witnesses had signed over the same. Even the witnesses appeared in support of the petitioner's contentions, had not shown any reservation about the genuineness of the document Ex.P-2. So far as the contention of the petitioner that the property in column No.16 was just mentioned as show-off is concerned, the petitioner has not produced any independent reliable confidence inspiring evidence on the same. The two witnesses produced are closely related to the petitioner. The petitioner could have produced the who has solemnized the and has filled in the columns of Ex.P-2 to prove his version, if, it was so settled. The version of the petitioner that it was for the lady to prove that the same was

written as dower, is not a correct approach because has the authenticity of correctness. And if the petitioner had any reservation then it was for him to prove the same. Ex.P-2 was exhibited in the evidence without objection. Meaning thereby, its all contents are correct and admissible to the petitioner. The learned Judge Family Court although has not correctly interpreted the statement of the petitioner regarding handing over of gold ornaments, yet the meaning of the sentence was that the petitioner had not proved with the evidence that the gold ornaments were paid at the time of to respondent No.3, as no receipt for the purchase of the same was produced nor any independent evidence was produced in this regard that at the time of , the same was given to the lady as dower, as mentioned in column No.16 of the Ex.P-2. Had it be given to the lady, it would have been mentioned in Ex.P-2, therefore, the finding on issue No.1 to the extent of gold ornaments is correctly recorded by both the courts below, in view of evidence of the parties.

7. So far as the interpretation regarding the remaining part of the dower mentioned in column No.16 of Ex.P-2 is concerned, the citation referred by counsel for respondent No.3 is not as such applicable to the present proposition, because there is no word " " in Islamic or Arabic dictionary used for dower. It may be then interpreted as deferred, as the same has been written in the column against the said condition of Ex.P-2. Therefore, the right interpretation of this entry is that such dower is payable but as deferred, which is a pre-mature demand of the lady at this stage. So to that extent, the prayer of respondent No.3 is not correctly decreed by the courts below. The finding on issue No.1 to the extent of decreeing 16 kanal land as prompt dower is hereby set-aside. However, the version of the petitioner is not proved and has been correctly answered by the courts below that it was just a show-off in Ex.P-2, but factually, this was a dower fixed between the parties, but it cannot be treated as prompt, at this stage.

8. Since, the petitioner has not pressed the findings on issues Nos.2 and 3, therefore, there is no need to discuss and answer the findings on both these issues and findings on these issues are upheld.

9. Upshot of the discussion is that the petition is partly allowed to the extent that the dower i.e. 10 tola gold ornaments has been correctly decreed in favour of respondent No.3 and to that extent, the findings of both the courts below are upheld. And the dower of 16 kanal land, will be treated as deferred dower and to that extent, the claim of respondent No.3 is pre-mature and the findings to that extent of both the courts below are reversed. This petition is partly allowed.

MHS/M-69/L Petition allowed.

2023 Y L R 497

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

Mst. SHARAM ELLAHI---Appellant

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petitions Nos. 3332 and 3333 of 2021, decided on 11th October, 2021.

(a) Guardians and Wards Act (VIII of 1890)---

----Ss.12, 25 & 47---Family Courts Act (XXXV of 1964), S.14(3)---Welfare of minors---Father as a natural guardian---Scope---Res judicata, non applicability of---Petitioner being maternal grandmother filed application before Guardian Judge for custody of minors, who were residing with the petitioner---Petitioner also filed application for permanent injunction regarding the custody of minors---Respondent (father) contested the application before Guardian judge for custody of minors along with application of interim custody of the minors---Guardian Court dismissed the application of the petitioner, and, accepted the application of respondent---Petitioner filed appeal before Appellate Court---Appellate Court dismissed appeal of the petitioner---Contention of father was that maternal grandmother had no lien to file the application in presence of real father---Validity---Father was natural guardian of the minors and he could look and take care of the welfare of the minors in a better way, when specifically there was no allegation of the character or any other negative object/act which was necessary to refuse the real father for the custody of minors---Order under S.12 of the Guardians and Wards Act, 1890 was not mentioned under the appealable orders as provided in S. 47 of the Act---Application for the custody of minors under S.25 of the Act, was still pending before the Guardian Court---As such there was no ground to interfere in order passed by Guardian Judge---Appeal against interlocutory order under S.12 of the Guardians and Wards Act, 1890, is not maintainable---No bar existed for repeating the applications for interim custody before the Guardian Court, if new grounds are available because such practice is not contrary to law as well as principle of res-judicata, as interim orders relating to the minors are tentative and with the material change in the circumstances, the Guardian Court can always be moved for modification of the orders to promote the welfare of the minors---High Court declined to interfere in the order of Guardian Judge, being interim in nature---High Court observed that final custody of the minors will be determined while deciding the application under S. 25 of the Guardians and Wards Act, 1890---Constitutional petitions were dismissed.

Nasir Raza v. ADJ, Jhelum and another 2018 SCMR 590 rel.

Maliha Hussain v. Additional District Judge-V and another 2017 MLD 485; Mst. Kaneez Akhtar v. Abdul Qadoos and 2 others 2005 MLD 828; Javed Irfan v. Additional District Judge 2007 MLD 1089; Nasir Raza v. Additional District Judge, Jhelum and another 2018 SCMR 590; Tassadaq Nawaz v. Masood Iqbal Usmani and others PLD 2018 Lah. 830 and Syed Saghir Ahmad Naqvi v. Provinvce of Sindh through Chief Secretary, S&GAD, Karachi and another 1996 SCMR 1165 distinguished.

(b) Family Courts Act (XXXV of 1964)---

----S.14(3)---Guardians and Wards Act (VIII of 1890), Ss. 12, 25 & 47---Appeal against interlocutory order---Interlocutory order/interim order passed by the Family Court is not subject to revision or appeal or review---Provision of revision or appeal has been given to the final order of the Family Court---Under S.14(3) of the Family Courts Act, 1964, no appeal or revision lies against interim order passed by the Family Court.

(c) Family Courts Act (XXXV of 1964)---

----S. 14(3)---Guardians and Wards Act (VIII of 1890), Ss. 12, 25 & 47---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of High Court--- Scope--- Interference at the interlocutory stage should be avoided by the High Court in constitutional jurisdiction, more particularly when the legislatures have not provided any appeal against interlocutory orders in relevant statutes--- Under, the constitutional jurisdiction such right should not be allowed to be exercised.

Syed Saghir Ahmad Naqvi v. Provinvce of Sindh through Chief Secretary, S&GAD, Karachi and another 1996 SCMR 1165 rel.

Jamil Hussain Joiya for Petitioner.

Abdul Jalil Khan for Respondent No.4.

Date of hearing: 11th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J. - Through this single judgment it is proposed to decide W.P. No.3332/2021 and W.P. No.3333/2021 as common questions of law and facts are involved in both these petitions.

2. Brief facts necessary for disposal of W.P. No.3332/2021 are that the petitioner being maternal grandmother filed an application before the learned Senior Civil Judge (Family Division), Bahawalpur for custody of minors Sobia Bibi (aged 07 years), Tayyeba Bibi (aged 06 years), Muhammad Owais (aged 04 years) and Muhammad Usama (aged 02-1/2 years) who are residing with the petitioner. Along with this application, the petitioner also filed an application for permanent injunction regarding the custody of the minors which was contested by respondent No.4 and he has also approached the learned Guardian Judge for the custody of the minors along with application of interim custody of the minors. The learned Guardian Judge after hearing arguments, dismissed the said

application of the petitioner vide order dated 28.01.2021, whereas, accepted the application of respondent No.4 for interim custody of the minors vide order of same date. Then the petitioner moved an appeal before the learned Additional District Judge, Bahawalpur against the order dated 28.01.2021, but the same was also dismissed vide judgment dated 31.03.2021.

3. The facts narrated in W.P. No.3333/2021 are that respondent No.4 filed an application under section 25 of the Guardians and Wards Act, 1890 for taking permanent custody of the above said minors who are residing with the petitioner/maternal grandmother. Along with said application, respondent No.4 also filed an application under section 12 of the Guardian and Wards Act, 1890 for interim custody of the minors. Application under section 12 of the Guardians and Wards Act, 1890 was contested by the petitioner and the learned Guardian Judge after hearing arguments on the said application, accepted the same vide order dated 28.01.2021. Thereafter, the petitioner moved an appeal before the learned Additional District Judge, Bahawalpur but the same was also dismissed vide judgment dated 31.03.2021.

4. The petitioner has attacked the orders dated 28.01.2021 and 31.03.2021 of both the courts below on the ground that real facts have not been considered by the courts below while passing the impugned orders. The learned Additional District Judge has not considered the facts on the record. And on the technical side, the matter has been decided by the learned Additional District Judge by observing that in view of Maliha Hussain v. Additional District Judge-V and another (2017 MLD 485), instant appeal against the interim order is not maintainable in the eyes of law. It was contended that respondent No.4 was not entitled for the custody of the minors as he has violated the order of the court. In the case of maintenance, interim maintenance allowance fixed by the court has not been paid by respondent No.4, but both the courts below have ignored this fact. Moreover, welfare of the minors lies with the petitioner and the petitioner being maternal grandmother has preferential right as the children are more safe and they feel comfortable in the company of the petitioner than respondent No.4.

5. Counsel for the petitioner while arguing the case referred the copy of proceedings of the case for maintenance allowance pending before the court. It was argued that till this time, the interim maintenance allowance fixed by the court for the minors had not been fully paid by respondent No.4. Furthermore, the court at this stage has to see the prima facie welfare of the minors. The minors from the very beginning i.e. after the death of their mother, had been residing with the petitioner. The point of permanent custody of the minors would be determined after recording evidence. It was argued that they have been admitted in the school by the petitioner. Furthermore, the father was not present at the time of the birth of the minor Usama; who treats the petitioner as mother; specially

at this stage, since the minors were living since long in the custody of the petitioner and in absence of mother, they need special care, therefore, prima facie, the petitioner was entitled for the custody of the minors but the court has not considered all these facts. Counsel in this regard referred Mst. Kaneez Akhtar v. Abdul Qadoos and 2 others (2005 MLD 828), Javed Irfan v. Additional District Judge (2007 MLD 1089), Nasir Raza v. Additional District Judge, Jhelum and another (2018 SCMR 590) and Tassadaq Nawaz v. Masood Iqbal Usmani and others (PLD 2018 Lahore 830).

6. Counsel for respondent No.4, on the other hand, resisted the arguments and argued that respondent No.4 is real father of the minors. The children were residing with respondent No.4, the minors were taken by the petitioner for meeting and thereafter, detained them with her; since that time, the children are residing with the petitioner. It was argued that the petitioner then filed the suit for maintenance allowance and delivery expenses and dowry articles. The respondent No.4 had been paying the maintenance allowance regularly. Since last two months, the lady petitioner had not attended the court and she had not withdrawn the maintenance allowance deposited by respondent No.4. It was argued that for the permanent custody of the minors, respondent No.4 filed an application under section 25 of the Guardians and Wards Act, 1890 and also filed the application under section 12 of the act ibid for interim custody of the minors. Guardian Court has rightly decided the application keeping in view the welfare of the minors in favour of respondent No.4. It was argued that the learned Additional District Judge has decided the application on merits.

7. Arguments heard. Record perused.

8. The court has discussed all the relevant points and believing the fact that welfare of the minor lies with respondent No.4, the appeal of the petitioner was declined by the court. The court has referred that it was interlocutory order against which the appeal was not maintainable, even then the other points raised by the petitioner were discussed and answered by the court and ultimately decided the fate of the appeal in favour of respondent No.4 and appeal of the petitioner was dismissed. It was version of respondent No.4 that the petitioner has no lien to file the application in presence of the real father. The father is natural guardian of the minors and he can look and take care of the welfare of the minors in a better way. When specifically there is no allegation of character or any other negative object/act which is necessary to refuse the real father for the custody of the minors. To this extent, the version of respondent No.4 is justified. Under section 14(3) of the West Pakistan Family Courts Act, 1964, against the interlocutory orders/interim orders passed by the family court is not subject to revision or appeal or review, keeping in view the fact that the matter should not be struck up because of all those factors. The provision of revision or appeal has been given to the

final order. Therefore, under the constitutional jurisdiction such right should not be allowed to be exercised. As it is held in Syed Saghir Ahmad Naqvi v. Provinvce of Sindh through Chief Secretary, S&GAD, Karachi and another (1996 SCMR 1165) that constitutional jurisdiction, exercise of---Statute excluding a right of appeal from the interim order could not be by-passed by brining under attack such interim orders in Constitutional jurisdiction---Party affected had to wait till it matured into a final order and then to attack it in the proper exclusive forum created for the purpose of examining such orders. It also has been held by the superior courts in the number of cases that interference at the interlocutory stage should be avoided by the High Court to constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 more particularly when the legislatures have not provided any appeal against interlocutory orders in the relevant statutes. Under section 14(3) of the West Pakistan Family Courts Act, 1964, no appeal or revision shall lie against the interim order passed by the family court. The order under section 12 of the Guardians and Wards Act, 1890 is not mentioned under the appealable orders as provided within section 47 of the Act ibid which is as under;-

47. Orders Appealable.---An appeal shall lie to the High Court from an order made by a [***]3 Court,--

(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or

(b) under section 9, subsection (3), returning an application: or

(c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or

(d) under section 26, refusing leave for the removal of a ward form the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or

(e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or

(f) under section 32, defining, restricting or extending the powers of a guardian; or

(g) under section 39, removing a guardian; or

(h) under section 40, refusing to discharge a guardian; or

(i) under section 43, regulating the conduct or proceedings of a guardian or setting a matter in difference between joint guardians, or enforcing the order; or

(j) under section 44, or section 45, imposing a penalty.

9. The application for custody of minors under section 25 of the Guardians and Wards Act, 1890 is still pending before the court. There is no such ground to interfere in the order passed by the learned Guardian Judge. The appeal against the interlocutory order under section 12 of the Guardians and Wards Act, 1890 was not as such maintainable.

The learned Additional District Judge has rightly not entertained the same, however, he has also based his judgment on the available record, study of the concerned Guardians and Wards Act, 1890 states that there is no bar for repeating the application for interim custody before the guardian court, if new grounds are available 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 the orders to promote the welfare of the minors. I will place reliance on Nasir Raza v. ADJ, Jhelum and another (2018 SCMR 590), wherein, it is held that;-

----S. 25--Custody of minors Right of hizanat--Death of mother--Old age of maternal grandmother--Father and maternal grandmother filing application for custody--Guardian Judge allowed application filed by maternal grandmother and dismissed application filed by father--Appellate Court accepted appeal of father and allowed him custody of minors--High Court set aside judgment of appellate Court--Challenge to---Petitioner submitted that respondent is 67 years of age and in bad health, children are being looked after by their step maternal aunt, who is not in position to look after an educate children properly--Welfare of minors--Validity--Father is natural guardian of children--On account of children s ages, right of Hizanat, no longer vests in their maternal grandmother--Petitioner is real father of children, is ready and willing to look after children and has financial resources to fulfil their maternal needs and educational requirements--Petitioner has neither returned to his job abroad nor remarried keeping in view welfare and best interest of his children--Best interest and welfare of minors lies in handing over their custody to petitioner, real father--There is nothing on record to suggest and it has not even been alleged that petitioner is unfit, unable or unwilling to perform his duties as a guardian of his children--Petition converted into appeal and allowed.

The learned Senior Civil Judge (Family Division) has mentioned in detail the reason for allowing the application of respondent No.4 under section 12 of the Guardians and Wards Act, 1890, however, this is interim management of the custody of the minors. The final custody of the minors will be determined while deciding the application under section 25 of the Guardians and Wards Act, 1890 certainly at its own criteria and merits.

10. In view of above, the writ petitions, on this ground are not maintainable before this Court, therefore, both these petitions i.e. W.P. No.3332/ 2021 and W.P. No.3333/2021 are hereby dismissed.

MHS/S-32/L Petition dismissed.

2023 Y L R 532

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

NOOR MUHAMMAD---Appellant

Versus

Mst. UMAR WADI and others---Respondents

Civil Revision No. 466/BWP of 2016, decided on 14th December, 2021.

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

----O. XLI, R. 23---Gift---Proof---Judgment of Appellate Court---Scope---Suit for declaration was filed by the respondent alleging that her father/deceased was paralyzed and was living with the petitioner (only son), hence, the deceased was under the influence of the petitioner and she sought 1/5th share out of the estate of her father---Suit was concurrently decreed---Petitioner contended that Appellate Court had not complied with the rules for passing the judgment in appeal and violated the rules framed under O. XLI, C.P.C.; that both the Courts below had not determined the time of deceased's death and also had not considered the statement of witness who categorically stated that the deceased had died about 07 years after attestation of impugned gift mutations; that no particular fraud was pointed out; that question of misrepresentation / non-delivery of possession had not been challenged/ proved; that the deceased predecessor was not suffering from any disease and he was not mentally paralyzed; and that entries of mutations were duly incorporated in record of rights---Validity---First appellate court had discussed all the relevant factors which were available in the evidence of the parties even the documents had been discussed by the first Appellate Court while deciding the point of controversy in between the parties---Appellate Court had to decide the controversy between the parties and there was no need to decide each and every issue by the Appellate Court---Where Appellate Court recorded its findings on all the points raised before it without discussing the issues separately, it could not be said to have committed any illegality/error---Appellate Court had critically examined all the evidence on record, i.e. oral/ documentary evidence and had recorded the judgment on the basis of the same---Appellate Court had appraised the mandate of law, thus, the impugned judgment was qualified to be called "judgment"---As fraud had been alleged, it was the responsibility of the petitioner being beneficiary to prove that whether gift mutation was validly sanctioned---Respondents were real sisters of the petitioner and were privileged for being Parda Nasheen ladies---Lady who claimed to be illiterate appeared in witness box which fact was also admitted fact on record---Lady was detained in the house and was recovered on the order of the court---No explanation for

such detention was provided by the petitioner and inference could be drawn that she was illegally detained, in order to prevent her from filing/agitating her claim---Proof of delivery of possession under the said mutation had not been brought on record---Revision petition was dismissed accordingly.

Naimat Khan and others v. Hamzullah Khan and others 2006

CLC 125 and Afsar Zaman and others v. Ayub Khan and others 2007 YLR 818 rel.

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

----O. XLI, R. 23---Appellate Court---Remand--- Principles--- Remand was not to be ordered lightly where the case could be decided by the appellate court itself---Where the evidence on record was sufficient to dispose of the case by the appellate court, the case should not be remanded.

Paramatha Nath Chowdhury and 17 others v. Karim Mondal and 3 others PLD 1965 SC 434; Fateh Ali v. Pir Muhammad and another 1975 SCMR 221 and Nasir Ahmad and another v. Khuda Bakhsh and another 1976 SCMR 388 rel.

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

----S. 2(9) & O. XLI, R. 23---"Judgment"---Essentials---Original and appellate court's judgment---Scope---Term "judgment" meant judicial decision of a court/judge---"Judgment" needs not necessarily deal with all matters in issue in the suit---Essential element of judgment was that there should be statement of grounds for decision---Most important ingredient of a valid judgment was the result/reasons/grounds of the decision because the validity of the judgment was to be seen from the reasoning and the same was to be challenged by the aggrieved party---Trial Court had to decide each/every issue, whereas, the Appellate Court was not required to record findings issue-wise---Sufficient for the Appellate Court to deal with all issues which mattered for disposal of the controversy accepting those abandoned by the appellants.

Ahmad Mansoor Chishti for Petitioner.

Aejaz Ahmad Ansari for Respondent No.1.

Ms. Ammara Tasneem Bhutta for Respondent No.2.

Tariq Mahmood Khan and Mian Muhammad Shahid Akhtar for Respondent No.3.

Date of hearing: 14th December, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision has been directed against the judgment and decree dated 27.03.2015, passed by learned Civil Judge, Khanpur vide

which, suit for declaration filed by the respondents was decreed and the judgment and decree dated 25.03.2016, passed by learned Additional District Judge, Khanpur, whereby, the appeal filed by the petitioner assailing the above said judgment and decree has been dismissed.

2. Brief facts of the case for decision of this revision petition are that the petitioner was only son of Khair Muhammad deceased who during his lifetime voluntarily got mutated his agricultural land to the petitioner through gift mutation No.139 situated in Chak No.63/P and gift mutation No.298 of Mouza Moosa Kanju, Tehsil Khanpur attested on 17.03.1983 which was accepted by the petitioner and possession was handed over to the petitioner. Said predecessor of the parties did not challenge the said gift mutations in his lifetime but after his death, respondent No.1 challenged both gift mutations by filing suit for declaration, in which suit, respondents Nos.2 and 3 were impleaded as defendants but afterwards, they were rearranged as plaintiffs, by alleging that her father was paralyzed who was living with the petitioner, hence, he was under the influence of the petitioner and she sought 1/5th share out of the estate of her father. The petitioner through filing his written statement, rebutted the stance of respondent No.1, whereas, respondents Nos.2 and 3 (who had been later on transposed as plaintiffs) submitted their joint written statement. Afterwards; respondents Nos.2 and 3 were transposed as plaintiffs and they submitted their yet another amended plaint. Out of divergent pleadings of the parties, following issues were framed;-

1. Whether the suit is time barred? OPD

2. Whether the suit is undervalued for the purposes of court fee and jurisdiction? OPD

3. Whether the suit is vexatious and the defendant is entitled to special costs? OPD

4. Whether the plaintiffs are estopped to file this suit by

their own words and conduct? OPD

5. Whether the impugned mutations of gift (Tamleek) Nos.139 and 298 of even dated 17.03.1983 are illegal, void, against law and facts, collusive and being based on fraud and misrepresentation, are ineffective qua the rights of the plaintiffs and are liable to be cancelled and hence, the revenue entries are liable to be rectified in favour of the plaintiffs accordingly? OPP

6. Whether the ancestor of the parties Khair Muhammad the donor, has not transferred the possession of the suit property to the defendant under the impugned mutations of gift? If so, its effect? OPP

7. Whether the impugned mutations in favour of the defendant are hit by Martial Law Regulation No.115? OPP

8. Whether the plaintiffs are entitled to get decree for declaration as prayed for? OPP

9. Relief.

After that; both the parties produced their respective evidence. The respondent/ plaintiff in support of their version produced Sher Muhammad identifier as PW-1, Muhammad Hanif as PW-2, Ghulam Ali as PW-3, Ahmad Yar her attorney as PW-4 and Mst. Haseena Bibi (plaintiff No.3) appeared as PW-5. In documentary evidence, they tendered;

Ex.P-1 Copy of power of attorney dated 26.05.1991.

Ex.P-2 Copy of Jamabandi for the year 1989-90 Khata No.2.

Ex.P-3 Copy of Jamabandi of the year 1989-90 Khata No.19.

Ex.P-4 Copy of Jamabandi for the year 1987-88.

Ex.P-5 Copy of mutation No.139 dated 17.03.1983.

Ex.P-6 Copy of mutation No.298 dated 17.03.1983.

Ex.P-7 Affidavit of witness Abdul Karim.

In contrast; petitioner/defendant produced Allah Ditta as DW-1, he himself appeared as DW-2, Muhammad Afzal Shah Record-keeper as DW-3, Ghulam Haider Patwari as DW-4, Muhammad Aslam Lukhwera Tehsildar as DW-5, Abdul Rehman as DW-6 and Abdul Kareem attesting witness of the mutation as DW-7. In documentary evidence, he produced;

Ex.D-1 Copy of mutation No.139 dated 17.03.1983.

Ex.D-2 Copy of mutation No.298 dated 17.03.1983.

Ex.D-3 Copy of mutation No.139 (Pert Patwar).

Ex.D-4 Copy of mutation No.298 (Pert Patwar).

Ex.D-5 Copy of mutation No.292 dated 17.03.1983.

Ex.D-6 Copy of mutation No.295 dated 17.03.1983.

Ex.D-7 Copy of mutation No.293 dated 17.03.1983.

Ex.D-8 Copy of mutation No.138 dated 06.11.1982.

Ex.D-9 Copy of mutation No.296 dated 14.04.1983.

Ex.D-10 Copy of Jamabandi for the year 2011-2012.

Ex.D-11 Copy of Jamabandi for the year 2008-2009.

Ex.D-12 Copy of Khasra Girdawari, Kharif 2009-2013.

Ex.D-13 Copy of Khasra Girdawari Kharif 2012-2013.

After recording evidence of both the parties, learned trial court decreed the suit of respondents vide impugned judgment and decree dated 27.03.2015. Being dissatisfied with the judgment passed by the learned trial Court, the petitioner preferred appeal before the first appellate court which was dismissed vide impugned judgment and decree dated 25.03.2016.

3. Counsel for the petitioner argued that the learned Additional District Judge has not complied with the rules for passing the judgment in appeal and has clearly violated the rules framed under Order XLI, C.P.C. The court has not passed the judgment on each issue. Whereas; the evidence of the parties also has not been discussed to finalize the issues framed by the learned trial court. Counsel argued that it is a case of remand to the learned first appellate court to re-write the judgment in view of Order XLI, C.P.C. for recording the judgment by the first appellate court. Further adds that both the learned courts below have not determined as to when Khair Muhammad predecessor has died and also not considered the statement of Allah Ditta DW-1 who categorically stated that Khair Muhammad died about 07 years after attestation of impugned gift mutations which were sanctioned on 17.03.1983, whereas, the suit was filed by the respondents on 02.09.1991. Respondent No.1 did not appear in the witness box in support of her claim, whereas, her husband Ahmad Yar had no direct knowledge about the facts involved in the case. In contrast; petitioner himself appeared as DW-2 and verified the gift mutations and his statement was not rebutted by the respondents. PW-4 Ahmad Yar husband of respondent No.1 is an interested witness, whereas, statement of PW-5 Mst. Haseena respondent No.3 is not in consonance with the averments of the plaint and statement of PW-4 and even she had admitted the version of the petitioner in her joint written statement, but afterwards by shaking hands with the respondents, she got recorded her statement in favour of respondent No.1. Further adds that; no particular fraud was pointed out by the respondents while challenging the gift mutations. Question of misrepresentation and non-delivery of possession has not been challenged and proved. Adds that; the deceased predecessor was not suffering from any disease and he was not mentally paralyzed. The entries of mutations are duly incorporated in record of rights.

4. Counsel for the respondents, on the other hand, resisted the arguments and argued that the suit property is agricultural land and still situated in joint Khata so, the question of physical possession is immaterial. The claim of the respondents is based on inheritance and there arises no question of limitation in such cases. The impugned revenue entries were against the law and facts and same were based on fraud. The petitioner has failed to prove that how and in what way the suit of the respondents was false, frivolous or vexatious. The respondents have examined one Sher Muhammad as PW-1 who has stated that the deceased donor had never made any offer to gift the suit property to the petitioner and that he had not identified him at the time of attestation of impugned mutations before the revenue officer, whereas, husband of respondent No.1 appearing as PW-4 deposed that the deceased was his cousin and father in law who died 03 years prior to filing the suit, he was ill from 10/11 years and his eye-sight was weak and he was unable to walk, hence, he was at the mercy of the petitioner, whereas, the respondents never transferred the suit property to the petitioner through impugned mutations of gift.

5. Arguments heard. Record perused.

6. Firstly; I would like to reproduce Order XLI, Rule 23, C.P.C. which is regarding the remand of case by the appellate court as under;-

"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 that issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with direction 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."

It is settled principle that remand should not be ordered lightly where the case can be decided by the appellate court itself. Where the evidence on record is sufficient to dispose of the case by the appellate court, the case should not be remanded. Reliance is placed on "Paramatha Nath Chowdhury and 17 others v. (1) Karim Mondal, (2) Ismail Mondal, (3) Baju Mondal alias Hagura Mondal and (4) Dukha Mondal" (PLD 1965 SC 434), "Fateh Ali v. Pir Muhammad and another" (1975 SCMR 221) and "Nasir Ahmad and another v. Khuda Bakhsh and another" (1976 SCMR 388). If the comprehensive issues have been framed and the evidence has been led on those issues, the learned trial court had decided the issues while appreciating the evidence

on record and even if the first appellate court, has not mentioned regarding the evidence on record but has appreciated the issues in view of the already recorded reasons recorded by the learned trial court. It will not be a case of remand because the reasons already had been recorded were found correct by the first appellate court and on the same reasons, the first appellate court has dismissed the appeal or revision filed by the said side. The grievance of the petitioner is not that the learned trial court has not properly framed the issues or has not appreciated the evidence by the learned trial court. The grievance of the petitioner is that the learned first appellate court has not mentioned the evidence of the parties on record whereas, this is not the case in this proposition. The learned first appellate court has discussed all the relevant factors which are available in the evidence of the parties even the documents have been discussed by the learned first appellate court while deciding the point of controversy in between the parties. The requirement of law is that the appellate court is to decide the controversy in between the parties and there is no need to decide each and every issue by the appellate court. This is also settled principle that where evidence on record is sufficient, appellate court may determine the case finally and there is no need to remand the case to the learned trial court.

7. The word judgment has been defined in section 2(9), C.P.C. which means statement given by the judge on the grounds of a decree or order. It means judicial decision of a court or of a judge, it need not necessarily deal with all matters in issue in the suit, it may determine all those issues decided of which, the effected side adjudicating all the matters in the controversy or result in final disposal of the suit. Essential element of judgment is that there should be statement of grounds for decision. The most important ingredient of a valid judgment is the result, reasons or grounds of the decision because the validity of the judgment is to be seen from the reasoning and the same is to be challenged by the aggrieved party against which the reference to the reason. It is, therefore, necessary for the learned trial court to decide each and every issue. Whereas; it is not required by the appellate court to record finding issue-wise. And it is sufficient for the court to deal with all issues as were matters for disposal of the controversy accepting those abandoned by the appellants. The appellate court recording its findings on all the points raised before it without discussing the issue separately cannot be said to have committed any illegality or error. Reliance is placed on "Naimat Khan and others v. Hamzullah Khan and others" (2006 CLC 125) and "Afsar Zaman and others v. Ayub Khan and others" (2007 YLR 818). As the first appellate court has decided issues Nos. 5, 6 and 7 jointly whereas the first four issues were regarding the legal aspect of the proposition and have answered through the judgment. Therefore; this is not a case for remand. The appellate court has critically examined all the evidence on record i.e. oral

as well as documentary evidence and has recorded the judgment on the basis of the same. Therefore, the contention of the petitioner is that it is a case for remand under Order XLI, Rule 23, C.P.C. to the first appellate court to record the judgment again is not sustainable in the eye of law.

8. Perusal of the impugned judgment passed by the learned trial court, it reveals that the learned trial court had given its findings on the issues framed in the suit, hence, mandatory provision of Order XX, Rule 5, C.P.C. has been fulfilled, which says;

"In suits in which issues have been framed, the Court shall state its findings 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."

Real controversy between the parties;

1. Legal Issue on legal aspect. Jurisdiction, court fee, limitation.

2. Issues on facts as per prayer. Matters question on issue on fact of law, limitation also included in the same. Every issue to be settled down by the trial court in view of the evidence on record.

9. The appellate court while deciding the points in controversy requiring determination formulated in a particular form and addressed to such points and recorded findings thereon. Requirement of recording findings issue-wise by the appellate court is not mandatory and every finding without discussing issues separately is not illegal. Appellate court has rendered its independent findings on each and every issue, hence, the appellate court in the present case has appraised the mandate of law thus, the impugned judgment has qualified to be called "judgment" in the eye of law.

10. The points of determination in this case are that said 03 mutations sanctioned on 17.03.1983 were illegal;

i- Whether there was any element of fraud?

ii- Whether mere possession can be made a ground for a valid gift when one of the claim of property is also residing in the same house with the donor?

iii- Whether the said mutations come within the definition of closed and past transaction in view of the conduct of the respondents?

iv- If the witnesses of said mutations are not produced, what is the effect?

In view of Ex.P-7; although, Abdul Karim whose signatures are available on Ex.D-5 who filed the affidavit which is Ex.P-7 that neither his signatures are there nor he

thumb-marked or signed over any mutation being Pattidar of the Mouza. In case, only affidavit is there but neither it was sent for comparison on the request of the either party, what will be its effect? As fraud has been alleged, the petitioner is beneficiary and it was the responsibility of the petitioner to prove that whether gift mutation was validly sanctioned when affidavit of Abdul Karim came on the surface, it was the duty of the petitioner to request the court to send the mutation for comparison of the signature and thumb mark of said Abdul Karim. However, said Abdul Karim has not appeared as witness from the respondents' side, but it will have no effect as originally it was the duty of the petitioner to prove validity of said mutations.

11. This is not a case of past and closed transaction, because the identifier of the impugned mutations had filed affidavit (Ex.P-7) that neither he identified the donee nor he signed or thumb marked the document Ex.D-5. The petitioner was the beneficiary of the document and as per principle laid down for such proposition, the petitioner was under obligation to prove the validity of those documents. The petitioner did not file application for production of said witness and he also did not file the application to summon said Abdul Karim as CW in order to verify the said document, or to disprove affidavit Ex.P-7. Even the petitioner did not file application for comparison of the signatures on the said document; with any admitted signature or thumb mark of said Abdul Karim. There was no objection placed when the document Ex.P-7 was exhibited in evidence. The respondents are real sisters of the petitioner. Admittedly; they have the privilege for being Parda Nasheen ladies. The lady appeared in witness box also claimed that she is illiterate and that is also admitted fact on record. There are two other important factors on the legal and factual sides which cannot be ignored. Why the lady was detained in the house. She was recovered on the order of the court. There was no explanation for that with the petitioner and inference can be drawn that she was illegally detained, in order to avoid that the lady could file or agitate her claim.

12. Second factor is on the legal side. The impugned mutation was sanctioned on the basis of gift. As the ingredients of a valid gift are;-

a) Offer.

b) Acceptance.

c) Delivery of possession.

The impugned mutation was sanctioned on 17.03.1983 but the document Ex.P-5 and Ex.P-6 mentions the names of the respondents in the column of owners. Ladies being owner will consider to be in possession. The proof of delivery of possession under the said mutation have not been brought on record. The witnesses of revenue department

who could have verified those factors had not been got examined in the witness box. The witnesses of petitioners are inter-se related to the petitioner. In absence of the best possible evidence regarding proof of delivery of possession, it will be considered that the third important ingredient for a valid gift was not established by the petitioner and inference is drawn that if such a witness or document is produced before the court, it could not have supported the version of the petitioner. So, valid gift is not proved. Both the courts below have examined the witnesses from both sides and also examined the documents produced by the parties. So, this was not a valid gift and it could not come within the meaning of past and closed transaction because for that the beneficiary has to prove that all three ingredients support him under the circumstances, the petitioner cannot have the benefit of the weaknesses of the respondents' evidence. Because the ladies have claimed their Sharai right. They have been deprived through gift mutations. It is not the case of the petitioner that he purchased the land or through sale mutations, he accrued the right of ownership.

13. The statement of the petitioner that he served the deceased father and his sisters (respondents) did not did so, is against the logic and if such plea was taken by the petitioner, he was under obligation to prove it. Whether his sisters were disobedient to their father or there was any reason to deprive them from their legal right. To prove this; no evidence was produced by the petitioner. If this particular plea had not been taken, then this could not be taken into consideration. But since the petitioner had taken this particular plea, then he was under obligation to prove the same.

14. Regarding limitation; both the courts below have categorically examined the evidence of the parties and answered the same with reasoning, which is in accordance with law. All other issues have been critically examined and settled by the courts below.

15. In view of above, petitioner is unable to point out any illegality or irregularity in the impugned verdicts. There was no jurisdictional error in the impugned judgment and decree passed by the learned courts below. All the evidence and the record have been properly appreciated by the learned courts below. There was no element of misreading or non-reading of evidence. The law was properly appreciated. There is no force in this revision petition, the same is dismissed.

ZH/N-15/L Revision Petition dismissed.

2023 Y L R 675

[Lahore]

Before Safdar Saleem Shahid, J

MUMTAZ BIBI and others---Petitioners

Versus

PUBLIC AT LARGE and others---Respondents

Civil Revision No. 471 of 2019, heard on 27th September, 2021.

(a) Succession Act (XXXIX of 1925)---

----S. 372---Succession certificate---Residuary and distant kindred---Preference---Respondents applied for issuance of succession certificate regarding debts and securities (amount of insurance policy) left by deceased claiming that the deceased was their paternal uncle; that the deceased died issueless leaving behind his widow (petitioner); and that respondents were sons of one brother of the deceased ("A") entitled for succession as residuaries---Four petitioners being the widow and daughters of the other brother of the deceased ("M") maintained in their written statement that they were legal hears of the deceased as their father "M" died after the death of the deceased; that petitioners fell under the definition of "distant kindred" of the deceased, so the respondents were not entitled for succession as they were remote in relation---Trial Court accepted the application and granted the petitioners and said four respondents' shares from the insurance policy being legal heirs of the deceased under the definition of residuary---Petitioners' impugned the Trial Court's order but District Court dismissed their appeal---Validity---Deceased left one wife only---"M" being real brother of the deceased died after one month of deceased' death, leaving behind three daughters and a wife---"A" being another real brother of the deceased died 18 years after the death of the deceased---Wife of the deceased will get 1/4th as sharer and rest of the legal heirs of "M" and "A" will get the share from the remaining inheritance of the deceased---Petitioners failed to point any illegality in the judgments of both the Courts below---Revision petition was dismissed accordingly.

Mst. Shah Jahan Begum through Legal Heirs v. Zafar Ahmed and others PLD 2018 Lah. 426; Mian Mazhar Ali and others v. Tahir Sarfraz and others PLD 2011 Lah. 23; Bashir Ahmed and 3 others v. Razia Bibi 2000 SCMR 1100; Bashir Ahmad and 2 others v. Atta Muhammad Khan and 20 others 2005 SCMR 1271; Mst. Bhaggay Bibi andothers v. Mst. Razia Bibi and others 2005 SCMR 1595 and Ghulam Ali v. Ghulam Muhammad and 3 others 1999 YLR 2182 rel.

Mst. Amina Khatoon and 5 others v. Mst. Nighat Jabeen and another PLD 2018 Sindh 325; Mst. Sughra Begum and 4 others v. Mst. Akbari Begum and 5 others PLD 2016

Sindh 232 and Mst. Sarwari Bibi v. Mst. Anwari Bibi and others 2004 MLD 1136 distinguished.

(b) Islamic law---

----Inheritance---Classes of heirs---Three classes of heirs namely: (1) Sharers, (2) Residuaries, and (3) Distant Kindred---"Sharers" are those who are entitled to a prescribed share of the inheritance---"Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied---"Distant Kindred"are all those relations by blood who are neither Sharers nor Residuaries.

Muhammadan Law by Mulla, Section 93 ref.

Ahmad Mansoor Chishti for Petitioners.

Hafiz Khaliq Ditta Langha for Respondents.

Date of hearing: 27th September, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision has been directed against the order and memo. of costs dated 14.03.2019, whereby the learned Civil Judge, Rahim Yar Khan, while accepting the application for issuance of succession certificate of respondents Nos.2 to 5, granted shares to them and the petitioners in the insurance policy, being legal heirs of deceased Muhammad Akram falling under the definition of residuary; and the judgment dated 14.06.2019 whereby the appeal of the petitioners was dismissed by the learned Additional District Judge, Rahim Yar Khan.

2. Brief facts for the disposal of the instant revision petition are that respondents Nos.2 to 5 filed an application for issuance of succession certificate regarding debts and securities (amount of Insurance Policy No.6083905617 of State Life Insurance Corporation, Rahim Yar Khan Zone) left by deceased Muhammad Akram, claiming him to be their paternal uncle, who died issueless leaving behind his widow namely Mumtaz Bibi (petitioner No.1); that the deceased had two brothers namely, Abdul Rehman and Muhammad Iqbal, who had also died; and respondents Nos. 2 to 5 are the sons of Abdul Rehman whereas petitioners Nos.2 to 5 are the widow and daughters of Muhammad Iqbal.

3. The petitioners contested the petition by filing their written reply and maintained that the petition was not maintainable; that at the time of death of Muhammad Akram, his brother namely Muhammad Iqbal was alive and died thereafter leaving behind his widow and daughters (petitioners Nos. 2 to 5), so the petitioners are the legal heirs of

deceased of Muhammad Akram, whereas respondents Nos. 2 to 5 are not entitled for any relief.

4. Out of divergent pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether the petitioners are legal heirs of deceased Muhammad Akram and are entitled to recover their legal shares from the movable property of the deceased? OPP

2. Whether petitioners of instant petition are fall under the definition of Distant Kinder, hence, instant petition is not maintainable and liable to be dismissed? OPR

3. Whether the instant petition is not maintainable in its present form and liable to be dismissed? OPR

4. Relief.

5. Both the parties produced their oral as well as documentary evidence. After recording of evidence of both the parties, the learned trial Court accepted the succession petition vide order dated 14.03.2019 and the petitioners and respondents Nos. 2 to 5 were granted shares from the insurance policy being legal heirs of the deceased Muhammad Akram falling under the definition of residuary. Feeling aggrieved, the petitioner field an appeal in the Court of learned Additional District Judge, who dismissed the same vide judgment dated 14.06.2019.

6. Learned counsel for the petitioners argued that both the Courts below have violated the provisions of Order XLI, Rule 31 and Order XX, Rule 4 of C.P.C., as no findings have been given on the main issue No.2, therefore, order and judgment passed by the Courts below are liable to be reversed. Furthermore, Muhammad Iqbal and Muhammad Akram were real from mother side, but Abdul Rehman was their brother from paternal side, therefore, the legal heirs of Abdul Rehman do not fall in the category of residuary. Counsel for the petitioner argued that this view of the learned Additional District Judge is against the basic principle of Succession Act, 1925; the learned Additional District Judge has observed as under:-

"Now as per Law of inheritance, in the first step, inheritance of Muhammad Akram shall go to his widow and his full brother namely Muhammad Iqbal as primary heir only and after the death of Muhammad Iqbal, share of Muhammad Iqbal shall go to his widow and his three daughters as primary heir and to his nephew/sons of consanguine brother as residuary.

7. It was further argued that both the Courts below have ignored this fact that the legal heirs of Abdul Rehman are not covered within the legal heirs of Muhammad Akram

deceased and were not entitled to have the share. Declaring them sharer, is mis-application of law. Learned counsel for the petitioner argued that this is a matter of inheritance. According to the Mohammedan Law status of respondents Nos. 2 to 5 was not of the legal heirs of Muhammad Akram as they are remote in relation to Muhammad Akram deceased and they cannot claim the inheritance of Muhammad Akram deceased as residuary. Muhammad Iqbal was the real brother of Muhammad Akram, who was alive at the time of death of Muhammad Akram and after one month he also died leaving behind one widow and three daughters. The principle laid down in Muhammadan Law is clear that step mother of deceased was neither a sharer nor a residuary and has no right to inherit the estate of the deceased. Reliance was placed on Mst. Amina Khatoon and 5 others v. Mst. Nighat Jabeen and another (PLD 2018 Sindh 325), Mst. Sughra Begum and 4 others v. Mst. Akbari Begum and 5 others (PLD 2016 Sindh 232) and Mst. Sarwari Bibi v. Mst. Anwari Bibi and others (2004 MLD 1136). In view of the citations referred above, the judgments of both the Courts are liable to be set aside.

8. Learned counsel for the respondents, on the other hand, resisted the arguments and contended that the respondents are entitled to get share of inheritance, as residuary as like the other sharers of legal heirs of Muhammad Iqbal deceased. Learned counsel in this regard, referred Mst. Shah Jahan Begum through Legal Heirs v. Zafar Ahmed and others (PLD 2018 Lahore 426), Mian Mazhar Ali and others v. Tahir Sarfraz and others (PLD 2011 Lahore 23), Bashir Ahmed and 3 others v. Razia Bibi (2000 SCMR 1100), Bashir Ahmad and 2 others v. Atta Muhammad Khan and 20 others (2005 SCMR 1271), Mst. Bhaggay Bibi and others v. Mst. Razia Bibi and others (2005 SCMR 1595) and Ghulam Ali v. Ghulam Muhammad and 3 others (1999 YLR 2182). It was argued that there is no illegality or irregularity in the order/judgment of Courts below and law has been properly applied.

9. Arguments heard. Record perused.

10. There are three classes of heirs namely; 1. Sharers, 2. Residuaries, and 3. Distant Kindred. "Sharers" are those who are entitled to a prescribed share, of the inheritance; "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied; and "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries. According to the Hanfi Law the first in the distribution of estate of a deceased Muhammadan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares to such of the relations as belong to the class of sharers and are entitled to a share. The next step is to divide the residue (if any) among such of the residuaries as are entitled to the residue. If there are

no sharers, the residuaries will succeed to the whole inheritance. If there are neither sharers nor residuaries, the inheritance will be divided among such of the distant kindred as are entitled to succeed thereto. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Muhammadan dies leaving a wife and distant kindred, the wife as sharer will take her share which is 1/4 and the remaining three-fourths will go to the distant kindred, the husband as sharer will take his 1/2 share, and the other half will go to the distant kindred.

11. In this case, Muhammad Akram deceased left one wife, whereas one real brother Muhammad Iqbal, who died after one month of his death, leaving behind three daughters and a wife. The other brother Abdul Rehman died 18 years back from the death of Muhammad Akram. He was having four male heirs. In that scenario the wife will get as sharer and rest of the legal heirs of Muhammad Iqbal and Abdul Rehman will get the share from the remaining inheritance of Muhammad Akram deceased.

12. The principle laid down in Section 93 of Muhammadan Law states:-

"93. Representation.---(1) The principle of representation has more than one meaning. It may be applied for the purpose of deciding.

(a) what persons are entitled to inherit, or

(b) the quantum of the share of any given person on the footing that he is entitled to inherit.

(2) Where for purpose (a) the rule of exclusion applies (i.e., the nearer in degree excludes the more remote it is true both of Sunnis and Shias that the principle of representation is not recognized as qualifying the rule of exclusion. Thus if A dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father.

(3) But if both sons predeceased the propositus who died leaving three grandsons by one son and two by the other then all the grandsons are heirs. In that case, is the principle of representation to be applied for purpose (b), that is for ascertaining the share of each grandson? This is a further and different question. If the principle is applied, the grandsons of one branch will have to divide into three what the grandsons of the other branch divide in half."

In this proposition the principle laid down, as mentioned above, is safely applicable that when a Muslim man dies leaving behind a wife but no issue, his wife will inherit 1/4th share of his property. The remaining 3/4th will go to the remaining legal heirs. In this proposition one real brother of the deceased was left who died after one month of deceased. He had a wife and three daughters. Now remaining 3/4th property will be divided to his legal heirs. His wife will get share as sharer to the extent of 1/8th of the property, 3/4th and 2/3rd of the remaining property will be given to the daughters (three in number) with equal share. Now if the deceased had a son then the sons of deceased's step-brother Muhammad Iqbal would not get any share, but in this case since Abdul Rehman had only three daughters and no son, therefore, the remaining 1/3rd will go to the sons of the deceased Muhammad Iqbal.

13. The citations referred by learned counsel for the petitioners i.e. Mst. Amina Khatoon and 5 others, Mst. Sughra Begum and 4 others and Mst. Sarwari Bibi (supra) are not as such applicable to the present petition, whereas the citations referred by the counsel for the respondents i.e., Mst. Shah Jahan Begum through Legal Heirs, Mian Mazhar Ali and others, Bashir Ahmed and 3 others, Bashir Ahmad and 2 others, Mst. Bhaggay Bibi and others and Ghulam Ali (supra), are as such applicable to the present proposition.

14. It has also been noted that the learned Additional District Judge in the operative para of his judgment has made the following observation:-

"In the light of detailed discussion above and the calculation above, I found illegality in the order of the learned trial Court dated 14.03.2019 and the share calcula-ted by him. Resultantly, appeal in hand is hereby dismissed."

15. It is noted that it was a clerical mistake because the result concluded by the learned Additional District Judge shows that he was agreed with the findings of the learned Civil Judge as the shares and division of shares have been calculated in detail which also have been mentioned by the learned Additional District Judge.

16. Upshot of the above discussion is that the petitioners have failed to point any illegality in the judgments of both the Courts below, calling for interference in the revisional jurisdiction of this Court. The petition, therefore, fails and is accordingly dismissed with no order as to costs.

ZH/M-79/L Petition dismissed.

2023 Y L R 854

[Lahore (Bahawalpur Bench)]

Before Safdar Saleem Shahid, J

IFTIKHAR ALI and others---Petitioners

Versus

RIAZ-UL-HAQ alias RIAZ AHMED and others---Respondents

Civil Revision No. 478 of 2015/BWP, decided on 27th October, 2021.

(a) Specific Relief Act (I of 1877)---

----S.12---Suit for specific performance of agreement to sell filed by petitioners before Trial Court--- Respondents contested the suit by filing written statement---Trial Court dismissed suit of the petitioners---Petitioners filed appeal before Appellate Court---Appellate Court dismissed the appeal of the petitioners---Advance consideration, proof of---Held, that Agreement to sell mentioned that advance amount was paid but there was no receipt for that when and where advance consideration was paid---Oral assertion of the petitioner's witnesses was there but that was also not consistent regarding the payment---In the plaint, there was not mentioning of the fact that agreement to sell was settled some days prior to the writing of the agreement to sell---Petitioner's witnesses consistently, mentioned that the agreement to sell was settled some days prior to the writing of agreement to sell---Even petitioner himself stated that the agreement to sell was written in the compound of the court and advance money was also paid on that day---Advance consideration amount had not been proved---No receipt was written on that date rather it was not mentioned that why the receipt was not written regarding the advance payment---Where the agreement to sell was alleged, the claiming person/plaintiff was bound to mention all the factors on the basis of which he claimed that execution of agreement to sell in the plaint and then, to prove the same with the reliable confidence inspiring evidence---Petitioners had not mentioned this factor that prior to writing of agreement to sell, any settlement between the parties was settled 02/03 days before in the house of one of the witness of petitioner---Civil revision was dismissed---Petitioners were not entitled for any discretionary relief on the ground that they had not proved the execution of the agreement to sell and the payment of the consideration amount--- Furthermore, if it was supposed that petitioners had paid amount to the respondents, even then the respondents had no lien to enter into an agreement to sell on behalf of the minors---Agreement to sell otherwise not valid and enforceable in the eye of law.

Hafiz Muhammad Iqbal v. Gul-e-Nasreen and others 2019 SCMR 1880 rel.

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

----O. XX, R. 5---Specific Relief Act (I of 1877), S.12---Contract Act (IX of 1872), S.11---Guardians and Wards Act (VIII of 1890), S.29---Court to state its decision on each issue---Purpose of framing issues---Held, that provision of the C.P.C binds the Court to make its findings on all the issues framed but at the same time it empowers the Court that if the Court finds it sufficient that the decision/findings on one or two issues would be sufficient for the decision of the case it would not have any effect on the other decided issues, then the court may do so---Purpose of framing of issues was to bring on record the real controversies between the parties---Out of the pleadings, the Court after finding the real controversy between the parties, farmes the issues and on these issues, the evidence is invited---Thereafter, the Court, if it deems that if the decision on one or two issues in detail is sufficient to decide the fate of the proposition, the Court can do so, and for the rest of issues if framed, if those were regarding the preliminary objections of the defendant or which have been framed on the basis of pleadings and which have connection with the main issues, and the Court considers that even without discussing these issues, the matter could be settled, there is no need to give detailed discussion on such issues---In the present case, petitioners objection regarding the Trial Court judgment was not valid---Main issues had been discussed by Trial Court, while fulfilling all the requirements of law---Appellate Court had given the findings on each and every issue---On those issues where the onus to prove was placed on the defendants/the petitioners, if the petitioners had not led any evidence then there was no need to discuss in detail the fate of that issue---No evidence was led by the petitioners/ defendants regarding that issue, and that issue was decided accordingly---Appellant Court had also pointed out that this issue was relevant and whole of the fate of the proposition was based on the decision of that issue---Issue was decided in detail by Appellate Court---If any other issue had any effect on the fate of the proposition, that would have been discussed and answered by the courts below---Trial Court mentioned that onus of the issues which were placed on the petitioners/defendants, did not produce any evidence---So there was no need to discuss those issues in detail and they were answered in negative by Trial Court---Civil revision was dismissed with no order as to costs.

(c) Guardians and Wards Act (VIII of 1890)---

----S.29---Specific Relief Act (I of 1877), S.12---Civil Procedure Code (V of 1908), O. XX, R. 5---Contract Act (IX of 1872), S.11---Persons entitled to sell immovable property of minor---Admittedly, the property of minors could not be sold by anybody including father who was legal guardian of the minors except in some exceptional cases

which have been stated in the Guardians and Wards Act, 1890 that following persons were legal guardian and entitled to be guardian of the property; (i) the father; (ii) the executor appointed by the will of father's will; (iii) the father's father; (iv) the executor appointed by the will of the father's father---In the present case, father of minors was never appointed as guardian by the Court under S. 29 of the Guardians and Wards Act, 1890---Father of minors had never applied for that---Furthermore; none of the circumstances were there to consider that father sold out the land to the petitioners as per their claim---In the agreement to sell, petitioners have mentioned that father of the minor would get the certificate and permission for the sale of the property and then, agreement to sell could be completed---Till the filing of suit respondents/plaintiffs had not brought on record anything that they ever gave any notice to father "M.H." for initiating the guardian certificate in order to execute the agreement to sell---Respondents themselves had also not filed any application before any Court to force "M.H." for completion of the agreement to sell---Even, the person who was appointed as guardian of the property of the minors, could not enter into the agreement to sell of the property of the minors with anyone except when it was in the benefit of the minors and that also required the permission of the Court---Petitioners act made their version doubtful that they were paying the amount to a person who was even not authorized to enter into a contract and for three years till filing of suit, they did not take any initiative to complete the said person for initiating to obtain the guardianship of the minors regarding the property.

(d) Contract Act (IX of 1872)---

----S. 11---Civil Procedure Code (V of 1908), O.XX, R.5---Specific Relief Act (I of 1877), S.12---Guardians and Wards Act (VIII of 1890), S.29---Person competent to contract---Minors were not competent to enter into the contract---Any contract which had been shown by the minors or on behalf of the minors without any authority, would be invalid.

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

----Arts. 59, 79, 17, 117 & 120---Civil Procedure Code (V of 1908), O.XX, R. 5---Specific Relief Act (I of 1877), S.12---Contract Act (IX of 1872), S.11---Guardians and Wards Act (VIII of 1890), S.29---Execution of agreement---Onus to prove--- Signature on document---Comparison of signature/thumb mark---Agreement to sell was comprised of 03 pages and only on the last page of the document, the signature of one of the respondents was affixed---When all the part of agreement to sell was not signed, it made the agreement to sell/document doubtful and that could not be rely upon in any

way; unless not proved that all 03 pert were produced with the same aim/object and those were signed by the executor---No sign of any identifier was on the agreement to sell---On each pert there was no signature of the vendee, so the execution of document could not be said to be proved---Petitioners did not file any application for comparison of the signature/thumb mark presented on the agreement to sell before the Trial Court inspite of the fact that the matter remained pending there for about six years---From the very beginning from the respondent's side, it was denial that no such agreement to sell was executed by the respondents---Petitioners were the beneficiaries of the agreement to sell and they were under obligation to prove the agreement to sell---Existence of agreement to sell, did not mean that it was validly executed and a proved document---When such document which create a right or mentioned some rights or obligations and if it was denied by the other side who was being effected by said document, that person who was beneficiary of the document had to prove the document.

Zafar Iqbal and others v. Mst. Nasim Akhtar and others PLD 2012 Lah. 386 rel.

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

----S. 115 & O. XX, R. 5---Concurrent findings on facts---Scope---No mis-reading or non-reading of the evidence---Concurrent findings on facts by the two courts below did not need interference by High Court.

Shamshad Begum v. Mst. Huma Begum and others 2008 SCMR 79; Arshad Mahmood v. Additional District Judge and 5 others 2005 SCMR 516; Haji Abdullah and 10 others v. Yahya Bakhtiar PLD 2001 SC 158 and Hanif and others v. Malik Ahmad Shah and another 2001 SCMR 577 rel.

Ahmad Mansoor Chishti for Petitioners.

Sh. Irfan Karim-ud-Din for Respondents.

Date of hearing: 27th October, 2021.

JUDGMENT

SAFDAR SALEEM SHAHID, J.---This civil revision has been directed against the judgment and decree dated 22.12.2012, passed by the learned Civil Judge, Bahawalnagar and the judgment and decree dated 09.07.2015, passed by learned Additional District Judge, Bahawalnagar, whereby, suit for specific performance of contract filed by Muhammad Siddique (deceased) through his L.Rs. was dismissed and appeal of the petitioners was also dismissed, respectively.

2. Brief facts for decision of this civil revision are that the respondents entered into an agreement to sell with Muhammad Siddique (deceased), predecessor in interest of the petitioners regarding suit property situated in Walayat Pur, Bahawalnagar in consideration of Rs.95,250/-, after receiving Rs.35,000/- as earnest money, they delivered the possession of the suit property to the petitioners, while the remaining consideration amount was agreed to be paid at the time of sanctioning of mutation. Later on; the respondents with mala fide, refused to perform their part of performance of agreement to sell, so, the petitioners filed a suit for specific performance of contract before the civil court, which suit was contested by the respondents through filing their written statement and the learned civil court dismissed the suit of the petitioners vide impugned judgment and decree dated 22.12.2012. Then the petitioners filed an appeal before the learned Additional District Judge which was also dismissed vide impugned judgment and decree dated 09.07.2015. The petitioners being dissatisfied with the judgments and decrees passed by both the courts below, preferred this civil revision.

3. Counsel for the petitioners argued that the petitioners proved the agreement to sell. All the witnesses of agreement had stated in line regarding the settlement of the agreement, execution of the agreement to sell Ex.P-1, payment of the amount Rs.35,000/- at the time of the execution of Ex.P-1. The possession was delivered by the respondents at the time of execution of the document and advance payment of the amount. Both the courts below have not appreciated the evidence on record. Provision of Order XLI, Rule 31, C.P.C. have been violated by the court. The learned first appellate court had not discussed the evidence produced by the petitioners nor had given any findings on all the issues. It was argued that the petitioners filed the application before the appellate court for comparison of the thumb mark and signature on Ex.P-1, but the same was turned down by the court. The application was not decided separately, but the court i.e. learned Additional District Judge postpone the decision of the application with the judgment of the appeal. The judgment is the result of non-reading or misreading of the evidence. The law also has not been appreciated. Furthermore; the learned Additional District Judge has not decided the application for appointment of the guardian of the minors in accordance with law. Therefore, the judgments and decrees passed by both the courts below are against the legal norms. Both the judgments be set-aside. The suit of the petitioners for specific performance be decreed.

4. Counsel for the respondents, on the other hand, resisted the arguments and argued that there was a specific denial from the respondents, from the very beginning through written statement that no such agreement was settled between the parties. Infact; the petitioners obtained the land from the respondents on lease and for lease purpose, the

said stamp papers were obtained. No amount was ever received by the respondents. The land belongs to the minors whereas, Manqad Hussain was neither appointed the guardian of the minors nor had any authority to enter into agreement with anybody for the land of the minors. Infact; he himself not owner of any land therefore, to his extent, even the suit is not maintainable. It was asserted by the counsel for the respondents that the land was given on lease and for that the agreement for lease was written. The petitioners have prepared a forged document regarding the agreement to sell. Counsel argued that so far as the application for comparison of thumb mark and signatures filed by the petitioners before the learned Additional District Judge is concerned; that was not maintainable, as before the learned civil court, where the case remained pending for a long time, the petitioner never had filed such application; And at the appellate stage, no can be allowed to create the evidence in their favour, at that stage. Counsel made reliance on *"Muhammad Sadeeq v. Pervaiz Khan and 2 others"* (2020 CLC 1582). Counsel argued that the application for additional evidence at the appellate stage can be decided along with the appeal and there is no bar. Counsel in this regard; placed reliance on *"Sultan Ali alias Sultan through L.Rs. and others v. Rasheed Ahmad and 45 others"* (2005 SCMR 1444). It was argued that additional evidence cannot be allowed to fill the lacuna. Reliance in this regard placed on *"Shakoor v. Province of Punjab through Collector and others" (PLD 2013 Lahore 17)*. It was argued that neither the execution of the document is proved nor ingredients for agreement to sell are proved by the petitioners. There are many contradictions in the statements of PWs regarding the payment of advance amount, regarding purchase of stamp papers and regarding settlement of the agreement to sell. Both the courts below have discussed each and every aspect of the proposition. The petitioners were failed to establish any of their claim. Therefore, the civil revision is not competent, as there is no illegality or irregularity which has been mentioned by the petitioners.

5. Arguments heard. Record perused.

6. In this proposition, there are two very legal important points involved;

> *1. Whether the father being legal guardian, can enter into agreement to sell on behalf of the minors when he has not obtained any certificate of guardian of property of the minors from the court; if not so, whether such agreement to sell if agreed between the parties, is executable?*
>
> *2. In absence of the receipt for payment of the advance amount, can the execution of document i.e. agreement to sell Ex.P-1 has any independent legal status?*

As there was a specific objection by the petitioner that the learned courts below have not followed the provisions of Order XX, Rule 5, C.P.C. Before going into the merits of the legal proposition and discussing the evidence of the parties, I would like to refer Order XX, Rule 5, C.P.C. which says that;

> *"In suits in which issues have been framed, the court shall state its finding or decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."*

7. No doubt; this provision of C.P.C. binds the court to make its finding on all the issues framed, but at the same time; it empowers the court that if the court finds it sufficient that the decision/findings on one or two issues would be sufficient for the decision of the case, it will not have any effect on the other decided issues. Furthermore; purpose for framing of issues is to bring on record the real controversies between the parties. Out of the pleadings, the court after finding the real controversy between the parties, framed the issues and on these issues, the evidence is invited. Certainly; then the court thinks that if the decision on one or two issues in detail is sufficient to decide the fate of the proposition, the court can do so and for the rest of the issues if framed, if those are regarding the preliminary objections of the defendant or which have been framed on the basis of pleadings and which had the connection with the main issues, and the court considers that even without discussing these issues, the matter can be settled. There is no need to give detailed discussion on those issues. While examining the record, I have seen that this objection of the petitioners was not valid. The first appellate court has given the findings on each and every issue, because on those issues where the onus to prove was placed on the defendants/the petitioners, if the petitioners had not led any evidence then there was no need to discuss in detail the fate of that issue. It was sufficient to mention that no evidence was led by the petitioner/defendant regarding that issue. And that issue was decided accordingly. In this proposition, the main issues were issues Nos.6 and 7. Learned Civil Judge has discussed these issues at length while fulfilling all the requirements of law. The learned Additional District Judge also in his judgment, has pointed out that this issue was relevant and whole the fate of the proposition was based on the decision of that issue. Therefore, that issue was decided in detail by the learned first appellate court. If any other issue had any effect on the fate of the proposition, that would have been discussed and answered by both the courts below. Otherwise; the learned Civil Judge has categorically mentioned that onus of the issues which were placed on the petitioners/defendant, did not produce any evidence, hence, there was no need to discuss those issues in detail and they were answered in negative by the court.

8. Now, I come to the legal aspect of this proposition. The property of the minors, admittedly, could not be sold by anybody including the father who is the legal guardian of the minors except in some exceptional cases which have been stated in section 359 (sic) of the Guardians and Wards Act, 1890 that following persons are legal guardian and entitled to be the guardian of the property of a minor;

(1) The father.

(2) The executor appointed by the will of father's will.

(3) The father's father.

(4) The executor appointed by the will of the father's father.

Further; section 362 of the Act ibid empowers the legal guardian to sell the immovable property of the minor under special circumstances mentioned in that. The father of the minors Manqad Hussain, was never appointed as guardian by the court under section 29 of the Guardians and Wards Act, 1890. He has never applied for that. Furthermore; none of the circumstances were there to consider that he sold out the land to the petitioners as per their claim. This is also important that in the agreement to sell Ex.P-1, they have mentioned that Manqad Hussain father of the minors will get the certificate and permission for sale of the property and then, will complete the agreement to sell Ex.P-1. Ex.P-1, according to record, was pen down on 18.06.2003. Till the filing of suit, the respondents/plaintiffs have not brought on record anything that they ever gave any notice to Manqad Hussain for initiating the guardian certificate in order to execute the impugned agreement to sell Ex.P-1. They themselves have also not filed any application before any court to force Manqad Hussain for completion of the agreement to sell. According section 11 of the Contract Act, the minors are not competent to enter into the contract. And any contract which has been shown by the minors or on behalf of the minors without any authority, would be invalid. Even, the person who is appointed as guardian of property of the minors, could not enter into the agreement to sell of the property of minors with anyone except when it is in the benefit of the minors and that also requires the permission of the court. So, knowingly, the act of the petitioners made their version doubtful that they were paying the amount to a person who was even not authorized to enter into a contract and for three years till filing of the suit, they did not take any initiative to complete the said person for initiating to obtain the guardianship of the minors regarding the said property.

9. The other important factor is the execution of document Ex.P-1. This document Ex.P-1 comprises of 03 pages and only on the last page of the document, the signature of Riaz ul Haq, one of the respondent is affixed. In such circumstances, when all the Pert of said

agreement are not signed, it makes the agreement/document doubtful and that cannot be relied upon in any way, unless not proved that all 03 Pert were produced with the same aim/object and those were signed by the executor. And there is no sign of any identifier on the same. Reliance is placed on *"Zafar Iqbal and others v. Mst. Nasim Akhtar and others"* (PLD 2012 Lahore 386) which says that;

> *"First page of such agreement not containing signature of vendor, vendee or any witness or identifier, whereas second page thereof not containing signature of vendee--- Validity--- Such agreement would not constitute a contract---Alleged vendee would not be bound by such agreement for not being its signatory."*

On each Pert, there is no signature of the vendee and in that scenario, the execution of the document cannot be said to be proved. So far as the other aspect of proving the same is concerned; the petitioners did not file any application for comparison of the signature/thumb mark present on the same before the learned Civil Judge inspite of the fact that the matter remained pending there for about 06 years. And from the very beginning, from the respondents' side, it was denial that no such document was executed by the respondents. Since; the petitioners were the beneficiaries of the document and they were under obligation to prove the same. The existence of the document, does not mean that it was validly executed and a proved document. When such a document which create a right or mentions some rights or obligations, and if it is denied by the other side who is being effected by the said document, this is rule that the person who is the beneficiary of the document has to prove the same. The document mentions that advance amount was paid. But there is no receipt for that when and where that amount was paid. Although; oral assertion of the PWs is there but that is also not consistent regarding the same. In the plaint, there is no mentioning of the fact that this agreement to sell was settled some days prior to the writing of Ex.P-1 whereas, consistently, the PWs mentioned that the agreement to sell was settled some days prior to the writing of the document. Even, PW-1 says that the agreement was written in the compound of the court and advance money was also paid on that day. He stated that;

> 15.06.2003 کو اس اراضی کا سودا ملزم کے مکان میں -/95،250 روپے میں ہوا تھا اس سودا کے وقت محمد صدیق، افتخار، محمد سلیم، ریاض الحق، منقاد حسین بھی موجود تھے۔ میں بھی موجود تھا۔ 18.06.2003 کو اقرار نامہ معاہدہ بیع تحریر ہوا تھا

He did not mention anything regarding the advance payment, whereas, PW-3 said that;

> حاصلپور کچہری میں اشٹام تحریر ہوا جو کہ سودا سے تین روز بعد ہوا تھا۔ بوقت اقرار نامہ -/35،000 روپے ادا ہوئے جو کہ ریاض الحق کے بہنوئی نے وصول کیے۔

Whereas; PW-1 in his cross-examination, mentioned that;

اراضی کا قبضہ تحریر سے اگلے روز حاصل کیا تھا

PW-2 says that;

پھر اسی روز 11:30 بجے قبضہ دے دیا گیا تھا

10. Advance consideration amount had not been proved, because regarding that, no receipt was written on that date, rather; it was not mentioned that why the receipt was not written regarding the same. This is now settled principle that in cases where the agreement to sell are alleged, the claiming person/plaintiff is bound to mention all the factors on the basis of which he claims that execution of the agreement to sell in the plaint and then, to prove the same with the reliable confidence inspiring evidence. The petitioners have not mentioned this factor that prior to writing of the agreement to sell Ex.P-1, any settlement between the parties is settled 02/3 days before, in the house of PW-2, rather it is mentioned in Ex.P-1 that;

آج روبرو گواہان مبلغ -/35،000 روپے بطور زر پیشگی وصول پاکر
قبضہ اراضی حوالہ مشتری فریق دوئم کردیا ہے۔

So, the petitioners never succeeded to prove that any settlement between the parties were done regarding the sale of the property. Any amount was received by the respondents in lieu of that agreement to sell alleged by the petitioners. Even the execution of the document Ex.P-1 is not proved through reliable evidence. Even otherwise; "Hafiz Muhammad Iqbal v. Gul-e-Nasreen and others" (2019 SCMR 1880) says that;

> *"Agreement for sale of immovable property---Ample discretion laid with the Court to deny the relief to a purchaser of an immovable property keeping in view the circumstances of each case---Purchaser could not claim specific performance of a contract as a matter of right even where it was lawful to do so."*

11. There is concurrent findings on facts by the two courts below, which do need interference. Reliance is placed upon *"Shamshad Begum v. Mst. Huma Begum and others"* (2008 SCMR 79), *Arshad Mahmood v. Additional District Judge and 5 others"* (2005 SCMR 516), *Haji Abdullah and 10 others v. Yahya Bakhtiar"* (PLD 2001 Supreme Court 158) and *"Hanif and others v. Malik Ahmad Shah and another"* (2001 SCMR 577).

12. Under such circumstances, the petitioners are not entitled for any discretionary relief on the ground that they had not proved the execution of the document and the payment of the consideration amount. Furthermore; if it supposed that they had paid the amount

to the respondents, even then, the respondents had no lien to enter into an agreement to sell on behalf of the minors. Therefore, agreement to sell otherwise not valid and enforceable in the eye of law. Both the learned courts below have correctly decided the issues. All the other issues were also settled on its merits by the learned Civil Judge. Since; onus to prove all those issues were upon the petitioners and the petitioners did not produce any evidence so that those issues could be discussed in detail.

12. In view of above, the petitioners were unable to point out any illegality or irregularity in the judgments and decrees passed by the learned courts below. There is no misreading or non-reading of the evidence and the law has been properly appreciated by both the courts below. I do not find any merit in this civil revision so, the same is dismissed with no order as to costs.

MHS/I-13/L Revision dismissed.